

Analyze Application of Criminal Law on Rape Against Biological Children

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Abstract.

The purpose of this study is as follows: to find out and analyze application of criminal law on rape against biological children. To know and analyze the basis for the judge's consideration of imposing criminal sanctions on perpetrators of raping their biological children. This research used empirical juridical approach and the specifications in this study are descriptive analytical. The data collection technique is done by means of literature study. The data analysis method used in analyzing in this research is descriptive qualitative. Based on the results of the study that application of Criminal Law on Rape of Biological Children shows that because of his act of raping his biological child, he was charged with Article 81 of the Act No. 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Act No. 1 of 2016 concerning Child Protection. Judges who have applied criminal sanctions based on Article 81 paragraph (3) of the Child Protection Act, the criminal sanctions are more severe considering the additional criminal sanctions of 1/3 of the criminal threat because the perpetrator of rape is the father of his own biological child. The Judge's Basis for Imposing Criminal Sanctions Against Perpetrators of Rape Against Biological Children is The panel of judges has many considerations that are revealed in the trial and are included in the case decision file. Apart from being the victim's biological child, the panel of judges also considered the condition of the victim's child as a result of the defendant's actions. These are things that are burdensome for the defendant, but in this case the panel of judges also has considerations that can relieve the defendant, including the existence of a confession (not covering up legal facts), regret for the actions committed, and the defendant has never been convicted.

Keywords: Biological; Children; Consideration; Crime; Rape.

1. Introduction

Children are the nation's assets and as the next generation that must be protected and welfare must be guaranteed. In society, a child must get protection from all forms of violence and crime that can endanger the safety of the child. In accordance with the national goals of the Indonesian nation as stated in the Preamble to the 1945 Constitution, paragraph 4, namely: "*protect the entire nation and the entire homeland of Indonesia, promote public welfare based on the life of the nation and participate in carrying out world order.*"¹

Children are social creatures just like adults. Children need other people to be able to help develop their abilities, because children are born with all the weaknesses so that without other people it is impossible to reach a normal level of humanity. Children are social creatures, children's social development requires the

¹ Sitichinet, "Teks Pembukaan Undang-undang Dasar 1945 (UUD 1945)," <https://sinichinet.blogspot.co.id/2016/08/teks-pembukaan-undang-undang-dasar-1945.html>, accessed on 11 November 2021 at 21.05 wib

maintenance of love and a place for their development.² Children are a mandate and gift from God Almighty that must always be protected because the inherent dignity, worth and rights as human beings must be upheld.³

A child by nature generally still has reasoning power that is not yet good enough to distinguish between good and bad things. Crimes committed by children in general are the process of imitating or being influenced by environmental behavior patterns because childhood is a period of forming the character, personality, and character of a human being. Indonesia as a state party to the Convention on the Rights of the Child, which regulates the principles of legal protection for children, is obliged to provide special protection to children in conflict with the law. One form of child protection by the state is realized through a special criminal justice system for children in conflict with the law.⁴

Children and women are indeed a very vulnerable group to become victims of violence, especially children. Various cases of violence against children occur in the environment around us, be it physical, psychological, or sexual violence. All forms of mistreatment do not know that their actions are wrong and it is parents who have an obligation to tell their children.⁵

Crime can occur anywhere and anytime. It can even be said that crime occurs in almost every society, but because of its detrimental nature, it is also natural for every community to try to prevent and overcome the occurrence of crimes, especially immoral crimes, however, almost every day, people are faced with news and discussions concerning the problem, which happens to a person who does not use reason and is coupled with lustful impulses in acting, so that transgressing crimes such as sexual or immoral crimes occur.

People are more familiar with the law as a binding rule and must be obeyed by every individual in society and if there are no sanctions for those who violate the rules.⁶ In law enforcement practice, sanctions in the community have a very important role so that a legal rule is obeyed by the community so that a legal sanction has an important role so that a goal in the formation of a legal regulation can be achieved and it is hoped that the process of social control in society can be realized properly.⁷

² Anggar sigit and fuandy, (2015), *Sistem Peradilan Anak*, Pustaka Yustisia, Jakarta. p.1

³ Oscar Stefanus Setjo and Umar Ma'ruf, 2020, *Investigation of Children Which Conflicting With Law in Narcotics Criminal Acts In Law Area of the Semarang City Police Jurisdiction*, Jurnal Daulat Hukum Volume 3 (2), Published Master Of Law, Faculty of Law Unissula p. 283, <http://jurnal.unissula.ac.id/index.php/RH/article/view/9851/4156>

⁴Yudi Hendaro and Umar Ma'ruf, 2018, *Diversion In Children Criminal Justice System Through Restorative Justice*, dalam Jurnal Daulat Hukum Volume 1 (2), Published Master Of Law, Faculty of Law Unissula, p. 331 <http://jurnal.unissula.ac.id/index.php/RH/article/view/3269/2404>

⁵ Nashriana, (2011), *Perlindungan Hukum Pidana Anak di Indonesia*. Raja Grafindo Persada, Jakarta, p.13

⁶Sulistiyawan Doni Ardiyanto, Eko Soponyono and Achmad Sulchan, 2020, *Judgment Considerations Policy in Decree of the Court Criminal Statement Based On Criminal Destination*, Jurnal Daulat Hukum Volume 3 (1), Published Master Of Law, Faculty of Law Unissula, p. 179, <http://jurnal.unissula.ac.id/index.php/RH/article/download/8409/4067>

⁷Haryanto Dwiatmodjo, (2012), *Penjatuhan Pidana Bersyarat Dalam Kasus Pencurian Kakao*, FH Unsoed, Purwokerto, Judicial Journal, Vol.5 No.1, p.103

According to Abdul Wahid, the crime of raping children has a serious impact, physical and psychological trauma will be attached until the child is an adult.⁸The crime of rape is one of the crimes that become a problem in the State of Indonesia. The crime of rape can happen to everyone without exception. Anyone can become a victim of rape, regardless of gender, whether male or female, regardless of age, physical appearance, social group, way of dressing, and the way a person walks. Whereas in Indonesia the majority of rape crimes occur against women, there are those who argue that women are raped because of their appearance, such as wearing skimpy clothes so that they can provoke someone to commit the crime of raping them. The crime of rape can occur in minors as well as in elderly people.⁹ Based on the above background, the authors are interested in conducting a research entitled Analysis of Judges' Considerations in the Crime of Rape Against Biological Children.

This study aims to determine and analyze application of criminal law on Rape Against Biological Children.

2. Research Methods

This research used empirical juridical approach and the specifications in this study are descriptive analytical. The data collection technique was done by means of literature study. The data analysis method used in analyzing in this research was descriptive qualitative.

3. Results and Discussion

3.1. Application of Criminal Law on Rape against Biological Children

Political criminals who are related to victims of rape crimes are still there to provide protection for women, both adults and children who are victims of rape, but do not touch how to provide legal protection if rape is to give birth to children, because not all rape victims are exposed or reported directly rape occurs immediately, but many cases are only revealed when women who are generally children have seen their uterus enlarged, the dilemma if abortion is in the womb, as stipulated in the MUI Fatwa, that abortion is a crime but for rape victims it is hoped that there will be legal protection for those who seek abortion in the hope of reducing the suffering experienced.¹⁰

The crime of blood rape is a sadistic crime, especially if the perpetrator is his own biological father. Basically, inbreeding is not only done by biological fathers, but can also be committed by brothers, uncles, and even grandfathers. Girls seem to be in a state of being threatened for their honor. Being in the house with the closest people does not guarantee the creation of comfort and security, but can

⁸ Abdul Wahid and Muhammad Irfan, (2001), *Korban Kekerasan Seksual*, Refika Aditama, Bandung, p.94.

⁹ Dewi, M. B. K., & Arifin, R. (2019), *Emancipation and Legal Justice; Potrait of Woman's Legal Protection in Indonesia*. Jurnal Cita Hukum, 7(1), p. 101–114.

¹⁰Endang Kusnandar, Anis Mashdurohatun, Siti Rodhiyah Dwi Istinah, (2020), *Protection Analysis Of Children Rights That Was Born From The Rape Causing (Study in State Court (PN) in Ex-Residency Cirebon Jurisdiction)*, Jurnal Daulat Hukum Volume 3 (1), Published Master Of Law, Faculty of Law Unissula p. 16, <http://jurnal.unissula.ac.id/index.php/RH/article/download/8395/3927>

bring suffering to the child. The rise of cases of rape perpetrated by a father against his biological child is evidence of the moral decay of parents.

Of the various crimes that are troubling the community as well as challenging the law, the author is interested in analyzing one form of crime, in this case the crime of rape. The crime of rape or sexual crimes is generally experienced by women, especially young children (teenagers). This incident occurs in society regardless of the social stratification of the perpetrator and the victim. These crimes can arise because of environmental and psychological influences that affect the behavior of the perpetrators in the past as well as spontaneous psychological shocks due to sexual stimulation.¹¹

It is this uncontrolled sexual stimulation which in turn gives birth to criminal acts of decency, especially the crime of rape. Previously, this crime was only committed by other parties against women who were not family members by using threats and coercion or violence. But nowadays these crimes are not only carried out with threats of violence but have used various chemical substances that can eliminate a woman's consciousness as well as cause sexual stimulation without her realizing it. However, one thing that is disappointing is that the crime of rape was carried out by people who were well known to the victims (seductive rape), such as teachers, doctors, close friends, siblings, and biological parents. Those who are the perpetrators of rape are the ones who should provide protection to the victims from environmental security disturbances and environmental responsibilities in the future. Its relevance to the crime of rape committed by parties known to the victim above, would like to focus on the crime of rape committed by a father against his biological child (*Sibiran Tulang*).

In addition, it can also be a triggering factor for rape which is stimulated by environmental influences around the perpetrator, such as the perpetrator after seeing or witnessing things related to pornography and pornography and the perpetrator's sexual desire arises. So that the perpetrator wants to vent his desire in various ways, one of which is rape. From every crime of rape there is a relationship between the perpetrator, the victim, and the situation and environmental conditions that play their respective roles as triggers for a crime of sexual violence, namely rape.¹²

It is the crime of rape committed by biological parents that attracts the author's interest to try to examine the psychological side of crime, by looking at the psychological symptoms that cause the perpetrator to rape his child, as well as seeing whether the handling of the perpetrator of the crime of rape by biological parents is psychological crime has been applied. As the author has described above, it is not enough just to see the occurrence of a crime from a criminological point of view, but also from another aspect, namely the psychological aspect of the perpetrator.

A rule of law has met the demands of a juridical, the rule of law will not be able to be effective in society if it does not meet the demands of enforceability sociologically and philosophically. This is because good law and therefore can be effectively applied in society always requires legal, philosophical and even historical

¹¹Gerson W. Bawengan, (1977), *Pengantar Psikologi Kriminal*, Pradnya Paramita, Jakarta, p. 22

¹²Eko Prasetyo and Suparman Marzuki, (1995), *Pelecehan Seksual*, Fakultas Hukum Universitas Islam Indonesia, Yogyakarta, p. 180

enforcement requirements.¹³

Rape by legislators is categorized as a sexual offense. The meaning of decency must be interpreted as things that are included in the mastery of the norms of propriety to behave in public relations, not only related to the notion of decency in the sexual field. Determining the material or substance must be sourced and have a strong backing from religious morals. In line with the above opinion, Mulyana W Kusuma stated that sex crimes and crimes involving sex (sex related crimes) which are formulated in criminal law as moral offenses must always be understood contextually in relation to cultural developments and changes in social structures that exist in society.¹⁴

Application of Criminal Law on Rape of Biological Children shows that because of his act of raping his biological child, he was charged with Article 81 of Act No. 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Act No. 1 of 2016 concerning the second amendment to Act No. 23 of 2002 concerning Child Protection into Law -Law in conjunction with the Act No. 35 of 2014 concerning Amendments to the Act No. 23 of 2002 concerning Child Protection. Judges who have applied criminal sanctions based on Article 81 paragraph (3) of the Child Protection Act, the criminal sanctions are more severe considering the additional criminal sanctions of 1/3 of the criminal threat because the perpetrator of rape is the father of his own biological child. Rape is basically caused by weak faith, so faith must be maintained so that lust is controlled. The application of criminal sanctions for perpetrators of rape by fathers against biological children has not been implemented as stipulated in Article 81 paragraph (3) of the Child Protection Act, judges should consider the weighting of criminal sanctions against fathers who rape their biological children, so that the punishment imposed is more severe. The imposition of a criminal offense cannot restore the loss suffered by the victim, but at least with the imposition of severe sanctions,

Article 81 is known to have 9 paragraphs that regulate criminal sanctions for rape against minors. In paragraph (3), it is emphasized in more detail regarding criminal sanctions against perpetrators who are parents, guardians, people who have family relationships, child caretakers, educators, educational staff, officers who handle child protection, or are carried out by more than one person.

3.2. The Judge's Basis for Imposing Criminal Sanctions Against Perpetrators of Rape Against Biological Children

Judge's considerations are things that become the basis or are considered by the judge in deciding a criminal case. Before deciding a case, the judge must pay attention to every important thing in a trial. The judge pays attention to the conditions that a person can be sentenced to, namely subjective conditions and

¹³Asshiddiqie Jimly, (1996), *Pembaharuan Hukum Pidana Indonesia Studi Tentang Bentuk-Bentuk Pidana Dalam Tradisi Hukum Fiqh dan Relevansinya Bagi Usaha Pembaharuan Hukum Pidana Nasional*, Angkasa, Bandung, p, 160

¹⁴W Kusuma Mulyana, (1993), *Perumusan Tindak Pidana Kesusilaan (Perzinaan dan Pemerkosaan) dalam Rancangan KUHP Baru di Tinjau dari Aspek Kebijakan Kriminal dan Aspek Sosial Budaya*, Makalah disampaikan pada seminar sehari tentang Tinjauan Terhadap Rancangan Rancangan KUHP Baru Khususnya Tindak Pidana Kesusilaan, Fak. Hukum Universitas Katolik Soegijapranata, Semarang.

objective conditions. The objective condition is that it comes from someone's mistake, while the subjective condition is that there is an error, the ability to be responsible for someone, and there is no excuse for him. In addition, the judge also pays attention to the objective requirements, namely the actions taken have matched the formulation of the offense, are against the law, and there is no justification.

Judges as the main actors in the court process are always required to hone sensitivity of conscience, moral intelligence, and professionalism in upholding law and justice in the form of their decisions. Judges' decisions must always be accountable to God Almighty and to the community, especially justice seekers. Judges' decisions that are not independent, indicate collusion, corruption, and nepotism (KKN), are unprofessional, do not provide legal certainty and a sense of justice, as well as decisions that cannot be executed, can reduce public trust as well as undermine the authority of the court.¹⁵

The rapid development of technology today creates new problems for legislators on how to protect society effectively and efficiently against the dangers of demoralization as a result of the entry of views and habits of foreigners regarding sexual life in their respective countries. In addition, if in the shortest possible time it is not predictable that the entry of views and habits of foreigners into Indonesia, it can create new problems for the government in its efforts to maintain public security and maintain public order in society, which is not impossible to affect negatively the efforts of the Indonesian people in maintaining their national security.¹⁶

This definition, whether or not there is an act in the sense of criminal law, depends on whether or not the act is in the meaning of criminal law, depending on the presence or absence of the "desired" condition which is an element of error. If the muscle movement is not desired, for example only a reflex movement, then from the beginning there is also no action within the meaning of criminal law. Acts and mistakes here are a unity because from the beginning there was no action but the person cannot be punished because there is no mistake. But in general, between actions and mistakes can be distinguished, even the distinction needs to be made for a more careful discussion; so that this systematic discussion also provides separate places for actions and mistakes.¹⁷

The crime of sexual intercourse is a crime related to decency. What is meant by "copulation" is a combination of male and female genitalia which is usually carried out to obtain children, so the male genitalia must enter the female genitalia so that semen is released.¹⁸ The crime of sexual intercourse can also be referred to as a decency offense, which means that a moral offense is part of a non-neutral criminal law, meaning that it is different, for example, with offenses such as murder, theft, rape, and others.¹⁹ Barda Nawawi Arief stated that a decency offense

¹⁵Syarif Mappiasse, (2015), *Logika Hukum Pertimbangan Putusan Hakim*, Jakarta, p.1

¹⁶P.A.F Lamintang & Theo Lamintang, (2011), *Delik-Delik Khusus Kejahatan Melanggar Norma Kesusilaan dan Norma Kepanutan*, Jakarta, p.1

¹⁷Frans Maramis, (2013), *Hukum Pidana Umum dan Tertulis di Indonesia*, Jakarta, p.65

¹⁸R.Soesilo, (1985), *Kitab Undang-Undang Hukum Pidana serta Komentar-komentarnya Lengkap dengan Pasalnya*, Bogor, p.209

¹⁹Andi Hamzah, (2016), *Delik-Delik Tertentu (Speciale Delicten) di dalam KUHP*, Jakarta, p.164

is an offense related to decency. This short and simple definition, when studied further to find out how far the scope is, turns out to be not easy, because the understanding and boundaries of morality are quite broad and can vary according to the views and values prevailing in society. Moreover, basically every offense or criminal act contains in it a violation of moral values, it is even said that the law itself is essentially a minimum of moral values. Thus, it is actually not easy to determine the limits or scope of a decency offense.²⁰

The analysis of the judge's decision based on Hans Kelsen's theory is basically a decision issued by the court must represent the conscience of the community seeking justice. The judge's decision is needed to examine, resolve and decide cases that are submitted to the court. The judge's decision is a legal product of the trial process in court. While the court is the last place for justice seekers to escape, so that the judge's decision should be able to meet the demands of justice seekers.²¹ Regarding this, the judge in deciding his case must reflect three elements, namely justice, legal certainty and expediency.

The Judge's Basis for Imposing Criminal Sanctions Against Perpetrators of Rape Against Biological Children. The panel of judges has many considerations that are revealed in the trial and are included in the case decision file. Apart from being the victim's biological child, the panel of judges also considered the condition of the victim's child as a result of the defendant's actions. These are things that are burdensome for the defendant, but in this case the panel of judges also has considerations that can relieve the defendant, including the existence of a confession (not covering up legal facts), regret for the actions committed, and the defendant has never been convicted.

4. Conclusion

Application of Criminal Law on Rape of Biological Children shows that because of his act of raping his biological child, he was charged with Article 81 of the Act No. 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Act No. 1 of 2016 concerning Child Protection. Judges who have applied criminal sanctions based on Article 81 paragraph (3) of the Child Protection Act, the criminal sanctions are more severe considering the additional criminal sanctions of 1/3 of the criminal threat because the perpetrator of rape is the father of his own biological child. The Judge's Basis for Imposing Criminal Sanctions Against Perpetrators of Rape Against Biological Children. The panel of judges has many considerations that are revealed in the trial and are included in the case decision file. Apart from being the victim's biological child, the panel of judges also considered the condition of the victim's child as a result of the defendant's actions. These are things that are burdensome for the defendant, but in this case the panel of judges also has considerations that can relieve the defendant, including the existence of a confession (not covering up legal facts), regret for the actions committed, and the defendant has never been convicted.

²⁰Barda Nawawi Arief, (1996), *Bunga Rampai Kebijakan Hukum Pidana*, Bandung, p. 291

²¹Setyanegara, E. 2013. *Kebebasan Hakim Memutuskan Perkara dalam Konteks Pancasila (Ditinjau dari Keadilan "Substantif")*. *Jurnal Hukum Dan Pembangunan Tahun*, 43(4), p. 434-468.

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