

Necrophilia In Perspectives of Indonesian Positive Law And Islamic Law

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Abstract

Necrophilia is one of the sexual crimes committed against corpses. In Indonesia, no law regulates the prohibition of Necrophilia. Meanwhile, Islam has specific and detailed laws governing Necrophilia, and most Indonesian people are Muslim so that it can be used as an illustration in the formation of positive law in Indonesia. Strengthen the judge's view of necrophilia perpetrators by implementing *rechtsvinding* through various methods. From this background, in this study, there are two problem formulations. First, how is the necrophilia law in positive Indonesian law? Second, how is the law of Necrophilia in Indonesia from the perspective of Islamic law? This research aims to enforce the law, to reduce necrophilia crimes, and to create the deterrent effect. The research method used is normative juridical. The author uses literature research, statutory approaches, and comparisons between Islamic and positive Indonesian law. Followed by the documentation of study data collection techniques and qualitative data analysis techniques, followed by a deductive mindset. So that a theoretical basis can be formed, that, Necrophilia is reviewed in positive Indonesian law and Islamic law, and analysis of Necrophilia in positive Indonesian law and Islamic law. This study concluded that regarding positive Indonesian law, there are no rules that specifically regulate Necrophilia, as for some regulations that can be imposed in the form of criminal law in accordance with previous crimes such as murder, immorality, and others that can be imposed by judges. As for according to Islamic law, it can be imposed *ta'zir* or had.

Keywords: *Necrophilia, Criminal Law, Islamic Law, Fiqh Jinayah.*

Abstrak

Nekrofilia adalah salah satu kejahatan seksual yang dilakukan terhadap mayat. Di Indonesia, belum ada hukum yang mengatur tentang pelarangan Nekrofilia. Sementara itu, Islam memiliki hukum yang spesifik dan rinci mengatur tentang Nekrofilia, dan sebagian besar masyarakat Indonesia beragama Islam sehingga dapat dijadikan gambaran dalam pembentukan hukum positif di Indonesia. Memperkuat pandangan hakim terhadap pelaku Necrophilia dengan menerapkan penemuan hukum (*rechtvinding*) melalui berbagai metode. Dari latar belakang tersebut, dalam penelitian ini terdapat dua rumusan masalah. Pertama, bagaimana hukum nekrofilia dalam hukum positif Indonesia? Kedua, bagaimana hukum Necrophilia di Indonesia dalam perspektif hukum Islam? Penelitian ini bertujuan untuk menegakkan hukum, mengurangi kejahatan nekrofilia, dan menciptakan efek jera. Metode penelitian yang digunakan adalah yuridis normatif. Penulis menggunakan penelitian kepustakaan, pendekatan perundang-undangan, dan perbandingan antara hukum Islam dan hukum positif Indonesia. Dilanjutkan dengan teknik pengumpulan data studi dokumentasi dan teknik analisis data kualitatif, dilanjutkan dengan pola pikir deduktif. Sehingga dapat dibentuk suatu landasan teori, bahwa, Nekrofilia ditinjau dalam hukum positif Indonesia dan hukum Islam, dan analisis terhadap Nekrofilia dalam hukum positif Indonesia dan hukum Islam. Penelitian ini menyimpulkan bahwa mengenai hukum positif Indonesia belum ada aturan yang secara khusus mengatur mengenai Necrophilia, adapun beberapa peraturan yang dapat dijatuhkan berupa hukum pidana sesuai dengan tindak pidana sebelumnya seperti pembunuhan, asusila, dan lainnya yang dapat dijatuhkan oleh hakim. Adapun menurut hukum Islam dapat dikenakan ta'zir atau had.

Kata Kunci: Necrofilia, Hukum Pidana, Hukum Islam, Fiqh Jinayah.

INTRODUCTION

The act of raping corpses by humans is one of acts sexual deviation known as Necrophilia. Necrophilia is a mental disorder in the form of sexual interest in having sex with corpses and having an abnormal interest in corpses. Another word for Necrophilia is thanatophilia or necrolagnia.¹

As time goes by and the progress of the times is increasingly rapid, the culture and technology, which development is followed by the human behavior development that is in harmony with existing conditions when this is viewed from a legal perspective, can be classified as behavior that is following established norms. There is behavior which includes violation in existing and establishing the norms. If you look at the conduct by the standard, it will not cause problems. However, the behavior that violates norms, Laws those not following the criteria, in general, will cause problems, especially in the field of law, which will be detrimental to society and become unrest for every person or group. This deviation can be regarded by society as a violation or even as a crime.

The first type is Necrophilic Homicide, where necrophilic sufferers must kill first to get a corpse and get sexual satisfaction. Second, Regular Necrophilia, where sufferers only have intercourse with the corpses that are truly

¹Kowland Hawary, "Gagasan Pemidanaan Terhadap Pelaku Kejahatan Pemerkosaan Mayat (Nekrofilia) Dalam hukum Positif Indonesia," *JOM Fakultas Hukum Universitas Riau* VI No. 2 (2019): 2.

dead to fulfill their sexual pleasure. Third, Necrophilic Fantasy, where the sufferer only hallucinates or fantasizes about having sex with a dead body, but he doesn't do it.²

Protection for sexual violence, rape, and protection for corpses has been stipulated in Indonesian positive law. Then, looking at incidents of sexual violence that do not only happen to human's live. Making law enforcers must be able to act decisively and wisely in formulating a regulation. By analyzing this problem, Necrophilia is very important and can be used as a reference for law enforcers to be more concerned about Necrophilia, which can have a negative impact and influence on the surrounding community. Remember that laws are static. That is, they will always follow and adjust to the conditions of place and time and adapt to the problems that arise when and where people gather. So, it is very necessary to pay attention to the problem of necrophilia or corpse rape.

In the regulations on rape and crimes against corpses, there are no specific rules governing sexual relations or the rape of corpses (Necrophilia). So, this makes necrophilia perpetrators free to commit crimes and opens up loopholes for immoral actors to carry out their immoral acts easily, without deterrence, because there is no legal certainty governing Indonesian criminal law. And what about in the view of fiqh jinayah or Islamic criminal law, which this regulates various laws originating from Islamic shari'ah. Because 86.88% of Indonesia's population is Muslim³, it has been stated in the Al-Qur'an and As-Sunnah that Allah SWT. It has banned all forms of sexual deviation, especially since there is no legal legality governing positive Indonesian law regarding the rape of corpses. So from Islamic law, or jinayah Fiqh, this can be used as a legal basis that can provide a sense of deterrent against necrophilia perpetrators and a sense of security for every community member.

Islam has handled sexual relations in such a way as to avoid sexual deviations that violate legal norms. And what is the Islamic view regarding cases of Necrophilia that occur in people's lives? As a religion that cares for its people with rules that originate from the Koran and hadith. It is clarified by the elements of protecting religion, protecting yourself, protecting your mind, protecting your wealth, and protecting your honor. As well as Rahmatan Alamin, what is the appropriate punishment for the perpetrators of this Necrophilia? Seeing that it is essential for the public to know and understand so that they remain alert and, of course, as a comparative glass of law that will be applied in looking at a problem. Necrophilia Perspective from Indonesian Positive Law and Islamic Law.

² Ismaya Indri Astuti, "Tiga Jenis Necrophilia," *FIMELA*, 2014, <https://www.fimela.com/lifestyle/read/3833467/3-jenis-necrophilia>. Accessed: 08.00 WIB, Sunday, March 6, 2022.

³ Viva Budi Kusnandar, "Persentase Pemeluk Agama/Kepercayaan di Indonesia (Juni 2021), Sumber Kementrian Dalam Negeri (Kemendagri)," <https://databoks.katadata.co.id/>. Accessed: 07.00 WIB, Tuesday, Mei 17, 2022.

The research method used is normative juridical. The author uses literature research, statutory approaches, and comparisons between Islamic and positive Indonesian law. Followed by the documentation of study data collection techniques and qualitative data analysis techniques, followed by a deductive mindset. So that a theoretical basis can be formed, that, Necrophilia is reviewed in positive Indonesian law and Islamic law, and analysis of Necrophilia in positive Indonesian law and Islamic law.

DISCUSSION AND RESULT

Definition of Necrophilia

Necrophilia comes from the word *necros* which means corpse, and *philein*, which means to love. It is a sexual disorder of having intercourse with a corpse and feeling sexually satisfied.⁴ Necrophilia is included in the form of sexual deviation. In Oxford Learner's Dictionaries, Necrophilia means sexual interest in dead bodies.⁵ Necrophilia is also known as necrophilism, necrolagnia, necrocoitus, necrochlesis, and thanatophilia.⁶ According to Rosman and Resnick, “necrophilia, a sexual attraction to corpses, is a rare disorder that has been known since ancient times.”⁷ From these definitions, it can be seen that Necrophilia is an abnormal attraction in having sexual intercourse with a corpse. Necrophilia is a type of paraphilia, namely psychosexual disorders involving unusual, strange, and disgusting fantasies or actions necessary for complete sexual pleasure.⁸ Not only Necrophilia is included in the form of paraphilia. There are many other forms of sexual disorders that are included in the form of paraphilia.

As seen in the table below, there are various types of Necrophilia as follows:⁹

Table 2.1 Types of Necrophilia

No.	Types of Necrophilia	Information
1.	<i>Necrophilic Homicide</i>	necrophilia sufferers must kill first to get a corpse and obtain sexual satisfaction. ¹⁰

⁴ Dadang, *Ilmu Kedokteran Jiva dan Kesehatan Jiva*, p. 75.

⁵ TT Ochoa and CN Jones, “Defiling the Dead: Necrophilia and the Law,” Whittier L. Rev 18. (1996): p. 540.

⁶ Oxford Learners Dictionaries, <https://www.oxfordlearnersdictionaries.com/definition/english/necrophilia?q=Necrophilia>. Accessed: at 07.00 WIB, September 4, 2022.

⁷ Jonathan P. Rosman dan Phillip J. Resnick, “Sexual Attraction to Corpses: A Psychiatric Review of Necrophilia,” *Bull Am Acad Psychiatry Law* 17. no. 2 (t.t.): p. 153.

⁸ CN Jones, “Defiling the Dead: Necrophilia and the Law,” p. 540.

⁹ Fadhli Rizal Makarim, Yang Perlu diketahui tentang Penyimpangan Seksual Necrofilia, Halodoc, 21 December 2020, <https://www.halodoc.com/articles/what-need-know-about-sexual-deviation-necrophilia>. Accessed: 07.30 WIB, Sunday, September 4, 2022.

¹⁰ Anil Agrawal, “A New Classification of Necrophilia,” *Journal of Forensic and Legal Medicine*, 2009, hlm. 2.

2.	<i>Regular Necrophilia</i>	the sufferer only copulates with corpses that are truly dead to fulfill their sexual gratification.
3.	<i>Necrophilic Fantasy</i>	The sufferer only hallucinates or fantasizes about having sex with a corpse, but he doesn't do it.

There are various forms of sexual deviation in cases of necrophilia, such as:

Table 2.2 Cases of Necrophilia

No.	Forms of Sexual Deviance	Information
1.	A murder caused by a man around 51 years old to a woman he obsessed with, only for raping her corpse	A man took the life of his dream lover because of one hand clapping. After killing the man who was crazy about the victim, he tried to have sex with the victim's body. ¹¹
2.	The fight between a girl and 3 boys cause a murder and rape	The Banten Police Dikrimun managed to arrest the perpetrators of the 13-year-old girl's murder. Based on the perpetrator's confession, the victim, girl S (13), was still having sex even though she was dead. ¹²
3	Iwan confess that he rape Alia before and after murdering her	In a lie test conducted by the Palembang Police Criminal Investigation Unit, Jakabarang, Palembang. Finally, Iwan Ardiyansyah (27) admitted to raping Alia before killing her. Even after Alia died again, copulating his corpse. ¹³
4.	Raping corpse, the online driver free from the rule of rape	Two suspects who work as motorcycle taxis, namely Sarifudin (34) and Farilham (36), killed and raped A (16), a first-grade

¹¹ Reza Gunadha, Lelaki 51 Tahun Bunuh Wanita idaman Supaya Bisa Setubuhi Mayatnya, Suara.com, September 18, 2019, <https://www.> Retrieved: September 3, 2022.

¹² Abdi Tumanggor, Pertarungan Sengit Gadis (13) Vs 3 Pria hingga Berujung Pembunuhan-Pemeriksaan, Tribun-Medan.com, September 7, 2019, <https://medan.tribunnews.com/amp/2019/09/07/pertarungan-sengit-gadis-13-vs-3-pria-to-berujung-pembunuhan-pemeriksaan-simak-4-facts-this>. Accessed: 08.20 WIB, Sunday September 4, 2022.

¹³ Jakabaring, Iwan Mengaku Perkosa Alia Sebelum dan Sesudah Dibunuh, Detik news. Saturday, August 29 2009 03.29 WIB. <https://news.detik.com/berita/d-1191939/iwan-mengaku-perkosa-alia-before-dan-sepuh-killed->. Accessed: 11.00 WIB. Friday, September 2, 2022.

		student of a vocational school in Bogor Regency. Both were charged with multiple layers of articles 340 and 338 and were not accused of rape or 285 of the Criminal Code. The police argued that the perpetrator raped a corpse. ¹⁴
5.	After raping the corpse of a murder, the murderer following the exam.	Murder accompanied by rape committed by ER because of hurt feelings is threatened by articles 338 and 339 of the Criminal Code, with 20 years in prison. He was assisted by his friends, DS (23), R (30), and RD (28), who raped and killed the victim in the Cibongor River. The victim was still raped even though she had died. ¹⁵

From the explanations and cases that have occurred, it can be seen that Necrophilia has various forms, one of which is necrophilia homicide. Necrophilia homicide is based on acts of murder and rape. Because to get a corpse that will be the target of fulfilling his desire in the form of a human still alive and then killed and raped.

Murder and Rape in Indonesian Positive Law

Indonesian positive law as *ius constitutum* is a collection of principles and rules of written law that are in effecting today and are binding in general or specifically and are enforced through the authorized law enforcement agencies, either the government or the courts within the country of Indonesia.

According to Sudarto, criminal law is a legal rule that binds to an act that meets certain conditions due to a criminal act.¹⁶ According to WFC van Hattum that criminal law is a whole of the principles and regulations which are followed by the state or the other general legal community, as custodians of public law and order, they have prohibited the actions that have an unlawful nature and have

¹⁴ Marieska Harya Virdhani, Setubuhi Mayat Tukang Ojek tak Dijerat Pasal Pemerkosaan, Okenws, okenews<https://www.google.com/amp/s/news.okezone.com/amp/2014/03/24/501/960003/sebuhi-mayat-tukang-ojek-tak-dijerat-pasal-pemerkosaan>. Accessed: 08.45 WIB. Sunday, September 4, 2022.

¹⁵ Bahtiar Rifa'i, Usai Perkosa Mayat yang Dibunuh Pelaku ikut Ujian Semester, detikNews, September 18, 2017, <https://news.detik.com/berita/d-3774890/usai-perkosa-mayat-yang-dbunuhnya-pelaku-ikut-ujian-semester-sma> Accessed: 11.45 WIB. Sunday, September 4, 2022.

¹⁶ Sudarto, *Hukum Pidana 1* (Semarang: Yayasan Sudarto Fakultas Hukum Universitas Diponegoro, 1990), p. 10.

linked the transgression with its rules with the extraordinary suffering in the form of punishment.¹⁷

In Indonesian Positive Law, especially regarding Criminal Law, in general, comes from two legal sources, namely:

- a. The source of material law is the place from the emergence of the legal material that taken as a factor for the law formation such as social relations, politics, economy, traditions (religion, morality), criminology, traffic, international developments, and geographical conditions.
- b. Formil sources of law are sources of law that can be seen in terms of their formation. Namely the legal regulations whose function is to implement or enforce the material law. As a step or way to realize the rights and the obligations in terms of administering the law.¹⁸

As for all regulations that must be obeyed and must be listed and listed in formil legal sources, they can be divided into five, those are:

- 1) Undang-Undang (*statute*)
- 2) Habits and customs (*custom*)
- 3) *Traktat* (International treaties or conventions)
- 4) Jurisprudence (case law, judge made law)
- 5) Opinion of legal experts (*doctrine*)¹⁹

From these sources, the criminal acts are judged and legally adjusted according to the applicable law in the regulations that have regulated the implementation and fulfill the rights and the obligations of each individually. However, a judge cannot reject every case, even if an offense or issue has not been regulated in the legal sources above. Therefore, a judge or law enforcer authorized to carry out *rechtvinding* (law discovery), namely a forming law process, is carried out by a judge assigned to enforce the law on concrete legal events. *Rechtvinding* is carried out because the law is unclear or incomplete on the offenses filed.

A judge who carries out *rechtvinding* will be guided by the existing methods, including:

1. The Interpretation Method occurs when statutory rules can be directly determined in the concrete events encountered, meaning that this method is carried out in terms of existing regulations. Still, it is unclear whether they can be applied to factual circumstances because there are conflicts between legal norms (antinomy norms), vague norms (vage norm), and the uncertainty legislation.

¹⁷ Fitri Wahyuni, *Dasar-Dasar Hukum Pidana di Indonesia*, 1 ed. (Tangerang Selatan: PT Nusantara Persada Utama, 2017), p. 2.

¹⁸ Rahman Syamsuddin, *Pengantar Hukum Indonesia* (Jakarta: Prenadamedia Group, 2019), p. 22.

¹⁹ *Ibid*, p. 23.

2. The Construction Method occurs when there is a legal vacuum (Recht vacuum) or a legal vacuum (wet vacuum), meaning that there are no laws or rules that regulate directly that can be applied to the legal problems at hand.²⁰

Murder and Rape in Islamic Law

In Islamic Law, a law discusses explicitly Islamic Criminal Law, often called *Fiqh Jinayah*. In language, the word Fiqh comes from *Fiqh*, *masdar* from *faqih*-*yafqahu*, which means understanding. On the other side, Fiqh means a deep understanding of the profound thought process. As all the words of fuqaha in the Qur'an have the meaning of understanding. As in the Al-Qur'an letter At-Taubah verse 122:

وَمَا كَانَ الْمُؤْمِنُونَ لِيَنْفِرُوا كَآفَّةً فَلَوْلَا نَفَرَ مِن كُلِّ فِرْقَةٍ مِّنْهُمْ طَائِفَةٌ لِّيَتَفَقَّهُوا فِي الدِّينِ
وَلِيُنذِرُوا قَوْمَهُمْ إِذَا رَجَعُوا إِلَيْهِمْ لَعَلَّهُمْ يَحْذَرُونَ

Meaning: "It is not fitting for all believers to go (to the battlefield). Why don't some of each group among them go (stay with the Messenger of Allah) to deepen their religious knowledge and warn their people when they return so that they can take care of themselves?"

In terms or terminology, fiqh has the following meanings:

"الفقه هو العلم بالأحكام الشرعية العملية المكتسب من أدلتها التفصيلية أو هو مجموعة الأحكام الشرعية العملية المستفادة من أدلتها التفصيلية"

Meaning: Fiqh is the Shari'a laws relating to actions through detailed arguments. Or Fiqh is a collection of practical syara' laws taken from clear statements.²¹

Islamic criminal law is often called *fiqh jinayah*. While the crime is usually called *jarimah*. In the language, *jarimah* means sin, mistake, or crime.²² In terms or terminology, the word *jarimah*, according to Al-mawardi, is a prohibition in law that Allah threatens with sanctions or punishments in the form of hadd or ta'zir:

"محظورات شرعية زجر الله تعالى عنها بحد أو تعزير"²³.

In this, legal prohibition can be in the form of doing prohibited acts or leaving what has been ordered.²⁴ Therefore, everyone who performs prohibited

²⁰Muwahid, *Metode Penemuan Hukum (Rechtvinding) Oleh Hakim Dalam Upaya Menujudkan Hukum Yang Responsif*, vol. 07 No. 01 (Al-Hukama: The Indonesian Journal of Islamic Family Law, 2017), p. 234.

²¹ عبد الوهاب خلاف، *علم اصول الفقه (دار العلم، ١٩٧٨)*، ص. ١١.

²²Marsaid, *Al-Fiqh Al-Jinayah (Hukum Pidana Islam)* (Palembang: Rafah Press, 2020), p. 53.

²³ الأحكام السلطانية و الوليات الدينية، ص. ٢١٩.

²⁴ محمد بن قدامة، *المغني الجزء الثاني عشر (الدمشقي: دار عالم الكتاب، ٦٣٠)*، ص. ٦٦.

actions and abandons requested actions will receive punishment or sanctions according to the things that has been done or abandoned.

The punishment given can be in the form of *hadd* and *ta'zir*. *Hadd* itself can be interpreted into two meanings: in general and specifically. The meaning of *hadd* in a general sense is all punishments that determined by *syara'*, whether these rights are in the form of Allah's or individual rights. What is included in the general mind of *hadd*, such as *qisas* and *diyab* punishments, are included in it. Meanwhile, in a special sense, *hadd* is a punishment that has been determined by *syara'* and is the right of Allah, such as cutting off hands for the theft, one hundred lashes for the adultery, and eighty lashes for *qadhaf*. In the specific sense of *hadd*, *qisas* and *diyab* punishments are not included because both are individual rights.

Furthermore, The meaning of *ta'zir* is a punishment that has not been determined by *syara'*. For the determination of its implementation, it is left to the uli *al-amr* (ruler) following his field. For example, the legislative body (DPR) can implement (judge) the court.²⁵

Usually, a crime in Islam is called *jinayah*, which means crime.²⁶ As quoted in 'Awdah, according to Ibn Nujaym, *jinayah* is an act that occurs in a person's soul or other parts of his body, such as killing, injuring, or hitting.²⁷ However, in this conception, there are still differences of opinion, according to the *fuqaha'* regarding this determination. There are several opinions that killing, injuring, and beating are included in the context of *jarimah*.

According to Hanafiyah, there is a separation regarding the meaning of *jinayah*. The word *jinayah* is only intended for all humans' deeds to objects of the limbs and soul. Like they are injuring or killing. In contrast, the crime related to the objects in the form of goods and property are called *ghasab*. Therefore, the discussion of theft is separated from *jinayah*. Then, according to the opinion of the Shaf'iyah, Malikiyah, and Hanbaliyah, there is no separation between evil acts against a person's soul and evil deeds against the property.²⁸ For this reason, *jinayah* has a general meaning that includes all aspects of crime.

Suppose the words Fiqh and *jinayah* are combined. In that case, *fiqh jinayah* is the science of *syara'* law relating to the problem of prohibited acts and their sanctions, taken from detailed arguments.

Necrophilia in Perspective Indonesian Positive Law

One of the sexual acts deviance in Necrophilia is a form of abnormal behavior. Sexual acts deviance are a form of sexual behavior that the society cannot accept because it is not in accordance with religious procedures and norms.

²⁵Muhammad Nur, *Pengantar dan Asas-Asas Hukum Pidana Islam* (Banda Aceh: Yayasan Pena Aceh, 2020), p. 10.

²⁶Said HM, *Epistimologi Hukum Pidana Islam* (Surabaya: Pustaka Idea, 2015), p. 3.
²⁷المغني الجزء الثاني عشر، ص. ٦٦.

²⁸*Epistimologi Hukum Pidana Islam*, p. 4.

Necrophilia is a form of sexual violence or rape against corpses, and one of the types is necrophilia homicide which contains elements of previous murder to get the corpse. If you look at the existing positive legal regulations, the Necrophilia case includes several aspects problem that can be seen in the Criminal Code (KUHP), those are murder, rape, and corpses or corpses. With respective penalties as follows:

Table. 3.1Regulations in the Criminal Code relating to Necrophilia

The Crime of Murder	Article 338 of the Criminal Code , namely: "Whoever deliberately takes the life of another person, is threatened, for murder, with a maximum imprisonment of fifteen years." ²⁹
Rape Crime	Crimes Against Decency. There are four articles that are closely related to rape that formulated in the Criminal Code, namely: 1. Article 285 of the Criminal Code: forcing a woman to have sex outside of marriage with violence or threats of violence; 2. Article 286 of the Criminal Code: having intercourse with a woman who is unconscious or helpless outside of marriage; 3. Article 287 of the Criminal Code: having sex outside of marriage with a woman who is not yet 15 years old or not yet ready for marriage; and 4. Article 288 of the Criminal Code: having sex in a marriage with a woman who is not yet 15 years old or not yet ready for marriage. ³⁰ 5. Article 290 of the Criminal Code: This is punishable by a maximum imprisonment of seven years. (1) "Whoever commits an obscene act with a person, knowing that the person is unconscious or incapacitated."
Crimes Against Bodies	1. Article 180 of the Criminal Code: deliberately and unlawfully digging up or taking a body or moving or transporting a body that has been exhumed or taken; and 2. Article 181 of the Criminal Code: to bury, hide, carry away or remove a corpse with the intention of concealing death or birth. ³¹

The above regulations, especially regarding the crime of rape in articles 285, 286, 287, 288, and 290, even though it has been stated that they have committed rape and sexual intercourse. However, in writing, it does not include sexual intercourse and rape with corpses or Necrophilia. Because Indonesia adheres to a principle of legality, there are the following consequences:

²⁹ *Article 338 of the Criminal Code (KUHP) concerning the Crime of Murder.*

³⁰ Sinaga, *Kitab Saku KUHP dan KUHLAP*, p. 122-123.

³¹ *Kitab Undang-Undang Hukum Pidana (KUHP) tentang kejahatan terhadap mayat, t.t.*

1. There is no act that is threatened and prohibited by a criminal if it has not been stated and written concretely in the law.
2. In determining the criminal law should not use analogies.
3. A penal code applies retroactively.³²

Thus, the elements "in a state of unconsciousness or helplessness" in article 286 and "the person is unconscious or helpless" in article 290 cannot be charged with ensnaring necrophilia perpetrators. Because death cannot be analogous to fainting or being helpless. So, the theoretical concept in a legality principle will only be submitted through the process of law enforcement or law enforcement.

They are judging from several cases of Necrophilia, one of the most dangerous incidents in Indonesia. Especially in necrophilia homicide,³³ The punishment imposed on the necrophilia perpetrator is based on the crime of murder that the perpetrator has committed to the victim. At the same time, he is still alive, namely murder and premeditated murder. Therefore, the sentence given was taken which based on Article 338 of the Criminal Code on Murder and Article 340 of the Criminal Code on Premeditated Murder, which reads: "Whoever deliberately and with a plan in advance takes the life of another person, is threatened, because of murder with a plan (moord), with a death penalty. or imprisonment for life or for a certain period of time, not more than 20 years." Meanwhile, Article 285 was not charged with the reason that the perpetrator raped the corpse.

Then other cases can be seen in Decision No. 320/ Pid.Sus/ 2019/ PN Siak regarding the crime of murder accompanied by rape which leads to cases of Necrophilia. He said that because the defendant Yogi Pratama alias Yogi bin Herdianto committed the raping victim named Selviyani, after which the defendant killed the victim by hitting the victim with a hoe and choking the victim until he died. Then the defendant left the victim and went back to the defendant's house in Simpang Belutu, Kandis District. However, not long after, around 17.00 WIB. The defendant went back to the scene and met the victim to have sex with the victim again, even though he was no longer alive, and took the victim's mobile phone.³⁴

From the chronology, it is stated in the decision that the panel of judges considered, in connection with the punishment to be handed down to the defendant, the panel of judges took the stand on the combined theory that the

³²Moeljatno, *Asas-Asas Hukum Pidana* (Jakarta: Rineka Cipta, 2018), p.27.

³³ Marieska Harya Virdhani, *Setubuhi Mayat Tukang Ojek tak Dijerat Pasal Pemerkosaan*, Okezones, okenews<https://www.google.com/amp/s/news.okezone.com/amp/2014/03/24/501/960003/sebuhi-mayat-tukang-ojek-tak-dijerat-pasal-pemerkosaan>. Accessed: 08.45 WIB. Sunday, September 4, 2022.

³⁴Directory of Decisions of the Supreme Court of the Republic of Indonesia (Decision No. 320/ Pid.Sus/ 2019/ PN Siak)

imposition of a crime does not only focus on revenge (retributive justice). However, it is also taking attention to the character and behavior of the defendant, who does not show an attitude of remorse, and does not deserve to be given leniency for him, considering the attitude and type of action of the defendant are classified as severe, sadistic, cruel, and inhumane, namely after the victim died, the defendant had time to come back to the hospital. Location and fuck the victim's body. From this case, there may be indications of paraphilia or sexual perversion tendencies that occurred in the defendant who had sex with the victim's corpse.³⁵

However, considering the age of the victim was underage, the panel of judges sentenced him based on the Child Protection Law, especially Article 81 Paragraph (1) of the Republic of Indonesia Law no. 17 of 2016, the second amendment to the Law of the Republic of Indonesia No. 23 of 2002 concerning Child Protection Jo. Article 76 letter D of RI Law no. 35 of 2014 amendments to the Law of the Republic of Indonesia No. 23 of 2002 concerning Child Protection. And Article 80 Paragraph (3) Jo. Article 76 letter C of the Republic of Indonesia Law no. 35 of 2014 amendments to the Law of the Republic of Indonesia No. 23 of 2002 concerning Child Protection. By imposing a sentence on the defendant with a prison sentence of twenty years. With a fine of Rp. 100,000,000 (one hundred million rupiahs) with the provision that if the fine is not paid, it is replaced with a prison sentence of three months.³⁶

Among the three basic forms of necrophilia, the most dangerous form of necrophilia homicide. Because, in his actions included in the delicts of crime. With the provisions of offenses, There are first murder. In the case of necrophilia, the crime of murder can be categorized as premeditated murder, because planning to kill the victim with the aim of being able to enjoy and fulfill his sexual desire for the victim. Second, the offense of rape. That is, the perpetrator raped the corpse of the victim who had been killed. From these two offenses, of course, it can be seen that necrophilia, especially the form of homicide, is very dangerous and has fulfilled serious crime offenses in it.

In this case, the judge acting as a law enforcer must take the right policy in each case. Even though the actions committed by the defendant included rape, murder, and Necrophilia, and the victim was a minor. Legal discovery, especially with the method of interpretation, can also be applied if something is found that is still unclear in the law to explain the real intent of the text of the law so that the provisions in the law can be applied in resolving the offenses faced by judges.

Necrophilia in Perspective Islamic Law

In the Islamic view, a sexual relationship is not only aimed at in giving vent to lust but an activity that must be fulfilled with ethical values and religious

³⁵Decision No. 320/ Pid.Sus/ 2019/ PN Siak, p. 37.

³⁶ Verdict No. 320/ Pid. Sus/ 2019/ PN Siak, p. 38-39.

values. Therefore, first, there must be a bond that justifies the two of them if they want to have sexual intercourse. If there is no legal bond, namely through marriage, then it is considered to have violated the law, and *uqubah* can be imposed on the culprit. Among the fingers of sexuality that is very clearly stated in the Qur'an is adultery. As explained in Surah An-Nur: 2:

الرَّائِيَّةُ وَالرَّائِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِّنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِّنَ الْمُؤْمِنِينَ

Meaning: Adulteress woman and adulterer man, flog each one of them a hundred times and do not feel compassion for both of them prevent you from (carrying out) Allah's religion (law) if you believe in Allah and the Last Day. Let the (implementation of) their punishment be witnessed by some of the believers.

Then, how is it legal to have intercourse with a corpse or Necrophilia in Islamic law? If the cast is between men and women who are not married or outside of marriage, they will be subject to *had zina*. While the punishment given to the perpetrator of Necrophilia with the object in the form of a real corpse, there is no difference between the scholars of forbidden *Fiqh* regarding sexual intercourse with a corpse, whether during his lifetime she was his wife or another woman who was not his wife, in Ibn Hajar al-Haitami's opinion, considers this as a great sin and immorality.³⁷ Shaykh Abu Hamid also stated that when a woman has died, it is forbidden for her husband to see her with lust.³⁸ As befits, a man is forbidden to look at other women.³⁹ However, regarding the punishment that will be given to the perpetrators, there are two different schools of thought, namely:

- 1) First, according to the Imam Hanafi and Imam Shafi'i schools of law in *qaul* that are *shobih* and Imam Hanbali schools according to the *qaul mu'tamad*, to have intercourse with a corpse, there is no obligation to drop Had (volumes or stoning). Because intercourse with a corpse is not like intercourse, this is because the relationship is carried out with organs that have been damaged. Besides that, intercourse with a corpse is not included in the desired action. It has been out of character and is self-reproached. So, the punishment given is limited to *ta'zir*.
- 2) Second, according to the Imam Malik madhhab and the Shafi'i madhhab in *qaul muqabbilal-ashab* and some Imam Hanbali schools, it is obligatory to have intercourse with a corpse if the perpetrator is not husband and wife. The reason the sentence was imposed was that the perpetrator had

³⁷إصدار، الموسوعة الفقهية الجزء الرابع والأربعون (الكويت: وزارة الأوقاف و الشؤون الإسلامية، ٢٠٠٦)،

ص. ٣١.

³⁸Necrophilia that doesn't go so far as to have intercourse with a dead body is illegitimate.

³⁹ للامام العلامة الفقيه الحافظ أبي ذكريا، المجموع الجزء الخامس شرح المذهب، ٦٧٦.

intercourse with a corpse which was the same as meaning that he had intercourse with the living adam (humans). Then, Imam al-Auza'i emphasized that intercourse with a corpse is a major sin because what the perpetrator has done has damaged the honor of the corpse.⁴⁰

In the first opinion, *ta'zir* punishment is given to perpetrators of Necrophilia or intercourse with corpses because it is to distinguish between having intercourse with a corpse or a dead person and having intercourse with someone who is still alive. The *ta'zir* punishment applies when an act of *jarimah* is not determined by its type, as well as the punishment according to the texts of the Qur'an and hadith. Of course the party authorized to decide on a type of *ta'zir* sanction measure is a judge who keeps thinking about religious texts properly and thoroughly and deeply because it covers the public good.⁴¹ Epistemologically, *Ta'zir* means to reject and prevent (*ar-rad wa al-man'u*).⁴² *Ta'zir* can be interpreted as destiny or giving lessons.⁴³ Meanwhile, according to Imaam Al-Mawardi, *ta'zir* defines *ta'zir* as follows:

"وَالْتَّعْزِيرُ تَأْدِيبٌ عَلَى ذُنُوبٍ لَمْ تُسَرَّحْ فِيهَا الْحُدُودُ"

"*Ta'zir* is an educational punishment for sins (crimes) that the law of syara has not determined".⁴⁴

Ta'zir punishment aims at Preventive, Repressive, Curative, and Educational. Which has the following meaning:

1. Preventive, as prevention, so that people do not commit crimes.
2. Repressive, Provides a deterrent effect to the perpetrator so that he does not repeat his crime again.
3. Curative, Creating improved attitudes for criminals.
4. Educational, as a learning and educational education, so that the perpetrators can improve their lifestyle.

Even though it is not a *hudud* and *qisas, diyat* punishment, *ta'zir* punishment cannot be underestimated. Precisely this punishment ranges from light to heavy punishment that can be applied according to the judge's will. A judge can choose from several types of *ta'zir* punishment itself, including:

1. *Ta'zir* punishments related to the body are divided into two, namely, the death penalty and caning.
2. *Ta'zir* punishment related to one's independence is divided into two, namely imprisonment and exile.
3. *Ta'zir* punishment is related to property. Ibn Taimiyyah divides it into three: destroying it, changing it, and owning it.

⁴⁰ الموسوعة الفقهية الجزء الرابع والأربعون، ص. ٣١ .

⁴¹ M. Nurul Irfan, *Hukum Pidana Islam* (Jakarta: Amzah, 2016), p. 93.

⁴² عبد العزيز النجار، المعجم الوسيط (مصر: مكتبة الشروق الدولية، ١٤٢٥ / ٢٠٠٤)، ص. ٥٩٨ .

⁴³ عبد القادير عودا، التشريع الجنائي الإسلام (بيروت: دار كتاب العربي)، ص. ٨٠ .

⁴⁴ عبد العزيز أمير، التعزير في الشريعة الإسلامية ٤ (دار الفكر العربي، ١٩٦٩)، ص. ٥٢ .

4. The punishment for *ta'zir* in other forms is in the form of a stern warning, presented before the court, advice, reproach, ex-communication, dismissal, and an open announcement of wrongdoing.

The second opinion is the had punishment given to perpetrators who have intercourse with dead bodies because it equates to cases of intercourse with people who are still alive. *Had* punishment is a punishment imposed on *hudud jarimah*, namely all types of criminal acts that have been determined in type, form, and sanctions by Allah SWT. In the Koran and by the Prophet Muhammad SAW.⁴⁵ Included in the known *jarimah hudud* are adultery, *qadzaf* (accusing someone of adultery), *syurbul khamr* (drinking liquor), *sariqah* (stealing), *hirabah* (robbing), *riddah* (apostasy), and *al bagyu* (rebellion). The problem here is that if an act is considered a *jarimah*, there is a formal element (*al-rikn al-syar'iy*) that must be fulfilled first, and there are textual provisions that prohibit or order an act and threaten the violator.⁴⁶ In the second opinion, it illustrates⁴⁷ sexual relation to a dead person is the same as rape to a living person in general. The problem lies in whether *kias* can be placed in the *hudud jarimah* category. There are two opinions, namely:

1. Shafi'iyah allowed *kias* in the field of *qisas* and *hudud*, reasoning:
 - a) Verily, the Messenger of Allah set a metaphor when he sent Mu'adz bin Jabal. So *kias* still apply in all types of *syar'i* law, including *qisas* and *hudud*.
 - b) When the companions of the Prophet were asked for their opinion on the punishment for the perpetrators of drinking alcohol, then Ali bin Abi Talib said, "If someone drinks alcohol, he will get drunk. If he's drunk, he'll mess up. If he messed up, he would accuse someone else. Therefore, the punishment is the punishment for adultery (eighty lashes). Therefore, with this, no one else will deny Ali's words."⁴⁸
2. The Hanafi group, which does not accept figurative language in the field of *hudud* and *kafarat*, reasoned:
 - a) The problem of *hudud* and *kaafarat* has been clearly explained in the texts, including the technicalities, types, and numbers of sanctions that are impossible to understand by reason. In addition, the basic figurative basis is the idea of 'Allah. Therefore, it is very unlikely that the attempt to reconcile text and reason.

⁴⁵ Nurul Irfan, *Hukum Pidana Islam*, p. 47.

⁴⁶ A. Djazul, *Fiqh Jinayah (Upaya Menanggulangi Kejahatan dalam islam)* (Jakarta: Raja Grafindo Persada, 1997), p. 3.

⁴⁷ Qiyas means measuring, comparing, or equating.

⁴⁸ عبد القادر عودة، التشريع الجناعي الإسلام (بيروت: دار كتاب العربي) ص. ١٨٤.

- b) Because it concerns the sanction of punishment, the *hudūd* issue is not a trivial matter. While the allegory is multi-interpretative (*ḥann*) and can contain errors so that there is an element of doubt.⁴⁹

So the second opinion about having intercourse with a corpse is tantamount to intercourse or ordinary rape, taking legal doctrines that allow figurative language in *hudud* cases. This means that the same as adultery, thus raping or having intercourse with a dead body follows the elements of the finger of adultery. Adultery is a sexual relationship committed by a man with a woman who is not bound in a legal marriage according to Islamic law, which is based on the consent of both parties concerned. In the Qur'an, it has been explained in surah al-Isra'ayat 32:

وَلَا تَقْرُبُوا الزَّوْجَ إِذَا كَانَ فَاحِشَةً يَوْسَاءَ سَبِيلًا

Meaning: "And do not approach adultery. Verily (zina) is a heinous act and the worst way."

Then, apart from *al-rukn al-syar'i* and *al-rukn al-maddi*, which are included in the elements of jarimah adultery, namely *al-rukn al-adabiy* are as follows:

1. Prohibited intercourse

Sexual intercourse, which is considered adultery, is intercourse in the *farji* (pubic). The size is when the pubic head (*hasyafab*) has entered the *farji*, even if a little. It is considered adultery even though there is a barrier between the *penis* (male genitalia) and *farji* (female genitalia) as long as the barrier is thin and does not hinder the feeling and enjoyment of intercourse.⁵⁰

2. There is intention or intent to violate the law

This element is fulfilled if the perpetrator commits an act (intercourse) even though he knows the woman he is having intercourse with is a woman who is unlawful for him.

If all the elements of the finger have been met, the next step is to determine accountability and punishment or sanctions. Regarding Islamic responsibility based on:

1. Doing prohibited acts or abandoning obligatory acts
2. The act is done voluntarily, meaning that the perpetrator has a free choice to carry out or not to commit the act
3. The perpetrator knows the consequences of his actions.⁵¹

Meanwhile, according to the second opinion, the punishment for perpetrators who have intercourse with corpses is had, so if the punishment for necrophilia perpetrators follows the rules of adultery, there are two categories, namely *mubshab* and *ghairu mubshab*. The *mubshab* perpetrators will be sentenced

⁴⁹ص. ١٨٣-١٨٤.

⁵⁰Ahmad Wardi Muslich, *Hukum Pidana Islam* (Jakarta: Sinar Grafika, 2005), p. 8.

⁵¹A. Hanafi, *Asas-Asas Hukum Pidana Islam* (Jakarta: Bulan Bintang, 1967), p. 154.

to stoning. The perpetrators will be buried up to the shoulder and then stoned to death. For *ghairu muhsan* perpetrators, the punishment is one hundred lashes and exile for one year.

As for the concept of a combined crime or in *jinayah fiqb*, it is called *ta'addud al-jaraim*. Ahmad Hanafi defines "a person who commits several types of jarimah, each of which has not yet received a final verdict."⁵² In Islamic criminal law, *fugaha* divide into two theories, namely:⁵³

1. The theory of *at-tadakhul* (entering or complementing each other)

In this theory, the offender is sentenced to one sentence even though he has committed a double crime because the criminal acts between one and the other are considered complementary or entering. Therefore, the following must be considered:

- a. If the perpetrator commits a similar crime before being decided by a judge, then the sanction can be imposed of one type with the aim of being educational (educational) and preventive (prevention). If the sentence is sufficient, then repeated punishment is not necessary. However, if the perpetrator repeats his actions again, he will be punished again.
- b. If the perpetrator of the finger has committed a crime repeatedly, followed by various kinds of the finger, then the perpetrator can be subject to one sentence, with the condition that he must pay attention to the imposition of a criminal sentence aimed at protecting common interests, and in order to create the same goal.

2. *al-Jabb* theory (absorption)

The imposition of punishment is intended to eliminate other punishments because they have been absorbed by the heavier penalties given to the perpetrators. For example, the death penalty absorbs other punishments. Several scholars who put forward this theory include Imam Malik, Abu Hanifah, and Ahmad. At the same time, Imam Syafi'i did not apply it.⁵⁴

Therefore, it can be formulated that if Necrophilia is preceded by another crime, then the formulation of the sentence is as follows:

1. According to the *tadakhul theory*, only one punishment is imposed on the perpetrator of the finger, even though he has committed more than one or multiple crimes. This is because the actions of one and the other complement or enter into each other, while the conditions for imposing

⁵² Ibid, p. 326.

⁵³ Sahid, *Pengantar Hukum Pidana Islam* (Surabaya: UIN Sunan Ampel Press, 2014), p. 139.

⁵⁴ Fitri Wahyuni, *Hukum Pidana Islam (Aktualisasi Nilai-Nilai Hukum Pidana Islam Dalam Pembabaran Hukum Pidana Indonesia)* (Tangerang Selatan: PT Nusantara Persada Utama, 2018), p. 92.

such punishment are to protect common interests and to achieve the same goal.

2. Meanwhile, according to *al-Jabb's* theory, the perpetrators of jarimah will be given the most severe punishment. For example, in the case of necrophilia homicide, according to Imam Malik, Imam Ahmad was sentenced to *qisas* because he absorbed other punishments. Imam Syafi'i said it must be *ta'zir* first, then *had*, then *qisas*.

Closing

Conclusion

Based on the explanations described in previous chapters, the following conclusions can be drawn that in Indonesia's positive law, Necrophilia has not been explicitly regulated, especially in the Criminal Code. However, law enforcement must still be enforced by law enforcers. Thus, the judge can conduct *rechtvinding* in deciding cases where the rules are unclear in the law or if there is a legal vacuum. Especially in the case of Necrophilia, the judge applies *rechtvinding* with an interpretation method in determining his decision. To clarify the true meaning of the law's text so that the law's provisions can be applied in resolving the offenses faced by judges. Especially in the case of Necrophilia in Indonesia, where the rules have not been stated explicitly in the law.

According to Islamic law, intercourse with a corpse, whether it is his wife or not, according to the *ijma'* of the *fuqaha*, is unlawful. Regarding the sanctions imposed, according to the first opinion, they were only given *ta'zir* sanctions. According to the second opinion, it should be subject to a *hadd* penalty. In the first opinion, it distinguishes between the rape of a corpse and rape or intercourse with a living person because it is done on organs that are damaged or no longer functioning. The second opinion for the reason in having intercourse with a corpse is the same as having intercourse with a living person, especially since the perpetrator has violated the honor of the corpse.

Meanwhile, suppose to the perpetrator of Necrophilia performs other *finger actions* before having intercourse with the corpse. In that case, the punishment for the perpetrator is adjusted to the theory of *tadakhul* or the theory of *al-jabb*. Criminal responsibility must be given to necrophilia perpetrators or who have raped or *had* the intercourse with corpses because these actions are prohibited by law. Regarding the sanctions that will be given if you follow the two opinions above, there are two categories, namely *ta'zir* or *had*.

There are no clear and unmistakable regulations regarding Necrophilia in Indonesian criminal law sources, so the perpetrators have the potential to escape the law. Thus, it is very necessary for the legislature to draft laws that specifically regulate necrophilic acts in order to provide legal certainty for perpetrators, justice for victims, and benefits for members of the public.

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