

DEATH PENALTY FOR PERPETRATORS OF CHILD SEXUAL VIOLENCE (CASE STUDY OF DECISION NUMBER 5642 K/PID.SUS/2022)

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Abstract

The increasing number of cases of sexual violence against minors has made the government required to make new regulations regarding child protection in order to deter the perpetrators. This study aims to explain the application of the death penalty against perpetrators of sexual violence against children in the perspective of law and legal experts as well as the judge's consideration in deciding the criminal case. The object used in this research is Judge Decision Number 5642 K/PID.SUS/2022 and the law regarding the application of the death penalty against child sex offenders. The type of data used is secondary data obtained from legal literature sources regarding child protection and sexual violence. The method used to analyze this research is normative qualitative research method. The application of the death penalty according to the law does not violate the existing rules but is a punishment that has been regulated in it. Another case with one of the legal experts in the field of human rights who stated that the application of the penalty does not reflect the protection of human rights and overrides the interests of protecting the rights of victims.

Keywords: Death Penalty, Sexual Violence, Children

1. Introduction

In general, sexual violence is interpreted as an act that harasses or attacks a person's body, sexual desire or reproductive function, which is contrary to a person's wishes, resulting in physical and psychological suffering. The two factors of this crime are the coercion of the act according to the will of the perpetrator and the helplessness of the victim in giving consent. Typically in the form of rape, sexualized gestures, sexual comments and so on, it often happens to women or children. A child can become a victim of sexual violence that is in fact committed by an adult because his mind and mind have not been able to develop perfectly. Children should be guaranteed protection by the state to avoid discrimination and also monitor their development and fulfill their rights.

According to the results of the 2016 MaPPI FHUI Sense of Justice Survey, most of these crimes are committed by certain individuals such as friends, boyfriends, family, relatives, and even teachers. And there are more female victims because they are seen as the main target by the perpetrators. In addition, research by Charlotte Watts and Cathy Zimmerman states that the high rate of sexual violence against women worldwide indicates that this crime has been experienced by millions of women.

The 1998-2013 span in Indonesia recorded 400,939 cases, and almost a quarter of those cases have occurred during that period. The National Commission on Women received reports of an increase from 1,413 to 2,389 cases in 2019. Then it increased by 8 times in 2020. The District and Religious Courts recorded 291,677 cases, and Komnas Perempuan's partner organizations handled 8,234 cases. KemenPPPA data shows that

there are around 797 cases involving children, which accounts for 9.13% of the total 8,730 cases in 2021. Furthermore, only in the 2022 Annual Report, there were reports of 338.486 cases involving women.

From the description of the data on cases of sexual violence above, it has proven that there are still many cases that may not have been recorded at the women's and children's protection agency. as in the following case that is widely discussed. Located at the Madani Tahfidz Islamic Boarding School with 13 female students as victims, where it was reported that 9 were pregnant and even gave birth to children. The crime was revealed after one of the victims reported the perpetrator Herry Wirawan. Then the case rose to the realm of law at the Bandung District Court in 2021, with an initial sentence of life. Then it became a death sentence at the local High Court because the prosecutor filed an appeal against the case. Herry filed an appeal, but was rejected by the panel of judges with the same sentence as before.

These cases cannot be underestimated, so the government needs to improve regulations to reduce the number of these crimes. The government has passed Law No. 17/2016 on Child Protection as a ratification of PERPPU No. 1/2016. This law regulates the addition of basic criminal penalties and additional penalties for perpetrators. The most severe punishment that is regulated is the death penalty, of course in its application this punishment is subject to certain conditions and criteria.

In the context of the application of death penalty, there are views that support and oppose it because it is considered to have too much risk in its implementation in Indonesia. Wrong decision making can have fatal consequences, because lives that have been lost cannot be returned. The government in issuing the latest law on child protection is not only intended to protect the rights of children, but also to provide a deterrent effect to criminals through the addition of the existing punishment system.

2. Theoretical Background

Criminal Liability Theory

In criminal law, the concept of "responsibility" is a central concept known as the doctrine of guilt. In Latin, this doctrine of guilt is known as *mens rea*. The *mens rea* doctrine is based on an act that does not make a person guilty unless the person's mind is evil. Based on this principle, there are two conditions that must be met in order to punish someone, namely there is an outward act/criminal act that is prohibited (*actus reus*), and there is an evil/disconnected inner attitude (*mens rea*).

So that a person who commits a criminal offense can be convicted if he meets the condition that the criminal act he committed fulfills the elements specified in the law. When viewed from the occurrence of a prohibited act, a person will be held accountable for the act, if the act committed is not against the law and there is no reason to justify or negate the nature of the unlawful act committed. And if seen from the ability to be responsible, then only people who are capable of being responsible can be held accountable for their actions.

Absolute Theory

This theory is imposed because the person has committed a criminal offense, and this theory was initiated by Kant and Hegel. Absolute theory is based on the idea that punishment is not intended to be used for practical purposes, such as to make criminals good but punishment is a demand that really starts, not only on something that needs to

be determined but has become a necessity, in the sense that the essence of punishment is retaliation (revenge).

In this theory emphasizes that sanctions in the realm of criminal law are imposed solely because the person has committed a crime which is an absolute consequence of what must exist as a form of retaliation against people who have committed crimes so that the consequences of sanctions here aim to fulfill the demands of justice.

The theory of retaliation illustrates that punishment does not focus on something practical. However, the crime itself contains elements for the imposition of punishment. Punishment is absolutely necessary, because of the action of a crime. There is no need to think about what the benefits of imposing punishment are because every crime must have consequences which will be imposed on violators. Therefore, this theory is called as absolute theory. It can be concluded that punishment is an absolute prosecution, but not just something that needs to be imposed but it has become a necessity, and basically the essence of a punishment is retaliation.

3. Methods

The research in this journal is normative legal research. Normative legal research is a process for finding legal rules, legal principles, in order to answer legal problems, normative legal research is carried out to produce new arguments, theories or concepts as prescriptions (assessments) in the problem at hand (Pater Mahmud Marzuki). The nature of the research is qualitative, namely the process of analyzing a series of data that has been arranged systematically and according to its classification by formulating it into a sentence description.

The approaches used are statute approach and case approach. The statutory approach is carried out by examining all regulations relevant to the legal issues discussed and for the case approach is carried out by examining cases related to the legal issues at hand and have become court decisions with permanent force (inkracht).

The sources of legal materials in this research are primary legal materials derived from laws and regulations related to the issues discussed such as Law Number 17 of 2016 concerning Child Protection and Supreme Court Decision Number 5642 K/PID.SUS/2022. Secondary legal materials are obtained through printed or online journals (open journal system), theses, theses, dissertations or others related to the research discussed. Tertiary legal materials are obtained through dictionaries or the internet.

The data collection technique uses documentation in the form of a proof process based on the type of written, oral or picture sources. Data processing techniques are carried out by reducing data, editing data, and presenting data in the form of narrative text to make it easier to draw a conclusion from the research.

4. Results and Discussion

Application of the Death Penalty to Perpetrators of Sexual Violence against Children: Law and Jurists Perspective

Crimes are committed intentionally against the law so that they can be punished and accounted for in terms of their actions (Simons). In addition, it can be an unlawful act carried out with a plan or without a plan and the individual who commits it is subject to punishment (Pompe). The term "criminal act" refers to a prohibited act and is threatened with special criminal punishment for anyone who violates it (Moeljatno). In another opinion, "punishment" has the same meaning as "criminal sanction" (Sudarto).

In the juridical-normative context, the provision of death penalty in Indonesia is contained in Article 10 of the Criminal Code, which is the main punishment. The implementation of the death penalty in accordance with Article 11 of the Criminal Code is carried out by wrapping a rope around a stake on the neck of the convicted person then the convicted person's pedestal is dropped by an executioner. In Article 10 of the KUHP, death penalty is justified as the heaviest punishment in the Indonesian legal system and is often referred to as the law of retaliation. The punishment is also regulated in other regulations. There are restrictions on its application because the United Nations (UN) issued the "Guarantee of Protection for Those on Death Row". This guide explains the practice of the death penalty which falls under the International Convention on Civil and Political Rights.

The limitations that exist in the application of the death penalty include:

- a. In countries where the death penalty has not been abolished, its use is restricted to very serious crimes;
- b. The imposition of death penalty is only in criminal offenses whose punishment has been determined in the verdict given at the time of the criminal offense;
- c. The death penalty is not imposed on individuals under 18 years of age, pregnant women, or individuals with mental disorders;
- d. Only people who are charged with strong evidence and facts, without any alternative explanation, can be sentenced to death;
- e. The death penalty is only imposed as a final decision by a court that has the authority after passing a legal process that guarantees fair treatment in court;
- f. Defendants sentenced to death have the right to appeal to a higher court and ensure that the process is carried out;
- g. Every individual who is sanctioned with the death penalty has the right to express apology and sentence reduction;
- h. There is no delay in the imposition of the death penalty during the appeal stage or any other stage of the process;

The legal conception of the death penalty reflects a view that considers the law as a concept that is analyzed based on absolute theory in its analytical perspective and relative theory in its fearful perspective aimed at maintaining public security. In the absolute theory, it states that a punishment is a form of retaliation for the wrong that has been committed. In this theory, the purpose of retaliation is to punish the perpetrator of the crime which will produce a deterrent effect. Immanuel Kant is one of the figures who introduced this concept with the phrase "Fiat justitia ruat coelum" which means that justice must be upheld even though the sky will fall.

In order to realize the values of Pancasila and the 1945 Constitution, Law No. 17/2016 was legally enacted. In immoral crimes that include victims and perpetrators who are children or minors, their identities are kept confidential to protect and prevent the disclosure of their personal information. In child protection regulations, there are provisions from Article 20 to Article 26 that regulate the obligations of the state, parents, or guardians in protecting the life of a child. The purpose of these provisions is to safeguard children's rights and prevent them from being harmed.

Based on Law Number 17 of 2016 concerning Child Protection, there are rules related to sexual violence against children, which are explained in Article 76D which reads: "Every person is prohibited from committing violence or threatening violence to force a child to have sexual intercourse with him/her or with another person."

In addition, there are regulations regarding the death penalty for perpetrators of sexual violence which are regulated as follows (Article 81 paragraph 5):

- (5) In the event that the criminal offense as referred to in Article 76D causes victims of more than 1 (one) person, results in serious injury, mental disorder, infectious disease, disruption or loss of reproductive function, and/or the death of the victim, the perpetrator shall be sentenced to death, life imprisonment, or imprisonment for a minimum of 10 (ten) years and a maximum of 20 (twenty) years;

In this article, for this crime, the actions taken by the perpetrator must reach the maximum provisions, namely causing more than one victim and serious injury or death. In its implementation, there are procedures that regulate the death penalty in accordance with the provisions in Law Number 17 of 2016 as follows:

- a. The application of the death penalty only applies to certain crimes;
- b. Judges at the court of first instance are responsible for deciding the death penalty, while the accused has the right to appeal and cassation to the Supreme Court;
- c. The death penalty is given as the highest sanction for some crimes and is only applied in very serious circumstances;
- d. The execution of the death penalty is carried out through lethal injection, using procedures and supervision to ensure that the sentence is carried out humanely;
- e. Prior to execution, in accordance with applicable law, rights are given to prisoners subject to the death penalty;
- f. The execution of the death penalty is carried out at a location determined by the Minister of Law and Human Rights, accompanied by medical personnel and witnesses who are present;
- g. Prior to the execution of the death penalty, the defendant has the right to apply for clemency or sentence reduction to the President;

The implementation of the death penalty in Indonesia is in accordance with established procedures. Not all criminal offenses are punishable by death penalty, but only certain criminal offenses that meet the predetermined criteria. The case that befell 13 female students committed by Herry Wirawan is a very extraordinary case. So that the panel of judges imposed Article 81 paragraph (1), (3) and (5) in conjunction with Article 76D of Law Number 17 of 2016 in conjunction with Article 65 paragraph (1) of the Criminal Code.

Law Number 17 of 2016 on the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection, states in Article 81 paragraphs (1), (3), and (5) which reads:

"(1) Every person who violates the provisions as referred to in Article 76D shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).

(3) In the event that the criminal offense as referred to in paragraph (1) is committed by parents, guardians, persons having family relationship, child caregivers, educators, education personnel, apparatus handling child protection, or committed by more than one person jointly, the punishment shall be increased by 1/3 (one third) of the punishment as referred to in paragraph (1).

(5) In the event that the criminal offense as referred to in Article 76D causes the victim of more than 1 (one) person, results in serious injury, mental disorder, infectious disease, impaired or loss of reproductive function, and/or the victim dies, the perpetrator shall be punished with death penalty, life imprisonment, or imprisonment for a minimum of 10 (ten) years and a maximum of 20 (twenty) years."

Based on the provisions contained in Article 81, the death penalty decision given to the defendant Herry Wirawan for the most serious crime he committed, was the result of a valid decision by the panel of judges.

As in the application of regulations and penalties, there are often debates about the pros and cons, including in the application of the death penalty. Some parties support the application of the death penalty such as the Deputy for Special Protection of Children of the Ministry of Women's Empowerment and Child Protection (KemenPPPA), namely Nahar, stating that the demand for the death penalty against Herry Wirawan is seen as a very serious form of crime marked by the submission of a death penalty charge by the public prosecutor, he hopes that the trial process can run well, justice can be upheld, and the rights of child victims can be restored.

Likewise, the Minister of Women's Empowerment and Child Protection, Bintang Puspayoga, appreciated the prosecutor's charges in the Herry Wirawan case. He considered the charges to be in line with the crimes committed by the perpetrators and also serve as a preventive measure against the increase of sexual violence cases in the future. He also stated that the proposed charges were among the most severe punishments, and hoped that other judges could give verdicts that were in accordance with the applicable laws.

There are also opinions that oppose the implementation of the death penalty. As conveyed by Ahmad Taufik Damanik as Chairman of Komnas HAM, that the judge needs to consider certain things. According to him, Komnas HAM as a state institution in the field of human rights reminds law enforcers to further consider abolishing the death penalty. Because this can provide an opportunity for the perpetrator to evaluate his attitude for the better.

Likewise, said Maidina Rahmawati, a researcher from the Institute for Criminal Justice Reform (ICJR), that the death penalty is not a solution for victims of sexual violence. According to her, the application of this penalty can divert the state's attention from important needs for victims. Efforts to pay restitution to victims are considered an urgency compared to the application of the death penalty.

As previously described, there are supporters or opponents of the application of the death penalty. As a preventive measure, the death penalty can influence offenders to rethink before committing similar crimes. In order to provide maximum protection to the community, the application of the death penalty is considered an effective measure to protect the community from individuals who commit heinous acts of sexual crimes.

This is important to maintain the integrity of the legal system and emphasize that such actions have consequences. The principle of retributive justice is the reason some parties support the application of the death penalty for perpetrators of child sexual abuse. This view is in line with the community's desire to punish the perpetrators as severely as possible.

Legal Considerations for Judges in Deciding Child Sex Violence Cases

Based on Decision Number 989/Pid.Sus/2021/PN.Bdg, in reviewing the evidence presented at trial, it will be assessed whether the defendant is proven to have committed a criminal offense in accordance with the charges filed by the public prosecutor. As stated in the Decision, the charges filed by the public prosecutor include:

It is stated that the Defendant has been proven guilty of committing the crime of violence in the form of sexual intercourse with a child, in accordance with the provisions and threats regulated by Article 81 paragraph (1), paragraph (3), and paragraph (5) jo

Article 76D of Law Number 17 of 2016 jo Article 65 paragraph (1) of the Criminal Code. Impose a criminal sentence in the form of the death penalty. The defendant is also required to pay restitution to the victim's child. In addition, the dissolution of the Foundation and Islamic Boarding School that has been managed by the Defendant and confiscation of the Defendant's assets.

Based on the charges of the public prosecutor, in its decision the Panel of Judges stated that the Defendant was proven to have committed the crime of "forcing a child to have sexual intercourse with him causing more than 1 (one) victim repeatedly". As punishment, the Defendant was sentenced to life imprisonment and detention. In addition, the Defendant was also required to pay restitution to the government in accordance with the charges.

Pursuant to Article 67 of the Criminal Code, a Defendant who receives a life sentence cannot be subject to additional punishment despite having committed an unlawful act, however, the imposition of punishment must be proportional. In this case, considering that the victims have suffered psychological trauma, the Panel of Judges is of the opinion that any form of physical contact or meeting between the Defendant and his victims will result in increasing the existing trauma. Therefore, they decided to sentence the Defendant to life imprisonment.

The Public Prosecutor for this decision filed an Appeal to the Bandung High Court, as stated in the Memorandum of Appeal in Decision Number 86/Pid.Sus/2022/PT.Bdg. The verdict of life imprisonment is considered not to fulfill justice for the victims. The burden of restitution cannot be imposed on the government but can only be imposed on the Defendant because it is contrary to the existing rules. In addition, it has an impact on the defendant who does not feel the deterrent effect. Freezing and revocation of the Defendant's rights to the managed Foundation, used to cover the shortfall in restitution payments by auctioning the land and buildings.

The Panel of Judges has granted the appeal filed by the Prosecutor and corrected the District Court Decision regarding the defendant's sentence. Subsequently, it ordered that the death penalty be imposed on the Defendant, as well as the imposition of restitution, confiscation of assets.

The application of death penalty stipulated in Article 81 paragraph (5) can be applied in this sexual violence case. The death penalty is not contrary to the Indonesian constitution or human rights. Violation of Article 28 J of the 1945 Constitution committed by the Defendant, the article is a limitation on human rights, especially the right to life. Therefore, constitutionally death penalty can be used as a punishment in this case.

Then the Defendant filed an appeal to the Supreme Court, Decision Number 5642 K/Pid.Sus/2022. Stating that the cassation was rejected. The Panel of Judges in the cassation decision did not accept the reason for the Defendant's cassation, because the Defendant was legally proven guilty of committing sexual violence against children and still imposed the death penalty.

The imposition of the death penalty for extraordinary crimes such as child sexual abuse is not a violation of the law, given the traumatic impact experienced by the victim. Meanwhile, if a lighter sentence is imposed, it will not fulfill the necessary protection for the victim as a child, and will not have a deterrent effect on the perpetrator.

5. Conclusion

Based on the results of data analysis that has been stated in the previous chapter, it can be concluded that the application of the death penalty is true without violating the rules,

so that the punishment is valid to be implemented and applied in certain cases according to the regulations. Although in its application it is still a pro and contra, but in reality the punishment has been regulated in the law. The application of the death penalty does not violate the rules of Human Rights, because basically the perpetrators who will be sentenced to death will still get their rights as a form of respect for human rights. Of course, in imposing a punishment to the perpetrator, a judge is required to understand the concept of justice, so it is mandatory to consider the concept of justice without being influenced by anything. In this case it is appropriate, sexual crimes that cause more than one victim to get the maximum penalty in the form of death penalty to get a deterrent effect on the perpetrators of such violence as contained in the Child Protection Law.

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