

Aggravated Sanctions in Cases of Sexual Violence Against Persons with Disabilities: A Comparative Study of Positive Law and Islamic Criminal Law

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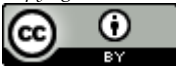
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Abstract

The phenomenon of sexual violence against persons with disabilities reveals a pattern of double vulnerability that demands stronger legal protection. This study aims to analyze and compare the aggravating sanctions imposed on perpetrators of sexual violence against persons with disabilities in both positive criminal law and Islamic criminal law. Employing a normative juridical method with a comparative approach, the research focuses on Law Number 12 of 2022 concerning Sexual Violence Crimes (UU TPKS) and the principles of Islamic criminal law related to *jarimah ta'zīr* and *maqāṣid al-sharī'ah*. The findings indicate that positive criminal law explicitly provides for a one-third sentence enhancement when the victim is a person with a disability. However, in practice, the application of this provision remains inconsistent due to limited awareness among law enforcement officials. In contrast, Islamic criminal law, while not specifying persons with disabilities, allows for aggravated sanctions based on moral considerations and the imperative to protect vulnerable groups. Both legal systems share a common orientation toward victim protection and the realization of substantive justice. The originality of this study lies in its cross-system analysis that integrates normative legal review with theological perspectives on vulnerability. The research implies a need for stronger synergy between legal frameworks and judicial practice, advocating for enhanced training, clearer implementation guidelines, and the incorporation of Islamic legal principles to reinforce protections for persons with disabilities. Such integration could lead to a more inclusive and just criminal justice system.

INTRODUCTION

Sexual violence constitutes a form of criminal behavior and a serious concern within society. This phenomenon continues to rise and is increasingly reported across various forms of media, including newspapers, magazines, and online platforms, which frequently highlight incidents of sexual violence occurring within the broader community. Sexual violence has existed since ancient times, stemming from a variety of social, psychological, and cultural factors.¹ Generally, sexual violence is recognized as deviant behavior due to its coercive nature, forcing individuals into unwanted sexual acts or subjecting them to unwelcome attention.²

Women with disabilities are particularly vulnerable to sexual violence, often becoming victims of discrimination in multiple aspects of life. These women face double marginalization, as they contend not only with gender-based discrimination but also with social exclusion resulting from their disabilities. In Indonesia, disability is often perceived as a condition that significantly hinders individual opportunities for personal development and overall well-being.³ The *World Report on Disability* notes that 19% of women globally live with disabilities, compared to only 12% of men. Women with disabilities are two to four times more likely to experience sexual violence than non-disabled women.⁴

Research by Aprilia Putri Adiningsih reveals that sexual violence,⁵ particularly rape against individuals with disabilities, continues to occur frequently. This indicates a significant gap in the existing legal protection system. Current law enforcement efforts primarily focus on punishing perpetrators, while recovery for victims and proportional justice in sentencing often remain neglected – highlighting the inadequacy of the current legal framework in delivering justice.

Further, a study by Jihan Kamilia Azhar, Eva Nuriyah Hidayat, and Santoso Tri Raharjo titled “*Sexual Violence: Women with Disabilities as Vulnerable Victims*” explores the

¹ Kadek Hendra Wirawan, I Wayan Landrawan, and Si Ngurah Ardhya, “Tinjauan Kriminologi Tindak Pidana Kekerasan Seksual Terhadap Anak Di Kabupaten Buleleng,” *Jurnal Media Komunikasi Pendidikan Pancasila Dan Kewarganegaraan* Vol.4, no. No.1 (2022): hlm.86-96, <https://doi.org/https://doi.org/10.23887/jmpppk.v4i1.1524>.

² Rohan Colier, “Pelecehan Seksual Hubungan Dominasi Masyarakat Dan Minoritas,” *Yogyakarta: PT. Tiara Yogya*, 1998, hlm.4.

³ Martin Pratiwi, “Aksesibilitas Perempuan Disabilitas Dalam Pemenuhan Hak Kesehatan Seksual Dan Reproduksi,” *Malahayati Nursing Journal* 5, no. 1 (2023): hlm.185.

⁴ World Health Organization, “Data Penyandang Disabilitas Di Indonesia,” *WHO*, 2023, <https://data.who.int/countries/360>.

⁵ Aprilia Putri Adiningsih and Ridwan Arifin, “Victims of Rape and The Legal Protection: Problems and Challenges in The Victimological Studies,” *Semarang State University Undergraduate Law and Society Review* 3, no. 1 (2023): 47-70.

heightened vulnerability of women with disabilities to sexual violence.⁶ Using a qualitative literature review method, the study found that women with disabilities face a substantially higher risk of sexual violence than their non-disabled counterparts. This vulnerability is attributed to two main factors: individual and environmental. Individual factors include physical and mental limitations, inability to resist or escape, and limited access to sexual education. Environmental factors involve persistent stigma, societal discrimination, and the lack of social support from families and communities. The consequences of sexual violence are multifaceted, ranging from physical and psychological trauma to feelings of shame, fear, social isolation, persistent insecurity, and suicidal ideation. These findings underscore the need for stronger legal protection and social interventions for women with disabilities and form a foundation for further legal reform, particularly in enhancing sentencing severity and victim rights.

Another study, conducted by M. Zhuri Fachyuzar, Indra Gunawan Purba, and Susilawati titled *“Juridical Analysis of Sexual Harassment Against Persons with Disabilities (Case Study of Decision No. 11/Pid.Sus/2024/PN Dob)”*,⁷ demonstrates that while the Indonesian Penal Code (KUHP) addresses sexual harassment, it remains limited to concepts such as indecency and rape. The enactment of Law No. 12 of 2022 on Sexual Violence Crimes introduces aggravated sentencing provisions, including for crimes committed against persons with disabilities. In the referenced court decision, the judge imposed an aggravated sentence on a perpetrator found guilty of molesting a person with a disability – one-third longer than the base sentence. This progressive application of sentencing reflects a more robust legal protection. The study also highlights the relevance of Law No. 8 of 2016 on Persons with Disabilities in ensuring justice for vulnerable groups and illustrates how this law can be practically applied to support judicial decision-making.

A study by Jhopin Bona Rejeki Panjaitan (2024) from Universitas Medan Area titled *“Legal Enforcement Against Perpetrators of Sexual Violence Crimes Committed Against Persons with Disabilities (Case Study of Decision No. 145/Pid.B/2023/PN Mdn)”*⁸ reveals that perpetrators are often individuals close to the victim. The main contributing factors

⁶ Jihan Kamilla Azhar, Eva Nuriyah Hidayat, and Santoso Tri Raharjo, “Kekerasan Seksual: Perempuan Disabilitas Rentan Menjadi Korban,” *Share: Social Work Journal* 13, no. 1 (2023): 82–91.

⁷ Susilawati Susilawati M. Zhuhri Fachyuzar, Indra Gunawan Purba, “Analisis Yuridis Tindak Pidana Pelecehan Seksual Yang Dilakukan Terhadap Penyandang Disabilitas (Studi Putusan Nomor 11/Pid.Sus/2024/PN Dob),” *Jurnal Hukum Dan Kemasyarakatan* 5, no. 4 (2024), <https://doi.org/https://doi.org/10.30743/jhah.v5i4.10859>.

⁸ Jhopin Bona Rejeki Panjaitan, “Penegakan Hukum Bagi Pelaku Tindak Pidana Kekerasan Seksual Yang Dilakukan Kepada Penyandang Disabilitas (Studi Putusan No. 1245/Pid. B/2023/PN Mdn),” 2024.

include lack of supervision, the perpetrator's sexual desire, and the intellectual limitations of the victims, which hinder their ability to resist or report the crime. Obstacles to law enforcement include insufficient legal inclusivity, structural and cultural barriers within the justice system, and a lack of supporting infrastructure. Nevertheless, Law No. 8 of 2016 offers a more inclusive and victim-oriented approach, especially regarding rehabilitation and social support. The judge in this case carefully balanced considerations of justice, legal certainty, and social benefit, weighing evidence, prosecution arguments, defenses, and moral implications to reach a substantively fair verdict.

The urgency of this study lies in the persistently high rates of sexual violence against persons with disabilities, which reveal systemic gaps in legal protection. While previous studies have explored the vulnerability of disabled victims, the weakness of legal safeguards, and limited effectiveness of sentencing enhancements in positive law, these studies often overlook Islamic criminal law's comparative perspective. Islamic law offers a unique framework for sentencing enhancements grounded in justice, deterrence, and moral protection. Therefore, this study aims to fill that gap by providing a comparative analysis of positive criminal law and Islamic criminal law to determine how the latter may supplement or strengthen protections for disabled victims of sexual violence. In an era that demands more inclusive legal protection, this research seeks to offer both theoretical and practical insights and lay the groundwork for more responsive and just legal development.

According to the 2023 Annual Report (CATAHU) of the National Commission on Violence Against Women (Komnas Perempuan), there were 105 recorded cases of sexual violence against women with disabilities. Women with mental disabilities were the most affected, with 40 cases, followed by those with sensory disabilities (33 cases), intellectual disabilities (20 cases), and physical disabilities (12 cases).⁹ These data confirm that women with mental and sensory disabilities are particularly vulnerable, thus reinforcing the urgent need for responsive legal enforcement and inclusive protection.

Article 5(3a) of Law No. 8 of 2016 concerning Persons with Disabilities guarantees their right to "special protection from discrimination, neglect, harassment, exploitation, as well as sexual violence and criminal acts." Article 26 further affirms the right to live free from discrimination, neglect, torture, and exploitation. These include the rights to: (a) socialize and interact in family, community, and national life without fear, and (b) receive protection from all forms of physical, psychological, economic, and sexual

⁹ Komnas Perempuan, "Lembar Fakta Catatan Tahunan Komnas Perempuan Tahun 2023 Kekerasan Terhadap Perempuan Di Ranah Publik Dan Negara: Minimnya Pelindungan Dan Pemulihan Jakarta, 7 Maret 2023," *KOMNAS PEREMPUAN*, 2023, <https://komnasperempuan.go.id/download-file/949>.

violence. Persons with disabilities often face significant barriers in accessing justice due to communication difficulties, lack of understanding among law enforcement personnel, and insufficient legal and psychological support. The state, therefore, bears a constitutional responsibility to provide comprehensive legal protection for this vulnerable group.

The sentencing of perpetrators of sexual violence under positive criminal law is specifically regulated by Law No. 12 of 2022 on Sexual Violence Crimes (UU TPKS). When the victim is a person with a disability, the law allows for an additional one-third sentence enhancement. This provision establishes a legal basis for imposing aggravated sentences on perpetrators of sexual violence against persons with disabilities. Several relevant court cases illustrate this:

1. Decision No. 27/Pid.B/2021/PN Bju by the Bajawa District Court sentenced two perpetrators to six years in prison for sexually assaulting a speech-impaired victim.
2. Decision No. 486/Pid.Sus/2024/PN Jkt.Pst by the Central Jakarta District Court sentenced a perpetrator to 13 years in prison and fined IDR 1,000,000,000 for sexually assaulting an intellectually disabled victim.
3. Decision No. 11/Pid.Sus/2025/PN Bar by the Barru District Court sentenced a perpetrator to three years in prison and fined IDR 50,000,000 for sexually assaulting a disabled victim.

These rulings demonstrate inconsistencies in sentencing, both in terms of prison duration and fines, despite the similar vulnerability of the victims. This disparity reveals serious issues in the application of positive criminal law, particularly concerning the principle of justice, which should be applied equally – especially for vulnerable groups. Such inconsistencies highlight the absence of clear standards or guidelines for determining enhanced sentencing for crimes against persons with disabilities.

While positive criminal law formally provides for sentencing enhancements – through Law No. 12 of 2022 and Law No. 8 of 2016 – its practical implementation remains weak due to differing judicial interpretations and inadequate integration of justice, legal certainty, and victim protection.

Conversely, Islamic criminal law offers a distinct approach. Sentencing enhancement is not solely based on the violation itself but is informed by the *maqāṣid al-sharī'ah* – the protection of life, intellect, and human dignity, which are core objectives of Islamic law. Islamic criminal law classifies crimes into *Jarīmah Ḥudūd*, *Qisās-Diyāt*, and *Ta'zīr*. In *Ta'zīr*, sentencing is at the discretion of the ruler (*ulil amr*), allowing for proportional, flexible, and victim-centered penalties based on the severity of the offense, the harm caused, and

public interest.¹⁰ This approach offers greater flexibility and justice, particularly for victims of sexual violence with disabilities.

Given these issues, this study is highly necessary. It does not merely describe the current situation but critically analyzes the effectiveness of sentencing enhancements in positive law and proposes alternative solutions through Islamic criminal law. The research also evaluates the extent to which Islamic legal concepts of enhanced sentencing can contribute to strengthening legal protection for disabled victims of sexual violence while promoting the integration of substantive justice values into the national legal system. Thus, this study not only provides normative analysis but also strives to offer concrete solutions grounded in moral justice, victim protection, and legal certainty.

METHODS

This research employs a qualitative method with a normative juridical approach. The normative juridical method is used to determine legal rules and principles in response to specific legal events and to provide a descriptive analysis that addresses the legal issues under examination.¹¹ Accordingly, this study investigates and analyzes the law as a set of norms, legal principles, and doctrines to resolve the legal problems identified in the research. A comparative approach is adopted to provide an in-depth understanding of the conceptual similarities and differences between positive criminal law and Islamic criminal law.

The legal materials used in this study include primary legal sources, namely Law No. 12 of 2022 on Sexual Violence Crimes, and secondary legal materials such as books, scholarly literature, and journal articles. The selection of legal cases for analysis was conducted purposively, based on the relevance of cases that have obtained permanent legal force (*inkracht*) and involve persons with disabilities as victims of sexual violence. Three court decisions were chosen as case studies: Decision No. 11/Pid.Sus/2024/PN Dob, Decision No. 145/Pid.B/2023/PN Mdn, and an additional relevant ruling. These cases were selected due to their variations in judgments, the application of sentencing enhancements, and their relevance in reflecting the legal issues under investigation.

The legal materials consist of both primary sources—laws and court decisions—and secondary sources, which include books, scholarly literature, and journal articles on both

¹⁰ Budi Dermawan and M Noor Harisudin, "Transformasi Pemikiran Hukum Pidana Islam Terhadap Hukum Pidana Nasional (Analisis Implementatif Jarimah Hudūd, Qishash Dan Ta'zir)," *Rechtenstudent 1*, no. 3 (2020): hlm.262.

¹¹ S H Suyanto, *Metode Penelitian Hukum Pengantar Penelitian Normatif, Empiris Dan Gabungan* (Unigres Press, 2023), hlm.123.

positive criminal law and Islamic criminal law. Data collection was conducted through library research, by identifying and gathering both primary and secondary legal materials. The data analysis employed a qualitative approach, whereby all collected legal materials were systematically processed and analyzed to comprehend and elaborate the concept of sentencing enhancements in both legal systems. The analysis was carried out through several stages: identification, interpretation, and synthesis.

To ensure the validity and reliability of the data and research findings, validation techniques such as regulatory cross-checking and document triangulation were applied. This involved comparing various legal sources, court decisions, and credible legal literature to ensure data accuracy and guarantee an objective and comprehensive analysis. The results of the analysis are presented in a descriptive-analytical manner, systematically outlining the applicable legal provisions, the comparison between positive criminal law and Islamic criminal law, and the relevance of sentencing enhancements to the legal protection of persons with disabilities in cases of sexual violence.

RESULTS AND DISCUSSION

1. Sentencing Enhancements for Perpetrators of Sexual Violence Against Persons with Disabilities Based on Positive Law

With the enactment of Law No. 8 of 2016 on Persons with Disabilities, the Indonesian government formally established the definition and categorization of persons with disabilities in the country. This legal framework serves as the basis for all stakeholders and the broader society to understand the definition and classification of individuals with disabilities in Indonesia.¹²

According to Article 1(1) of Law No. 8 of 2016, a person with a disability is defined as *“any individual who experiences physical, intellectual, mental, and/or sensory limitations over a long period of time which, in interaction with their environment, may hinder their full and effective participation with other citizens on the basis of equal rights.”* Article 4(1) outlines four categories of disability:

- a. Physical Disability
- b. Intellectual Disability
- c. Mental Disability
- d. Sensory Disability

In 2022, the Indonesian government enacted Law No. 12 of 2022 on Sexual Violence

¹² Henokh Adijaya and Daniel Martin Tamera, “Memahami Disabilitas Dari Perspektif Teologis,” *Alucio Dei* 8, no. 1 (2024): hlm.55.

Crimes (UU TPKS), which centers on ensuring justice and protection for victims, while also providing legal clarity for law enforcement. This law aims to distinguish between public and private interests in cases of sexual violence and is designed to prevent all forms of sexual violence; to address, protect, and restore victims; to ensure prosecution and rehabilitation of perpetrators; to create environments free from sexual violence; and to guarantee non-recurrence, particularly in cases involving victims with disabilities.

Indonesia's positive criminal law provides special legal protection for victims of sexual violence, particularly for vulnerable groups such as persons with disabilities. This is explicitly stated in Law No. 12 of 2022. Article 6 of the UU TPKS defines the types of sexual violence crimes, including physical sexual harassment aimed at degrading the dignity of a person, as well as acts that exploit the victim's vulnerability to commit or allow sexual acts.

The law further reinforces this protection through sentencing enhancements as provided in Article 15. It stipulates that the criminal sentence may be increased by one-third of the base sentence if the offense is committed under aggravating circumstances. One such aggravating factor is when the victim is a person with a disability. This provision normatively affirms the state's legal commitment to ensuring stronger protection for persons with disabilities as a vulnerable group.

These enhanced sentencing provisions reflect the substantive justice approach in positive criminal law, recognizing that crimes against vulnerable individuals, such as persons with disabilities, merit harsher punishment.¹³ However, despite the normative comprehensiveness of these provisions, their implementation in court proceedings often lacks consistency.

Under Article 15(1)(h) of the UU TPKS, if the victim is a person with a disability, an additional penalty amounting to one-third of the base sentence must be applied. This recognizes the specific vulnerability of persons with disabilities and the need for greater legal protection to ensure their safety. This enhancement applies across all forms of sexual violence regulated under the UU TPKS, including harassment, rape, and sexual exploitation, underscoring the state's commitment to offering heightened protection for vulnerable victims.

¹³ Setiyowati Setiyowati, "Rekonstruksi Regulasi Penerapan Sanksi Pidana Terhadap Pelaku Lanjut Usia (Lansia) Yang Berbasis Keadilan Pancasila" (Universitas Islam Sultan Agung, 2023).

Table 1. Sentencing Enhancements under the UU TPKS

Type of Offense		Base Sentence	Sentence with Aggravation
Physical Harassment	Sexual	4 years in prison and a fine up to IDR 50,000,000	5 years and 4 months in prison, fine of IDR 66,666,666
Forced Intercourse	Sexual	12 years in prison and a fine up to IDR 300,000,000	16 years in prison and a fine of IDR 400,000,000
Sexual Exploitation		15 years in prison and a fine of IDR 750,000,000	20 years in prison and a fine of IDR 1,000,000,000

Despite the clear provisions of the UU TPKS, its practical application in court decisions remains inconsistent.

In Case 1 (District Court of Bajawa Decision No. 27/Pid.B/2021/PN Bjw), two perpetrators were found guilty of committing rape against a visually impaired victim and were sentenced to six years of imprisonment each under Article 285 jo. Article 55(1) of the Indonesian Penal Code (KUHP). However, this case predates the enforcement of the UU TPKS, and thus no sentencing enhancement was applied.

In Case 2 (Central Jakarta District Court Decision No. 486/Pid.Sus/2024/PN Jkt.Pst), the defendant was found guilty of sexual violence against an intellectually disabled person. The court applied Article 6(c) jo. Article 15(h) of the UU TPKS and sentenced the defendant to 13 years in prison and a fine of IDR 1,000,000,000. This case demonstrates a proper application of the enhanced sentence, reflecting a strong commitment to substantive justice, deterrence, and protection of victims.

In Case 3 (District Court of Barru Decision No. 11/Pid.Sus/2025/PN Bar), the defendant was sentenced to three years in prison and fined IDR 50,000,000 for committing sexual violence against a person with a disability. Although the UU TPKS had already come into effect, the judgment did not reflect the one-third sentencing enhancement as mandated in Article 15(2), raising concerns about judicial consistency and interpretation.

This inconsistency in applying enhanced penalties for crimes against persons with disabilities raises questions about the judiciary's understanding and commitment to the law's intent. Although the UU TPKS clearly includes persons with disabilities as a vulnerable group deserving maximum legal protection (Article 15(3)), many court decisions fail to reflect this.

Several factors contribute to this inconsistency: First, a lack of comprehensive understanding among judges regarding the significance of sentencing enhancements for vulnerable victims. Second, limited technical training and legal capacity-building related

to the UU TPKS for law enforcement and judicial officers, which leads to uneven application of the law. Third, a tendency among judges to prioritize mitigating factors (e.g., the perpetrator's age, admission of guilt, or apology), while neglecting the mandatory application of enhanced sentencing—even in cases involving vulnerable victims.

These patterns indicate that the challenge lies not merely in the legal norms but also in the judiciary's perspective on achieving substantive justice for persons with disabilities. Therefore, a judicial reform initiative is needed, emphasizing a more inclusive, empathetic, and responsive legal interpretation, particularly in cases involving vulnerable groups.

2. Aggravated Sanctions for Perpetrators of Sexual Violence Against Persons with Disabilities in the Perspective of Islamic Criminal Law

In the perspective of Islamic criminal law, sexual violence or rape is understood as an act committed through coercion. Sayyid Sabiq refers to it as *al-wath' bil al-ikrah* (forced sexual intercourse), while Al-Juzairi terms it *al-zina bil ikrah* (forcible illicit sexual relations).¹⁴ The core element of this act is the presence of coercion (*ikrah*), which positions the perpetrator as the coercer (*mukrih*) and the victim as the coerced party (*mukrah*) or the wronged (*madhlum*).¹⁵ In Islamic criminal law, the punishment for sexual violence can be imposed under two categories. If it fulfills the elements of *zina* (illicit sexual intercourse), then *hudud*—a fixed and severe punishment prescribed by Shari'ah—is applicable. However, if it does not meet the criteria for *hudud* or if there is no explicit textual basis (*nash*) for the act, the punishment falls under *ta'zir*, which is a discretionary penalty determined by the authority (*ulil amri*), considering justice, public welfare (*maslahah*), and deterrence.¹⁶

The fundamental objective of Islamic criminal law is to educate and guide individuals to adhere to the legal and moral codes prescribed by God. These divine regulations are designed to be within the cognitive and practical capacity of human beings. Within this legal framework, all actions are categorized as permissible or impermissible. Particularly in cases of rape or sexual violence—where victims are not only able-bodied women but also children and women with disabilities—Islamic law enforces strict and comprehensive rules.

¹⁴ M Nurul Irfan, *Gratifikasi Dan Kriminalitas Seksual Dalam Hukum Pidana Islam*, 2014, hlm.158.

¹⁵ Ummu Kalsum, Ahmad Syafii, and Randy Atma R Massi, "Tindak Pidana Kekerasan Seksual (Perspektif Perbandingan Hukum Islam Dan Hukum Positif)," *Comparativa: Jurnal Ilmiah Perbandingan Mazhab Dan Hukum* 5, no. 1 (2024): hlm.11.

¹⁶ Achmad Irwan Hamzani and Havis Aravik, *Hukum Pidana Islam Tinjauan Teoritis* (Penerbit NEM, 2022).

Although classical Islamic legal literature does not explicitly identify disability as an aggravating factor in the imposition of punishment, the principle of *maqāṣid al-sharī'ah* (objectives of Islamic law) provides a strong foundation for the aggravation of sanctions against perpetrators of sexual violence, especially when the victims are vulnerable groups such as persons with disabilities. Within the *maqāṣid al-sharī'ah* framework, two primary objectives are particularly relevant to cases of sexual violence: *hifz al-'ird* (protection of honor) and *hifz al-nafs* (protection of life).¹⁷ Sexual violence directly violates both of these objectives. Persons with disabilities—due to their physical or mental limitations—are clearly in a highly vulnerable position, making them more susceptible to violations of dignity and threats to personal safety. Therefore, in this context, the imposition of harsher sanctions on perpetrators is not only permissible but is also a concrete expression of upholding the *maqāṣid al-sharī'ah* by safeguarding the dignity, honor, and well-being of victims.

In the domain of *ta'zir*, Islam provides broad discretion to judges or the governing authority (*ulil amri*) to determine appropriate punishments based on the severity of the moral and social damage caused.¹⁸ The classification of *ta'zir* encompasses various types of crimes, including those against personal dignity and public morality. Abdul Aziz Amir, in his works on Islamic criminal jurisprudence (*fiqh jinayah*), categorizes *ta'zir* into several types, one of which pertains to crimes against honor (*al-jarā'im al-muta'alliqa bi al-'ird wa al-akhlaq*).¹⁹ Within this framework, sexual crimes against persons with disabilities clearly fall into this category, as they violate the honor of victims who are inherently defenseless and vulnerable.

Historically, there are precedents within Islamic legal practice demonstrating that perpetrators of crimes against vulnerable groups can be subjected to severe sanctions. For instance, in the legal opinions (*fatwas*) of scholars such as Sheikh Wahbah al-Zuhaili, it is stated that judges may impose harsher *ta'zir* punishments on perpetrators who exploit the weakness of victims to commit their crimes, as a means of enforcing justice and preventing harm (*dar' al-mafasid*).²⁰ Furthermore, historical records from Islamic judicial systems note that Caliph Umar ibn al-Khattab imposed severe punishments on offenders

¹⁷ M Lutfi Khakim and Mukhlis Ardiyanto, "Menjaga Kehormatan Sebagai Perlindungan Nasab Perspektif Maqashid Syari'ah," *Nizham Journal of Islamic Studies* Vol.8, no. No.01 (2020): hlm.32-41, <https://doi.org/https://doi.org/10.32332/nizham.v8i01.2105>.

¹⁸ Ikromul Afifi Ahmad, "Tinjauan Hukum Islam Terhadap Hukuman Ta'zir Dalam Pendidikan Di Pondok Pesantren Modern Baitussalam Prambanan" (Universitas Islam Indonesia, 2024).

¹⁹ Ahmad Syarbaini, *Op.cit.* hlm.45.

²⁰ Ahmad Syarbaini, "Konsep Ta'Zir Menurut Perspektif Hukum Pidana Islam," *Jurnal Tahqiq: Jurnal Ilmiah Pemikiran Hukum Islam* 17, no. 2 (2023): 37-48.

who abused their power or position to harm marginalized groups. These principles may be adopted as justification for imposing aggravated penalties on perpetrators of sexual violence against persons with disabilities.

Therefore, the application of *ta'zir* in cases of sexual violence involving persons with disabilities is not merely an optional course of action; rather, it constitutes a moral and legal obligation within the framework of *maqāṣid al-sharī'ah*. The imposition of aggravated sanctions on offenders serves as an effort to protect victims, prevent recurrence of similar crimes, and uphold public welfare. This further affirms that Islamic law possesses both the flexibility and the relevance to address contemporary challenges concerning the legal protection of vulnerable groups in modern society.

3. Comparison of Sentence Aggravation in Positive Criminal Law and Islamic Criminal Law

The aggravation of penalties for perpetrators of sexual violence against persons with disabilities reflects a serious effort by both legal systems to protect vulnerable groups. Although both systems appear to share a common goal—namely, the protection of victims and the deterrence of offenders—their approaches in positive criminal law and Islamic criminal law reveal markedly different characteristics in terms of legal foundation, mechanisms of aggravation, and the effectiveness of implementation.

Positive criminal law demonstrates a strength in terms of legal certainty. Law Number 12 of 2022 explicitly mentions persons with disabilities as a basis for sentence aggravation, thereby providing a clear, strong, and measurable legal framework for judges in rendering decisions. However, a notable weakness lies in its implementation. Despite the clarity of the legal norms, judicial practice often shows inconsistency due to the limited perspective of law enforcement officials in interpreting the vulnerability of persons with disabilities, as well as a general lack of understanding regarding the objectives of such special protection. As a result, aggravated sanctions remain merely potential and are not always effectively enforced.

Conversely, Islamic criminal law offers a high degree of flexibility through the mechanism of *ta'zīr*. Its strength lies in the discretionary authority (*ijtihād*) granted to judges to determine penalties based on the moral and social damage caused, guided by the principles of *maqāṣid al-sharī'ah*, such as *ḥifẓ al-naḥs* (protection of life) and *ḥifẓ al-'ird* (protection of dignity).²¹ This enables the imposition of harsher penalties in cases of sexual violence against persons with disabilities, even without explicit mention in the legal texts. However, the drawback lies in the aspect of legal certainty. Since decisions

²¹ Khakim and Ardiyanto, *Loc.,cit.*

rely on judicial discretion, they can vary greatly depending on the judge’s perspective, which may result in discrepancies in legal application if not accompanied by a strong understanding of *maqāṣid*.

To clarify this comparison, the following table presents a comparative analysis between the two legal systems:

Aspect	Positive Criminal Law (Law on Sexual Violence Crimes)	Islamic Criminal Law (<i>Ta’zīr</i> Offenses)
Basis of Aggravation	Explicitly stated in Article 15 of the Law	Implicit, based on <i>ijtihād</i> and <i>maqāṣid al-sharī’ah</i>
Legal Nature	Normative, based on written statutes	Flexible, dependent on judicial discretion
Victim Protection	Specifically regulated for persons with disabilities	Based on <i>ḥifẓ al-nafs</i> and <i>ḥifẓ al-ird</i>
Deterrence Effect	Potentially strong, but often inconsistently applied	Highly dependent on judicial awareness and interpretation
Legal Certainty	High in normative terms, weak in implementation	Low in formal terms, strong in moral-social context
Flexibility	Low, adheres strictly to statutory text	High, adaptable to social and moral circumstances
Main Weakness	Inconsistent application in court	Risk of sentencing disparity among judges

This comparison reveals that each legal system has its own strengths and weaknesses. Positive criminal law excels in formal legal certainty but is vulnerable in terms of practical enforcement. In contrast, Islamic criminal law is superior in flexibility and social relevance but faces challenges in maintaining consistency across judgments. Therefore, an integrative approach—combining normative legal certainty with sensitivity to moral principles and social justice—is ideal for formulating legal protection for persons with disabilities.

CONCLUSION

This study finds an inconsistency in the application of aggravated sanctions against perpetrators of sexual violence against persons with disabilities within the practice of positive criminal law, despite the normative clarity of Article 15 of Law Number 12 of 2022, which explicitly stipulates a sentence enhancement of one-third of the principal

punishment. This inconsistency arises from the inadequate understanding among law enforcement officers regarding the vulnerability of persons with disabilities, as well as the limited internalization of the principle of substantive justice in judicial practice. In contrast, Islamic criminal law, through the mechanism of *jarimah ta'zir*, provides flexibility for judges to impose harsher punishments based on the principles of *maqāsid al-sharī'ah*, particularly the protection of life (*ḥifz al-nafs*) and honor (*ḥifz al-'ird*). Although Islamic law does not explicitly mention persons with disabilities, it morally and theologically allows for the imposition of aggravated sanctions against perpetrators who target vulnerable groups.

The implications of these findings for national law highlight the urgent need to optimize the implementation of the Sexual Violence Crime Law (UU TPKS) by strengthening the capacity of law enforcement personnel to understand the specific vulnerabilities of persons with disabilities. This includes specialized training and the development of technical guidelines for applying the aggravating provisions. Ensuring equal and consistent legal protection for victims with disabilities is essential. As a policy recommendation, the principles of Islamic criminal law grounded in *maqāsid al-sharī'ah* may serve as a normative reference to enhance the national legal framework, particularly in promoting sentencing flexibility and a greater emphasis on substantive justice. The state should encourage a model of justice that is more responsive to vulnerable groups by integrating the certainty of positive law with the social justice values inherent in Islamic law, thereby fostering a legal system that is inclusive, equitable, and socially just.

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