

Additional Criminal Penalties in Application for Assertion of the Identity to Perpetrator of Sexual Violence against Children

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Abstract: *This research was conducted to comprehend the implementation of personal identity assertion to perpetrators of child sexual abuse as a new notion considering identity announcement as required on Article 81 Verse (6) of Government Regulation in Lieu of Law Number 1 of 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection (Law Number 1 of 2016) perceived hasn't been yet optimal. Law Number 1/2016 is reasonable additional penalties as incriminated for perpetrators of sexual abuse against children which is categorized as extraordinary crime, the manifestation of the implicated itself passed guidelines regarding the procedure regulated in Government Regulation Number 70 of 2020 concerning Procedure of chemical castration, Installation of Electronic Detection Devices, Rehabilitation, and Identity Announcements to perpetrators of child sexual abuse (Law Number 70 of 2020) which requires that the procedure for announcing identity is by the media. The announcement of the sexual perpetrator's identity by the media needs to be optimised by asserting the identity of the perpetrator as a unique identity as best practice has been carried out by other countries, including using the concept of justice theory and labelling theory in human rights by providing protection for victims and benefits for the perpetrators themselves with the limitation of their mobility without violating the rights of the perpetrators themselves, and in a global concept will increase awareness for the community and law enforcement officials.*

Keywords: Sexual Violence

1. Introduction

In 1990, Indonesia signed the *Convention on the Rights of the Child*, which was later ratified into national law. Thus, Indonesia must implement all the provisions stipulated in the convention. In essence, the purpose of the crime is to realize protection for the interests of individuals or human rights fairly protect the interests of the community against disgraceful actions by one party and from the actions of arbitrary rulers. Through Law Number 23 of 2002 concerning Child Protection (Law Number 23 of 2002), which later changed to Law Number 35 of 2014, Indonesia tries to accommodate the resolution of social problems in children, one of which is by protecting them from sexual violence.

Implementing the Act on Child Protection has not yet been realized properly. Data from the National Commission on Violence Against Women of the Republic of Indonesia in 2020 revealed that sexual violence is consistently the second most common after physical violence. One of the cases that can describe it is the rape case by Herry Wirawan against 13 underage female students. In this case, 9 out of 13 victims have even given birth to a child from the perpetrator. In his application in court, the Public Prosecutor asked for the death penalty, the announcement of the perpetrator's identity, and restitution to the victims, which was granted by the West Java High Court to give the death penalty along with restitution to the victims.

Through Government Regulation in place of Law Number 1 of 2016, the government tries to overcome the phenomenon of sexual violence against children, namely by adding the main law, namely in the form of the death penalty and life imprisonment, as well as additional punishment by announcing the identity of the perpetrator. In essence,

criminal sanctions are given to achieve the purpose of punishment itself (M. Sholehuddin, 2003, p.7). To achieve maximum goals in applying the weighting penalties, new ideas are needed that can give substantial criminal effects. In this case, asserting a unique identity for perpetrators of serious sexual crimes against children in personal documents can be one of the ideas for criminal sanctions in solving these problems.

The country that has implemented the use of sanctions for the inclusion of a unique identity on personal documents is the United States. In America, perpetrators of sexual violence against children must obtain a special passport before travelling abroad. However, the ultimate goal of the inclusion of this unique identity is to prevent the perpetrators from moving freely to create a sense of security and comfort for the community. According to Eddy OS Hiairiej, the perpetrators of the crimes were isolated so that their dangerous actions would not harm the community. Strictly speaking, government must protect the community from the evil actions of the perpetrators. According to Prins, punishment in the context of public defense must be proportional to the extent to which the perpetrator threatens public order and security (*la defense sociale et les transformations du droit penal*).

Relation to Legal Theory Framework

The research can use at least some relevant legal theories to explore the discussion on this issue. The first is the Theory of Justice which according to Aristotle, justice is a virtue that is both general and moral, which relates to how humans relate to other people. Aristotle distinguishes justice into two forms: distributive justice, which is related to public law, and collective justice, which is connected to the justification for wrongdoing, such as providing compensation. Second is the Theory of Criminal Retaliation or Retribution. In this

theory, the perpetrator of a crime must get a punishment or sanction commensurate with the crime he committed (Luthan, 2007, p.155). Immanuel Kant pioneered this theory based on moral and ethical principles.

Third, Additional Criminal in Indonesian Criminal Law. Roeslan Saleh mention the provision of additional penalties is facultative. In other words, this crime can be imposed if the provisions of the law have regulated the actions taken by the perpetrators. However, this does not become absolute if the law governs the possibility of additional penalties being imposed. If so, the judge must consider whether or not it is necessary to impose additional penalties on the perpetrator. The provision of additional penalties is also carried out with the consideration of exceptions, namely, this additional punishment is imperative (Salah, 1983, p.25 - 26). *Fourth*, Human Rights. In the *Universal Declaration of Human Rights*, human rights are defined as the recognition of the natural dignity and the equal and inalienable rights of all members of the human family, which are the basis for freedom, justice and peace in the world. However, human rights can also be limited for certain reasons. According to Dominic McGoldrick, restrictions on human rights can be done because most human rights are not absolute. Then the second reason is that these restrictions are carried out to resolve conflicts between the rights of one party and another.

Fifth, Theory of Labeling. Becker defines this theory as a consequence of the application of rules and sanctions by others to violators. This theory departs from the view that no action is intrinsically criminal. This means that the competent authorities determine the definition of crime through the formulation of laws and interpretations carried out by law enforcement officers such as the police, courts, etc. Giving a label or nickname to someone will cause stigma as a response from others to perpetrators. This stigma makes an individual disqualified from full social acceptance. The interaction between a criminal and the community certainly causes a reaction between both. Labelling the perpetrators of crimes is one of the reactions or responses to these interactions (Erving, 1963, p.3).

Sexual Violence against Children in Indonesia

According to data from the World Health Organization (WHO), in 2010, about 20% of women and 5 - 10% of men in the world experienced sexual violence during childhood. The United Nations International Children's Emergency Fund (UNICEF) (2014) revealed that around 120 million children worldwide or more than 100 children, have been victims of sexual abuse under the age of 20 years (Liginal, et. al., 2018, p.110). In Indonesia itself, the Indonesian Child Protection Commission, in 2010 noted that of the 1717 complaints that came in, 553 of them were cases of violence against children. The cases continue to increase from period to period. In 2011, cases of violence against children occurred as many as 887 cases, in 2012 as many as 1, 028, and in 2013 as many as 1, 266 cases (Liginal, et. al., 2018, p.109 - 118).

The United Nations (UN) found evidence through research in 21 countries that the violence experienced by girls is one and a half to three times higher than to boys, and the majority of violence is experienced within the family (UN,

2006). This has also been proven to occur in Indonesia. According to data from the Indonesian Pediatrician Association (IDAI), sexual violence against children that occurs at home has the largest percentage, namely 48.7%.

The high rate of sexual violence against children in Indonesia proves the urgency of regulations that can concretely protect children. In 2002 the new chapter began with the issuance of the Child Protection Act. M. Junus Lamuda stated that it was very necessary to establish this law based on the consideration that child protection in all its aspects is part of national development activities, especially in advancing the life of the nation and state. This is also in line with the awareness of Human Rights after its promulgation in 1999. Although Law Number 39 of 1999 concerning Human Rights has detailed the rights of children, the implementation of the obligations and responsibilities of parents, families, communities and the Government To protect children, it is still necessary to have a law regarding child protection as a juridical basis for the implementation of these obligations and responsibilities.

The development of child protection arrangements made progress again in 2014, which was marked by the government making changes and additions to Law Number 23 of 2002 through Law Number 35 of 2014. The addition of a substance in the new law is in the definition of violence, protection of children's rights from all forms of violence in the education unit, fulfilment of children's rights to continue to meet and have personal contact with their parents after a divorce, prohibitions against treating children discriminatory and all forms of violence (Saraswati, 2015, p.15 - 16). The rise of crimes against children in the community, one of which is sexual crimes, requires increased commitment from the government, local governments and the community as well as all stakeholders related to implementing child protection. For effective supervision of child protection, an independent institution is needed which is expected to support the government and local governments in the implementation of child protection.

The enactment of Law Number 35 of 2014 has been unable to generate clear benefits. Child observers continue to encourage the government to issue new regulations that replace old ones. In 2016, the Government finally issued Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. This regulation is often referred to as a castration regulation because its substance legitimizes additional criminal acts in the form of castration against perpetrators of sexual violence against children. In addition, regulations regarding the provision of additional penalties in the form of announcing the perpetrator's identity are also included.

The rules regarding the announcement of new identities are included as additional penalties in the ratification of Law Number 1 of 2016, namely in Article 82 paragraph (5), which reads: "*In addition to being subject to the punishment as referred to in paragraph (1) to paragraph (4), the perpetrator may be subject to additional punishment in the form of announcing the identity of the perpetrator.*". Concerning the paragraph, procedures and procedures for the application of the announcement of the identity are also

regulated. An announcement of the perpetrator's identity of a serious sexual crime can be made if it causes more than 1 (one) victim, causes serious injury, mental disorder, infectious disease, impaired or lost reproductive function, or the victim dies. However, the inclusion of the personal identity of a perpetrator of sexual violence against children has not yet become a discourse that has been ratified as a provision because it is an idea that reflects on *best practices* that have been carried out previously in other countries, so that legalization of the regulation on the inclusion of the identity of perpetrators of sexual violence against children in Indonesia need to be discussed.

Urgency of Additional Criminal Penalties in the Form of Assertion of the Identity of Child Sexual Violence Perpetrators

In Indonesia, sexual violence against children is classified as an *serious crime*. Kok - Chor - Tan argues, "*In this regard, international lawmakers are categorized acts of extreme evil as qualitatively different than ordinary common crimes insofar as their nature was much more serious*" (Tan, 2004, p.102 - 105). Crimes can be classified as extraordinary crimes when recognized as enemies of all people and nations. This is in line with Held's opinion: "*These acts seeped into the realm of extraordinary international criminality. And the perpetrator of extraordinary international crimes has become cast, rhetorically as well as legally, as an enemy of all humankind. I use both of these phrases in this book, given that they reflect dominant understandings of the wrongdoing and wrongdoers. Those acts of atrocity are characterized as extraordinary international crimes, including crimes against humanity (an appellation that neatly embodies our shared victimization), genocide, and war crimes*".

Various international conventions are carried out to fight for children's rights, especially against protection from sexual crimes. The 1999 UNCAC convention states that children should not be forced to engage in any sexual activity, may not exploit children to be traded, and prohibit the exploitation of children in pornographic activities. If analyzed more deeply, sexual violence against children is not only in physical activities but also verbally and psychologically against children. This indicates that the scope of activities categorized as sexual violence against children is very broad, because these crimes can seriously impact victims.

To see the urgency of additional punishment for perpetrators of sexual violence against children, it is necessary to first look at what dimensions are important to explain from the perspective of the perpetrators. These dimensions cover five aspects, namely: (1) *Gender*; (2) *Ages*; (3) *Persistence*; (4) *Criminal Versatility*; and (5) *Modus Operandi*. Implementing this identity announcement is to establish Law Number 1 of 2016, which is to overcome sexual violence against children, provide a deterrent effect to perpetrators, and prevent sexual violence against children. Still, in practice, the announcement of identity is considered less than optimal because the announcement involves the media. Like a double - edged sword, with the many positive impacts that the media can do on crime prevention, the media's

negative effects also relatable with its correlation to crime prevention in society.

The negative impact of announcements to the media is a moral panic that occurs when the media gives a label to a criminal, causing panic in society. Ian Marsh and Gaynor Melville view that moral panic is an overreaction of the community to respond to news so that it will create a pattern of people's habits toward what is considered excessive. Marsh and Melville thought that the situation that made the public become overreact was due to the lack of in - depth knowledge of the problem. By looking at the fact that sexual violence against children is an extraordinary crime that has a very significant impact, then the implementation of punishment for this crime should be maximized so that it can provide maximum protection and sanctions for victims and perpetrators.

Ideal Implementation of Asserting the Identity of Perpetrators of Sexual Violence Against Children

Announcement of the identity of perpetrators of sexual violence against children is a form of state duty and responsibility to society at large and victims in a narrow sense to increase awareness and concern at the same time over these heinous crimes. The idealization of asserting the identity of perpetrators of sexual violence against children must be based on the purpose of the punishment, which is not only closely related to acts of retaliation but also to efforts to improve the behavior of perpetrators of crimes (Faisal, 2021, p.291).

First, the Paradigm as a pillar of punishment is related to criminal sanctions and the purpose of sentencing. The development of the contemporary criminal law paradigm which is establishing the principle of restoration as the initial foundation of benefit - oriented criminal law, in this case is done by limiting the mobility of a person who is a criminal, which can bring benefits to the community to get a sense of security because security is part of the basic rights that the state must fulfill to the society. Constitutionally, Article 28G (1) of the constitution stipulates as: "*Everyone has the right to protection of himself, his family, honor, dignity and property under his control, and has the right to a sense of security and protection from the threat of fear to do or not do something, which is a human right.*" Based on this constitutional norm, it can be assumed that the concept of the right to a sense of security is related to personal and family self - protection, both in the context of physical and psychological integrity, including property control.

In terms of labelling to perpetrators of child sexual abuse, it will certainly have an impact on the formation of community stigma against behavior of criminals. However, according to Hadjimatheou, the stigmatization depends on how many people can see the label. The more people aware of the label, the more people can see and monitor the behavior of criminals, and vice versa. In addition, labelling is forms of punishment created to control and monitor the behavior of criminals from a social perspective. Labelling criminals can also affect the pattern of policies and the quality of policies in eradicating a crime.

Second, the assertion of identity is associated with the implementation of human rights, which cannot be applied without limitations with appropriate standards. Slamet Effendy Yusuf argues: "*In exercising his rights and freedoms, everyone is subject to the restrictions set by law for the sole purpose of guaranteeing recognition and respect for the rights and freedoms of others and to meet fair demands by considerations of morality, security and public order in a democratic society*". The assertion of the identity of the perpetrator of sexual violence on the identity card is different from *labelling* so that it does not conflict with human rights, because when there are restrictions on human rights that are attributable to laws and regulations, those restrictions are subject to and comply with the law, as described in the constitution.

Third, the imposition of severe punishment as a mere reason for retaliation (just dessert) in the context of retributive criminal law is considered appropriate for this crime. If sexual crimes against children in Indonesia are factually considered a serious crime, the form of punishment and treatment for perpetrators must also meet the category of *graviora delicta* or a very cruel serious crime. If normatively sexual crimes against children are categorized as serious crimes, then theoretically, it eliminates the consideration that perpetrators of sexual crimes against children must be fully protected. Labelling and limiting the mobilization of perpetrators of sexual crimes is a legal consequence of actions categorized as serious crimes. These sanctions have no other purpose than creating a sense of security in the community. Roebuck and Wood also agree that punishment will not be given more than what they did in retributive flow. "*That is, they agree that it is morally impermissible to impose a punishment on an offender that is more severe than the punishment that is proportionate to the seriousness of the offender's crime. They thus endorse what could be termed the 'limiting proportionality thesis': LPT: It is morally permissible to impose a punishment on an offender only if the punishment is not more severe than the punishment that is proportionate to the seriousness of the offender's crime.*".

In a retributive point of view, according to Von Hirsch and Ashworth, 3 things determine punishment for action, namely: (a) *Parity (equally serious crimes are to be punished with equal severity* (Hirsch, 2005, p.139)) (b) *rankordering (more serious crimes should receive more severe penalties);* and (c) *spacing, Parity and rank - ordering are reasonably straightforward, but spacing requires some explanation. and (what is called) 'spacing'. Parity and rank - ordering are reasonably straightforward, but spacing requires some explanation.* In this regard, the form of inclusion of identity and the impact of labelling and limitations on mobility are proportional or *equal* that can be applied to perpetrators of sexual violence. This is also similar to some forms of punishment in Indonesia which are considered severe but proportional, such as chemical castration.

2. Conclusion

- 1) Law Number 17 of 2016 concerning assignment of Government Regulation in Lieu of Law Number 1 of

2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection ("Law Number 17 of 2016") has provided child protection efforts by append additional criminal penalties to the perpetrator to provide a deterrent effect. However, in implementation, identity announcements are less than optimal since in the implementing regulations the announcement of the identity of the perpetrator involving the media which the media has not been optimally used as a means of preventing sexual violence against children, it is preferably to maximize the penalties with assertion of Personal Identity as a form of community protection, a sense of justice for the victim and finally for the benefit of perpetrator himself.

- 2) The assertion of personal identity to perpetrators of child sexual abuse is a form of suppression and limitation of human rights in accordance to the principles and norms in the constitution, so this type of supposed first be regulated in law - level rules through the revision of Law Number 17 of 2016. The ideal application of the assertion of identity to perpetrators of sexual violence against children in the personal identity of a perpetrator can be performed to identity cards such as driver's licenses, ID cards, passports (by making colors, new columns, certain signs) which describe a sign that an individual is a perpetrator of sexual violence against children and is carried out by integrating data on population data through a Single Identity Number (SIN) of Population.

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