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Imposition of Criminal Sanction Against Sexual Offenders from the Perspective of Child Protection Laws

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Abstract

While the Indonesian government has passed the Law on Child Protection to ensure the fulfillment of children's rights, there remain a substantial number of children who are victims of sexual violence. In fact, the cases reached 14,517 in 2021. For that reason, this paper aims to discuss the imposition of criminal sanction against sexual abusers and law protection for child victims of sexual abuse. This paper is a normative legal research that puts emphasis on the legal approach, especially the Child Protection Law. Regulations on procedures for imposition of sanction against sexual offenders are already included in the Child Protection Law, despite the fact that sanctions are not explicitly defined since there are minimum and maximum criminal sanctions. Therefore, it is perceived that judges can impose minimal criminal sanctions, including chemical castration, which is one of the additional sanctions as regulated in Law Number 17 of 2016. For those categorized as child victims, psychological advocacy is important to recover their mental condition and to move on from past trauma. This has been regulated as special protection that takes the forms of reproductive health education, inculcation of religious values and decency; social rehabilitation; psychosocial advocacy toward healing; and protection and advocacy at every stage of trial, from investigation, prosecution, up to examination in court. Imposition of criminal sanctions against the offender and advocacy for child victims of sexual abuse must be optimally implemented to ensure their optimal growth and development to become this country's future generation that succeed in making their dream come true.

Keywords: Children's Rights; Victim; Sexual Abuse.

Introduction

Our children have the major potential to drive the progress of the nation and the people. Children must be protected to make sure that they can grow and develop into prosperous and tough adults to support the existence of our nation in the international community. Consequently, there are children's rights to be protected to ensure their normal growth and development in order to achieve all the ideals and dreams of their life and to contribute to national development.

Indonesia is a constitutional state, as regulated in Article 1 paragraph (3) of the 1945 Constitution. The essence of being a constitutional state is to provide legal protection, more specifically, in this case, legal protection for Indonesian children to ensure the fulfillment of their rights. Diana Yusyanti, citing Frans Magnis Suseno, argued that recognition of human rights comes not only from the community and the state, but also from human inherent dignity.¹ Implementation of legal protection for children is very important so that the human rights inherent in them can be seen as legal rights.

Indonesia has a number of regulations concerning child protection. Article 28B paragraph (2) of the 1945 Constitution stipulates that every child has the right to survival, growth and development as well as protection from violence and discrimination. Rini Fitriani and Marlina, citing Mukhtar Yahya, opined that fulfillment and protection of child rights are based on the non-discrimination principles, best interests of the child, and the right to participation; these are the prerequisite for effective fulfillment and protection of children's rights.²

Indonesia has also ratified the Law on Child Protection, namely Law Number 23 of 2002 which was amended by Law Number 35 of 2014. The Child Protection Law stipulates that child protection needs to be implemented in order to realize the wellbeing of children and guarantee the fulfillment of their rights without discriminatory treatment. Article 3 emphasizes that child protection aims to ensure the fulfillment of children's rights so that they can live, develop, and participate optimally in accordance with human dignity and standards, and receive protection from violence and discrimination, for the realization of quality, noble, prosperous Indonesian children.

In theory, the regulations concerning legal protection for children have already been made, in practice, however, the implementation remains far less than optimal

¹ Diana Yusyanti, 'Perlindungan Hukum Terhadap Anak Korban Dari Pelaku Tindak Pidana Kekerasan Seksual' (2020) 20 De Jure Jurnal Penelitian Hukum.[13].

² Rini Fitriani and Marlina, 'Perlindungan Hukum Terhadap Anak Korban Kekerasan Seksual Dalam Rumah Tangga' (2009) 2 Mercatoria.[31].

considering the substantial number of children who fall victim to sexual abuse. The Ministry of Women's Empowerment and Child Protection noted that, throughout 2021, there were 14,517 cases of child abuse and almost half of them were sexual abuses. I Gusti Ayu Bintang Darmawati, the Minister of Women's Empowerment and Child Protection, further elaborated that out of 14,517 cases, 45.1% were sexual abuses.³ The Indonesian Child Protection Commission reported that, throughout 2021, there were 18 cases of child sexual abuse in education institutions, and this is quite worrying because it is not impossible that the cases constitute the tip of the iceberg that has only recently been revealed to the public.⁴

A quite horrendous case was the rape of 12 female students by a man with the initials HW as the leader and teacher at an Islamic boarding school in Bandung, West Java. A similar case also occurred in South Sumatra where the South Ogan Komerling Ulu (OKU) Resort police were investigating a case of raping a 9-year-old student perpetrated by the initials MS who was a teacher at an Islamic boarding school.⁵ Children who are victims of sexual abuse need protection in the pursuit of justice. Therefore, this paper aims to focus primarily on the imposition of criminal sanctions against the perpetrators of sexual abuse and the legal protection of child victims of sexual abuse.

This paper constitutes a doctrinal legal or normative juridical study. As a normative juridical study, it uses legal approach to examine the laws relating to legal issues in this study. We use primary and secondary legal sources. The former consists of laws and regulations related to the topic in this research, the latter consists of books and journals that support this research.

³ CNN Indonesia, '14.517 Kasus Kekerasan Anak Terjadi Sepanjang 2021' (*CNN Indonesia*, 2021) <<https://www.cnnindonesia.com/nasional/20220120030219-20-748827/14517-kasus-kekerasan-anak-terjadi-sepanjang-2021>> accessed 12 December 2021.

⁴ Vania Rossa and Lilis Varwati, 'KPAI: Ada 18 Kasus Kekerasan Seksual Pada Anak Yang Terjadi Selama Tahun 2021' (*Suara.com*, 2021) <<https://www.suara.com/lifestyle/2021/12/29/133434/kpai-ada-18-kasus-kekerasan-seksual-pada-anak-yang-terjadi-selama-tahun-2021>> accessed 26 September 2021.

⁵ Antara, 'Polisi Dalami Kasus Pemerksosaan Santri Di Sumsel, Mencari Korban Lain' (*Antara*, 2022) <<https://nasional.tempo.co/read/1545554/polisi-dalami-kasus-pemerksosaan-santri-di-sumsel-mencari-korban-lain/full&view=ok>> accessed 2 January 2022.

The legal materials were collected through literature review, namely by reading and studying both primary and secondary legal materials. Meanwhile, the analysis of legal materials is carried out through a syllogistic reasoning approach that applies deductive reasoning.

Sexual Abuse is a Violation of Children's Rights

Children are a particularly vulnerable group and highly dependent on others in living their lives. Child sexual abuse is like the iceberg phenomenon because the victims do not want to tell their close related person about what the perpetrator had done to them for fear of the perpetrator's intimidation. If left unattended, the victims can experience psychological disorders such as a traumatic feeling within themselves. According to Stephanie Delaney, the scope of sexual violence includes all forms of sexual abuse, sexual assault, pornography, prostitution, trafficking for sexual purposes, sex tourism, forced and early marriage and slavery.⁶

Every child has the right to be free from abuse, especially sexual abuse in this case, where perpetrators can be other people or even relatives. In Arif Gosita's opinion, victims are those who suffer physically and psychologically as a result of the actions of others who seek fulfillment for themselves or others but are contrary to the interests and human rights of those who suffer.⁷ Child protection efforts are based on Pancasila and the 1945 Constitution, in addition to the basic principles of the Convention on the Rights of the Child which include non-discrimination, the best interests of the child, the right to life, survival and development, and respect for children's views. The basic principle of the Convention on the Rights of the Child is that the human rights inherent in children must be protected by the state, government, community, family, and parents.

Article 4 of the Child Protection Law affirms that every child has the right to live, grow, develop and participate fairly in accordance with human dignity and

⁶ Anggar Kurniawati, 'Perlindungan Hukum Terhadap Anak Korban Kekerasan Seksual Di Kota Surakarta (Studi Kasus Pelayanan Terpadu Perempuan Dan Anak Surakarta)' (2014) 3 Recidive.[117].

⁷ Bambang Waluyo, *Victimologi Perlindungan Korban & Saksi* (Sinar Grafika 2012).[9]

standard, as well as to be protected from violence and discrimination. From Article 4 we see that children's rights from the perspective of law include legal aspects in one's social circle.⁸ Article 15 letter f states that every child has the right to the protection against sexual crimes. This means that every child has the fundamental right in his or her life to be free from sexual abuse. Specifically, Article 9 paragraph (1) states that every child has the right to the protection, in the education unit, from sexual crimes and violence committed by educators, education staff, fellow students and/or other parties. The regulation of this article shows that children in an educational environment must be free from acts of sexual violence that can be perpetrated by educators, education staff, fellow students and/or other parties. The regulation in Article 9 focuses more on the perpetrators in the educational environment; this suggests that, in addition to the right to education, children also have the right to be free from sexual abuse. This is also emphasized in Article 54 paragraph (1) stating that children in and around the education unit are entitled to protection from acts of physical, psychological, sexual violence, and other crimes committed by educators, education staff, fellow students, and/or other party.

Sanctions for Perpetrators of Sexual Violence

When a child's rights are violated and he or she becomes a victim of sexual violence, the perpetrator must be punished because Article 27 paragraph (1) of the 1945 Constitution stipulates that all citizens are equal before the law and treated equally in administrative practices and are obligated to obey the law and the government with no exceptions. Thus, the regulation in this article emphasizes that Indonesia as a constitutional state must uphold human rights by ensuring their legal position. The Indonesian government is obliged to guarantee the rights of children who are victims of sexual violence.

Criminal sanctions for sexual offenders in Indonesia are regulated in three laws: Indonesian Criminal Code, Child Protection Law, and Law on the Elimination

⁸ Maulana Hasan Wadong, *Pengantar Advokasi Dan Hukum Perlindungan Anak* (Grasindo 2000).[33].

of Domestic Violence. The Indonesian Criminal Code has a more general scope, meaning that it does not mention sexual violence, but sexual harassment which is part of decency crime. In the case of children as victims of sexual violence, the Child Protection Law is applied when the perpetrator is a person other than the family members. If the perpetrator of sexual abuse is a member of the child victim's family, the sanction will be imposed under the Law on the Elimination of Domestic Violence. The regulation of criminal sanction for sexual violence perpetrators in Indonesia adopted the principle of *lex specialis derogat legi generali*, which means special law repeals general laws. Thus, sanctions in the Criminal Code are not imposed on perpetrators of sexual violence if the victim is his or her child. In the latter case, the sanctions are imposed under Child Protection Law. When the perpetrator is the relative of the child victim, the sanctions imposed are those stipulated in the Law on the Elimination of Domestic Violence.

Article 76E stipulates that everyone is prohibited from using violence or threats of violence, coercing, deceiving, committing a series of lies, or persuading children to commit or allow obscene acts to be committed. Article 76I of the Child Protection Law further regulates that everyone is prohibited from placing, allowing, carrying out, ordering to do, or participating in economic and/or sexual exploitation of children. Sanctions for those who violate the regulations are specified in Article 82 paragraph (1) stipulating that anyone who violates the provisions of Article 76E shall be subject to a minimum imprisonment of five years and a maximum of 15 years and a maximum fine of Rp. 5,000,000,000, - (five billion rupiah). When this crime is committed by parents, guardians, child caretakers, educators, or education staff, then paragraph (2) determines the penalty plus one third of the criminal threat in paragraph (1). In the case of obscene acts, Article 88 stipulates that the perpetrators of obscene acts are subject to a maximum penalty of 10 years imprisonment and/or a maximum fine of Rp. 200,000,000, - (two hundred million rupiah).

The basis of criminal sanctions is suffering, the severity of which is adjusted to the crime that has been committed. The provision of criminal sanctions in the Child Protection Act can lead to a perception that judges can pass lighter criminal

sentence because of the available choices from the lightest to the heaviest criminal sentences. Moreover, the imposition of a fine is an ancillary, rather than mandatory, order. Such provision of criminal sanctions makes law enforcement less likely to provide a deterrent effect for perpetrators. For that reason, the Government passed Law Number 17 of 2016 concerning 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 Laws which elucidated that there had been no significant reduction in incidence of sexual violence against children. Therefore, the Indonesian government has taken optimal and comprehensive steps by imposing chemical castration sentence as an effort to prevent repeated crime by already convicted offenders. The technique for administering chemical castration is regulated in Government Regulation Number 70 of 2020.

Chemical castration is the injection of chemical compounds meant to quell the sex drive of male sex offenders by lowering their testosterone levels. The chemical castration is a penalty that aims to improve the behavior of child sexual abusers. The imposition of chemical castration is additional to punitive imprisonment. The provision of chemical castration is intended to rehabilitate the convicted child sex abusers to prevent them from repeating their crime. The imposed criminal penalty is meant to inflict fear upon the convicted offenders and serves as a retributive justice for them.⁹

Legal Protection for Child Victims of Sexual Abuse

According to C.S.T Kansil, legal protections are actions by law enforcement officers to provide a sense of security, both mentally and physically from interference and various threats from any party.¹⁰ It is further stated that this protection is not limited to providing physical security, but also psychological. The purpose of providing legal protection for children is certainly inseparable from efforts to

⁹ Tunggal S and Nathalina Naibaho, 'Penjatuhan Kebiri Kimia Bagi Pelaku Kejahatan Seksual Terhadap Anak Dalam Perspektif Falsafah Pemidanaan' (2020) 50 Jurnal Hukum dan Pembangunan.[337].

¹⁰ Indriastuti Yustiningsih, 'Perlindungan Hukum Anak Korban Kekerasan Seksual Dari Reviktimisasi Dalam Sistem Peradilan Pidana' (2020) 5 Lex Renaissance.[294].

prosper them as the future generation of the nation and state so that they grow and develop physically and spiritually. Legal protection of children is certainly intended to guarantee their fundamental rights. Therefore, legal protection for children is an absolute necessity.

The protection of child victims has two meanings: legal protection from becoming victims of criminal offence and guarantees of compensation for the suffering or losses of people who have become victims of criminal offences.¹¹ Victim protection is an effort to provide fair and good treatment, especially for children who are victims of sexual abuse. Child victims of sexual abuse are the ones who suffer the most, so that protection for them must be provided by guaranteeing their rights as victims, especially to protect their psychological security. The goal is that children who are victims of sexual violence and have reported it to the authorities are no longer experiencing repeated trauma through re-victimization. If this happens, it is feared that the number of cases of child sexual abuse will increase.

Article 59 paragraph (2) letter j stipulates special protection for children who are victims of sexual offences. This protection is provided by the central government, regional governments and other state institutions as regulated in Article 59 paragraph (1). Special protection is carried out through educational efforts on reproductive health, religious values, and moral values; social rehabilitation; psychosocial assistance from treatment to recovery; and providing protection and assistance at every stage of the trial, from investigation, prosecution, to examination in court. This has been regulated in Article 69A of the Child Protection Law.

Efforts to provide education on reproductive health, religious values, and decency values are intended to improve child knowledge of the human reproductive system. With this education, children are expected to be protective toward their reproductive organs. In addition, education on religious and decency values aims to improve children's understanding of their religion as a guide of life and of the things they can and can't do. Social rehabilitation is an integrated process of

¹¹ Barda Nawawi Arief, *Masalah Penegakan Hukum Dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan* (2007).[6]

physical, psychological and social recovery to make sure that child victims can return to their normal functions in social life. As for psychosocial advocacy, it is a psychological assistance aimed at helping to relieve, protect, and also restore the physical, psychological, social, and spiritual condition of the victim.¹²

The protection and advocacy provided at every stage of trial, from investigation, prosecution, up to examination in court must comply with the Criminal Procedure Code. As a child, the victim is entitled to be accompanied by his or her family or relatives during the judicial process. This is important to make the child feel comfortable in telling chronologically what has happened to him or her. Based on the provision of special protection stipulated in the Child Protection Law mentioned above, child protection can mean any effort to rehabilitate and empower the child victims of wrongdoing, exploitation, and abandonment and to ensure their normal growth and development physically, mentally and socially.¹³

The research shows that special protection is part of repressive legal protection, which means that children who are the future generation of the nation actually become victims of sexual violence so that the protection process must be carried out continuously until they really move on from past trauma or can return to their normal lives, so that the period of time is not limited to only children's age group. The provisions in the Child Protection Law have not yet firmly imposed criminal sanctions for perpetrators of sexual violence. However, from a legal perspective there is already special protection for child victims of sexual abuse which is intended to restore their psychological condition so that they can accomplish their dreams and hopes.

Conclusion

Children are our nation's future providers and, therefore, they need to be protected from all types of violence, especially sexual violence. The occurrence of

¹² Nurini Apriandi, 'Perlindungan Anak Korban Kekerasan Seksual Melalui Pendekatan Keadilan Restoratif' (2017) 10 *Arena Hukum*. [317].

¹³ Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia* (Refika Aditama 2014). [42].

sexual violence against children is a form of violation of children's rights Article 4 of the Child Protection Law affirms that every child has the right to live, grow, develop and participate fairly in accordance with human dignity and standards, as well as to be protected from violence and discrimination. Therefore, any offender who violates will be given criminal sanctions as regulated in the Child Protection Act.

While the Indonesian government has passed the Child Protection Law, in practice, however, the regulations of criminal sanction for sexual offenders need to be firmly imposed, including the additional penalty in the form of chemical castration. Legal protection for child victims of sexual violence is very visible with the existence of repressive legal protection, namely the application of imprisonment plus chemical castration sanctions, and special protection.

The imposition of criminal sanction is aimed to produce a deterrent effect on the perpetrator, which is the embodiment of repressive legal protection. Moreover, protection for children who are victims of sexual violence remains very important, especially for their mental recovery in order to move on from past traumatic experiences that can hamper their growth and development processes.

Special protection for child victims of sexual abuse must be carried out continuously until the victim can live a normal life. The period of time to recover the victims' condition is indeterminable and, therefore, support is needed not only from the family, but also local community and NGOs that have concern for child victims of sexual violence. Equally important is support from law enforcement apparatus such as the police, which is expected to be responsive in handling complaints from victims, prosecutors to intensify sanctions in the prosecution process, and judges who are firm in imposing maximum criminal sanctions on the perpetrators.

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