

Formulative Policy on Criminal Acts of Sexual Violence Against Children as the Guarantee Implementation of Child Rights Protection in Indonesia

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Abstract: The increasing cases of criminal actions against children, especially child sexual abuse, have become a concern of many parties within the state. From individual and child protection institutions to state officials have their statement of concern of the situation. In some cases, the child victims have been found dead. This study is a normative legal research that specifically aims to nationally mapping the issue of child protection related to cases of child sexual abuse. Research purposes expected to find the fundamental weaknesses of every related legal product presents today, either formally or materially, related to preventing child sexual abuse. The system of penalties in the aforementioned legal products becomes the subject discussed. Imprisonment becomes one of the main sub-studies, in addition to the possibility of other types of penalties as a strategy to minimize the potential for child sexual abuse. The results found that the presence of legal products that specifically regulate child protection in reality has not been able to reduce the number of child sexual abuse cases in Indonesia up to the present.

1 INTRODUCTION

Protecting children from abuse, neglect, and mistreatment is a major concern across the globe (Zuchowski, Miles, Woods, & Tsey, 2017). Child protection is all activities to guarantee and protect the child and the rights in order to live, grow, develop, and participate in the community based on dignity and humanity principles, as well as to get protection from violence and discrimination. The definition is clearly stated in Article 1 of the Law Number 23 Year 2002 on the Child Protection. However, there seems that these legal products are being ignored, that the cases of crimes against children, especially sexual abuse, have been increasing even more. It is indeed a situation of concern, considering that in certain instances, the victims, these innocent children, have been found dead.

Referring to the data collected by the Coordinating Ministry for People's Welfare, from 2010 to 2014 alone, there were 21,869,797 cases of child sexual abuse in over 34 provinces and 179 regencies and cities. Of these violations to children's rights, 42% to 58% cases constitute sexual crimes against children (Humaira *et al.*, 2007). (Humaira *et*

al., 2007). In comparison, the data from Komisi Perlindungan Anak Indonesia (KPAI)¹, specifically for 2011, shows approximately 2,275 cases of child abuse; off these, 887 were child sexual abuse. In the following year, in 2012, violence against children was recorded around 3,871 cases; 1,028 cases of which were sexual abuse against children. In 2013, there were approximately 2,637 cases of violence against children; of which 48% or about 1,266 were sexual abuse (Noviana, 2015).

The increasing number of child sexual violence cases in Indonesia has made us questioned about the law enforcement related to the matter; the question arises on legal guarantee for the children to enjoy

their right of protection and on the penalties given to the offenders.

In the context of the state policy, the child protection has been regulated explicitly as follows:

1. Law Number 4 of 1979 on Child Welfare.
2. Law Number 39 of 1999 on Human Rights.
3. Law Number 23 of 2002 on Child Protection as first amended by Law Number 35 of 2014 and further amended by Government Regulation in Lieu of Law Number 1 of 2016 which has been defined as Law Number 17 of 2016.
4. Law Number 23 of 2004 on the Elimination of Domestic Violence.
5. Law Number 11 of 2012 on the Juvenile Justice System.

In general, child sexual abuse is associated with a variety of problems in the short and the long term for both male and female victims (Stoltenborgh, van Ijzendoorn, Euser, & Bakermans-Kranenburg, 2011). Child sexual abuse has been identified as a critical global public health, human rights, and humanitarian-related issue, with rates of self-reported child sexual abuse overall at 18% for girls and 7.6% for boys (Wekerle, Goldstein, Tanaka, & Tonmyr, 2017) Child sexual abuse is a part of child maltreatment. Meanwhile child maltreatment is a complex phenomenon, with four main types (childhood sexual abuse, physical abuse, emotional abuse, and neglect) highly interrelated (Moore et al., 2015). On another point, research state that the view of what constitutes child abuse and neglect is dependent on the laws, cultural context, local thresholds and the availability (Dubowitz, 2017).

However, seeing the increasing number of child sexual abuse cases, it seems that these regulations are not so much effective. The question is, with this many regulations, why do the number of cases increase year by year? The next question then refers to the effectiveness of the existing legal products in presenting even the least fear on offenders in particular and the public in general? Or, is it related to the ineffective work of the law enforcement apparatus in enforcing the regulations?

The current government's idea to present chemical castration is quite controversial. At this point, it is evident that this issue of child sexual abuse has reached a point that forces the government to consider chemical castration, which in reality seems rather brutal and is degrading human dignity.

From the aforementioned description, the research problems are as follows. First, what is the legal consideration to present regulations related to child protection, especially for cases of child sexual

abuse? Second, what are the penalties for the offenders of child sexual abuse?

2 METHOD

This study is legal research. The approach used was to focus on the statute approach, the philosophical approach, and the comparative approach. The study was literature research whose data sources were primary law materials, secondary law materials, and tertiary or supporting legal materials. The stages of the research included the preparation phase, data collection phase, data analysis phase, and report preparation phase.

3 THE LEGAL CONSIDERATION TO PRESENT REGULATIONS RELATED TO CHILD SEXUAL ABUSE

In Indonesia, the sexual violence cases have increased per year and the victims are not only adults, but also teenagers and even toddlers. This phenomenon of child sexual abuse has also increased globally, both in quantity and quality. The even worse fact is that the offenders are mostly from the closest environment, either school or home or child's neighborhood (Noviana, 2015).

Lawson categorizes sexual violence as a form of coercion of sexual intercourse, of sexual contact in unfair and unpopular ways, and of sexual intercourse with others for a specific commercial or purposeful aims. Sexual violence can be oral-genital, genital-genital, genital-rectal, hand-genital, hand-rectal, hand-breast, sexual anatomical exposure, and sharing pornographic images or movies (Proboosiwi & Bahransyaf, 2015). Meanwhile, child sexual abuse as a part of sexual violence, defined by the Keeping Children and Families Safe Act of 2003 and involves: (a) the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (b) the rape, and in cases of caretaker or interfamilial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children (Carson, Foster, & Tripathi, 2013). According to The National Center on Child Abuse

and Neglect, child sexual violence is sexual contact between children and adults who use children as sexual satisfaction. Sexual violence in children involves children up to the age of 18, including exhibitionism, peeping, fondling, seducing, oral sex, and sexual intercourse (Paramastri Ira *et al.*, 2011).

Following the Royal Commission into Institutional Responses to Child Sexual Abuse, we define child sexual abuse as: ...any act that exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism and exposing the child to or involving the child in pornography (Palmer & Feldman, 2017).

In comparison, the cases of sexual violence and denials in children in the United States of America (USA) in 1999 result in 1,100 children under the age of 14 died. In Indonesia, such cases of sexual violence are still seen as a domestic or family matter that others not need to know (Paramastri Ira *et al.*, 2011). This view in reality negatively affects the investigation on the case for the benefit of law enforcement as well as the medical and psychological treatment of the child.

According to Komisi Nasional Perlindungan Anak Indonesia (National Commission for Child Protection Indonesia), from 2015 to April 2016, there were 312 cases of child abuse, in which 51% (150 cases) included sexual violence. Data from Komisi Perlindungan Anak Indonesia (KPAI) shows the fluctuative number of child victims of sexual violence (rape, obscenity, sodomy or pedophilia, and so forth) from 2011 to 2016 (Andari, 2017). The figures clearly require follow-up in the context of the state policy.

The relationship between the accused and the complainant was coded into 5 categories: (1) parent (i.e., biological father, step-father, common-law father, foster father, biological mother, common-law mother), (2) other relative (i.e., biological brother, common-law brother, step-brother, foster brother, half-brother, brother-in-law, biological grandfather, step-grandfather, biological cousin, biological uncle, common-law uncle, step-uncle), (3) family connection (i.e., family friend, neighbor, mother's boyfriend who was not living in the child's home, boarder in home, parent of childhood friend, employer, babysitter), (4) community connection (i.e., priest/minister, counselor, big brother, psychologist/psychiatrist, doctor/dentist,

teacher/principal, guard, coach), or (5) stranger (Giroux, Chong, Coburn, & Connolly, 2018).

The increasing number of child sexual abuse cases not only affects the life of children themselves, but also affects the state development. The Minister for Women Empowerment and Child Protection, Yohana Yembise, says children are an asset to national development and should be fully protected (Elshinta.com, 2016) Thus, to handle cases child sexual abuse, six ministries are involved including the Coordinating Ministry for Human Development and Culture, the Ministry of Health, the Ministry of Social Affairs, the Ministry of Foreign Affairs, the Ministry of Home Affairs, and the Ministry of Justice and Human Rights (Noviyanti, 2016). Existing social problems, for example, child sexual abuse in fact associated with increased risk for sexually transmitted diseases including HIV. Evidence linking violence against women and HIV has grown, including on the cycle of violence and the links between violence against children and women (Sommarin, Kilbane, Mercy, Moloney-Kitts, & Ligiero, 2014).

In the study of social development, there is evidence of the negative economic impact for the country from the cases of sexual violence against children. The present study provides an estimate of the U.S. economic impact of child sexual abuse. Costs of it were measured from the societal perspective and include health care costs, productivity losses, child welfare costs, violence/crime costs, special education costs, and suicide death costs (Letourneau, Brown, Fang, Hassan, & Mercy, 2018). In India, child sexual abuse is a serious and widespread problem in India. The factor of child sexual abuse comes from socio-culture and family (Carson *et al.*, 2013). It also happened in Australia. Few studies have attempted to quantify the economic and social costs associated with child maltreatment including also child sexual abuse (Mccarthy *et al.*, 2016).

In the context of legislation policy, child protection is regulated in Law Number 23 of 2002 regarding Child Protection. The presence of this law is actually not the first to attend but has been preceded by some legal products such as Law Number 4 of 1979 on Child Welfare and Law Number 39 of 1999 on Human Rights. However, in the practice, the mentioned law products regulate only certain matters concerning children, and in particular, have not regulated all aspects related to child protection. The whole aspect of child protection seems to be a central point in consideration of the presence of the law. The

explanatory section of the law products mention that a child is a mandate as well as a gift from the one and only God, whom we must always take care because within a child inherent is dignity and rights as a human that we must look up upon. Child basic rights are a part of human rights contained in Constitutions of 1945 and in Convention of United Nations on child's rights. From the side of state and civic life, a child is the country's future and generation that carries on the state's aspirations, so every child is entitled to live, grow, develop, and participate and also entitled to be protected from violence and discrimination as well as entitled to enjoy civic rights and freedom (Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak).

In the explanatory section of the law products, it is mentioned that although Law Number 39 of 1999 on Human Rights has included the rights of children, the implementation of obligations and responsibilities of parents, families, communities, governments, and the state to provide protection to children still requires a particular law on child protection as the juridical basis. There is a basic reason that the establishment of the Law Number 23 of 2002 is based on the consideration that child protection in all its aspects is part of the national development activities, especially in promoting the life of the nation and the state. Thus, there is an affirmation that the presence of special provisions on child protection is based on several main points. First, the presence of the Law Number 23 of 2002 on child protection is related to the implementation of the obligations and responsibilities of parents, families, society, and the state to children. Second, there is a basic concept that needs to be enforced that child protection is essentially a part of national development activities.

The two reasons can be categorized as normative technical reasons, which affirm the imperative nature of this provision. It can be said that there are absolutes to be exercised based on such considerations. Furthermore, in the second consideration affirms, in particular, that this legal product is about to convey the message of the future dependence of the state to children. In this case, the dependency refers to the existence of important conditions related to the future of the state dependent on the background of the national situation at the time of the formulation of the law concerned. This is the real urgency for the existence of the legal products related to child protection.

4 THE CRIMINAL RESPONSIBILITY OF THE OFFENDERS OF CHILD SEXUAL ABUSE

Criminal responsibility in principle is a mechanism used to decide whether a person may or may not be accountable for a criminal act, by referring to the elements in the legislation. Related to this, Moeljatno defines a criminal act as an act that is prohibited by a rule of law, whose prohibition is accompanied by a sanction in the form of a certain penalty for anyone violating the prohibition. The prohibition is directed against an act (a condition or an event caused by a person's conduct), while a criminal penalty is directed against the person who caused the incident (Moeljatno, 1984).

While Barda Nawawi Arief state that criminal responsibility contains the principle of culpability, which is based on the monodualism equilibrium, i.e. the principle of culpability based on the value of justice must be aligned with the principle of legality based on the value of certainty. Although the concept states that criminal responsibility is based on culpability, in some cases, it does not rule out the possibility of vicarious liability and strict liability. The problem of error, be it in the situation (*error facti*) or error in the law in accordance with the concept is one of the reasons for forgiveness so that the perpetrator is not punished unless they are to be blame for their error (Arief, 2001).

Roeslan Saleh mentions that the following three conditions must be fulfilled if the criminal or the offender is to be punished. First, the criminal has an ability to be responsible (*toerekeningsvatsbaarheid*); secondly, there is a causal relationship between the criminal and the action done either in the form of intent or negligence; and, thirdly, the absence of excuses for the crime done (Saleh, 1981). These three requirements are said to be valid as a basis for criminal responsibility of a person deemed to have committed a crime. In relation to the ability to be responsible, we can refer to van Hamel's view which includes three things, namely being able to grasp the consequences of the action done, able to realize that the action done is contrary to public order, and able to determine the will to do (Eddy O.S. Hiariej, 2016).

Related to criminal responsibility of child sexual abuse, we refer to the Child Protection Law itself. With such relevance, the Law Number 23 of 2002 on Child Protection actually has a special section on acts that are categorized as criminal acts

in the context of child protection. The articles in this legal product include 13 articles, which start from Article 77 to Article 90, respectively.

While specifically for criminal acts related to sexual violence then actually the Law Number 23 of 2002 has not regulated the matter in details. It seems that the legislators have not yet had special attention regarding the sexual violence. Of the 13 previous articles, there may be only four articles that can be related to sexual violence crimes, i.e. Article 78, Article 81, Article 82, and Article 88.

Further, Article 78 explicitly regulates the act of negligence against a child who needs help including a child who is sexually exploited. Imprisonment for this act shall be a maximum of 5 years and/or a maximum fine of IDR 100 million. Article 81 further affirms the existence of a criminal penalty for any person who perpetrates violence or threats of violence, including by craftiness forcing a child to have sexual intercourse with the person or with another person. The threat is maximum imprisonment of 15 years and a minimum of 3 years (Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak).

Article 82 regulates acts of violence or threats of violence, coercion, craftiness, lies, or persuading a child to commit or allow obscene acts in which the act is punishable by a maximum imprisonment of 15 years and a minimum of 3 years and/or a fine of at most IDR 300 million and at least IDR 60 million. Further, Article 88 stipulates that the act of sexual exploitation of children be threatened with a maximum imprisonment of 10 years and/or a fine of up to IDR 200 million.

As time goes by, then Law Number 23 of 2002 is seen as no longer able to meet the needs of regulation of child protection. Some points in this legal product are then revised. The Law Number 35 of 2014 is the legal product concerned containing these important changes. The new law contains of several new provisions regarding sexual violence:

1. Article 76D *juncto* Article 81 regulates the prohibition of violence or threats of violence, coercion, craftiness, lies, or persuading a child to have sexual intercourse with the person or with another person. This action shall be punishable by imprisonment of a maximum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of IDR 5 billion. This punishment is increased by 1/3 if the perpetrator is a parent, guardian, child caregiver, educator, or educational staff.

2. Article 76E *juncto* Article 82 regulates the prohibition of violence or threats of violence, coercion, craftiness, lies, or persuading a child to commit or allow obscene acts. This action shall be punishable by imprisonment for a minimum of 5 years and maximum of 15 years and a maximum fine of IDR 5 billion.

3. Article 76I *juncto* Article 88 concerns on the prohibition of placing, neglecting, doing, ordering, or participating in economic and/or sexual exploitation of a child. This act shall be punishable by imprisonment for a maximum of 10 (ten) years and/or a fine of up to IDR 200 million.

The three provisions on sexual violence are important as to fill the gap in the previous regulation. Within this context, there is a more detailed formulation on what is defined as sexual violence.

However, there seems that child sexual abuse cases are not decreasing. Thus, the government feels the need to amend the Law Number 23 of 2002 for the second time. This is the reason for the issuance of the Government Regulation in Lieu of Law Number 1 of 2016 about the Second Amendment on the Law Number 23 of 2002 on Child Protection. The Government Regulation in Lieu of Law Number 1 of 2016 has been set as the Law Number 17 of 2016.

The increasing cases of child sexual abuse in Indonesia is the only reason for the government to formulate even harder penalties compared to penalties in the previous legal products. The option for chemical castration and installation of electronic devices on the offenders of child sexual abuse shows the seriousness of the government to tackle the matter. Through the Government Regulation in Lieu of Law Number 1 of 2016, later the Law Number 17 of 2016, it is clear that the government has been trying to formulate actions considered as criminal acts measured by the effects of such the actions; this has not been regulated in the Law Number 23 of 2002 or in its amendment the Law Number 35 of 2014.

For example, death sentence, life imprisonment or imprisonment of at least 10 (ten) years and 20 (twenty) years at the most presented in Article 81 is a real action to combat the outbreak of such crime. Moral sanctions are also formulated, by announcing the identity of the offender.

5 LEGAL ENFORCEMENT BARRIERS

The facts show that the above child protection laws have not maximally reduced the number cases of child sexual violence; the children, and their family, are very disadvantaged by this situation—and in a wider scope, the community. The legal protection has not yet presented through the existing legal products. In such conditions, the law is deemed incapable of providing benefits in the life of the community.

We then have to look for factors making the implementation difficult to minimize the number of child sexual violence. As there have been the legal products, the problem should later refer to other things. Referring to the concept of legal system according to Lawrence M. Friedman, the legal system includes three components, namely:

- a. Legal substance are the rules, norms, and patterns of real human behavior residing within a system, including the products produced by those within the legal system, the decisions they make, or the new rules they compile.
- b. Legal structure is a framework, a persisting part, a section that provides some form and restriction to the whole law enforcement agencies. The structure of the legal system in Indonesia, among others, are institutions or law enforcement agencies such as advocates, police, prosecutors, and judges.
- c. Legal culture is the mood of the system and the social forces that determine how the law is used, avoided, or abused by society (Friedman, 1969).

Soerjono Soekanto mentions several factors to maximize the legal work force in the community. The first is the legal factor itself. The second is the law enforcement factors or those that make up and enforce the law. The third are facilities that support law enforcement. The fourth is the community factor or the environment in which the law is applicable or applied. The fifth are cultural factors, as a result of creation and sense based on human initiative in the social life (Soekanto, 2000).

Failure of the legal products to provide benefits can be viewed from the substantive aspect, structures, and even the legal culture in the society where the law is presented and used. In relation to the current condition, the main problem is no longer on the legal substance that includes existing legal products, but more to the issue of the legal structure. Law enforcement institutions, both the police and the prosecutors, can be said to have not maximally presented individuals suspected as the offenders of

sexual violence in the courtroom with the nil possibility of escaping punishment. In addition, the role of judges is very needed in presenting decisions that can reveal the existence of justice for the victim and the family even for the community. On the specificity of sexual violence, the actual expectations of the community are so great in relation to the completion of every case that goes into the existing law enforcement institutions.

Considering the view of Jeremy Bentham, that the law in principle is to pursue prosperity and happiness, then it would seem reasonable (Suhardin, 2007). The law must be able to bring benefits in its application. Thus, the presence of law should consider the factor of the will of the community.

Beyond that, law in the context of the social system must be able to realize justice in society. Justice is even regarded as the most important goal of the law. Plato even calls justice as the supreme virtue, which harmonizes all others (Sutiyoso, 2012).

The fact about law enforcement is that societies are often held hostage by the issue of legal procedure that becomes the main basis of law enforcement. Individuals seeking justice are often disappointed to deal with the fulfillment of elements of criminal acts, which actually is the task of law enforcement officers; this is one of the problems faced by law enforcement officers. The community's disappointment, about the inaction and the inability of law enforcement resources, has caused people to be pessimistic about the successful implementation of the laws and regulations produced by the government.

The above general conditions seem to have nullified the purpose of law enforcement itself that is to uphold justice. Muladi mentions that victims of crime need to be protected in the context of the criminal justice system, by prosecution process therein. The basis of the argument is that the prosecution process requires the full responsibility of the penitentiary infrastructure (law enforcement) in which there are moral demands (philosophically) and within the framework of the interpersonal relationship in society (sociologically). The protection of crime is usually associated with one of the purposes of criminal prosecution (Sunarso, 2015).

There have also been many problems with the legal substance. Chemical castration, as mentioned in the Law Number 23 of 2002, especially through the second amendment of the Law Number 17 of 2016, in reality is creating such controversy within the society. One of the questions is who will conduct such punishment. The Indonesian Doctors

Association refuses to be the executor of this chemical castration. The doctors state that they are prohibited from using their knowledge to conduct an action against humanity (Prahassacitta, 2016). The chemical castration as a form of saction is essentially seen contrary to the code of ethics of physicians.

From the context of legal culture, the Indonesian people in a broad context do not yet have a strong tradition of protection and law enforcement. The reluctance to report on a criminal case is the cause of the difficult handling of such cases. While on the other hand, the unwillingness arises from a pessimistic attitude toward the work of law enforcement. Hard work to maximize the work force of the current legal system is needed to actually encourage the decline of this crime rate.

6 CONCLUSION

The presence of legal products that specifically regulate child protection in reality has not been able to reduce the number of child sexual abuse cases in Indonesia up to the present. Meanwhile, the Law Number 23 of 2002 on Child Protection with its criminal provisions has not been substantively able to give suchfearor even a deterrent effect for the potential individuals of child sexual abuse. The presence of the Government Regulation in Lieu of Law Number 1 of 2016, then stipulated as Law Number 17 of 2016 as the second amendment to Law Number 23 of 2002, is expected to cover the substantive weakness. However, in reality this law product does not have a strong connectivity, as there are technical issues related to execution.

In addition, there have also been issues related to the work of law enforcement officials. The public puts so much expectation on the state-owned law enforcement officials as to maximize the execution of these legal products; yet, they seem to have not been able to do so. Structuring elements of the legal system becomes very important in relation to efforts to overcome the cases of child sexual abuse. Improvement must be made not only in the legislation, with maximum penalty therein, but also in the readiness, ability, and even dedication of law enforcement institutions related to the duty and responsibility according to their field of work. This is the common hope we have so the negative conditions associated with increased sexual violence in this country can be resolved soon.

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