

REFORM OF THE IMPLEMENTATION OF PROTECTION AND RECOVERY RAPE VICTIM'S CHILD RIGHTS

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ABSTRACT

Children are the next generation of the nation who have an important position in this country. Therefore, a state guarantee to protect children from all kinds of criminal acts is absolutely necessary. However, with the intrusion of foreign globalization which has caused disruption to the life value of this nation has resulted in children always being victims of sexual violence, including rape. This situation is increasingly dilemmatic given the legal politics of child protection as a rape victim has not been based on the recovery and protection of the conditions and rights of child victims of rape. That is why this article as an empirical juridical research approach will further discuss the reform of the implementation of protection for child victims of rape in Indonesia, and then try to provide initial input to realize the protection and recovery of child victims of justice in the country.

Keywords: Reform, Child Protection, Rape, Justice.

1. Introduction

The rapid flow of globalization and the negative impact of developments in the field of information and communication technology, gave rise to a new phenomenon of sexual crime in this country. Sexual crimes against children constitute serious crimes (serious crimes) which are increasing from time to time and significantly threatening and endangering lives especially for children, damaging children's personal lives and development and development, as well as disrupting a sense of comfort, peace, security, and public order . Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection has provided criminal sanctions for perpetrators of sexual violence against children, but the conviction has not yet provided deterrent effect and has not been able to comprehensively prevent the occurrence of sexual violence against children. In its

development the government established Government Regulations in lieu of a Law the Second Amendment to Law Number 23 of 2002 concerning Child Protection. In Government Regulation in Lieu of Law Number 1 Year 2016 Regarding Second Amendment to Law Number 23 Year 2002 Regarding Child Protection, more regulates the perpetrators, while the victims are not clearly regulated, especially in terms of compensation and restitution from sexual victims to children. For this reason, the authors urge that protection against victims of sexual crimes against children should be fought for whether in a criminal offense must be considered the effect of a crime against the victim or the victim's family, compensation, restitution and even the need for a special protection, to eliminate trauma experienced by women, especially children under the age of victims of sexual crimes, for example, new resettlement and schools for the healing process of their lives. Although it seems that for the Indonesian situation it is indeed difficult to realize it, but it is the government's obligation. The trauma experienced by women, especially children under the age of rape victims, suffers greatly from sexual atrocities in the form of physical-mental suffering which always crushes their victims. As for physical suffering such as: 1. Pain when having sex; 2. Injuries to the genitals; 3. Genital infections; 4. and the possibility of venereal disease (HIV AIDS); 5. And feel no longer a virgin; 6. Menstruation is chaotic; 7. Feelings of fear of pregnancy; 8. Insomnia and frequent nightmares; 9. Difficulty urinating; 10. Losing weight, being thin; 11. Loss of appetite; 12. Experiencing fatigue, dizziness, nausea, fainting; 13. Psychosomatic (feeling sick but not sick); 14. Indigestion.

In addition, the suffering suffered by the ridicule of certain heartless people. Where they were ostracized even though the incident was out of their will, and not to mention the most humiliating and hurtful loss that is virginity lost outside of marriage because purity is indeed the honor of women.¹ From the suffering experienced by the victims, not a few women, especially children victims of sexual crimes, were silent and forced to swallow the bitterness of life itself because the victim was afraid of threats, such as being killed by the perpetrators when reporting. Usually victims of sexual crimes try to save something bad (disgrace) from relatives, neighbors, and even family. And victims of sexual crimes are very afraid that if there is mass media that will expose due to fear of revealing their identity and place of residence, they believe that (hospitals, police, and

¹ Topo Santoso, *Seksualitas Dan Hukum Pidana*, Ind-Hill Co.1997, Jakarta, page 53.

courts) will be abused. Moreover, they are afraid of the proof process that will open up their personal lives as if the painful wounds they have experienced are re-opened.²

Sexual harassment by family members is a form of incest, and can produce more serious effects and long-term psychological trauma, especially in cases of parental incest. After cases of sexual violence continue to occur today even perpetrated by perpetrators who are still relatively immature / perpetrators are still children in a way that can be considered sadistic, one of them by inserting a hoe into the victim's vagina, the government then considers that criminal acts of sexual violence have entered into a dangerous stage, the government on May 25, 2016 has issued Government Regulation in Lieu of Law Number 1 Year 2016 Regarding the Second Amendment to Law Number 23 Year 2002 concerning Child Protection. In epistemology, the second provision of the Child Protection Act, in addition to imprisonment there are also criminal fines for perpetrators of sexual crimes against children. Criminal fines listed in the two Child Protection Acts actually do not need to be applied, because the criminal fines do not accommodate the interests of children as victims of sexual crimes. The criminal fines actually only accommodate the interests of the state, namely as income to the state treasury which does not provide any benefit for children as victims of sexual crimes.

Axiologically, protection of victims (of course including children) of crime (violence) can include forms of protection that are abstract (indirect) or concrete (direct). Abstract protection is basically a form of protection that can only be enjoyed or felt emotionally (psychologically), such as a sense of satisfaction (satisfaction). Meanwhile, concrete protection is basically a form of protection that can be enjoyed in real terms, such as giving in the form of material or non-material nature. Provision of material nature can be in the form of compensation or restitution, exemption from living expenses or education. Therefore it is interesting if the discussion is further related to "Reform of the Implementation of the Protection and Restoration of the Rights of Children of Rape Victims".

2. Issues Discussed

The issues that will be discussed in this paper are related to the issue of the implementation of protection and recovery of rape victims in Indonesia.

² Ibid

3. The method used

At this article using qualitative research which has the essence of four elements, namely: (1) Purposing / determination of samples³; (2) inductive analysis; (3) Grounded Theory; (4) Temporary design, which will change according to the context. This research belongs to the tradition of qualitative⁴ research with the operationalization of natural paradigm research⁵. This paradigm departs from the view of Mark Webber which was later further developed by Irwin Deutcher, who is more popular as the phenomenological title. This paradigm underlies the axioms on the naturalistic ecological theory and the qualitative phenomenological theory.⁶

4. Discussion

A. Effectiveness of the Current Rape Victim Protection Child Protection

In its development the implementation of protection for rape victims often encountered obstacles. In general, the obstacles faced are internal and external obstacles.⁷

1. Internal Barriers

- a. The number of activities, the broad scope of activities covering all law enforcement institutions and working partners. The many parties involved from various institutions as well as the range of activities create difficulties in monitoring the implementation of each activity. Therefore, solution steps are taken to overcome this problem. For example, consolidating and streamlining

³ The sample referred to as the informant was determined purposively ie the sample chosen carefully so that it was relevant to the purpose of the study, which had special and essential characteristics. All of this depends on the judgment or judgment of the researcher. Therefore, purposive sampling is also called Judgment Sampling, that is, key informants, informants whose numbers are not determined imitatively but follow the snowball principle. See, Soeratno dan Lincoln Arsyad, *Metodologi Penelitian untuk Ekonomi dan Bisnis*, Unit Penerbitan dan Percetakan APMP YKPN, Yogyakarta, 1993, page 119-120.

⁴ Noeng Muhadjir, *Metodologi Penelitian Kualitatif*, Penerbit Rake Sarasin, Yogyakarta, 2002, page 165-168

⁵ Robert Bogdan & Steven J Taylor, *Dasar-dasar Penelitian Kualitatif* (Penerjemah : A. Khozin Afandi), usaha nasional, Surabaya, 1993, page 30-31.

⁶ Paradigma ini mendasari aksiomanya pada “*the naturalistic ecological theory*” dan “*the qualitative phenomenological theory*”, jika diringkas, menurut Guba dan Lincoln, bertumpu pada 5 aksioma. Lihat Lexy J. Moeloeng, *Metodologi Penelitian Kualitatif*, PT. Remaja Rosdakarya, Bandung, hlm. 31-32. Bandingkan dengan Zamroni, *Pengantar Pengembangan Teori Sosial*, PT Tiara Wacana Yogya, Yogyakarta, 1992, hlm. 80-81. Bandingkan dengan pusat perhatian penelitian kualitatif dan sifat penelitian kualitatif yang holistik dalam Burhan Ashshofa, *Metode Penelitian Hukum*, Rineka Karya, Jakarta, 1998, hlm. 20-21 dan Hadari Nawai dan Mimi Martini, *Penelitian Terapan*, Gadjah Mada University Press, Yogyakarta, 1996, page 175.

⁷ Komnas Perempuan, LBH APIK Jakarta, LBPP DERAP-Warapsari, Convention Watch, PKWJ UI dalam Penegakan Hukum yang Berkeadilan Jender: Setahun Program Penguatan Penegak Hukum, CV Kurnia Sejati, 2005, page 37-38

communication and information flow. The work team requires consolidation into and evaluating appropriate and continuous activities.

- b. Technical obstacles, namely the need to provide _okum_ digital and intrnet information that is adequate and equitable. However, this was successfully overcome. The third internal obstacle, namely capacity. There are differences and gaps in work capacities in each work team, law enforcement agencies and other participants, which often creates obstacles in running the program.

2. External Obstacles

- a. There is a difference in understanding. This has been estimated since the beginning of designing the Program. Introducing the concept of a law enforcement system that has a perspective of justice, realize early that it was realized it would not be as easy as turning the palm of the hand. The solution taken is taking a participatory approach in the entire program by involving all interested parties.
- b. Formulate strategies to equalize perceptions and assessments of programs that have been carried out by law enforcement institutions.
- c. Introduce the concept of a just law enforcement system by exploring the experience of the parties involved in the Program in dealing with violence against children. In the process, experience is then discussed together. The introduction of the concept of the Integrated Criminal Justice System Handling Cases of Violence against Children is slowly carried out and discussed together as well until reaching a common perception and understanding.
- d. Bureaucratic obstacles related to not being a priority among policy makers. This also relates to the dynamics of the legal field in the social, economic, political context. Information from law enforcers that the writer interviewed with facts that happened in the field is indeed very different. Weak laws and regulations in supervising and protecting the rights of victims are one of the factors causing ineffective compensation and restitution. When in fact there have been many sources of law governing the problem of applying and providing compensation and restitution both in the Criminal Procedure Code, Law Number 13 of 2006 concerning CSWs, Law Number 21 of 2007 About PTPPO, but it is still rare and difficult to apply in some cases that occur .

So as to overcome obstacles in fulfilling the right to compensation and restitution for victims, it is necessary to use a systemic approach in law enforcement to be more optimal, namely through revamping the legal structure, legal substance, and legal culture. This is in line with the legal system proposed by Friedman in Khozim, that law enforcement can run effectively if the legal structure, legal substance, and legal culture are examined as a single entity and should be carried out simultaneously.⁸ Law enforcement itself is part of all life activities which in essence are interactions between various human behaviors that represent different interests within the framework of rules that have been mutually agreed upon in an applicable regulation, both written and unwritten. Written joint arrangement as stipulated in a product of legislation is intended to regulate the life arrangements of the people, nation and state so that they are more orderly and have legal certainty.⁹

Consistent law enforcement is part of the efforts to achieve legal goals for the life of society, nation and state, namely the upholding of justice and legal certainty in a balanced manner, as well as the realization of order.¹⁰ In the implementation of law enforcement, it is not as easy as turning the palm of the hand, bearing in mind that there are other problems that have influenced the law enforcement process itself, which is related to the substance of the law, legal structure and legal culture.

Various efforts can be taken in granting compensation and restitution rights to victims of trafficking in persons, both by the government through legislation and victims' efforts through litigation and non-litigation. However, in reality on the ground, the provision of compensation and restitution is not in accordance with the regulations that have been made both according to the law and the implementing regulations. Therefore, law enforcement officers should provide an understanding to victims of trafficking in persons to claim their rights to obtain compensation and restitution as a form of legal protection for victims in accordance with existing laws and regulations. In addition, it requires the strictness of punishment by law enforcement officers against traffickers and vice versa, making it easier for victims to claim their rights so that the process is not complicated and the victims are easier to obtain compensation and

⁸ Khozim Muh). *Sistem Hukum Perspektif Ilmu Sosial*. Cetakan pertama. Nusa Media, Bandung, 2009, page18

⁹ Yulia Rena. (2010). *Viktimologi Perlindungan Hukum Terhadap Korban Kejahatan*. Graha Ilmu, Yogyakarta, 2010, page25

¹⁰ Mulyadi Lilik. *Kapita Selekta Hukum Pidana Kriminologi dan Viktimologi*. Djambatan, Jakarta, 2007, page17

restitution. The mechanism for providing compensation and restitution to victims of criminal acts is regulated in PP No. 44 of 2008 concerning the Granting of Compensation, Restitution, and Assistance to Witnesses and Victims which is the implementation of Law Number 13 of 2006. However, in the implementation of the provision of restitution is still not effective, this is due to weaknesses related to statutory regulations. This can be seen from the existence of laws and regulations governing mechanisms related to restitution to victims of criminal acts that lack legal certainty and the non-uniformity of the provision for restitution, should be harmonized between the regulations related to restitution. Victims of a criminal offense do not necessarily get the right to compensation for the provision of restitution only covering certain victims of a criminal offense. In this case, law enforcement tends to choose to use the Criminal Procedure Code because the rule of law is considered more certain and effective. The form of compensation has so far been limited to material losses, even though victims also suffered physical or psychological losses. Therefore we need the concept and calculation of immaterial losses to victims.

B. Reforming the Implementation of Child Protection for Rape Victims with Fairness

In its development the existence of victims in the criminal justice system must indeed receive attention. Oriental offenders that are characteristic of law enforcement now do not guarantee the interests of victims who have suffered losses due to crime. The position of victims as justice seekers no longer gets the desired justice. This is due to the interests of the victims who do not represent or fight for the running of the criminal justice system. Fulfillment of justice for victims is not enough with the conviction of the perpetrators but must arrive at the recovery of the suffering of victims due to crimes that occurred. Therefore it is necessary to reform the criminal justice system which further reaffirms the technical implementation of restitution and compensation which is accompanied by provisions relating to guarantees from the implementation of the recovery of victims of rape fairly. In the aspect of enforcement there needs to be a reform of the law enforcement system that is more paradigmatic in the protection and recovery of rape victims based on Pancasila, and the need for an active public role that prioritizes the protection and recovery of victims. So that the protection of rape victims is not biased. Furthermore, in the event that the victim is still entitled to claim retaliation or compensation against or from the violator, the role or contribution of the victim in the occurrence of the violation must be considered and

determine the extent of the retaliation or compensation. After all revenge and anti-loss is fully the right of the State, the victim's role in the occurrence of violations is no longer considered. In fact, those who are now trying to defend the fate of victims (among others by fighting for compensation through civil procedures) also forget the role of victims. Also the development of thoughts about criminal objectives, which among others are based on the need for fostering the offender (convict) in order to return to the community. According to Shafer, it has been accompanied by the fact that there is very little attention paid to victims. And even if there is attention to the victim, it is deemed not to be in the way of guiding the perpetrator / convict.¹¹

From the description above, there are dual things that can be delivered, namely:¹²

- a. That the victim needs to be considered and given attention to the sufferer experienced because of the offense, and
- b. Whereas for the offender, it is necessary to know how the victim plays a role in the occurrence of offense, as well as the crime situation in general.

The thinking from point a will have an influence on criminal law and the criminal justice process. If it is true that it can be shown that the current criminal justice system does not / does not give satisfaction to the victims, in the sense that it does not / does not give enough attention to the interests that have been violated (disadvantaged), then it may be necessary to have a deep update about it. The relationship advocates this thinking, specifically for areas involving offense in which individual victims (individuals) can be appointed. In the context of Indonesia, where the Criminal Code and the science of criminal law are realized by Western thought, it is necessary to explore how customary legal thinking (*adat delicen recht*) can contribute towards this. While the results of thinking about point b will certainly help the development in criminology. Among other things Nagel (with his *relatie-criminology*) should be noted and with the concept of functional responsibility noteworthy in this regard.¹³ By knowing more about the role of victims in the occurrence of offenses, law enforcement agencies will also be able to benefit greatly from them, especially in prevention activities and efforts. In the context of knowledge about the state of crime in general, a

¹¹ Mardjono Reksodiputro, *op.cit.*, page75-76

¹² *Ibid*, page76

¹³ *Ibid*, page76

survey of victims will also be able to increase our understanding of hidden criminality.¹⁴ Based on the arguments mentioned above, a red thread can be drawn that the legal protection of victims, can be interpreted as an effort to restore the rights of victims to be restored as before when the crime happened. Countries in this context must be progressive to hold the perpetrators responsible for the recovery of victims on one side. Meanwhile, on the other hand the state is responsible for its negligence to protect its citizens from the consequences of crime (the perspective of the Victim) and also the state is responsible for anticipating the occurrence of evil events (perspective of the situation and conditions as well as the motivation of the Actor daring to commit his evil deeds). So it is clear that the purpose of punishment should be more related to the recovery of victims. At present the purpose of punishment is more colored by physical revenge. So that the recovery of child rapists must also be given more attention.¹⁵

5. Conclusions

Based on various explanations above, it is clear that the protection of rape victims, especially children, is not yet just, this is due to overlapping legal regulations, as well as paradigms both in law enforcement and in communities that have not prioritized victim protection.

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¹⁴ Ibid, page77

¹⁵ Ibid, page187

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