

Criminal Construction of Sexual Violence Crimes in Indonesia

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Abstract: *The purpose of this study is to examine and analyze the criminal construction of acts of sexual violence in Indonesia. In this writing, the author uses a normative legal method with a descriptive analysis research specification. There are many news reports in the mass media, both print and electronic, reporting incidents of sexual violence against children and women. The problem of punishment for perpetrators of sexual violence needs serious attention. In the Criminal Code, there are several articles related to sexual violence, including Article 285 concerning rape. Then, molestation is regulated in Article 289 of the Criminal Code. Regarding sexual violence itself, it is regulated in Law No. 35 of 2014. Where in Article 76C it is stated that everyone is prohibited from placing, allowing, doing, ordering, or participating in committing violence against children. Article 46 of the Domestic Violence Law is a criminal sanction that closes the legal gap in the Criminal Code with Article 8a. By regulating criminal acts of sexual violence against women and children in positive law in Indonesia, it is hoped that it can prevent and minimize the occurrence of criminal acts of sexual violence against women and children. This regulation is also expected to provide justice and protection for women and children who are victims of criminal acts of sexual violence.*

Keywords: *criminal; purpose; victims.*

1. Introduction

Terminologically, the term "legal state" in the provisions of Article 1 paragraph (3) of the Third Amendment to the 1945 Constitution of the Republic of Indonesia does not refer specifically to one of the main concepts in the Western legal tradition, either Rechtsstaat or Rule of Law. This means that the term "legal state" in the 1945 Constitution of the Republic of Indonesia is a relatively 'neutral' concept that opens up room for interpretation for new understandings in accordance with the paradigm and reality of the Republic of Indonesia.¹

¹Beno, Gunarto and Sri Kusriyah, (2020), Implementation of Fully Required Elements in the Crime of Planning Murder (Case Study in Blora State Court), Jurnal Daulat Hukum, 3 (1), p 109

Justice is a requirement for achieving happiness in life for citizens and therefore it is necessary to teach morality to every human being in order to become a good citizen. The basic concept of the Indonesian legal state, namely the concept of *rechtsstaat*, prioritizes the principle of *wetmatigheid* which then becomes *rechtmatigheid*. The characteristics of a legal state of *rechtsstaat* are the protection of Human Rights (HAM), the separation and division of state powers to guarantee the protection of HAM, government based on laws and regulations, and the existence of administrative justice.²

An important issue to discuss is the protection of Human Rights (HAM) in all aspects of life, especially the protection of children and women in Indonesia. The emergence of many problems of criminal acts against children and women such as the rampant immoral acts, sexual harassment, sexual violence and rape of children and women, has become a concern for the Indonesian people as well as the world community. Where currently there is a lot of news in the mass media, both print and electronic, reporting incidents of sexual violence against children and women.

The negative impact of globalization and the development of information and communication technology has given rise to a new crime, one of which is sexual violence. The objects of sexual violence that often occur against children and women continue to increase every day, becoming a serious crime because it threatens the safety and security of women and damages the growth and development of children and causes unrest in society.

Sexual violence against children and women is torture in a sexual context carried out by the perpetrator when in this case the perpetrator is an older person towards the child. Sexual violence has various forms such as asking a child or woman to have forced sexual intercourse, seeing and touching a child's genitals outside of a medical examination, showing pornography to children and using children to produce child pornography.

The issue of punishment for perpetrators of sexual violence needs serious attention. The aspects of justice and human rights in criminal law enforcement are difficult to implement, the punishment for perpetrators of sexual violence against children and women is considered less than what has been done. Regulations governing punishment for perpetrators of sexual violence against children and women may also play a role in the many cases of sexual violence against children and women. The punishment given to perpetrators of sexual violence is considered light and does not deter the perpetrators. Therefore, there must be an increase in criminal sanctions.³

Based on the background above, the author is interested in conducting research on the emergency phenomenon of sexual violence in Indonesia, which is

²Mukthie Fadjar, (2005), *Types of Legal States*, Malang: Bayumedia Publishing, p 42.

³Supaijo, et al., (2017), *Death Penalty for Perpetrators of Sexual Violence Against Children from the Perspective of Islamic Law*, *Asas Jurnal Hukum Ekonomi Syariah*, IX (2), p 184

presented withThe purpose of the research isexamine and analyze the criminal construction of sexual violence in Indonesia.

2. Research Methods

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and regulations and other documents related to this study.

3. Results and Discussion

3.1. Sexual Violence

Violence is a term consisting of two words, namely "vis" which means (power, strength) and "latus" which means (carry), which is then translated as bringing strength. The Great Dictionary of the Indonesian Language provides an understanding of violence in a narrow sense, namely only including physical violence. According to the KBBI, violence is an act that can cause injury or death to another person or cause physical damage or property of another person.⁴

The terminological definition of violence is a condition and nature that destroys human life. Humans as rational and noble creatures become trapped in animalistic traits. Damaging, suppressing, blackmailing, raping, terrorizing, stealing, killing, and destroying are actions that tarnish and destroy the glory of humans as God's creatures.⁵

Sexual violence comes from two words, namely violence and sexual, which in English is called sexual hardness. The word hardness means violence, unpleasant and not free.⁶The word sexual cannot be separated from sex and sexuality. Sex is the biological difference between women and men or what is often called gender. While sexuality involves various broad dimensions, namely biological dimensions, social dimensions, psychological dimensions and cultural dimensions.

Sexual violence is any act of sexual assault directed at women, whether physical or non-physical and regardless of whether or not there is a personal relationship between the perpetrator and the victim.⁷Sexual violence is an act, either in the form of words or actions, carried out by someone to control and make another

⁴Mulida H. Syaiful Tency and Ibnu Elmi, (2009), *Sexual Violence and Divorce*, Intimedia, Malang, p 17

⁵Langgeng Saputro, (2018), *The Impact of Sexual Violence Against Children in Sempaja Village, North Samarinda District (Case Study of the "Kharisma Pertiwi Foundation" Psychosocial Recovery Protection Home, Kasih Bunda Utari Orphanage)*, *eJournal of Sosiatri-Sociology*, 6 (4), p. 17

⁶John M. Echols and Hassan Shadily, (1997), *English-Indonesian Dictionary*, Gramedia Pustaka Utama, Jakarta, p 517

⁷Aroma Elmina Martha, (2003), *Women Violence and the Law*, UII Press, Yogyakarta, p 36

person engage in sexual activity that is not desired by the other person. There are two important elements in sexual violence, namely the element of coercion or the element of no consent from the other party, and the element of the victim being unable or not yet able to give consent, for example sexual violence against children.

The definition of sexual violence according to the PKS Bill is any act of degrading, insulting, attacking, and/or other acts against a person's body, sexual desire, and/or reproductive function, by force, against a person's will, which causes the person to be unable to give consent in a free state, due to unequal power relations and/or gender relations, which results in or can result in suffering or misery physically, psychologically, sexually, economic, social, cultural, and/or political losses.

3.2. Criminal Construction of Sexual Violence in Indonesia

Legal Construction is a way to fill the gaps in legislation with legal principles and joints. Construction consists of 3 (three) forms, namely Analogy (Abstraction), Determination (Legal Refinement) and Argumentum A Contrario.⁸ Meanwhile, the term "criminal" used in the Criminal Code written by Moeljatno is actually synonymous with the word "punishment" used in the Criminal Code written by R. Soesilo. Punishment is the name for all legal consequences for violating a legal norm. If what is violated is a disciplinary legal norm, then the reward is disciplinary punishment. If what is violated is civil law, then the reward or punishment is civil sanctions, and for violations of administrative law, administrative penalties or administrative sanctions are given. Meanwhile, violations of criminal law will be given criminal penalties or criminal sanctions.

The act that is considered a crime against morality is sexual violence. Sexual violence is generally defined as a form of crime that attacks a person's sexual honor. This act can be done in various ways, both directly (physically) and indirectly (psychologically).

The UN has ratified the Declaration on the Elimination of Violence Against Women in 1993, which in principle eliminates all acts of gender-based violence that can result in suffering for women, whether physical, sexual or psychological. Such acts of violence can be in the form of threats, certain actions, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁹

Simply put, sexual violence is any kind of action related to sexual desire and attacks a person's psyche or physical. Sexual violence does not have to be between people outside of marriage, husband and wife can also be involved in sexual violence. The government has attempted to formulate various legal

⁸Enju Juanda, (2017), Legal Reasoning, Galuh University, 5 (1), p 160

⁹Hairani Siregar, (2015), Forms of Violence Experienced by Women Residents of the North Sumatra Province Animal Husbandry Service Complex, Journal of Social Welfare Sciences, 14 (1), p 11.

regulations in an effort to prevent the occurrence of sexual violence, both general regulations and specific regulations, including:

1. Sexual Violence in the Criminal Code

In the Criminal Code there are several articles relating to sexual violence, including Article 285 concerning rape:¹⁰

"Anyone who by force or threat of force forces a woman to have sexual intercourse with him outside of marriage, is threatened with rape with a maximum prison sentence of twelve years."

Then, indecent acts are regulated in Article 289 of the Criminal Code as follows: "Anyone who by violence or threat of violence forces someone to commit or allow an indecent act to be committed, is threatened with committing an act that attacks the honor of morality, with a maximum prison sentence of nine years."

2. Sexual violence in the Child Protection Law

Regarding sexual violence itself, it is regulated in Law No. 35 of 2014. Article 76C states that everyone is prohibited from placing, allowing, committing, ordering, or participating in committing violence against children.

Article 76D, namely; "Everyone is prohibited from committing violence or threats of violence to force a child to have sexual intercourse with him or another person."

Meanwhile, the sanctions imposed are criminal sanctions in the form of imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years. Accompanied by a maximum fine of Rp5,000,000,000,- (five billion rupiah).

3. Sexual Violence in the Domestic Violence Elimination Act

Article 46 of the Domestic Violence Law is a criminal sanction that closes the legal gap in the Criminal Code with Article 8a which reads:

"Forced sexual intercourse committed against a person residing within the scope of the household;"

From the article which initially defined rape as an act committed outside of marriage, in this article rape can also be committed within marriage.

Article 46 reads: "Any person who commits an act of sexual violence as referred to in Article 8 letter a shall be punished with a maximum imprisonment of 12 (twelve) years or a maximum fine of IDR 36,000,000.00 (thirty-six million rupiah)."

Article 47: "Any person who forces a person residing in his/her household to have sexual relations as referred to in Article 8 letter b shall be punished with imprisonment of at least 4 (four) years and imprisonment of at most 15 (fifteen)

¹⁰Mulyatno, (2001). Criminal Code, 21st Edition, Jakarta; Bumi Aksara, p 105

years or a fine of at least Rp. 12,000,000.00 (twelve million rupiah) or a fine of at most Rp. 300,000,000.00 (three hundred million rupiah)."

From several general articles of the legislation above, the criminal sanctions are relatively light, and none are specific to sexual violence such as castration sanctions, the scope of sexual violence is still narrow considering the extraordinary traumatic impact on victims of sexual violence, especially women who can carry a fetus, and many of them experience long-term suffering.

The Indonesian government has formed and enforced Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (UU TPKS) as a special criminal regulation on sexual violence. Because after all, criminal law must follow the development and needs of society and can provide legal certainty and justice correctly and appropriately.¹¹

Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence. The Law on Criminal Acts of Sexual Violence regulates criminal acts of sexual violence. The articles relating to criminal acts of sexual violence leading to rape are in Article 6 and Article 15 of the Law on Criminal Acts of Sexual Violence, the second article reads as follows:

Article 6:

"Convicted of physical sexual abuse:

- a) Any person who commits a physical sexual act directed at the body, sexual desire, and/or reproductive organs with the intention of degrading a person's dignity and honor based on their sexuality and/or morality which is not included in other more severe criminal provisions with a maximum prison sentence of 4 (four) years and/or a maximum fine of IDR 50,000,000.00 (fifty million rupiah).
- b) Any person who commits a physical sexual act directed at the body, sexual desire, and/or reproductive organs with the intention of placing someone under his/her control unlawfully, either within or outside of marriage, shall be subject to a maximum imprisonment of 12 (twelve) years and/or a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah).
- c) "Any person who abuses his position, authority, trust or influence arising from deceit or a relationship of circumstances or takes advantage of a person's vulnerability, inequality or dependency, forces or by misleading that person to commit or allow sexual intercourse or indecent acts to be committed with him or with another person, shall be punished with a maximum imprisonment of 12 (twelve) years and/or a maximum fine of Rp. 300,000,000.00 (three hundred million rupiah)."

Article 15:

¹¹Agus Setiawan, (2017), Legal Reasoning Capable of Realizing Legal Objectives Proportionally, *Mimbar Justitia Law Journal*, 3 (2), p 204

- (1) The criminal penalties as referred to in Article 5, Article 6, and Article 8 to Article 14 are increased by 1/3 (one third), if:
- a) carried out within the family scope;
 - b) carried out by health workers, medical personnel, educators, education personnel, or other professional personnel who have been given a mandate to carry out Handling, Protection, and Recovery;
 - c) carried out by employees, managers or officers against people entrusted or handed over to them for their care;
 - d) committed by a public official, employer, superior, or manager against a person employed or working with him;
 - e) carried out more than 1 (one) time or carried out against more than 1 (one) person;
 - f) carried out by 2 (two) or more people in partnership;
 - g) committed against Children;
 - h) carried out on Persons with Disabilities;
 - i) carried out on pregnant women;
 - j) committed against a person in an unconscious or helpless state;
 - k) committed against a person in a state of emergency, danger, conflict situation, disaster or war;
 - l) carried out using electronic means;
 - m) The victim suffered serious injuries, severe psychological impacts, or an infectious disease;
 - n) results in the cessation and/or damage to reproductive function; and/or
 - o) resulting in the victim's death.
- (2) "The provisions regarding the addition of 1/3 (one third) as intended in paragraph (1) letter l do not apply to Article 1."

As for sexual violence against children with its own rules that have been approved by the government. Regulations regarding sexual violence, especially against children, have been regulated by positive law in Indonesia. Of course, this legal regulation is a rule that applies to all people in Indonesia, which means that if a violation occurs, sanctions will apply in accordance with the regulations stipulated in the laws and regulations. The legal regulation of these criminal acts is an effort to protect that needs to be done, because in any case the victim is the party that is in a very disadvantageous position, so it is only right that the victim has the right to receive fair treatment and protection.¹²

¹²Dedy Setiawan, (2021), Criminal Acts Related to Sexual Violence Against Children from the Perspective of Protecting Children Under 5 Years of Age. *Legal Spirit Journal*, 4 (2), p 3.

The government wants to create new regulations, in the form of increasing the number of sanctions against perpetrators of sexual crimes against children and women, not enough with the criminal penalties mentioned above. So the government created regulations in the form of Government Regulation in Lieu of Law (PERPPU), so that Perppu Number 1 of 2016 can be issued relatively quickly, which then became Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

The threat of increasing criminal penalties for perpetrators of sexual violence against children, in the Castration Perppu, is carried out by making changes to Article 81 of the Child Protection Law, including in the form of:

- 1) The threat of the death penalty, life imprisonment, or imprisonment for a minimum of 10 years and a maximum of 20 years;
- 2) Additional sentence of 1/3 of the principal criminal penalty;
- 3) Additional criminal threats include the announcement of the perpetrator's identity;
- 4) Threat of action in the form of chemical castration; and
- 5) Installation of electronic detection devices.

Based on Article 81 of the Child Protection Law as mentioned above, the death penalty can be imposed on perpetrators of sexual violence against children, but is more of an aggravating punishment. The death penalty can only be imposed if the perpetrator of the crime regulated in Article 76D. of the Child Protection Law, if certain conditions are met, namely:

- a. More than one victim;
- b. The victim suffered serious injuries;
- c. The victim suffered from mental disorders;
- d. The victim is suffering from an infectious disease;
- e. Disruption or loss of reproductive function of the victim; and/or
- f. The victim died.

The death penalty threatened to the perpetrators in the Castration Perppu is very likely to be implemented, considering that the requirements for implementation regulated in the Castration Perppu are very likely to be met. This is different from the requirements for the application of the death penalty for perpetrators of corruption. Where the requirements for the application of the death penalty for perpetrators of corruption regulated in the Corruption Eradication Law are very difficult to fulfill. For that, we still have to wait to find out who the perpetrators of sexual violence against children will be sentenced to death by the court, as an implication of the implementation of the Castration

Perppu. Considering that many parties (society) want perpetrators of sexual violence (rape) to be sentenced to death.

By regulating the crime of sexual violence against women and children in positive law in Indonesia, it is expected to prevent and minimize the occurrence of sexual violence against women and children. This regulation is also expected to provide justice and protection for women and children who are victims of sexual violence. It is only right that women and children as groups that are very vulnerable to becoming victims, receive legal protection through applicable legal products.

4. Conclusion

In the Criminal Code there are several articles related to sexual violence, including Article 285 concerning rape. Then, indecency is regulated in Article 289 of the Criminal Code. Article 46 of Law No. 23 of 2004 on the Elimination of Domestic Violence is a criminal sanction that closes the legal gap in the Criminal Code with Article 8a. Law Number 12 of 2022 concerning the Crime of Sexual Violence. The Law on the Crime of Sexual Violence regulates the crime of sexual violence. Articles relating to the crime of sexual violence leading to rape are in Article 6 and Article 15 of the Law on the Crime of Sexual Violence. the government made regulations in the form of Government Regulations in Lieu of Law (PERPPU), so that Perppu Number 1 of 2016 could be issued relatively quickly, which then became Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

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