

Legal Protection of Child as Victim of Crime of Rape

Arianus Harefa

Faculty of Law, University of Nias Raya

Corresponding Author: arisharefa86@gmail.com

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Abstract: Along with the rapid flow of globalization and the negative impact of the development of information and communication technology is the occurrence of violence against children, especially related to sexual violence, which is increasing, where since the last year (2021) cases of violence against children have been reported reaching 11,952 cases, including 58,6 percent or 7,004 were cases of sexual violence. Based on this, the aim of this research is to identify and analyze forms of legal protection for children as victims of rape. This study uses a normative legal research type using approaches (1) statutory approach, (2) case approach, (3) conceptual approach, and also (4) analytic approach, (analytical approach) with the data used, namely secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials, as well as qualitative analysis data using a descriptive, logical, and systematic approach so that they can answer problems or issues that exist and make withdrawals inductive to deductive conclusions. Based on the results of the research that legal protection for children as victims of the crime of rape in the Bandung District Court decision Number 989/Pid.Sus/2021/PN.Bdg and the Bandung High Court decision Number 86/Pid.Sus/2022/PT.Bdg on behalf of the defendant Herry Wirawan still has not provided protection to victims, especially in terms of providing compensation to victims in the form of compensation borne by the state and also fulfilling victims' rights in the form of recovery in the form of implementing both medical and social rehabilitation.

Abstrak: Seiring pesatnya arus globalisasi dan dampak negatif dari perkembangan teknologi informasi dan komunikasi adalah terjadinya kekerasan terhadap anak khususnya yang berkaitan dengan kekerasan seksual yang semakin meningkat, dimana sejak satu tahun terakhir (tahun 2021) kasus kekerasan terhadap anak yang dilaporkan mencapai 11.952 kasus, diantaranya 58,6 persen atau 7.004 adalah kasus kekerasan seksual. Berdasarkan hal tersebut yang menjadi tujuan penelitian ini adalah untuk mengetahui dan menganalisis bentuk perlindungan hukum terhadap anak sebagai korban tindak pidana perkosaan. Penelitian ini menggunakan jenis penelitian hukum normatif dengan pendekatan (1) peraturan perundang-undangan (statute approach), (2) kasus (case approach), (3) konsep (conceptual approach), dan juga (4) pendekatan analitik (analytical approach) dengan data yang digunakan yaitu data sekunder yang terdiri dari bahan hukum primer, bahan hukum sekunder dan bahan hukum tersier, serta data analisis secara kualitatif dengan pendekatan deskriptif, logis, dan sistematis sehingga dapat menjawab permasalahan atau yang isu ada serta dilakukan penarikan kesimpulan secara induktif ke deduktif. Berdasarkan hasil penelitian bahwa perlindungan hukum terhadap anak sebagai korban tindak pidana perkosaan dalam putusan Pengadilan Negeri Bandung Nomor 989/Pid.Sus/2021/PN.Bdg dan putusan Pengadilan Tinggi Bandung Nomor 86/Pid.Sus/2022/PT.Bdg atas nama terdakwa Herry Wirawan masih belum memberikan perlindungan kepada para korban terutama dalam hal memberikan



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ganti rugi kepada para korban yang dalam bentuk kompensasi yang dibebankan kepada negara dan juga pemenuhan hak-hak korban berupa pemulihan dalam bentuk penerapan rehabilitasi baik medis maupun rehabilitasi sosial.

INTRODUCTION

Children are an integral part of human survival and also the continuity of a nation and state. Children as human resources to continue the ideals of the Indonesian nation's struggle need to get the widest possible opportunity to grow and develop optimally, both physically, mentally and socially. In order to obtain these rights, legal protection efforts are urgently needed for children in order to achieve prosperity by guaranteeing the fulfillment of their rights without discriminatory treatment.

Article 28 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (IV Amendment) stipulates that the state guarantees children's rights to survival, growth and development, as well as protection against acts of violence and discrimination. This means that parents, society and the state (government) have an obligation to provide protection for children to be free from various forms of threats of violence, both physical violence and threats of psycho-logical violence.

Along with the rapid flow of globalization and the negative impact of the development of information and communication technology, violence against children, especially those related to sexual violence, has increased sharply, where since the last year that cases of violence against children based on data for 2021 were recorded, cases of violence against children which reported 11,952 cases. Where as much as 58.6 percent or 7,004 of them were cases of sexual violence. There are many victims who do not report rape or are even reluctant to report it for certain reasons, for example; First, the perpetrators were

closest to the victim, the two families did not want to report because they did not know where to report, and the law enforcers actually complicated the process. Third, the infrastructure in the area still could not reach the victim (Kompas com).

An example of a case in the decision of the Bandung District Court Number 989/Pid.Sus/ 2021/PN.Bdg and the decision of the Bandung High Court Number 86/Pid.Sus/2022/PT.Bdg on behalf of the defendant Herry Wirawan in the crime of rape of a minor age. Where this case really shocked the community because it was carried out by an unscrupulous teacher as well as the owner of a boarding school who actually provided protection in the form of educating children to have morals, guiding them well, but in fact the defendant committed the act of raping his own students with victims totaling 13 students under the age.

This case appeared in early December 2021 and became news that caught the public's attention. Where the actions taken by Herry were carried out within a period of five years, namely from 2016 to 2021. During this period, Herry carried out his actions by enticing them to pay for the living expenses of the victims at the Islamic boarding school to tuition fees. This case was revealed to have started when one of the victims told the family what happened to him, so the family immediately reported the incident to the West Java Regional Police and the Garut Women and Children Empowerment Integrated Service Center (P2TP2A). The defendant Herry Wirawan was proven to have committed the crime of rape against a minor by causing 13 (thirteen) of his students to become pregnant and give birth. Then the defendant was also suspected of misusing social assistance and the Smart Indonesia Program from the Ministry of Religion to deceive his actions.

Based on the decision of the Bandung District Court which sentenced the defendant (Herry Wirawan) to life imprisonment, then imposed restitution on the Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia to be paid to 13 (thirteen) santri (children as) victims of rape, the decision was controversial in the community, then the public prosecutor filed an appeal at the Bandung High Court (PT) with a decision, namely; firstly Improving the Bandung District Court's decision from life imprisonment to death penalty, secondly Imposing restitution to the Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia to be borne by the defendant (Herry Wirawan) by paying a total of Rp. 300 million in compensation to the 13 victims, thirdly Confiscation of property or assets the accused to be confiscated and auctioned off and the results handed over to the Government cq. The Regional Government of the Province of Barut Java to be used as educational expenses and for the survival of the victim's children and their babies until they are adults.

The crime of rape against children in general (genus or general) is regulated in the Criminal Code (KUHP) in book II regarding crimes in Article 285 and Article 287 paragraph (1). Article 285 of the Criminal Code determines:

"Whoever uses violence and threats of violence to force a woman who is not his wife to have intercourse with him, is threatened with committing rape with a maximum imprisonment of twelve years."

Whereas Article 287 paragraph (1) of the Criminal Code determines:

"Whoever has intercourse with a woman who is not his wife, he knows or should reasonably suspect, that the woman is

not yet 15 years old, if it is not clear how old she is, that the woman is not yet marriageable, shall be punished with a maximum imprisonment of nine years."

While the crime of rape against children is specifically regulated (specialist) in Law Number 17 of 2016 on Amendments to Law Number 35 of 2014 concerning Child Protection in Article 81 jo. Article 76 D and Article 76 E. Article 81 of the Child Protection Law determines, namely:

- (1) *Any person who violates the provisions referred to in Article 76 D shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of 5,000,000,000.00- (five billion rupiahs)*
- (2) *The criminal provisions as referred to in paragraph (1) also apply to anyone who intentionally commits deception. A series of lies, or persuading a child to have intercourse with him or with someone else.*
- (3) *In the event that the crime referred to in paragraph (1) is committed by a parent, guardian, babysitter, educator, or education staff, then the penalty shall be added to 1/3 (one third) of the criminal penalty referred to in paragraph (1).*

While Article 76 D and E of the Child Protection Law, namely: Article 76 D stipulates that:

Everyone is prohibited from using violence or threats of violence to force a child to have intercourse with him or with another person. Whereas Article 76 E stipulates that: Everyone is prohibited from committing violence or threats of violence, forcing, tricking, committing a series of lies, or persuading a child to commit or allow obscene acts to be carried out.

Rape can be interpreted as an act of forcefully subduing a woman who is not his wife to have intercourse. So, the main element in the act of rape is that the victim is not the wife of the perpetrator who is forced to have intercourse with the perpetrator, and because there is refusal by putting up a fight, the perpetrator uses violence or threats of violence to achieve his goals. Committing violence in this case can be interpreted as an act that uses great or strong force, for example: hitting with the hand, kicking, and so on, as is regulated according to the provisions of Article 89 of the Criminal Code. The definition of violence referred to in Article 285 of the Criminal Code is different from the meaning in Article 89 of the Criminal Code. The definition of violence according to Article 285 of the Criminal Code is not only physical violence but includes psychological violence, which can make a person faint or lose consciousness. Not only using energy that can achieve the intended goal but can also use threats that can cause feelings of fear and pressure.

The trial process for the criminal act of rape with other criminal acts is the same. It's just that the trial process for the criminal act of rape is closed to the public (trial closed to the public) because the criminal act of rape is included in a case of decency, as stipulated in Article 153 paragraph (3) of the Criminal Procedure Code. In order to prove that the elements contained in the crime of rape in Article 285 of the Criminal Code have been fulfilled, all available evidence can be fulfilled.

The elements that must be proven in Article 285 of the Criminal Code are: (1) Whoever, (2) Using violence or threats of violence to force a woman who is not his wife to have sex with him.

There are difficulties in proving that rape has occurred, namely there are no

witnesses other than the victim himself and the defendant does not want to admit that the act has been committed, or the defendant argues that the act was consensual.

METHODS

This study uses a type of normative legal research. Normative legal research is also called doctrinal legal research through library research by collecting secondary data as a basis for research by conducting a search of statutory regulations and literature relating to the issues studied. Normative legal research is a process of seeking and discovering legal rules, legal principles, and legal doctrines in order to answer the legal issues at hand. Normative legal research usually uses approaches (1) statutory approach, (2) case approach, (3) conceptual approach, and also (4) analytical approach (analytical approach). The data used in normative legal research is secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. By analyzing descriptive qualitative data, legal materials were collected, arranged and grouped, then analyzed descriptively, logically and systematically so that they could answer existing problems or issues and draw conclusions inductively to deductively.

RESULTS AND DISCUSSION

Legal protection for children as victims of the crime of rape is that in general legal protection is the provision of protection for the rights of every human being who is harmed by other people. Legal protection is also an illustration of several legal functions to realize a goal of obtaining justice and legal certainty for the community and can be given to legal subjects in accordance with the rules that apply. In the principle of ordinary criminal law enforcement, legal protection is not only for the victim, but also for the

perpetrator, because the legal protection in question is the fulfillment of the rights of both the victim and the rights of the perpetrator, starting from the examination stage at the investigation level, the prosecution stage, and the stage of examination at trial, up to the stage of criminal execution in correctional institutions.

According to Satjipto Rahardjo legal protection is giving a right to protect the basic rights of every human being who has been harmed by others and this legal protection is given to all people despite cultural and religious differences to get their rights properly. (Rahardjo, 1983). Meanwhile, according to Muktie, A. Fadjar said that legal protection is a protection that is given regarding legal rights and has an obligation to protect the rights of fellow human beings in society because humans are based on their nature as legal subjects (Muktie, 2017).

Therefore, legal protection for children as victims of rape in the Bandung District Court decision Number 989/Pid.Sus/2021/PN.Bdg and Bandung High Court decision Number 86/Pid. Sus/2022/PT.Bdg on behalf of the defendant Herry Wirawan as described in the data below, namely:

Analysis of the Indictment of the Public Prosecutor (JPU)

Based on the position case regarding the crime of rape committed by Herry Wirawan with victims of minors, totaling 13 (thirteen) people. As a result of the defendant's actions, the Bandung District Attorney through the Public Prosecutor (JPU) has compiled an indictment carefully, clearly and completely in accordance with Article 143 paragraph (2) of the Criminal Procedure Code, in the form of an Alternative indictment (based on the decision of the Supreme Court of the Republic of Indonesia Number 86 K/Pid/1982 and the decision of the

Supreme Court of the Republic of Indonesia Number 606 K/Pid/1984, (Lilik Mulyadi: 2007; 114) Primary indictment pursuant to Article 81 paragraph (1) and paragraph (3) in conjunction with Article 76.D of the Law Republic of Indonesia Number 17 of 2016 concerning Amendments to Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection in conjunction with Article 65 paragraph (1) of the Criminal Code, and Subsidiary Charges in accordance with Article 81 paragraph (2) and paragraph (3) jo Article 76 .D Law of the Republic of Indonesia Number 17 of 2016 concerning Amendments to Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection in conjunction with Article 65 paragraph (1) of the Criminal Code.

Public Prosecutor's Claims

After the public prosecutor read out his indictment at trial and proved the defendant's actions, both material and formal criminal acts, and also listened to the statements of the victim's children presented at trial, the public prosecutor prosecuted the defendant by asking the panel of judges to: (1) Declare the defendant Herry Wirawan proven guilty of committing the crime of rape as stated in the Primary Indictment; (2) Sentenced against the defendant with death penalty; (3) Imposing additional punishment on the defendant in the form of chemical castration; (4) Sentenced a fine of Rp. 500,000,000.- (five hundred million rupiahs) against the defendant; (5) Obliging and burdening the accused to pay restitution to each victim; (6) Freeze, revoke and dissolve the Manarul Huda Orphanage Foundation, Synergy Complex, Jalan Comfort No. 34 Parakan in Antapani, Central Bandung; (7) Confiscate the defendant's assets/ assets in the form of Tahfidz Madani Boarding School Islamic Boarding School land and buildings and other assets, both those that have been confiscated and those that have not been confiscated, to be auctioned and the results

submitted to the state Cq. The West Java Provincial Government will pay for school fees and the survival of the victim's children and their babies.

Consideration of the Judge's Decision

The court's decision is the judge's crown and the essence of the crown lies in the legal considerations. The essence of legal considerations or considerations of a decision is the most important part of a decision, because it is the responsibility of the judge for his decision. In legal considerations, it contains legal reasoning and legal reasoning. Various legal constructions and interpretations are used as the basis for arguments in assessing and testing the evidence presented in court. Between the arguments or legal basis a verification test is carried out with the legal facts revealed in court, by applying the theory of truth and justice.

The theory of truth that is applied in legal considerations, namely (1) the theory of correspondent truth, namely the correspondence between what is said and reality. The construction of thinking is proven by finding relevant relationships with others. (2) the tendency theory emphasizes the duality between subject and object, which means that it emphasizes more on the importance of objects for truth. (3) theories that emphasize evidence or evidence for truth. The three theories, justification (proof), is the process of presenting supporting facts or propositions or hypotheses. This means that all statements, propositions, or hypotheses that are not supported by empirical evidence, by any factual fact, are not considered true. Coherent truth states that something is stated to be true if there is an agreement between rational meaning with a particular object.

The judge's consideration is one of the most important aspects in determining the realization of the value of a judge's

decision which contains justice (*exaequo et bono*) and contains legal certainty, besides that it also contains benefits for the parties concerned so that this judge's consideration must be addressed carefully, either, and careful. Therefore, before the judge makes a decision, the judge must consider juridically and sociologically (non juridically), as well as philosophically the actions of the accused and take care of the facts that were revealed during the examination process at trial.

Judgmental judgement by the defendant Herry Wirawan where in the primary indictment the public prosecutor proved and fulfilled the elements of Article 81 paragraph (1) and paragraph (3) jo. Article 76. D Law No. 17 of 2016 Amendments to Number 35 of 2014 concerning Child Protection jo. Article 65 paragraph (1) of the Criminal Code, so that he is blamed for violating the provisions of the criminal law regulations as referred to in the Public Prosecutor's primary indictment.

While the judge's sociological considerations in the case on behalf of the defendant Herry Wirawan, are the judge's assessment of the facts revealed during the examination process in court, for example the form of the perpetrator's mistake, the motive and purpose of committing the crime, the perpetrator's mental attitude, life history or social or economic condition of the perpetrator, the influence of a crime on the victim or the victim's family, and the legal values that exist in society. After assessing these matters, the judge passed a decision by taking into account the light weight of the criminal sentence given to the perpetrator. In the case of Herry Wirawan, the judge's sociological considerations, namely the judge's assessment during the examination process at trial and also the facts that were revealed, there was an agreement between evidence and evidence in evidence, so that the judge's

considerations juridically and non-juridically (sociologically) are one unity that cannot be separated and fulfills the requirements for imposing a sentencing decision in Article 183 of the Criminal Code which states that "a judge in passing a decision on a defendant, at least 2 (two) pieces of evidence plus the judge's conviction" this is in accordance with the *wettelijke bewijstheori* negative proof theory. And then during the examination process the defendant did not show a regretful attitude, the defendant's actions were an act that was not commendable where the defendant as a teacher and foundation owner should provide protection, provide good examples to his students and also to the community, but instead the defendant destroyed the future of the victim's children.

While the judge's considerations are philosophical, namely considerations or elements that focus on the value of justice for the defendant and the victim for the defendant's actions, namely that the judge's assessment during the examination of the defendant at trial sees and pays more attention to the meaning and purpose of the sentence imposed on the perpetrator, considering the crime of rape against a child. What's happening lately is very worrying, because in practice it doesn't only happen in the surrounding community, for example in government offices, private offices, in schools, campuses, even in the family environment. Observing this situation so that the judge in imposing a sentencing decision on the perpetrator must consider the philosophical meaning or the nature of the purpose of giving a sentence. In theory, the essence of the purpose of giving punishment to perpetrators is as revenge for their actions, as a deterrent effect on perpetrators, and to improve the perpetrators of evil deeds.

Philosophically the judge's conside-

ration of the defendant as the perpetrator of the crime of rape against 13 (thirteen) children of the santri until the victim's child gave birth and experienced trauma, loss of self confidence. Therefore, the judge's philosophical considerations of the defendant's actions are more likely to consider the purpose of sentencing as re-ompense for the defendant's actions, so that a death penalty is imposed on him and added to other crimes in the form of restitution.

Law Enforcement for Actors

Law enforcement for perpetrators of the crime of rape of minors for violating Article 81 paragraph (1) and paragraph (3) jo. Article 76.D Law no. 17 of 2016 Amendments to Number 35 of 2014 concerning Child Protection jo. Article 65 paragraphs (1) and (1) of the Criminal Code. In proving at trial that the defendant who was proven legally and convincingly violated the provisions of laws and regulations as in the primary indictment of the Public Prosecutor and the formulation of Article 81 paragraph (1) and (3) of the Child Protection Law, with a minimum prison sentence of 5 (five) years and maximum 15 (fifteen years). Then the defendant's actions were actions that were not commendable as an educator who should have provided protection, fostered and educated the victim's child, and the defendant's actions were carried out repeatedly to other victims so that they were seen as stand-alone acts as referred to in Article 65 paragraph (1) and paragraph (2) of the Criminal Code, which determines:

"In a combination of several acts, each of which must be seen as an act separately and each being a crime threatened with a similar main punishment, only one sentence shall be imposed with the addition of one third".

This means that the main punishment

imposed on the defendant in Article 81 paragraph (1) in conjunction with 65 paragraph (2) of the Criminal Code, namely the threat of imprisonment for 15 (fifteen years) plus one third, is equal to 20 (twenty years). So, in fact the penalty for imprisonment for the defendant is 20 (twenty years). However, in the judge's decision, the verdict was much heavier when compared to the formulation of Article 81 paragraph (3) of the Child Protection Law jo. Article 65 paragraph (2) of the Criminal Code, namely the judge imposes a death sentence on the perpetrator and also additional laws in the form of payment of restitution to the victims and confiscation of the perpetrator's assets. If you look closely at the Bandung High Court judge's decision on case decision Number 86/Pid.Sus/22/PT.Bdg, then the sentence handed down by the judge greatly exceeded his authority and violated the basic legal principles as stipulated in Article 1 paragraph (1) of the Constitution. The Republic of Indonesia determines that Indonesia is a rule of law country, and violates Article 67 of the Criminal Code which is the main criminal law applicable in Indonesia, determines that:

"If the judge imposes a death sentence or life imprisonment, then with that, no other punishment may be imposed other than revocation of certain rights, seizing goods that have been confiscated, and announcing the judge's decision."

The aim is to prohibit or limit the power and authority of judges, to show that the laws in force in Indonesia are a reflection of the values of Pancasila as the soul and spiritual principle of the nation and state of Indonesia which are obliged to uphold human rights and fulfill those rights. rights of every citizen without exception.

Victim Self Recovery

Legal protection for victims of rape in the criminal justice system in Indonesia is often neglected, in fact what is paid attention to or maintained is the more dominant interests of the perpetrators' rights, so that it does not provide balanced justice to everyone whose rights or interests have been violated. In cases Number 989/Pid.Sus/ 2021/PN.Bdg and Number 86/Pid. Sus/2022/PT.Bdg in the name of the defendant Herry Wirawan as the perpetrator of the crime of rape against 13 (thirteen) minors of sanstrai. The panel of judges' decision did not give a decision in the form of self-recovery for the child victims of rape, instead the panel of judges handed down a death sentence to the perpetrators, while the victims experienced trauma and lost self-confidence.

To restore the condition of the victims, the panel of judges who examined, tried and decided on the case should provide protection to victims as much as possible through the implementation of rehabilitation both medically and socially as stipulated in Law Number 35 of 2014 concerning Child Protection.

Payment of Compensation to Victims

Protection of children as victims of rape can be in the form of compensation in the form of restitution or compensation. Compensation for victims is in accordance with the mandate of Government Regulation Number 35 of 2020 concerning Amendments to Government Regulation Number 7 of 2018 concerning Provision of Compensation, Restitution and Assistance to Witness Victims.

In order to be able to provide compensation to the children as victims of the crime of rape, the Public Prosecutor (JPU) must apply through his demands to the panel of judges so that the rights of the victims can be fulfilled. Through the

judge's decision, the prosecutor can grant the prosecutor's demands in which restitution is charged to the perpetrator to pay, and compensation is charged to the state for the failure to provide protection to the victims, as formulated in the Preamble to the 1945 Constitution which stipulates that one of the goals of the state (purpose national) namely protecting the entire Indonesian nation and all spilled from Indonesia.

In the case of children as victims of the crime of rape committed by the defendant Herry Wirawan it can be considered that the state has neglected to provide protection to the victims, so that the state can be held accountable in the form of providing compensation to the victims until they reach adulthood. This compensation is an integral part of human rights in the field of welfare and social security for victims.

CONCLUSION

Based on the results of the research findings, it shows that legal protection for children as victims of the crime of rape in the Bandung District Court decision Number 989/Pid.Sus/2021/PN.Bdg and the Bandung High Court decision Number 86/Pid.Sus/ 2022/PT.Bdg on the name of the defendant Herry Wirawan is that he still has not provided protection to the victims, especially in terms of providing compensation to the victims in the form of compensation charged to the state and also fulfilling the rights of victims in the form of recovery in the form of implementing rehabilitation both medical and social rehabilitation, as well as imposition punishment in the form of capital punishment and payment of restitution to victims and confiscation of assets of the accused are considered by the judge's decision to violate the values of justice in constitutional law in Article 81 paragraph (3) of the Child Protection Act in conjunction with Article 65 paragraph

(2) of the Indonesian Criminal Code Indonesian Criminal.

SUGGESTION

Based on these conclusions, the suggestions for this research are: (a) judges in trying, examining and deciding cases of rape against minors should be more careful and thorough and more progressive in order to provide protection to victims, (b) the government together with the DPR need to make changes to the Law on Protection so that the rights of children as victims of crime get protection from the state.

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