

## COMPARATIVE STUDY OF CRIMINAL LAW AND SHARIA LAW (CASE STUDY: MINOR WORKERS)

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### *Abstract*

*A child is someone who is still underage, whether male or female. The phenomenon of children as workers often occurs. The reality shows that poor families really need jobs for their children to help the family economy and for their own lives. In this research, the author examines "Judicial Review of Child Labor (Study of Positive Legal Analysis and Islamic Criminal Law)", so the author formulates the problem as follows: 1) What is the positive legal view of child labor? 2) What is the view of Islamic criminal law regarding child labor? This research is library research, which is descriptive in nature with a normative approach, namely by using Al-Qur'an texts and is based on other legal products in the form of books, laws and regulations related to the discussion. Based on the research results, the author concludes that children are not allowed to work unless the work they do is light and does not interfere with the child's physical, social and mental health development and meets the requirements in article 69 paragraph 2 of Law Number 13 of 2003 concerning Employment. If you violate the provisions as stipulated in article 185 of Law Number 13 of 2003 concerning Employment, you will be subject to imprisonment for a minimum of 1 (one) year and a maximum of 4 (four) years and/or a fine of at least Rp. 100,000,000 (one hundred million rupiah), and a maximum of Rp. 400,000,000 (four hundred million rupiah), while the sanctions for employing children in Islamic criminal law fall into the category of jarimahta'zir whose punishment is not specified in the Al-Quran and Hadith but is left to the authorities (Judges).*

**Keywords:** Workers, Children, Criminals, Islamic Criminals.

### INTRODUCTION

Indonesia is a country of law, so all its people are obliged to comply with existing legal regulations. The existence of law and compliance with law is in principle useful for maintaining calm in social life. Law is a system in which there are norms and rules that regulate human behavior so that humans or society can live in an orderly manner.

According to several legal experts, the definition of law can be explained by explaining the concept of law, such as:

1. Aristotle said: "Particular law is that which each community lays down and applies to its own members. Universal law is the law of nature" (Law is the fundamental wisdom for the lives of members of society. Natural law is a universal law);
2. Grotius said: "Law is a rule of moral action obliging to the one which is right" (Law is a rule of moral action that leads to truth);
3. Immanuel Kant said that law is the entire condition for the free will of one person to be able to adapt to the free will of another person by following the rules regarding free will;
4. Abdul Wahab Khalaf said that the law is guidance from Allah SWT which relates to the actions of adults which involve orders, prohibitions, the ability to carry out or abandon them;

5. Mochtar Kusumatdja said that law is a set of rules and principles that regulate human life in society but includes the institutions and processes needed to realize the law in reality.

So according to the author, law is norms, rules, principles that are regulatory and coercive as well as sanctions made by government agencies that have the authority to regulate all social life to create justice, certainty, security and tranquility.

According to Apeldoorn, legal certainty has 2 (two) aspects, the first concerns the question of whether the law can be formed (*bepaalbaarheid*) in concrete matters. This means that parties seeking justice want to know the law in specific terms before starting a case. Second, legal certainty means legal security. This means protection for the parties against the judge's arbitrariness. In the positivism paradigm, the definition of law must prohibit all regulations that are similar to law, but are not orders from a sovereign authority, legal certainty must always be upheld whatever the consequences and there is no reason not to uphold this because in the paradigm positive law is the only law.

Hans Kelsen, in his book general theory of law and state, is of the view that law is a social order that can be declared fair if it can regulate human actions in a satisfactory way so that they can find happiness in it. According to Hans Kelsen, justice is a subjective value judgment. Even though a just order assumes that an order is not the happiness of each individual, but rather the greatest happiness for as many individuals as possible in the sense of a group, namely the fulfillment of certain needs, which the authorities or law makers consider to be needs that deserve to be met. , such as the need for clothing, food and shelter. But which human needs should take priority? This can be answered using rational knowledge, which is a value judgment, determined by emotional factors and therefore subjective. Based on the legal theory above, according to Lj Van Apeldoorn in Shidarta, Islamic law or Islamic sharia is a system of rules based on the revelation of Allah SWT and the Sunnah of the Prophet regarding the behavior of themukallaf (people who can be burdened with obligations) which are recognized and believed, which are binding on all of His followers. And this refers to what the Apostle has done to implement it totally. Sharia according to the term means the laws ordered by Allah SWT for His people brought by a Prophet, both related to belief (*aqidah*) and related to *amaliyah*. The sources of Islamic law are the Al-Quran, Hadith, Ijtihad, Ijma, Qiyas and Urf. As a Muslim, in principle it is prohibited for him to violate the legal rules contained therein.

Islamic Criminal Law is often called *Fiqh Jinayah*. *Jinayah fiqh* consists of two words. *Fiqh* linguistically comes from the pronunciation of *faqiha, yafqahu fiqhan*, which means to understand, understand. The definition of *fiqh* in terms put forward by Abdul Wahab Khallaf is the science of practical sharia laws taken from detailed postulates. *Fiqh* is a collection of practical Sharia laws taken from detailed postulates. Meanwhile, according to language, *jinayah* is the name for the results of someone's bad actions and what they have attempted. As for *Jinayah*, in terms of the term put forward by Abdul Qadir Audah, namely *jinayah* is a term for actions that are prohibited by sharia', whether the action concerns life, property, or anything else.

Children are a gift that comes from Allah SWT as a result of marriage between father and mother. So that children must receive appropriate and best needs for them. So that

children can grow and develop as people who are beneficial to their family, country and religion.

Children are part of the young generation as one of the human resources who are the potential and successors of the ideals of the nation's struggle, who have a strategic role, have special characteristics and characteristics, require guidance and protection in order to ensure complete physical, mental and social growth and development. , harmony, harmony and balance.<sup>10</sup>

In Law Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law it is clearly stated that children have the right to life, the right to grow and develop. , the right to protection, the right to participate fairly in accordance with human dignity, and the right to protection from discrimination and violence. The State, Government and Parents are obliged and responsible for implementing the protection of children's rights. As in article 28 B paragraph 2 of the 1945 Constitution "Every child has the right to survival, growth and development and the right to protection from discrimination and violence."

Parents have a big responsibility for the growth and development of their children, as Allah SWT says in QS An-Nisa' verse 9 which means: "And let those who fear Allah leave behind them weak children, they are worried about their (welfare), therefore let them fear Allah and let them speak the right words." (QS An-Nisa' verse 9).

Children as jewelry of worldly life are actually a blessing in the family that really needs to be loved and cherished, as mentioned in QS Al-Kahf verse 46 which means: "Wealth and children are jewelry of worldly life but continuous good deeds are better rewarded. in the sight of your Lord and it is better to be a hope." (QS Al-Kahf verse 46).

Normatively, children should have all their needs met in accordance with their rights, but there are still many children whose rights are not fulfilled because they do not receive attention from their parents, so there are still many children who have to live by earning money on the street as street children. In fact, quite a few of them are exploited by their parents to earn money to meet their family's living needs.

In Indonesia itself, protection for children has been regulated if children are employed or economically exploited, namely in Law Number 17 of 2016 concerning the Establishment of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection Becomes a law that states the prohibition of economic exploitation of children. It is contained in Article 76 letter I and Article 88 with the threat of a maximum prison sentence of 10 (ten) years and/or a maximum fine of IDR 200,000,000 (two hundred million rupiah) as well as in Law Number 13 of 2003 concerning Employment. Where in the Labor Law in Article 68 and Article 69 which regulates that entrepreneurs are prohibited from employing children if they want to work as long as the work, they do is light then there are conditions that must be fulfilled in Article 69 Paragraph 2. If they violate the provisions of Article 68 or Article 69 there are sanctions. The penalty is imprisonment for a maximum of 4 (four) years and a minimum of 1 (one) year and/or a fine of a maximum of IDR 400,000,000 (four hundred million rupiah) and a minimum of IDR 100,000,000 (one hundred million rupiah).

In the convention on children's rights which has been ratified by the Indonesian Government, it is stated and acknowledged that children essentially have the right to receive a proper education and they should not be involved in economic activities prematurely. However, due to the pressure of poverty, parents' lack of concern for the importance of education, and a number of other factors, voluntarily or forcedly, children become an important source of family income.

It must be acknowledged that there are still cultures in society that are less favorable towards children. Although there is no official data regarding which cultures are detrimental to children, both emotionally and physically. There are provisions that are commonplace in society, for example in childcare practices, children's habit of working from childhood and many other practices that are detrimental to children who are "protected" in the name of custom and culture.

One of the reasons for the large number of child laborers is poverty. So parents feel that children belong to their parents alone, forcing children who are still underage to make economic contributions to the family, for example by becoming street singers, child beggars and employing children as karaoke guides.

Based on the explanation above, the author wants to further explain the criminal act of employing children with these things, so the author intends to write and compile a journal with the title Child Labor in the Perspective of Criminal Law and Sharia Law: A Comparative Study. I hope that this research can helping to raise awareness and sensitivity of the community or parents towards the rights and obligations of children so that child labor is reduced.

With the focus of the problem being discussed, what is the positive legal view regarding child labor? And what is the view of Islamic criminal law regarding child labor?

## **METHOD**

The research methods described include the steps taken in determining, processing, analyzing and presenting research results. This research is library research, which focuses on analyzing sources such as laws, books, papers, articles, journals, and others. The methodology uses a juridical-normative approach, based on positive legal provisions originating from various laws and Islamic criminal law originating from the Al-Qur'an and Hadith.

This research data collection technique involves searching for literature that is relevant to the object of discussion. Carefulness in selecting and compiling data collection techniques and tools has a significant effect on the objectivity of research results. Data analysis was carried out descriptively-analytically, comparing views and statements in the literature with the research object, especially regarding the provisions between positive law and Islamic criminal law regarding the issue of underage child labor.

## **RESULTS AND DISCUSSION**

### **Positive Legal Views Regarding Child Labor**

Child labor is a complex issue that shows failure in implementing the protection and fulfillment of children's rights. In the context of positive law, this phenomenon is a serious

legal violation and can be subject to criminal sanctions. Based on Law no. 13 of 2003 concerning Employment, a child is defined as anyone under 18 years of age. According to this article, children do not yet have the ability to meet their own needs, so the duty to protect and fulfill their needs falls on parents, guardians and the government.

Article 301 of the Criminal Code (KUHP) provides criminal sanctions for anyone who exploits children under the age of 12 to beg or carry out dangerous work. Apart from that, Law no. 13 of 2003 also confirms the prohibition on employing children in article 68. However, there are several exceptions in article 69 paragraph 2, which allows children to work as long as they fulfill seven certain conditions, and the work does not damage their physical, mental and social development. Violation of this article will be subject to imprisonment and/or fines, as regulated in article 185.

Furthermore, Law no. 17 of 2016, which is a revision of Law no. 23 of 2002, also provides heavier sanctions for child exploitation, both economically and sexually. These sanctions include imprisonment for up to 10 years and/or a fine of up to IDR 200,000,000.

Based on a review of these various regulations and laws, it is clear that positive law in Indonesia tries to provide maximum protection for children from exploitation in the form of work. However, in reality there are still many children who are trapped in jobs that damage their development. This shows a failure in the implementation and enforcement of the law. It is not enough to simply have laws and regulations; it is also important to ensure that these laws are implemented and enforced effectively.

In this context, apart from implementing stricter laws, a multidisciplinary approach is also needed involving various parties, including government, communities and families, to address the root causes of the child labor phenomenon. Without this comprehensive approach, it is difficult to completely eliminate the practice of child exploitation in the form of labor.

Legal experts often highlight the importance of implementing and enforcing the law in child labor cases. Professor Andi Hamzah, an expert on criminal law in Indonesia, for example, emphasized that criminal punishment alone is not enough to eradicate the practice of child labor. According to him, an effective solution requires a comprehensive approach, including public education and active participation from the community.

On the other hand, Dr. Saldi Isra, an expert in constitutional law, highlighted the importance of the government's role in enforcing the law and protecting children's rights. He believes that there is a need to improve coordination between government agencies and strengthen monitoring mechanisms, including increasing the capacity of law enforcement officials.

So, although positive law has provided a fairly strong legal framework to protect children from exploitation in work, there is still a lot of homework to be done. More effective implementation and enforcement of these laws, as well as a multidisciplinary approach to addressing these issues, are necessary to fully realize the objectives of these laws and regulations.



### Views of Islamic Criminal Law Regarding Child Labor

In the context of Islamic criminal law, employing children who do not meet the requirements or are not yet capable of working is considered a jarimah (criminal act) which is included in the ta'zir category. In ta'zir law, the type and size of punishment is determined by the ruler or judge, taking into account the public interest and the benefit of the individual.

Also, the importance of Al-Dharuriyyat al-Khams, the five basic needs that need to be maintained in Islamic law, including the protection of children as part of "protection of offspring." This confirms that in the Islamic view, child labor is something that is strictly avoided because it violates the basic principles of sharia.

Based on the concept of Al-Dharuriyyat al-Khams, one of the goals of Islamic law is preserving offspring. If a child is employed, it violates the provisions of the Shari'ah and the goals of Islam. So the obligation for parents or guardians of children is to protect children from unfair actions, discrimination, exploitation and physical use.

Regarding regulations governing criminal offenses and punishment for child perpetrators of crimes. In Islam, the term criminal act can be interpreted as jarimah. In providing a definition according to the term, Imam Al-Mawardi stated the following "Jarimah are actions that are prohibited by sharia' which are threatened with the punishment of had or ta'zir".

Jarimah Ta'zir, namely a finger that is threatened with the punishment of ta'zir (teaching or ta'dzib in its own sense). All types of jarimah apart from the hudud and qisas-diyat, including the ta'zir, so there are many types and the punishment varies from mild to severe. Sharia' does not determine the types of actions that are threatened with ta'zir punishment and sharia' also does not determine the types of punishment that are threatened. In determining the ta'zir radius, the main principle that is used as a reference for the authorities is to safeguard the public interest and protect every member of society from harm (danger). In addition, the enforcement of ta'zir jarimah must be in accordance with sharia principles.

However, the authorities are not permitted to abuse the delegation of authority in determining a punishment for ta'zir. because in Islamic law the principles that must be upheld are the principles of justice, even if it is towards your family and closest relatives. One of the words of Allah SWT regarding the principles of justice in Islamic law.

*"O you who believe, be upholders of justice and witnesses for Allah, even if the testimony incriminates yourselves, your parents or your relatives. If he (who is weighed in the testimony) is rich or poor, Allah is more worthy of knowing (the benefits of) both. So, do not follow your desires because you want to deviate (from the truth). If you distort (words) or turn away (reluctant to be a witness), verily Allah is All-Aware of everything you do."(QS An Nisa': 135)*

And also, in law there is something called the Principle of Legal Certainty, which means that no act can be punished except on the strength of legal certainty or legal rules in the form of verses from the Koran, Hadith or Fatwa of the Ulama.

*"O you who believe, protect yourselves and your families from the fire of hell whose fuel is people and stones. Its guardians are rough and tough angels. They did not disobey*

*Allah for what He commanded them and always did what they were commanded.*"(QS At Tahrim: 6)

From this it is clear that the law of employing minors is included in the category of jarimah ta'zir, namely relating to the welfare of individuals who violate the rights of children, because the punishment in the jarimah ta'zir is determined by the government in power because the law of employing minors is not regulated in detail in Islamic criminal law. There are many ta'zir punishments, ranging from the lightest to the heaviest. The judge is given the authority to choose between these punishments, namely the punishment that suits the condition of the finger and the person who made it. Ta'zir punishments are viewed in terms of the place where the punishment is carried out, namely:

1. Corporal punishment, namely that which is imposed on the body such as the death penalty, whipping, imprisonment and so on;
2. Mental punishment, which is imposed on a person's soul, not his body, such as threats, warnings and reprimands;
3. Property penalties, namely those imposed on someone's property, such as diyat, fines and confiscation of property.

*Jarimah ta'zir* is to teach a lesson, meaning a jarimah that is threatened with the punishment of ta'zir, namely punishment other than had and qisas. This judiciary to determine the size or limit of punishment is fully exercised by the government authority, in this case the judge. Like the case of child labor, it is included in the ta'zir radius because it is not regulated directly in Islam and full authority is returned to the government. All these actions are strictly prohibited by Islam because they can damage the fabric of national and state life.

Because the punishment for ta'zir is not determined directly by the Al-Qur'an and Hadith, it is the competence of local authorities. When deciding on the type of punishment and size of ta'zir sanctions, you must still pay careful attention to the text's instructions because they involve the public benefit.

The implementation of Islamic Criminal Law regarding child labor is reflected in Aceh Qanun Number 7 of 2014 concerning Employment which states that it is prohibited to employ children and involve children in the worst jobs. Article 75 states that anyone who violates the provisions on employing children in the worst jobs as stated in Article 43, will be subject to imprisonment for a minimum of 2 (two) years and a maximum of 5 (five) years and/or a fine of at least IDR 200,000,000 (two hundred million rupiah) and a maximum of IDR 500,000,000 (five hundred million rupiah).

From the many discussions that the author has outlined above, the author really realizes that it is very clear that the rules that have been set by the government seem to be barren and have no "nails" as if the rules that have been implemented are only ceremonial. Why not, just look at how many child workers there are, exploit children or even deliberately employ children at intersections or red lights. Busking, singing or even just pretending to sell tissue.

A small observation that the author has made around the city of Medan, the author found that many children were being used for selling, starting from selling tissue, packaged drinks and even selling light snacks. For every 10 red lights that the author visited, 9 of them would have children selling or even busking and begging there. This shows that the legal

rules that have been established do not operate in accordance with the spirit of the rules that were created.

Child labor from the perspective of criminal law and sharia law is a complex and multi-dimensional topic, especially when viewed through the lens of maqasid sharia or the objectives of sharia law. Maqasid sharia, which was introduced by scholars such as Al-Ghazali and Ibn Ashur, aims to protect five basic aspects of human life: religion, soul, reason, heredity and property. In the context of child labor, Maqasid Syariah provides moral and ethical guidance that can be used to evaluate and direct legal practice, both in criminal law and sharia law. In various countries, including Indonesia, there are laws prohibiting the exploitation of child labor. However, in reality, this rule often does not work as expected. Many children are still forced to work in detrimental conditions, both physically and mentally, often due to poor family economic conditions. In sharia law, work for children, especially those that have the potential to harm or exploit them, are expressly prohibited. This prohibition is not only legal, but also ethical and moral, contained in various propositions Al-Quran and Hadith.

First, from a maqasid sharia perspective, children's work is contrary to the principle of protecting the soul and mind. In Surah At-Takwir verses 8-9, it is stated, "And if a baby girl who was buried alive is asked, for what sin she was killed." This verse shows the protection of innocent souls, including children. Child labor is often exploitative and causes physical and psychological harm, which clearly contradicts this principle.

Second, Islam emphasizes the importance of education and learning as part of a child's growth and development. Rasulullah SAW said, "Seeking knowledge is an obligation for every Muslim." (Ibn Majah). By forcing children to work, they deprive them of the right and opportunity to receive a proper education, potentially harming their intellectual and spiritual development.

Third, in the context of assets, maqasid sharia emphasizes the protection and fair distribution of wealth. Employment of children is often linked to unfair economic practices, where children are victims of exploitation for financial gain. This is contrary to the principles of economic justice in Islam.

Criminal laws in many countries, including Indonesia, do have provisions prohibiting child work, but their implementation is often ineffective. This can be caused by various factors, such as a lack of resources, weak supervision, corruption, or even a lack of public awareness about the dangers and impacts of child work. Sharia law, guided by maqasid sharia, offers a more holistic and integrated perspective in dealing with these issues.

In practice, more effective law enforcement on child labor issues requires an approach that focuses not only on punishment, but also on a broader understanding of social and economic justice, both of which are at the core of maqasid sharia. This approach involves not only the government and justice system, but also society, including religious institutions, education, and civil society groups, to jointly create an environment that supports children's rights and well-being. In the context of handling the issue of child labor in Indonesia, even though legal regulations already exist, such as Law no. 35 of 2014 concerning Amendments to Law no. 23 of 2002 concerning Child Protection and Law no. 13 of 2003 concerning Employment, there is still a significant gap between theory and practice. Criticism of the



government often revolves around the effectiveness of implementing and enforcing these laws. In order to overcome the problem of child exploitation, the government needs to take a number of strategic steps to ensure that the rule of law does not only exist on paper but is actually implemented and has an impact on social reality.

First, stricter and consistent law enforcement is needed. This means that governments must ensure that all violations of laws protecting children from labor exploitation are identified and dealt with firmly. This requires better coordination between various government agencies, including the police, prosecutors, and justice systems, as well as increasing their capacity and resources to handle such cases. Second, the government needs to intensify prevention efforts. Prevention can be done through public education about the negative impacts of child labor and the importance of education for children. Programs aimed at increasing public awareness can be carried out through schools, media and campaigns in local communities.

Third, the government must increase access to education and social services, especially for children from low-income families. By providing broader and better-quality access to formal and non-formal education, children are more likely to remain in school and less vulnerable to labor exploitation.

Fourth, the government needs to work together with various stakeholders, including non-governmental organizations, international organizations and the private sector, to develop and implement comprehensive strategies to tackle the problem of child labor. This cooperation could include job training programs for unskilled parents, so they can get better jobs and not depend on the income of their children.

Fifth, there needs to be continuous monitoring and evaluation of implemented policies and programs. This aims to assess their effectiveness and make necessary adjustments. Accurate data and statistics on child labor also need to be collected and analyzed regularly to assist in planning and determining policies.

Finally, it is important to strengthen existing legal and policy frameworks. This can be through the revision of laws or regulations that are not effective enough, as well as the development of new policies that are more appropriate to changing socio-economic conditions. Active involvement from legal experts, academics and practitioners can provide valuable insight into this process.

Through these steps, the government will not only be more effective in reducing cases of child labor but will also demonstrate its commitment to child protection and fair law enforcement. This harmony is not only important in the context of national law, but also in meeting international standards and norms upheld in maqasid sharia, which emphasizes the protection and development of the potential of every individual, including children.

## **CLOSING**

Positive law in Indonesia strictly prohibits the exploitation of child labor and provides criminal sanctions for violations. Under the Labor Law and Criminal Code, children under 18 years of age are protected from harmful work, with severe sanctions for perpetrators of exploitation, including prison and fines. However, even though the existing legal framework is strong enough, there are still many cases of child exploitation that occur. Legal experts

emphasize the importance of more effective implementation and enforcement of laws, as well as a multidisciplinary approach involving government, communities and families to address the root causes of child exploitation in work. This shows that simply having regulations is not enough; There must be serious efforts to implement and enforce the law, as well as a comprehensive approach to eliminating child labor practices.

In the view of Islamic law, employing minors is considered to be ta'zir, a criminal act that is punishable based on the judge's considerations and the public interest. The principle of Al-Dharuriyyat al-Khams, which emphasizes the protection of offspring, shows that children's work is contrary to Islamic law. Islamic law emphasizes the prohibition of child exploitation, viewing it as a violation of children's rights and a neglect of the obligations of protection and education. Jarimah ta'zir in this context refers to punishments that are not specifically determined in the Shari'a, but are given authority to the authorities or judges to determine sanctions that are in accordance with the public benefit and the principles of justice. The implementation of Islamic criminal law, as reflected in the Aceh Qanun, emphasizes the prohibition against child labor, with significant sanctions for violators. However, there are still challenges in effectively implementing this law in society, as seen in the ongoing practice of child labor in various regions.

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