

Legal Analysis of Diversion Efforts on Criminal Acts of Sexual Violence by Children as Perpetrators

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ABSTRACT

This paper aims to explain diversion efforts in sexual violence crimes committed by children. Knowing the weaknesses of diversion efforts if these efforts are applied in sexual violence crimes committed by children. This paper uses a normative juridical method with a statutory approach as well as a conceptual approach with two legal materials, namely the law on criminal acts of sexual violence, the law on child protection and the law on the juvenile justice system. The result of this study is that the crime of sexual violence is a crime against the sexuality and dignity of another person's body. The perpetrators of this crime are not only adults but also children who will later be referred to as children in conflict with the law. The perpetrator's child has a different justice system as stated in the spa law with its specialty, namely diversion efforts. However, this does not support the goal of diversion itself which prioritizes the interests of the victim and provides a deterrent effect on children as perpetrators. It is said that diversion efforts will be enforced if the sentence is under 7 years, whereas there are articles that provide sentences under 7 years. The conclusion of this study is that the diversion effort does not fulfill the objective value of the diversion itself and can result in a loss of deterrent effect on the perpetrator so that the interests of the victim are not prioritized.

INTRODUCTION

A criminal act is an activity carried out by one or more people which is contrary to the law or is also called an act against the law. If this act is carried out to the detriment of other people then the perpetrator will receive a fine or imprisonment according to the severity of the unlawful act. the perpetrator did. Meanwhile, the content of the legal regulations themselves is a set or series of rules in a good and correct society in which good moral actions are enforced by the existence of these legal regulations.[1]

This can be interpreted as meaning that everyone should obey the laws and regulations established and ratified by the government for the continuity of state life. Legislation plays a role in various areas of human life (Saleh, 1981). One of the criminal acts that is still widespread in Indonesia is the crime of sexual violence, one form of unlawful sexual conduct is sexual

harassment. Sexual harassment or *sexual harassment* is an action or activity carried out by someone of a sexual nature that is not wanted by the person concerned.

Sexual harassment includes verbal and non-verbal (physical), sexual harassment is usually coercion of sexual activity, degrading sexuality or sexual orientation, asking to do sexual things that the perpetrator likes, words or behavior with sexual connotations are all included in acts of sexual harassment. Criminal acts of sexual violence are not only committed by adults, errors in the growth and formation of children's characteristics can also impact children who commit criminal acts. An act that is classified as a juvenile crime is any act, whether a violation or crime, of the law regulated by statutory regulations.

UUSPPA focuses on a restorative justice approach. Article 1 number 3 UUSPPA states that children who have conflicts with the law are 12 years old but not yet 18 years old. The main punishments that should be focused on children are warning punishment, conditional punishment for receiving guidance, job training, guidance in institutions, and finally prison.

Prison can be placed as the last option because prison is the last solution that can be chosen to be able to deal with children who are in conflict with the law, apart from being said to be an additional punishment, it can be in the form of confiscation of a benefit that the child obtains by committing a criminal act or carrying out customary obligations. . Article 5 paragraph (3) UUSPPA for children can be said to be a process for resolving an incident that occurred in a child crime and resolving the case using efforts known as diversion.

Diversion is an action that can refer to diversion or a solution to a case committed by a child outside juvenile justice. UUSPPA regulates diversion in articles 6 to 15 and provides the understanding that diversion exists when the threat of punishment is imprisonment for less than 7 years and not recidivism. Basically, if there is an act of violating the law with a serious level of threat contained in the Criminal Code, then if the subject of the law violation is a child, then the threat of the criminal act is punishable by, for example, the threat above seven years, and if the violation is a form of repeat or subject crime The child has committed a similar crime and has been punished, so the resolution of the criminal case committed by the child cannot be done by means of diversion.

These provisions will raise questions regarding the certainty that the child as the perpetrator will not repeat his actions, the certainty that mental healing for the victim will be met, and the fairness of the punishment received by the perpetrator with the physical and mental injuries received by the victim. From the statement above, a problem formulation emerges, namely whether the application of diversion efforts in juvenile justice as perpetrators of criminal acts of sexual violence is in accordance with the objectives of Article 7 of Law no. 11 of 2012?

METHOD

This research uses a normative juridical research method which is carried out by researching the literature to obtain legal material to be analyzed. The approach in this research uses a statutory approach and a concept approach [2]. There are two legal materials in this research, namely primary legal materials including the Sexual Violence Crime Law, the Child Protection Law and the Juvenile Criminal Justice System Law. As well as the second legal material, namely secondary legal material including books and journal articles [3].

RESULTS AND DISCUSSION

Crime of Sexual Violence

Luhulima provides an understanding of sexual violence, namely crimes that are related to the genitals or sexuality, especially the sexuality of women and men. [4]The term *sexual violence* is found in foreign literature, which is basically a criminal act as a form of action related to a person's sexuality, where the subject of the action can be a man or a woman. [5] in the case of an explanation of the rules governing these criminal acts, they have been described in general criminal law instruments, namely the Criminal Code which mentions rape and molestation, Law 35/2014 which amends Law 23/2002 concerning Child Protection (UUPA) which provides special rules regarding children up to The regulation that was recently passed is Law 12/2022 concerning Criminal Acts of Sexual Violence (UU TPKS).[6]

Sexual violence is mandated by the TPKS Law which states that things that fulfill the elements of this law constitute the definition of the criminal act of sexual violence itself. The TPKS Law states at least 9 forms of criminal acts of sexual violence, namely sexual exploitation; forced contraception; physical and non-physical sexual harassment; sterilization and marriage; sexual slavery; as well as sexual violence whose basis is electronic.[7]

The TPKS Law provides specific regulations regardless of the gender of the victim, the age of the victim or the health condition of the victim (victims with disabilities). However, in more depth the special protection for children as victims of criminal acts of sexual violence is discussed in the UUPA.

Various types of sexual violence committed by each person are given prison sentences as stated in the TPKS Law, namely:

1. Non-physical sexual acts are punishable by a maximum fine of 10 million rupiah and/or imprisonment of a maximum of 9 months (article 5)
2. Physical sexual acts are punishable by a maximum fine of 50 million rupiah and/or imprisonment of a maximum of 4 years (Article 6 letter a)
3. Physical sexual acts using one's power are punishable by a maximum fine of 300 million rupiah and/or imprisonment of a maximum of 12 years (article 6 letter b)
4. Coercion of contraception which causes temporary loss of reproductive function is punishable by a maximum fine of 50 million rupiah and/or imprisonment of a maximum of 5 years (article 8)
5. Coercion of contraceptives that causes permanent loss of reproductive function is punishable by a maximum fine of 200 million rupiah and/or imprisonment of a maximum of 9 years (article 9)
6. Criminals for electronic-based sexual violence are subject to a maximum fine of 200 million rupiah and/or maximum imprisonment of 4 years (article 14 point 1)

These articles at least provide criminal penalties for perpetrators. The TPKS Law also provides criminal provisions in articles 5, article 6, article 8 and article 14 plus 1/3 if committed against children. Criminal sanctions are given to perpetrators to provide a deterrent effect. This is expected to be able to tackle sexual violence.[8]

Sexual crime/violence can happen to anyone and anyone can be the perpetrator. Both men and women, in any profession, in any age range. Adults can be perpetrators, but so can children. [9]The Indonesian Child Protection Commission (KPAI) together with the Kita and Buah Hati Foundation have surveyed that even elementary school children have become perpetrators of sexual violence. This fact makes it worrying why young children can act sexually. Their capacities as children differ from those of adults regarding sexual, cognitive and emotional

maturity. This could also be the reason why children can do it, namely because of the child's great curiosity.[10]

The Justice System in Crimes of Sexual Violence

On December 23 2002, the first law on child protection in Indonesia was passed with UU 23/2002 . However, the law underwent several changes, where Law 35/2014 changed Law 23/2002 to Law no. 17 of 2016 and underwent a second amendment by replacing Law no. 1 of 2016. One example is Law Number 35 of 2014 which aims to increase sanctions and fines for crimes against children. The aim is to prevent crime and prioritize effective actions to assist the physical, psychological and social recovery of child crime victims. Apart from that, the government has also passed Law 1 of 2016, which was later changed to Law 17 of 2016, with the aim of not only increasing penalties but also preventing violence against children.

Even though Law 35/2014 is intended to regulate criminal penalties for perpetrators of sexual crimes against children, its implementation has not significantly reduced the incidence of sexual crimes against children. Therefore, the government introduced the death penalty, life imprisonment and disclosure of the perpetrator's identity under Law 17/2016. In addition, the government also implemented regulations on chemical castration, installed detection equipment, and rehabilitated those responsible for sexual crimes against children.[11]

Obscene acts occur when a child is forced or involved in obscene acts and is exposed to or engaged in obscene activities with the aim of obscene exploitation through pornography, obscene images, gestures, films or other means. Children who violate the law, children who violate the law and children who are victims of crime have the right to receive special protection in accordance with Law 23/2002, by understanding:

1. The definition of a child who is in conflict with the law is :
 - a. Treatment that respects children's human rights and dignity;
 - b. Providing special assistance for children from an early age;
 - c. Focusing on providing appropriate facilities and infrastructure;
 - d. Take appropriate sanctions in the best interests of the child;
 - e. Continue to monitor and record the progress of children who violate the law;
 - f. Maintaining children's relationships with parents or family;
 - g. Protecting children from media exposure and stigmatization.
2. Subject Children as victims in criminal acts:
 - a. recovery actions, both inside and outside the institution;
 - b. preventive measures against identity disclosure by the media and avoid stereotyping;
 - c. rather than ensuring the safety of victims and expert witnesses, both physically, mentally and socially; And
 - d. provide access to information regarding case progress.

Juvenile Criminal Justice System Regulation Number 11 of 2012 regulates all matters related to legal prosecution of children involved in violations of the law (ABH). In explaining ABH cases, this rule "became the main focus of the judges". Arrest of children is only permitted in situations described in Article 32(2) that the juvenile is 14 years old or older; and charges of committing a crime that carries a potential prison sentence of 7 years. However, this is excluded if the child in question is not yet 14 years old .

From the summary of this article, it can be understood that if a child is suspected of committing an act in the form of a criminal act with serious threats or is categorized as a serious criminal act which can be punished with imprisonment for more than seven years and has reached the age of 14 years, he will be subject to criminal penalties. If someone forces a woman to have

sex outside marriage, they will be subject to a maximum sentence of 12 years according to Section 285 of the Criminal Code which regulates the crime of rape. If the perpetrator is an adult who commits an immoral act, especially rape, he will be sentenced to 12 years in prison. However, if the perpetrator is a child, the sentence will be reduced by half. This is regulated in Article 81(2) of Law no. 11 of 2012, which states that the maximum sentence for minors is half the maximum sentence for adults.[12]

However, even though this law has been passed, there are still many judges who decide ABH cases without following the rules of "UU 11/2012 concerning the Juvenile Justice System". For example, in Decision Number 27/Pid.sus anak/2016/PN.MTR, the judge sentenced the perpetrator to only six months. The perpetrator raped another child, injuring the victim's head and genitals. According to the law, perpetrators who are minors must undergo training at the "Children's Special Education Institute (LPKA)" for 6 years.[13]

The juvenile criminal justice system has been redivided under the SPPA which requires diversification. Diversification itself is the act of handling children's cases that is different from conventional litigation, which is explained in Article 1 paragraph 7 of this regulation, which defines diversification as moving children's cases from the litigation process or criminal court to an external resolution process. Historically, diversification was introduced in the United States and originated with the chair of the Australian crime commission (chief crime commission) in 1960, when the juvenile justice agency was established.[14]

Apart from that, the term diversion also became known with UN resolution 40/33 dated 29 November 1985 or commonly called The Beijing Rules, which are international standard benchmarks in terms of the justice system for resolving child disputes. Diversion itself has several objectives as stated in Article 6 of the SPPA Law, including to bring about peace between child subjects as victims and child subjects as perpetrators, then diversion is also expected to be able to resolve problems surrounding children in a way outside the judicial process through litigation, diversion is also aimed at preventing children from being deprived of their right to independence by completing the case process. Apart from that, the aim of diversion also comes from outside the judicial process, namely to encourage public awareness to participate and be aware of the law, as well as instilling a sense of responsibility in a child. Which basically states that punishment in the form of imprisonment is a form of punishment that is relevant to provide a deterrent effect for my conscience so as to instill a sense of responsibility in the future, this is what is formulated in the threat of imprisonment which is imperative and is a thought from the classical school of criminal law (definite sentence). [15]

Basically, diversion is mandatory to be pursued in a series of criminal proceedings, including investigations, prosecutions, and even examinations which were originally carried out in the district court, are attempted to be resolved outside of court, which is so that children do not go through the criminal procedural process like legally competent adults who are going through series of criminal proceedings. This is intended for cases where the criminal act committed by a child is a criminal act which carries a threat of imprisonment not exceeding 7 (seven) years or a criminal offense of 7 (seven) years or less, and the criminal act committed does not constitute a crime. punishment in the form of repetition. This is exactly as explained in Article 7 of the SPPA Law. Furthermore, the diversion process carried out is in the form of deliberation, namely a resolution outside of litigation involving various elements, namely the child as the perpetrator, the parent or guardian, and the victim. Apart from these elements, professional workers in the social sector were also present to act as mediators in the case resolution process. And this process is carried out using a deliberative approach aimed at restorative justice.

As explained in Article 8 paragraph (3), the diversion process generally must pay attention to several aspects, including aspects of the child's welfare and responsibility, and the interests of the victim, to avoid revenge or retaliation in the future, social harmony, distancing from other things. things that have a negative stigma, and consider propriety and public order. Diversion cannot be carried out according to the series of procedures listed, but must also take into account several aspects, namely as explained in Article 9 paragraph (2) of the SPPA Law regarding the existence of an element of agreement or agreement on the part of the child as a victim, namely, it could be the child's parent or guardian. However There are also exceptions to this, namely if a criminal offense is threatened for the behavior committed in the form of a violation, a criminal act that has a loss value for the victim that is at least the minimum wage value of the local province or lower than that.

In fact, the provisions in the SPPA Law cover the entire series of resolutions of children's cases regarding criminal acts which focus on the principles of restorative justice with the diversion process, as well as considerations regarding the decision to carry out diversion which are focused on many aspects, including the child's age, child propriety and growth and development. children to turn the problems faced by children into teachings for those children. However, by looking at the act of sexual harassment which, if committed by a child, is the subject of the threat contained in the instrument of positive legal regulations which specifically explains criminal acts regarding sexual violence behavior as described above, then by looking at the consideration of diversion efforts for resolving children's cases. which considers several categories, including the category of criminal threats under 7 (seven) years as explained in Article 7 of the SPPA Law and also considerations in Article 9 paragraph (1).

If you pay close attention, it suggests that criminal acts in the form of sexual abuse committed by children can be carried out with diversion efforts, but this will conflict with the aim of diversion itself, namely regarding instilling a sense of responsibility in children as stated in Article 6 of the SPPA Law, which is considered to be irrelevant if diversion efforts are made. carried out in the criminal act of sexual harassment which was of course carried out intentionally and was not an element of negligence. On the other hand, consideration of the victim factor must also be taken into account.

CONCLUSION

Sexual violence has at least been regulated in the TPKS Law as a special regulation and UUPA to protect children's rights. Sexual violence is a crime against the sexuality of other people, both adults and children. The provision of criminal sanctions for perpetrators mentioned in the TPKS Law is not only limited to legal subjects with age categories, so that both adults and children are also included in the legal subjects referred to in the regulation. Meanwhile, if the perpetrator in question is a child, then it refers to the SPPA Law, which is referred to as a child in conflict with the law.

Children who are in conflict with the law have special features in the criminal justice system, namely the existence of efforts in the form of diversion in terms of resolving a case suspected of being a criminal act committed by a child legal subject with all the considerations contained in Articles 7 to Article 9 of the regulation, then correlated with criminal threats regarding the issue of criminal acts of sexual violence as stated in the new legal instrument, namely the TPKS Law. Sexual harassment is threatened by the regulations regarding sexual violence with a threat of less than 7 years as outlined in the SPPA Law, so that with legal certainty the child is the perpetrator of the crime, the case is resolved through a diversion process. This solution can

actually be considered inconsistent and even contrary to the aim of diversion itself as explained in Article 6 of the SPPA Law, namely regarding instilling a sense of responsibility in children, which should have a deterrent effect.

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