

# The Legal Protection of Victims on Criminal Acts of Agreement in Criminal Jurisdiction Process

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## Abstract.

*The purpose of this study is to examine and analyze the legal protection of victims of sexual intercourse in the criminal justice process against residents who experience mild mental retardation. The approach method used is empirical juridical emphasizes obtaining legal knowledge empirically by going directly to the object with the theory of intentionality and will towards the problem under study. The results of the study that the application of legal protection for victims of the crime of sexual intercourse in the criminal justice process for victims of crime, especially victims of mild mental retardation/intellectual disability, to get protection in the form of granting victims' rights. The existence of compensation in the form of compensation, restitution and rehabilitation provided by the perpetrator to the victim considering the impact caused by the perpetrator's actions, physical, social, and psychological impacts. Although the defendant was sentenced to imprisonment for 7 (seven) years and 6 (six) months. The sentence handed down to the perpetrator is not commensurate with the suffering experienced by the victim.*

*Keywords: Crime; Judicial; Protection; Sexual.*

## 1. Introduction

Article 28B paragraph (2) the 1945 Constitution of the Republic of Indonesia. Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination.<sup>1</sup> Children are an inseparable part of the survival of human life and the sustainability of a nation and state. In order to be able to be responsible later, children need to have the widest opportunity to grow and develop optimally, both physically, mentally, and socially. For this reason, it is necessary to protect children to realize the welfare of children by providing guarantees for the fulfillment of their rights without discriminatory treatment.<sup>2</sup>

The problem of immoral crimes against children arises because the prison sentences given to the perpetrators do not make people afraid to do this, in fact there are more and more perpetrators of rape and sexual abuse of children. Although there have also been many laws that threaten perpetrators of immoral crimes against children with severe criminal threats, immoral crimes still occur.<sup>3</sup> The

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<sup>1</sup> Act No. 35 of 2014 concerning Child Protection

<sup>2</sup> Lailatul Nur Hasanah and Sri Endah Wahyuningish. The Application Of Justice Principles Of Rapid Simple Fee In Criminal Justice System In The State Court (Case Study in State court of Pati). *Jurnal Daulat Hukum* Volume 2 Issue 4, December (2019). Url : <http://jurnal.unissula.ac.id/index.php/RH/article/view/8353/3910>, accessed 17 March 2022.

<sup>3</sup> Sri Endah Wahyuningish. Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Kesusilaan Dalam Hukum Pidana Positif Saat Ini. *Jurnal Pembaharuan Hukum* Vol 3, No 2 (2016). Url : <http://jurnal.unissula.ac.id/index.php/PH/article/view/1407/1080>, accessed 17 March 2022.

existence of protection for children is a human right that must be obtained by every child, because every citizen along with a position in law and the government is obliged to uphold the law and government with no exceptions.<sup>4</sup> Thus, child protection can be said that: "An effort to protect children so that they can carry out their rights and obligations. The protection of children's rights is essentially directly related to the regulation of the law."<sup>5</sup>

The problem of sexual violence is a form of crime that harasses and tarnishes human dignity, and deserves to be categorized as a crime against humanity (Crime Against Humanity) as well as a very important legal issue, especially victims in a state of mild mental retardation / intellectual disability and mental patterns.<sup>6</sup>

Positive legal arrangements for the crime of rape, including crimes regarding decency in terms of intercourse, are not included in the type of offense but are included in the type of crime. The crimes referred to in Article 285 (rape), 286 (having sex with a woman who is not his wife) in a state of unconsciousness and helplessness), 287 (having sex with a woman who is not yet fifteen years old who is not his wife).<sup>7</sup> The explanation of the articles in the Criminal Code (KUHP), namely:

- Article 285 reads: Whoever by force or threat of violence forces a woman who is not his wife to have intercourse with him outside of marriage, is sentenced to rape with a maximum imprisonment of 12 years.
- Article 286 of the Criminal Code reads: Anyone who has intercourse with a woman who is not his wife while it is known that the woman is unconscious or incapacitated, shall be sentenced to a maximum imprisonment of 9 years.
- Article 287 of the Criminal Code paragraph (1) reads: Anyone who has intercourse with a woman who is not his wife is being known or should be suspected, that the age of the woman is not yet 15 years old, or if her age is not proven, that she is not yet able to marry, she shall be sentenced to imprisonment for a maximum of 9 years. Then, paragraph (2) reads that prosecution is only carried out on a complaint, unless the woman is not yet twelve years old or if there is one of the things based on Article 291 and Article 294.<sup>8</sup>

The description above can be concluded that the purpose of law to uphold justice, order and public peace can be realized by the existence of clear legal rules. One example is the existence of a judge's decision that contains a sense of justice so

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<sup>4</sup> Roswati Dewi, Sri Endah Wahyuningsih and Umar Ma'ruf. Law Enforcement Of Giving Restitution For Victims Of Trafficking In The State Court Of Central Jakarta. *Jurnal Daulat Hukum Volume 2 Issue 4, December (2019)*. [Url:http://jurnal.unissula.ac.id/index.php/RH/article/view/8363/3896](http://jurnal.unissula.ac.id/index.php/RH/article/view/8363/3896), accessed March 16, 2022.

<sup>5</sup> Maidin Gultom. (2014). *Perlindungan Hukum Terhadap Anak (Dalam Sistem Peradilan Pidana Anak Indonesia)*. Bandung:Refika Aditama, p.42

<sup>6</sup> Abdul Wahid dan Muhammad Irfan. (2001). *Perlindungan Terhadap Korban Kekerasan Seksual (Advokasi Atas Hak Asasi Perempuan)*. Bandung: PT. Refika Aditama, p.25

<sup>7</sup> Ari Yudistira and Widayati. The Investigation Process of Prospective Children in Criminal Action. *Jurnal Daulat Hukum Volume 4 Issue 1, March (2021)*. [Url: http://jurnal.unissula.ac.id/index.php/RH/article/view/13695/5374](http://jurnal.unissula.ac.id/index.php/RH/article/view/13695/5374), accessed March 16, 2022.

<sup>8</sup> Act No. 8 of 1981 concerning Criminal Procedures Chapter XIV of the Criminal Procedure Code and the Criminal Code. Jakarta: Sinar Graphika, p.98

that the community will obey, when there is a case regarding the crime of rape.<sup>9</sup>In accordance with the incident of sexual intercourse which was carried out intentionally by the suspect but the victim was in a state of helplessness, the victim had mental retardation. This study aims to examine and analyze the legal protection of victims of the crime of sexual intercourse in the criminal justice process against residents with mild mental retardation.

## 2. Research Methods

The approach method using empirical juridical refers to the effectiveness of the implementation of the law, written norms are made and promulgated by the authorized institution or official, namely the court. The specifications used are descriptive analytical, provide systematic, logical explanations, analyze them in the context of reviewing library materials, legislation, applicable legal norms and analyzed to draw conclusions.<sup>10</sup> The data sources used are secondary data consisting of primary legal materials in the form of: legislation related to legal research conducted.

The method of data collection with the main activities carried out is library research, reviewing, analyzing and processing literature, laws and regulations, judges' decisions and articles or writings related to the problems to be studied.<sup>11</sup> The data analysis method was carried out qualitatively with the data analysis method by grouping and selecting the data obtained from library research.

## 3. Results and Discussion

### 3.1 Implementation of Legal Protection for Victims of the Crime of Sexual Intercourse in the Criminal Justice Process at the Batulicin District Court, South Kalimantan.

Everyone has the right to recognition, guarantee, protection and fair legal certainty, as well as equal treatment before the law.<sup>12</sup>Everyone has the right to personal protection, family, honor, dignity and property under his control, and has the right to a sense of security and protection from the threat of fear to do or not do something which is a human right.<sup>13</sup>From the explanation, it can be understood that the State guarantees protection for every citizen in the form of personal protection, family, honor, dignity, and property. Legal protection is the protection of dignity and worth, as well as the recognition of human rights owned by legal subjects based on legal provisions from arbitrariness.<sup>14</sup>

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<sup>9</sup> Abdul Wahid dan Muhammad Irfan. (2001). *Perlindungan Kekerasan Seksual, Advokasi Atas Hak Asasi Perempuan*. Bandung:PT Refika Aditama, p.67

<sup>10</sup> Amirudin and Zainal Asikin. (2004). *Pengantar Metode Penelitian Hukum*. Jakarta:Raja Grafindo Persada, p.118

<sup>11</sup>Abdulkadir Muhammad. (2004). *Hukum dan Penelitian Hukum*, Cet. I. Bandung: Citra AdityaBakti, p.50

<sup>12</sup>Article 28 d paragraph (1) of the 1945 Constitution of the Republic of Indonesia

<sup>13</sup>Ibid

<sup>14</sup> Abdul Wahid and Muhammad Irfan. Op.Cit, p.67

The definition of sexual intercourse is a combination of male and female sex which is usually carried out to get children, so the male genitalia must enter the female genitalia, thereby releasing semen.<sup>15</sup> In simple terms, intercourse is defined as a humane act because it is a common activity carried out to obtain sexual pleasure or to obtain children, even it is a natural human need, but is categorized as a sexual crime when it is considered contrary to people's views of propriety in the field of sexual life, or if it is done not in accordance with the applicable law.<sup>16</sup>

The legal arrangement in the Criminal Code (KUHP) regarding sexual intercourse without coercion from the perpetrator against the victim of sexual intercourse outside of marriage, the woman is in a state of unconsciousness or helplessness. It is regulated in Article 286 of the Criminal Code which reads: "*Whoever has intercourse with a woman who is not his wife, while he is aware that she is unconscious or incapacitated, shall be sentenced to a maximum imprisonment of nine years.*" The terms of intercourse contained in this article regarding women and outside marriage are the same as Article 285 of the Criminal Code. Another absolute condition for the fulfillment of the act is the condition of a female victim who is unconscious or helpless.<sup>17</sup>

In practice, judges in examining and deciding cases of perpetrators are suspected of violating Article 286 of the Criminal Code. Women are victims and legal objects of people in the elements of this article, women/women who have mental retardation/mental retardation (as victims) are also included in the category of helpless. The use of Article 286 of the Criminal Code as a legal basis in imposing criminal sanctions on perpetrators of sexual intercourse with people who have mental retardation can be seen in the decision of the Batulicin District Court, the case that occurred against Defendant RY, Thursday, November 19, 2020 at 18.00 WITA which took place at the victim's house on st. Pelabuhan, Kec. Simpang Empat District. Seasoning Land Prov. South Kalimantan. The act was carried out when the defendant RY, who was a neighbor of the SD victim, came to the victim's house to meet with Ms. WH who is the victim's parent, but in the house there is only the victim along with Ms. NS. Defendant RY by looking at the situation of the victim's house which was in a quiet condition where at that time the defendant RY already knew the condition of the elementary school victim who had mental retardation since he was 10 (ten) years old whose thinking ability did not develop properly so that the defendant RY's desire arose to have intercourse with victim. The way the defendant committed the affair was by showing a pornographic video to SD using the defendant's cellphone and after the SD victim watched the pornographic film for

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<sup>15</sup>Leden Marpaung. (2016). *Kejahatan Terhadap Kesusilaan dan Masalah Prevensinya*. Jakarta:Sinar Grafika, p.57

<sup>16</sup> Danang Suchayo and Aryani Witasari. The Diversion in Law Enforcement of Criminal Action of Children in the Judicial System of Children. *Jurnal Daulat Hukum Volume 4 Issue 1, March (2021)*. Url: <http://jurnal.unissula.ac.id/index.php/RH/article/view/13694/5368>, accessed March 16, 2022.

<sup>17</sup> Arif Khoirul Umam, Sri Endah Wahyuningsih, and Achmad Sulchan. The Authority of Police in Implementation of Restorative Justice in Framework of Enforcement of Criminal Actions in Indonesia), *Law Development Journal Volume 4 Issue 1, March (2022)*. Url : <http://jurnal.unissula.ac.id/index.php/ldj/article/view/20615/6880>, accessed March 11, 2022.

approximately 1 (one) minute. RY invites the victim by saying "Let's follow like in the video."

After that the defendant RY give money in the amount of IDR 100,000.- (one hundred thousand rupiah) to the victim to ask the SD victim to follow the invitation from the defendant RY to have sexual intercourse with the defendant RY on the sofa in front of the TV in the victim's house. Defendant RY immediately kissed the victim's lips, breast and right hand while holding the victim's vagina. After that the defendant RY immediately took off the underwear of the victim SD, the underwear of the defendant RY himself. Furthermore, the defendant RY immediately licked, sucked the victim's vagina to invite the SD victim to have sex with the defendant RY. After that, the defendant RY immediately grabbed his penis which was already in a tense state, then inserted it into the victim's vaginal opening for a while until the defendant RY released sperm inside the victim's genitals. After finishing, the victim and the defendant, RY, immediately washed their private parts, using their own clothes. After having the first sexual intercourse, the defendant RY continued to have sexual relations with the SD victim at the victim's house for 5 (five) times.

The application of the law of the panel of judges in the trial process at the Batulicin Court based on the facts revealed about the elements of the criminal act that was charged. The defendant was brought before the trial with a single charge of Article 286 of the Criminal Code in conjunction with Article 64 Paragraph (1) of the Criminal Code, with the following elements:

- Explanation: The element of "whoever"  
What is meant by "anyone" in criminal law, every person as a legal subject, is able to be responsible for his actions. It is intended to find out who or anyone who has been accused or will be held accountable for his actions as formulated in the indictment. The trial process was presented by 1 (one) man who claimed to be named RY. The person was determined as a defendant and charged by the Public Prosecutor with the crime of sexual intercourse. The witnesses and the testimony of the defendant himself have admitted to what he has done.
- Element "Having had intercourse with a woman outside of marriage"  
Sexual intercourse means sexual intercourse between a man and a woman. Sexual intercourse in general can result in pregnancy for women. In the context of the law requires that there must be consequences in the form of inserting the genitals of the perpetrator (in this case the man) into the genitals of the victim (in this case the woman). Men and women are not legally husband and wife. The facts revealed in the trial related to this element when the defendant RY had intercourse with the SD victim was carried out by the defendant RY outside of marriage because the defendant RY had previously been living with a family.
- The element "Even though it is known that the woman is in a state of unconsciousness or helplessness"  
The element of intent in the form of the term "even though it is known" is that the woman is in a state of unconsciousness or helplessness. This element is the condition or condition of the victim at the time the intercourse occurred. This is different from the provisions of Article 286, which states that the victim (woman) who is sexually assaulted is conscious, but is forced to be willing to have sexual intercourse because of violence or threats of violence. Whereas in



Article 286 there is no element of violence or threats of violence, but the perpetrator (male) has intercourse with the woman who is unconscious or helpless. The victim's fainting or helplessness is not due to the perpetrator's actions, but the situation existed before the perpetrator had intercourse. If it is the perpetrator who makes unconscious or helpless, then the article that is appropriate to be applied is Article 285 in the form of violence. Because according to Article 89 of the Criminal Code it is said that "Making people faint or helpless is the same as using violence". The trial process proved that there was a will from the defendant to have sex with the victim in the form of persuading by showing pornographic videos and giving IDR 100,000.- (one hundred thousand rupiah). When he wanted to invite the victim to have sex and the defendant knew that the victim was not his wife and also knew that the victim was in a state of mental disorder.

- **The element "Which of the action has such a relationship that it should be viewed as a continuing action"**

The indecent act that the defendant committed against the SD victim was committed more than once. After having sexual intercourse for the first time, then the defendant continued to repeatedly have sexual relations with the SD victim at the victim's house for 5 (five) times. Based on the testimony of the witnesses and the facts revealed in the trial as well as from the testimony of the defendant himself, it was explained that the defendant had 5 (five) times having sexual relations with the victim of SD. The defendant's actions even though in the formulation of Article 286 of the Criminal Code (KUHP) does not require an element of "intentional" but acts of sexual intercourse outside of marriage with a woman who is in a state of helplessness, the criminal acts listed in the article must be carried out with "on purpose".<sup>18</sup>

Theory of *Memorie van Toerichting*, intentionally/intentionally is "willing and realizing" the occurrence of an action and its consequences (*willens en wetens veroorzaken van een gevolg*) meaning that someone who does an action intentionally must will and realize/know the action and/or its consequences.<sup>19</sup> So there are two kinds of intentionality, intentionality in the form of will and intentionality in the form of being known. Seeing the meaning of intentionality as *willens en wetens*, then there are 2 (two) theories related to willfulness, namely will theory (*wilstheori*) and knowledge theory (*voorstellings-theorie*).<sup>20</sup>

The will theory of *wetens* was pioneered by von Hippel (Germany) and Simons (Netherlands). In this theory, intentionality is the will to make an action and the will to cause an effect because of that action. In other words, it is intentional if the result of an action is desired, if the result is the true intention of the action taken. While the theory of knowledge departs from intentionality in the sense of *Willens*, which was

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<sup>18</sup>P.A.F. Lamintang. (1990). *Delik-Delik Khusus Tindak Pidana Melanggar Norma-Norma Kesusilaan dan Norma-Norma Keputusan*. Bandung: Mandar Maju, p.109

<sup>19</sup>Azizah Puji Rahayu, Sri Endah Wahyuningsih. Tinjauan Yuridis Pemidanaan Pelaku Anak yang Melakukan Tindak Pidana Kekerasan terhadap Anak yang Menyebabkan Meninggal Dunia Di Pengadilan Negeri Jepara. *Jurnal Daulat Hukum Vol 2 January (2022)*. Url: <http://jurnal.unissula.ac.id/index.php/ldj/article/view/20615/6880>, accessed March 16, 2022

<sup>20</sup>Andi Hamzah. (2008). *Hukum Acara Pidana Indonesia*. Jakarta: Sinar Grafika, p.11.

pioneered by Frank, von Listz and van Hamel who said that based on a psychological reason, it is impossible for an "effect" to be known. Humans can only want an action, humans cannot want an "effect", humans can only desire, expect or imagine (*voorstellen*) the possibility of an "effect". Frank's formula reads "There is a deliberate."<sup>21</sup>

The panel of judges in the trial process by considering the evidence used has complied with the provisions of Article 183 of the Criminal Procedure Code that "A judge may not pass a criminal verdict on a person unless, with at least two valid pieces of evidence, he obtains the belief that a criminal act has actually occurred and that the defendant is guilty of committing it."<sup>22</sup> Then all the elements of Article 286 of the Criminal Code in conjunction with Article 64 paragraph (1) of the Criminal Code have been fulfilled, the defendant is proven legally and convincingly guilty of committing the crime of "intercourse outside marriage with a woman who is in a state of continuous helplessness." The panel of judges sentenced the defendant to imprisonment for 7 (seven) years and 6 (six) months. The defendant's actions are capable of being responsible, then they must be given the appropriate punishment. Against the SD victim witness, the chronology of the case that occurred, contained an element of coercion from the perpetrator by showing a pornographic video to the victim's witness using the defendant's cellphone and after the victim's witness watched a pornographic film for approximately 1 (one) minute. The defendant invited the victim by saying, "Let's follow like in the video." The defendant also gave IDR 100,000.- (one hundred thousand rupiah) to the victim to order the victim's witness to follow the defendant's invitation to have sexual intercourse. So it can be said that the perpetrator's actions have fulfilled the elements charged by the public prosecutor.

The verdict imprisonment for 7 (seven) years and 6 (six) months imposed by the panel of judges on the accused perpetrators of sexual intercourse committed against a helpless person in this case the witness of the SD victim still does not protect the interests of the victim's witness, considering that the victim has Mild Mental / Intellectual Retardation Disability psychological examination results. Victims will experience suffering for the actions they experience will be traumatized.<sup>23</sup> In Islamic law, sexual intercourse is known as the concept (*ikrah*) of coercion from perpetrators, both male and female, generally categorized in the crime of adultery. It is classified as *Jarimah Hudud*, where the *rajam* punishment for the *Zina mukhson* and for the *zina ghairu mukhson* is 100 lashes and exiled or expelled from the area. If this is viewed from the perspective of Islamic law, it is clear that the perpetrators are threatened with a very severe punishment, namely had. So that the sentence handed down to the perpetrator is not commensurate with the suffering experienced by the victim, it should need to be considered regarding the interests and rights of the victim, especially if they can seek compensation in the form of compensation, restitution and rehabilitation for victims of sexual intercourse who experience physical and psychological suffering (Mild Mental

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<sup>21</sup> Leden Marpaung. Op.Cit, p.49-50

<sup>22</sup> Article 64 paragraph 1 of the Criminal Code (KUHP)

<sup>23</sup> Abdul Wahid and Muhammad Irfan, Op.cit., p.113.

Retardation/Intellectual Disability). Such efforts will be able to better protect the rights of victims. Thus, victims who must receive legal services in the form of legal protection are not only suspects or defendants whose rights are protected, but victims must also be protected. So it is natural that there is a balance between the protection of the suspect/accused and the protection of the victim.<sup>24</sup>

#### 4. Conclusion

Implementation of Legal Protection for Victims of the Crime of Sexual Intercourse in the Criminal Justice Process at the Batulicin District Court for victims of crime, especially victims who experience Mild Mental Retardation/Intellectual Disability, to obtain protection in the form of granting victims' rights with compensation in the form of compensation, restitution and rehabilitation provided by the perpetrator to the victim considering the impact caused by the perpetrator's actions, physical, social, and psychological impacts.

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<sup>24</sup> Bambang Waluyo. (2011). *Viktimologi Perlindungan Korban Dan Saksi*. Jakarta: Sinar Grafika Offset, p.8



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- [1] 1945 Constitution of the Republic of Indonesia
- [2] Criminal Code (KUHP)
- [3] Act No. 35 of 2014 concerning Child Protection