



## Legal Protection for Suspect on Sexual Harassment Against Children With Disabilities at The Examination Stage

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### Abstract

Sexual malpractice against children with disabilities in recent years is an increasing trend in quality and quantity throughout Indonesia. In that case, there is a growing issue in the community. It is that legal protection for suspects of the cases of sexual harassment against children with disabilities at the stage of examination is not optimal. This study seeks to address the issue in question by revealing the procedures of providing legal aid to perpetrators of sexual harassment against children with disabilities at the examination stage and to the impacts of such legal protection. The type of research used in the study is empirical law research. The results of data analysis indicate that: 1) procedures of providing legal aid in the form of protection to perpetrators of sexual harassment against children with disabilities are adjusted according to the provisions contained in the Criminal Procedure Code; 2) the impact of legal protection toward such perpetrators against sexual harassment is that the number of crimes decreases.

**Keywords:** Children With Disabilities; Legal Protection; Sexual Harrasment.

### INTRODUCTION

Human rights are widely accepted as being generally-agreed values existing to ensure human dignity and the fulfilment of basic needs of all human beings around the world (van der Ploeg & Vanclay, 2017). The effectiveness of human rights education varies across individuals (Kim, 2018). Arguably, the reason for this is not that companies are opposed to human rights, but rather it is unclear what they actually have to do to address human rights issues (Esteves, Factor, Vanclay, Götzmann, & Moreira, 2017). The Human Rights Commission and later Council (UNHRCC) are internationally legitimized tools where member of the states shame repressive regimes for human rights violations in public resolutions (Vadlamannati, Janz, & Berntsen, 2018). Government success in creating democratised modern laissez-faire economies has increasingly been thought to depend upon a mobile, flexible and skilled workforce that is not held back by the traditions of collective agency, traditional communities, language and identities (Arnot, Casely-Hayford, & Yeboah, 2018). The application of existing human rights to sexuality and sexual health constitutes sexual rights. Sexual rights protect all people's rights to fulfil and express their sexuality and enjoy sexual health, with due regard to the rights of others, within a framework of protection against discrimination (Miller, Kismödi, Cottingham, & Gruskin, 2015).

Every human being always has two desires in his life, that is, the desire to do good things and desire to do evil. This is what leads to emergence of violations in human rights,

such as killing, robbing, looting, and others. Violations over human rights may occur in the interaction between the government apparatus and the community, and among the citizens. However, such cases that have often occurred are between the government apparatus and the community. The granting of rights to the accused is not merely a manifestation of protection for human rights in the criminal justice system in Indonesia, but at the same time an embodiment of presumption principle of innocence. The recognition of presumption principle of innocence calls for the adoption of the equality of arms principle which is reflected in the provision of equal opportunity between the prosecutor and the defendant in a legal fight. Like wise with the protection of human rights for the suspect/defendant, there should be no discrimination in the treatment because the state guarantees the rights of individual, the only right that can be lost from a suspect as an offender, namely the right to freedom of movement.

Such condition is because the law authorizes law enforcement officials to arrest and detain a suspect/defendant if there is sufficient initial evidence. If examined carefully, not everyone has a good understanding toward law. Instead, everyone considers himself to have a good comprehension and understanding over the law. Apparently, in order to deal with legal issues, everyone needs legal aid from others who are better informed about the law, capable of providing legal consultation and aid. Article 54 of Law of Criminal Procedure (KUHAP) precribes:

For the interest of defense, a suspect or an accused shall have the right to obtain legal aid from one or more legal counsels during the period of and at every stage of examination, according to the procedures stipulated by law.

Meanwhile, article 56 of KUHAP stipulates:

In the event a suspect or an accused is suspected of or accused of having committed an offense which is liable to a death penalty or imprisonment of fifteen years or more or for those who are destitute and liable to imprisonment of five years or more who do not have their own legal counsel, the official concerned at all stages of examination in the criminal justice process shall be obligated to assign legal counsel for them<sup>1</sup>.

Building on the above description, this study examines two legal issues, namely: 1) the procedures of providing legal aid to the suspect of sexual harrassment against children with disabilities at the stage of examination and the impacts of the legal rprotection afforded to perpetrators of such sexual harassment.

## **METHOD**

The research type used in the study is empirical law research. This action is done to reveal the extent to which a particular legislation is vertically or horizontally appropriate. The procedures undertaken in the implementation of the study is to conduct an inventory of legislation regulating the field of law that has been determined to be examined related to the protection and legal aid for suspects in criminal justice process for sexual harassment case against children with disabilities at the stage of examination. Furthermore, data were collected though the following methods and instruments: observation method or field observation; legislation approach; and library study approach. The data collected were then analyzed using qualitative interpretation technique, which covers interpreting the data based on the quality of law enforcement analysis on legal protection and aid to the suspect. After a qualitative analysis carried out then the data were presented in a qualitative descriptive and systematic way.

## **DISCUSSION**

### **Procedures of Providing Legal Aid to Suspects Sexual Harassment against Children with Disabilities**

The term 'legal aid' is still a new thing for the Indonesian people. The flow of legal aid institution developing in Indonesia is essentially not spared from the developmental of legal assitance found in developed countries. Legal aid is essential in creating a just life and

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1. Oemar Seno Adji, 1984 KUHP sekarang, penerbit Erlangga, Jakarta, p. 63

protected human rights. Provision of legal aid aims to protect the rights of society in the case of legal issues in order to avoid any kind of actions that could endanger it or to avoid arbitrary actions of the law enforcement officers. According to M. Yahya Harahap, Indonesia Civil Code (KUHAP) has appointed and placed a human being in a dignified position as God's creature. KUHAP places a human being in a position that must be treated in accordance with the noble values of humanity<sup>2</sup>.

Furthermore, it is stated in the Criminal Procedure Code that a suspect must be placed in a human position that has dignity. The suspect must be assessed as a subject not an object. The substance of the Criminal Procedure Code relating to the protection of the rights of suspects/defendants can be found in the articles which are imbued with the principle of equality of rights and the same position and obligations before the law (equality before the law). For that ground the provision of legal aid to the suspect at the examination stage is expected to be carried out fairly for the underprivileged suspects and for those who do not understand the law, in addition to providing opportunities for the poor to defend themselves accompanied by a reliable advocate.

The provision of legal aid at the stage of examination in the criminal justice procedural law in Indonesia is expected to provide maximum protection for the rights of life of suspects, especially those from the weak and poor since the initial stage of examination. Legal aid is not only interpreted as a suspect's right from the examination stage but also as an obligation that must be fulfilled by every law enforcement officer, especially the investigator at the time before the examination of the suspect begins. Ignoring these provisions will have fatal consequences for the Public Prosecutor's indictment. Protection of human rights at the stage of examination is at least expected to be one of the factors that minimize the possibility of abuse of law enforcement officials and the possibility of irregularities in the application of criminal procedural law procedures<sup>3</sup>. Suspects who do not understand the law and who are financially unable to pay the ransom for the consequences of a violation of the law often get unfair treatment that they are often subjected to torture when interrogated by law enforcement. Additionally, the suspects like this were tried and convicted by a court that reduced their dignity as human beings. They are examined without a fair legal process (Due process of Law), especially during investigation at examination stage. The provision of legal aid at the level of investigation in criminal justice procedural law in Indonesia is expected to provide maximum protection for the rights of living of the suspects, especially those of the weak and poor, in the form of legal aid since the initial stage of examination. Legal aid is not only interpreted as the right of the suspect since the examination stage but also as an obligation that must be fulfilled by every law enforcement apparatus, especially the investigator before starting the examination. Ignoring these provisions will be fatal to the public prosecutor's indictment. The protection of the suspect's human rights since the examination stage is at least expected to be one of the factors that minimize the possibility of abuse of law enforcement officials and the possibility of irregularities in the application of criminal procedural law. Suspects who do not understand the law and are unable to financially pay for the violation often experience unfair treatment, undergo torture when interrogated by law enforcement and are tried and punished by a court that degrades their dignity as human beings. They are examined without a fair legal process (Due process of Law) especially at the examination stage.

According to Soerjono Soekanto, the effective application of the law is determined by five factors, namely:

- Legal factor itself.
- Law enforcement, namely parties that determine or apply the law.
- Infrastructure and facilities supporting the law enforcement.
- Community, namely the environment in which the law applies or is applied.

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2. M. Yahya Harahap, 2007, *Pembahasan dan penerapan KUHAP Penyidikan dan Penuntutan*, Edisi dua cetakan kesembilan, Sinar Grafika, Jakarta, p. 45

3. M. Yahya Harahap, *Op cit*, p. 11

Culture, namely the work, creativity and taste based on human intentions in the life relationship.

In the investigation process, the obligation of the investigator to provide legal aid can be seen when referring to article 54 of the Criminal Procedure Code (KUHAP) and Article 55 of the Criminal Procedure Code, namely in the event that a suspect is suspected of committing a criminal offense for 5 (five) years imprisonment or more.

The rights of suspects related to legal aid are regulated in articles 54, 55, 56, 57, 59 and 60 of the Indonesia KUHAP. According to article 54 of the Criminal Procedure Code, "For the purpose of defense, a suspect or accused shall have the right to obtain legal aid from one or more legal counselors at every stage of examination; according to the procedures stipulated by this law." Based on this article, it can be concluded that in order to defend their rights, they have the right to be accompanied by one or more legal counselors at each stage of examination.

In accordance with the provisions of article 114 of the Criminal Procedure Code, legal counsel grants the right to obtain legal aid, its nature changes to be mandatory. The mandatory nature obtains legal aid for suspects at all stages of examination as stipulated in article 56. Provided that the allegations or charges alleged or charged are threatened with a criminal offense:

- Death penalty
- Penalty of fifteen years or more
- Penalty of five years or more.

The procedure of granting legal aid is the applicant submits an application for legal aid in written form to the legal aid provider, which at least contains:

- The identity of the applicant for legal aid, evidenced by the identity card and/or other documents issued by the competent authority. In this case the legal aid applicant does not have an identity; the legal aid provider assists the legal aid applicant in obtaining a temporary address certificate and/or other documents from the authorized agency in accordance with the legal aid domicile.
- Documents relating to cases. In the event that the legal aid applicant does not have the requirements referred to the above, the legal aid provider assists the applicant in obtaining these requirements. Authorized agencies according to domicile legal aid providers must issue temporary address certificates and/or other documents for the purpose of receiving legal aid. Head of village or official in accordance with the domicile of legal aid provider must issue a certificate of poverty or other document as a substitute for a certificate of poverty for the purpose of receiving legal aid. The applicant for legal aid who are not able to compose the request in writing can execute it orally.

In requests for legal aid submitted verbally, the provider expresses it in written form; the application is signed or given a thumbprint by the applicant. The legal aid provider must check the completeness of the requirements as referred to in Article 6 within a maximum of one working day after enrolment. If an application for legal aid meets the requirements, the legal aid provider must submit a written readiness or rejection on the application within three working days after the application is declared complete.

### **Impact of Legal Aid Provision to the Suspect of Sexual Harassment Against Children with Disabilities**

Legal reasoning is an activity of problematic and systematic thinking of a legal subject as an individual and social creature in the cultural environment. Legal reasoning can be defined as thinking activities that intersect with the multi-faceted (multidimensional and multifaceted) interpretation of the law. Legal reasoning as a problematic and systematic thinking activity has some characteristics. According to Berman the hallmark of legal reasoning is:

- Legal reasoning seeks to realize consistency in legal rules. The premise is the principle (belief) that the law must apply equally to all people including in the jurisdiction. The same case must be given same decision based on the principle of *similia similibus* (equation).
- Legal reasoning seeks to maintain continuity in time (historical consistency). Legal reasoning will refer to the legal rules that have been formed beforehand and refers to the previously established legal rules and legal decisions so as to ensure stability and predictability.
- In legal reasoning dialectical reasoning takes place, that is, considering, opposing claiming, both in the debate on the formation of law and in the process of considering the views and facts submitted by the parties in the judicial process, and in the negotiation process<sup>4</sup>.

In carrying out this task, the authorities, such as the police, are not justified in violating human rights. However, the police have the authority to arrest, to detain, and to carry out discretion toward certain cases on the basis of juridical, sociological consideration and toward suspect who are worried and escape. Legal protection and human rights by law through laws and regulations cover all aspects of people's lives/law community including in the judicial process.

If a member of the public is involved in a criminal case or a criminal act, a suspect or a defendant in examination ranging from the police, to attorney, to the court, for the purpose of defense, in essence, the suspect or defendant shall have the rights of obtaining legal aid from legal persons or counsel. If the suspect is in the sense a poor, the law must provide aid by providing legal counsel or appointing an advisor in all levels of examination, as proof of the provision of protection from the law to the nation.

In essence, principles of a legal state on its principle are guaranteeing the provision of legal protection for the nation; upholding human rights; and guaranteeing legal certainty. Legal certainty principle in this case as one of the general principles of good governance is not only of formal form (written law only) but also of living unwritten law in society, such as customary law and traditional law. In the identification of legal rules there is often legal absence (*leemten in het recht*), conflicts between legal norms (legal antinomy), and vague norms. In dealing with conflicts of legal norms, the principles of settlement applied (principles of preference) are:

- *Lex superior derogate legi inferiori*, that is, higher laws and regulations will paralyze the lower legislation.
- *Lex specialis derogate legi generali*, that is, special regulations that will paralyze general rules of character or special actions that must take precedence.
- *Lex posteriori derogate legi priori*, that is, the new rules defeat or paralyze old rules<sup>5</sup>.

In addition, there are practical procedures to improve the conflict, namely disavowal, reinterpretation, invalidation, and remedy<sup>6</sup>. In the case of facing vague legal norms the judge interprets the law to find the law. Interpretation by the judge is an explanation that must lead to the implementation of legal rules against concrete events; the interpretation method is a suggestion or tool to find out the meaning of the law that can be accepted by the community. In dealing with a legal vacuum (*rechts vacuum*) or a vacuum (*wet vacuum*) the judge adheres to the principle of *ius curia novit*, where the judge understands about the law. Judges shall not reject a case on the grounds that the law is absent or unclear. They shall not be entitled to make rejection in making decisions.

## CONCLUSION

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4. B. Arief Shidarta, 2000, refleksi tentang struktur ilmu Hukum sebuah penelitian tentang fundasi kefilsafatan dan sifat keilmuan ilmu hukum sebagai landasan pengembangan ilmu Hukum Nasional Indonesia, Bandung, p 166-167.
  5. Shidarta, 2011, Penemuan hukum melalui putusan Hakim, Medan, hal 3-4
  6. *Ibid*, Hal 4

Providing legal assistance to the suspect, as a perpetrator of sexual harassment against children with disabilities at the examination stage is carried out in several stages: starting from the request of the suspect's family to the investigator so that the suspect is accompanied by a legal advisor or lawyer. If the action of the suspect fulfills the offense threatening the sentence more than five years, the state will provide protection by appointing legal counsel funded by the state itself. Mentoring by legal counsel for suspects starts from the time of the examination until finally the prosecution takes place in court. If deemed necessary for the sake of fair, definite and useful law enforcement and assistance to suspects can also be made at the level of legal efforts from an appeal to the cassation.

The impact of legal protection provision on criminal acts of sexual harassment against children with disabilities during examining stage are law enforcers, in this case are investigators, shall be more careful and always follow standard operating procedures in carrying out state duties when examining suspects of sexual harassment against children with disabilities. Thus, arbitrary behavior of violating on human rights committed by the state apparatus can be prevented and if necessary it can be eliminated altogether. Investigator's behavior that often creates obstacles in terms of protecting the rights of suspects can be reduced. This often happens because human resources, namely the investigators themselves, do not explain the rights of suspects who do not understand their rights. Meanwhile, provisions of legislation in Indonesia have substantially provided sufficient protection for the rights of suspects. In accordance with the development and needs of the community, the law relating to legal protection and human rights of citizens and the defendants, if it is no longer appropriate, should be revised or amended to adapt to the situation and conditions of development in the community. Law enforcers shall not be bad models in violating human rights of suspects in the process of criminal proceedings at every level of legal protection, but human rights must be upheld. For the poor, the state is obliged to provide legal advisors for free of charge to suspects/defendants as a manifestation of the government's goodwill.

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