

Juridical Review of the Crime of Rape against biological children.

Masdin Saragih
Universitas Simalungun, Indonesia.

Abstract

The aim of this research was to ascertain how the criminal law treats rapes of biological children and to ascertain the protection afforded to children who are rape victims. The research will contribute conceptually by providing material for a more in-depth study of science and by providing insight into daily issues, particularly child protection. In practice, it will serve as a guide and resource for law enforcement, the community, and parents in dealing with, teaching, protecting, and monitoring their children to avoid becoming victims of rape, and will be considered by judges when determining instances of child rape.

Keywords: Law, Child, Victim, Rape, Protection

Introduction

Children are a mandate from the gift of God Almighty, who has the dignity and worth as a whole human being. Lately, there have been many cases of rape committed by biological fathers against their children who are still underage. Rape or sexual crimes are generally experienced by women and young children (teenagers). Every child has a dignity that should be upheld, and every child born must get his rights without the child having to ask for them.

Rape is a very heinous crime, immoral, despicable, and violates norms where the victims are women, both adults and minors. This case is very detrimental to women whose self-esteem and honour are at stake. The crime of rape is very worrying, especially if the victims are minors, because it will affect the child's psychological development and cause trauma for the rest of his life. In addition, their future has become bleak, and they have no future. The perpetrators of the crime of rape are often people who are known to the victim, and some even have family relations. The most concerning is a father who has the heart to rape his biological child (incest). Nevertheless, the perpetrators of the crime of rape may be outsiders.

This condition causes concern and impacts fear in the community of taking care of their children because even within the household, it does not rule out the possibility of criminal acts against children. This condition also raises doubts about what punishment is appropriate and whether the punishment has a deterrent effect on the perpetrator. Besides, if a father/perpetrator is punished, what about the responsibility to provide a living left behind? On the other hand, if this is not anticipated, it is possible for many other parents who wish to have sexual relations with their biological children.

The author wants to analyze deviations committed by a father against his biological child from the juridical aspect. Namely, by looking at the regulations governing rape. Because lately, there have been many rape crimes committed by fathers against their biological children. This case attracts the author's attention to whether the judge in deciding cases like this imposes a too light sentence so that it does not provide a deterrent effect and does not give fear to other parties so as not to follow suit.

It is estimated that the number of rapes in which the perpetrators are their own families is still relatively small compared to the number of actual incidents that are not reported by the victims because, psychologically and socially, they experience very complex problems. Among them are fear, shame when others know it, and pity for the perpetrator. Victims of rape often experience great trauma, especially if the perpetrators of rape are their parents because psychologically, the child remains bound and dependent on their parents, especially the father, to meet their needs.

In Indonesia, many regulations regulate the crime of rape against children, including the Criminal Code and Law No. 23. The Year 2002 concerning Child Protection. It proves that there is special attention given to protecting the rights of these children.

Good law depends on the principles, the systematic formulation of the articles, and the existing sanctions and depends on the implementation procedures and the people as implementers and supporters of the law itself.

Therefore, the role of law enforcement officers in uncovering and resolving cases of criminal acts of rape is demanded by professionals who are accompanied by intellectual maturity and high moral integrity. This case is necessary so that the judicial process in resolving criminal acts of rape can obtain justice, and the perpetrators are subject to severe criminal sanctions. Because it has damaged the victim's future, it can even hurt the psychological development of the child. Therefore, several questions are highlighted in this regard.

RQ-1. What is the application of criminal law regarding the crime of rape committed by biological fathers against biological children in Indonesia?

RQ-2. What is the Protection of Children as Victims of Rape?

The purpose of this study was to find out how the criminal law reviews the rape of biological children and to determine the protection of children as victims of rape. The research will contribute theoretically as material for a more in-depth study of science and add insight, especially child protection in everyday life. Practically, it will be a reference and input for law enforcement, the community, and also parents in dealing with, educating, protecting, and supervising their children so as not to become victims of the crime of rape, and can be considered by judges in deciding cases of rape against children.

Literature Review

Definition of Crime

The term crime is a translation of the Dutch language, namely *Strafbaarfeit* or delict, which comes from the Latin *delictum*. While the word "feit" itself in Dutch means "part of reality" or "een gedeelte van werkelijkheid", while "strafbaar" means "can be punished", literally, the word "strafbaar feit" can be translated as "part of a thing"—punishable reality" (PAF Lamintang, 1997: 181). The definition of a crime is very much formulated by legal experts who are all different so that obtaining a definition of a criminal act is very difficult.

An act will be a criminal act if it contains the following elements.

- a) Human actions committed by mistake
- b) Is against the law
- c) Violating the rule of law
- d) Performed by a person who is capable of being responsible.

According to criminal law knowledge, every criminal act in the Criminal Code can generally be translated into elements that we can divide into two elements, namely subjective elements and objective elements. However, to describe the formulation of a criminal act into its elements, the first thing is human actions or actions prohibited by law. What is meant by subjective elements of a crime are elements attached to the perpetrator or related to the perpetrator himself, including everything contained in his heart. According to Van Hamel, formulating "strafbaar feit" is a person's behaviour (*menselijkegedraging*) which is formulated into "wet", which is against the law, which deserves to be punished and done wrong (Andi Hamzah, 1994: 41). The elements of "strafbaar feit" are:

- a) A human or a corporation commits the act.
- b) By breaking the law.
- c) Should be punished
- d) Done by mistake

Rape

Rape is an attempt to vent the sexual desire of a man against a woman in a way that violates them according to morals or law. In this sense, what is called rape, on the one hand, can be seen as an act of a person who forcibly wants to vent his sexual desires, and on the other hand, can also be seen as an event which is a violation of social norms and order (Abdul Wahid & Muhammad Irfan, 2011).

Based on the Big Indonesian Dictionary, it shows that the main element attached to the act of rape is the existence of violent behaviour related to sex, which is carried out in a way that violates the law. The crime of rape in the Criminal Code is included in the crime of decency. The crime of rape is regulated in Book II of the Criminal Code, described in several articles.

According to the Criminal Code, this crime can only be committed by men as perpetrators. The establishment of regulations in this field shows the protection of women's legal interests. The crime of rape is included in the classification of the types of criminal acts of decency.

The formulation of rape contained in Article 285 of the Criminal Code is as follows: "Whoever by force or threat of violence forces a woman who is not his wife to have intercourse with him is punished for raping with a maximum imprisonment of twelve years".

Criminal acts of decency in the Criminal Code are divided into two categories, namely:

- a. The crime of rape for intercourse is regulated by Articles 285, 286, 287, and 288 of the Criminal Code.
- b. The crime of rape to commit obscenity is regulated in Articles 289-296 of the Criminal Code.

Based on Article 285 of the Criminal Code, the crime of rape has the following elements:

- (1) Whoever
The element of "whoever" in the Criminal Code is not explained in detail. However, if we look at Articles 44, 45, 46, 49, 50, and 51 of the Criminal Code, it can be concluded, the intent of Anyone or the subject of a criminal act is a person or a human being. In order to appoint the subject of a crime, there must be an element of error or the ability to be responsible for the perpetrator, which is following the *Geen Strafzonder Schuld* principle.
- (2) By violence
Violence is a physical force that causes people to be physically incapable of resisting or defending themselves.
- (3) By threat of violence
The threat of violence is a psychological intention that causes people to become afraid not to defend or fight the violence that has not been realized but causes the affected person to have no choice but to follow the will of the person who threatens violence.
- (4) Forcing
The element of coercion in rape shows a conflict of will between the perpetrator and the victim.
- (5) A woman
The element of people in this article means that the victims of rape are usually women.
- (6) Having sex with her outside of marriage
This element implies that unlawful intercourse by a man against a woman is carried out by force.

The crime of rape against minors is contained in Article 287 of the Criminal Code. The provisions read: "Whoever has intercourse with a woman outside marriage, it is known or should be forgotten, that he is not yet fifteen years old, or if his age is not proven, that he is not yet able to marry, shall be punished by a maximum imprisonment of nine years.

Other provisions governing the crime of rape against minors are contained in Law Number 23 of 2002 concerning Child Protection. These provisions are contained in Article 81 as follows:

- (1) Any person who intentionally commits violence or threats of violence against a child commits sexual intercourse with him or another person, imprisonment for a maximum of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of IDR. 300,000,000.00 (three hundred million rupiahs) and at least IDR. 60,000,000.00 (sixty million rupiah).
- (2) As referred to in paragraph (1), also for people who intentionally commit deception, the provisions apply or persuade children to have sex with them or with other people.

Understanding Children

In general, it is said that a child is someone who is born from a marriage between a woman and a man, regardless of whether the child is born inside or outside of marriage. Children are shoots, potential, and the next generation of the nation's ideals. According to the Minimum Age Convention number 138 (1973), the definition of a child is someone aged 15 years and below. On the other hand, in the Convention on the Rights of the Child (1989), which the Indonesian government ratified through Presidential Decree number 39 of 1990, it is stated that children are those aged 18 years and below. Meanwhile, UNICEF defines children as residents aged 0 to 18 years (Abu Huraerah, 2008).

According to civil law, the position of a child as a result of being immature gives rise to the child's rights, which must be realized with special legal provisions concerning the child's civil rights. The civil rights of children are explained in Article 2 of the Civil Code. It states: "A child in the womb of a woman who is considered to have been born, if the interests of the child to desire" (Subekti & Tjitrosudibio, 1992).

According to the Criminal Code, the definition of a child is not explained in writing. Nevertheless, the meaning of a child is implied. In Article 293 paragraph (1), there is a mention of someone who is not yet an adult. That is, in Article 292 of the Criminal Code, adults are those who are not yet 21 years old or not yet 21 years old but are married or have been married.

According to Law no. 23 of 2002 concerning Child Protection, in Article 1 point 1, it is stated: "A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb."

Law Number 3 of 1997 concerning Juvenile Court. A child is a person who, in the case of a naughty child, has reached the age of 8 (eight) years but has not yet reached the age of 18 (eighteen) years and is not yet married (Article 1 paragraph (1)).

Law Number 12 of 1995 concerning Corrections According to this law, the definition of children is regulated in Article 1 paragraph (8), which explains that correctional students consist of criminal children, state children and civilian children.

- a) A criminal child is a child who has been sentenced to a maximum juvenile prison sentence of 18 (eighteen) years based on a court decision.
- b) State children are children who, based on court decisions, are handed over to the state to be educated and placed in child prisons at the latest until the age of 18 (eighteen) years.
- c) Civilian children are children who, at the request of their parents, obtain a court order to be educated in prison for children up to 18 (eighteen) years old.

Rape Perpetrated by Biological Fathers Against Biological Children

The crime of raping a biological child is a very disgraceful act, especially if the victim is a person who is still related by blood, namely his biological child, so many assume that the punishment from the perpetrator must be commensurate with the consequences of his actions.

As stipulated by Article 81 paragraph (1) of the Republic of Indonesia Law, No 23 of 2002, concerning Child Protection in conjunction with Article 64 paragraph (1) of the Criminal Code. Article 81 paragraph (1) reads: "Anyone who intentionally commits violence or threats of violence, forcing a child to have intercourse with him or with another person, shall be punished with imprisonment for a maximum of 15 (fifteen) years and a minimum of 3 (three) years and a maximum fine of Rp. 300,000,000.00 (three hundred million rupiahs) and a minimum of Rp. 60,000,000.00 (sixty million rupiah)."

Article 64 paragraph (1) reads: "If there are several acts of communication so that they must be considered as one continuous act, then only one criminal provision is used even though each act becomes a crime or violation; if the law is different, then the one with the heaviest punishment is used."

The review of criminal law against the crime of raping biological children includes the role of criminal law in reviewing and resolving and applying criminal sanctions under the actions committed, as the nature of criminal law is coercive and can be enforced. Any unlawful act can be subject to suffering in the form of punishment. The punishment is adjusted to the actions that have been done. The crime of rape is included in the classification of the types of criminal acts of decency.

In general, the settlement of cases of criminal acts of rape is more complicated than the process of resolving other crimes, for example, crimes against life and property. This case is because many rape victims often do not immediately report the rape incident they experienced. However, it is only reported after a few days. The rape was committed against them because of the shame factor in themselves and their families. The incident is known to many people or the general public. If the perpetrators of rape are their parents, psychologically, the child is still bound and dependent on his parents, especially the father, to fulfil his life needs. However, it will be complicated for the authorities in the examination process and proof in court to obtain the material truth of the crime of rape.

Objective elements

What is meant by "copulation" is the existence of competition between male and female genitalia, which is usually carried out to obtain offspring, so the male genitalia must enter the female genitalia.

What is meant by "child" is, based on Article 1 Number 1 of Law no. 23 of 2002 concerning Child Protection, a person who is not yet 18 (eighteen) years old, including children who are still in the womb.

Subjective elements

According to the explanatory memory of MvT (memory van toelichting), what is meant by intentional is "willing and realizing" the occurrence of an action and its consequences. A person who commits an action intentionally must will and realize the action and its consequences (Kanter & Sianturi, 2012).

In the Criminal Code, the crime of raping a child as a victim has not been regulated. In the Criminal Code on Rape of a child, the punishment is the same as raping an adult woman unconscious and helpless, as regulated in Article 286.

In-Law no. 23 of 2004 concerning the Elimination of Domestic Violence, Article 46 has more clearly regulated the criminal sanctions for rape committed against people who live permanently within the scope of the household (children). However, the formulation of the crime in this article is an alternative, namely imprisonment or fines.

In-Law no. 26 of 2000 concerning the Human Rights Court, rape is classified as a gross violation of human rights, including crimes against humanity.

Rape of children is regulated by Article 81 of Law no. 23 of 2002 concerning Child Protection with a maximum imprisonment of 15 years and a maximum fine of 60 million rupiahs. The punishment received by the perpetrators of the crime of rape committed by biological fathers against their biological children is approximately 12 years in prison and a fine of IDR. 60,000,000,-(sixty million rupiah). If the fine is not paid, it will be replaced with three months imprisonment.

Special protection for children as victims of rape is regulated in Article 64 paragraph (3) of Law Number 23 of 2002 concerning child protection. Based on this article, protection of child victims is carried out through:

- a. Rehabilitation efforts, both within the institution and outside the institution;
- b. Efforts to protect people from identity reporting through the mass media and to avoid labelling;
- c. Providing safety guarantees for victim-witnesses and expert witnesses, both physically, mentally, and socially; and
- d. Provide access to get information about the progress of the case.

According to Article 69 of Law Number 23 of 2002 concerning child protection, based on this article, the protection of children who are victims of physical, psychological, and sexual violence is carried out through efforts; (a) Dissemination and socialization of the provisions of laws and regulations that protect children victims of acts of violence; and (b) Monitoring, reporting, and sanctioning.

References

- Abdul Wahid dan Muhammad Irfan, *Perlindungan Terhadap Korban Kekerasan Seksual*, refika Aditama, Bandung, 2011,
- Abu Huraerah, *Kekerasan terhadap anak*, Nuansa, Bandung, 2008
- Aspan, Henry, Muhammad Isa Indrawan, & Ety Sri Wahyuni. (2021). The Authority of Active Partners and Passive Partners in the Company Type of Commanditaire Vennootschap. *American Journal of Humanities and Social Sciences Research*, e-ISSN: 2378-703X, Volume-5, Issue-5, pp-310-313.
- Aspan, Henry. (2021). Legal Basis for the Implementation of Work From Home Amid the Covid-19 Pandemic in Indonesia. *Saudi Journal of Humanities and Social Sciences*, e-ISSN 2415-6248, Volume 6 Issue 4, pp. 116 – 121.
- Aspan, Henry. (2020). The Role of Notaries in the Registration of the Establishment of Commanditaire Vennootschap (CV) Through the Business Entity Administration System. *Scholar International Journal of Law, Crime, and Justice*, e-ISSN 2617-3484, Volume 3 Issue 12, pp. 463-467.
- Aspan, Henry, Ety Sri Wahyuni, Ari Prabowo, Ami Natuz Zahara, Ika Novita Sari, & Mariyana. (2020). Individual Characteristics and Job Characteristics on Work Effectiveness in the State-Owned Company: the Moderating Effect of Emotional Intelligence. *International Journal of Innovation, Creativity, and Change*, Volume 13, Issue 6, pp. 761-774.

- Aspan, Henry. (2020). The Role of Legal History in the Creation of Aspirational Legislation in Indonesia. *International Journal of Research and Review*, Vol. 7, Issue 6, pp 40-47.
- Aspan, Henry. (2020). The Political History of Land Law in Indonesia. *International Journal of Advance Research and Innovative Ideas in Education*, e-ISSN 2395-4396, Volume 6, Issue 3, pp. 707-713.
- Aspan, Henry, Fadlan, & E. Arinda Chikita. (2019). Perjanjian Pengangkutan Barang Loose Cargo Pada Perusahaan Kapal Bongkar Muat. *Jurnal Soumatera Law Review*, Vol. 2, No. 2, pp. 322-334.
- Aspan, Henry, Ety Sri Wahyuni, Sjahril Effendy, Syaiful Bahri, Muis Fauzi Rambe, & Febrian Bodro Saksono. (2019). The Moderating Effect of Personality on Organizational Citizenship Behavior: the Case of University Lecturers. *International Journal of Recent Technology and Engineering*, Vol. 8, No. 2S, pp. 412-416.
- Aspan, Henry. (2017). *Aspek Hukum Dalam Bisnis: Tinjauan Atas Masalah Perlindungan Hukum Pemegang Saham Minoritas dan Masalah Penggabungan Perusahaan (Merger)*. ISBN 9786022692362, Halaman Moeka, Jakarta.
- Aspan, Henry. (2017). Good Corporate Governance Principles in the Management of Limited Liability Company. *International Journal of Law Reconstruction*, Vol. 1, No. 1, pp. 87-100.
- Aspan, Henry. (2017). Peranan Polri Dalam Penegakan Hukum Ditinjau Dari Sudut Pandang Sosiologi Hukum. *Prosiding Seminar Nasional Menata Legislasi Demi Pembangunan Hukum Nasional*, ISBN 9786027480360, pp. 71-82.
- Aspan, Henry. (2014). Konstruksi Hukum Prinsip Good Governance Dalam Mewujudkan Tata Kelola Perusahaan Yang Baik. *Jurnal Dialogia Iuridica Universitas Maranatha Bandung*, Vol. 2, No. 2, pp. 57-64.
- Bambang Poernomo. *Azas-azas Hukum Pidana*. Jakarta : Ghalia Indonesia.1985.
- E. Y. Kanter,dan S.R. Sianturi, *Asas-Asas Hukum Pidana di Indonesia dan Penerapannya*,Storia Grafika, Jakarta,2012.
- Heribertus Sutopo. *Metodelogi Penelitian Kualitatif Dasar Teori dan Terapannya dalam Penelitian*. Surakarta : Universitas Sebelas Maret Press.2002.
- Martiman Prodjohamidjojo.*Memahami Dasar-dasar Hukum Pidana Indonesia*. Jakarta : Pradnya Paramita. 1997.
- Moeljatno. *Azas-azas Hukum Pidana*. Jakarta : Rineka Cipta.2000
- Muladi dan barda Nanawi.*Teori-Teori dan Kebijakan Pidana*. Bandung : Alumni.1998.
- Oemar Seno Adji. *Hukum Hakim Pidana*. Jakarta : Bumi Aksara.1984.
- R. Subekti dan R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, Pradnya Paramitha, Jakarta, 1992.
- Sholeh Soeaidy dan Zulkhair.*Dasar Hukum Perlindungan Anak*. Jakarta : CV. Novindo Pustaka Mandiri. 2001.
- Soerjono Soekamto. *Pengantar Penelitian Hukum*. Jakarta : UI Press.1986.
- Sudarto. *Hukum Pidana I*. Semarang : Yayasan Sudarto Fakultas Hukum.Universitas Diponegoro.1990.
- Sutrisno Hadi. *Metode Research*. Yogyakarta : Andi.1983
- Winarno Surachmat.*Pengantar Penelitian Ilmiah Dasar : Metode dan Tehnik*. Bandung : Tarsito.1982
- Wirjono Prodjodikoro.*Azas-azas Hukum Pidana di Indonesia*. Jakarta :Ghalia Indonesia.1969
- Kitab Undang-undang Hukum Perdata
- Kitab Undang-undang Hukum Pidana
- Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan.
- Undang-undang Nomor 4 Tahun 1979 tentang Kesejahteraan Anak.
- Undang-undang Nomor 12 Tahun 1995 tentang Pemasarakatan.
- Undang-undang Nomor 3 Tahun 1997 tentang Pengadilan Anak.
- Undang-undang Nomor 23 Tahun 2002 tentang Perlindungan Anak