

The Urgency of the Legal Protection for Children Involving In Sexual Harassment

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ABSTRACT: Sexual harassment committed by children for the time being has reached an alarming level. Children who conducts a delinquency have their characteristics, and thus they should be given a special protection. In the article 59, law of The Republic of Indonesia Number 35 of 2014 Pertaining to Child Protection, it has been determined that government, local government, and other state institutions are obliged and responsible for the provision of protection, particularly for children. This study aims at describing why children who committed sexual harassment need to achieve special protection. This study is considered as normative law research. The data was collected by means of literature review, meaning that the analysis was undertaken on secondary research data. Based on the result, it can be revealed that the protection toward children that committed sexual harassment is related to physical and psychological matter of the involving children. Therefore, the sanction toward the children who conduct the sexual harassment must be in line with a principle focusing mainly for the interest of children because this principle is very urgent in tackling children's delinquency cases. It means that sanction toward children who committed sexual harassment is not similar to that given to adult criminal. Children who conduct delinquency should not be held fully responsible since the basic principle of a crime cannot be wholly found, unlike adult criminals. It is expected that parents and government should supervise the children since they are still young to prevent them from doing delinquency action that can harm other people.

Keywords: *Urgency, Legal Protection, Child Offender, Sexual harassment*

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I. INTRODUCTION

Delinquency which is committed by children at the moment has quantitatively and qualitatively reached an alarming level, one of which is sexual harassment. Sexual harassment (violence) toward children can be defined as the relationship or interaction between a child and someone who is older or a child with more rationale or adult such as a foreign person, sibling, or parents in which that child is used as an object that can fulfill an actor's sexual desire. That action is done through force, threat, inducement, lie, or pressure. A deviant action conducted by a child is influenced by intrinsic and extrinsic motivation. Intrinsic motivation includes intelligence, age, sexes, and the children's position in the family. Meanwhile, extrinsic motivation consists of household, education and school, children's social involvement and interaction, and mass media.¹ According to Bambang Waluyo, children who do not receive enough physical, mental, and social attention often behave and asocially act or even anti-socially behave that can harm themselves, family, and society.² A misconduct committed by children is also called children's mischief.³ An action can be defined as mischief if it contains a behavior that violates the existing law and moral values. Children's mischief has an asocial purpose, meaning that a particular action or behavior done by children is contradictory with existing social values and norms in

¹ Wagiyati Soetodjo, *Hukum Pidana Anak*, (Bandung: Refika Aditama, 2006), p. 17

² Bambang Waluyo, *Pidana dan Pemidanaan*, (Jakarta: Sinar Grafika, 2004), p. 10.

³ Child delinquency is also called juvenile delinquency. In Indonesian language, it refers to children, juvenile, while delinquency means being ignored or ignoring that was later expanded to be child mischief, crime, law violation and etc. A.Syamsudin Meliala & E.Sumaryono, *Kejahatan Anak Suatu Tinjauan Dari Psikologis Dan Hukum*, (Yogyakarta: Liberty, 1985), p. 31

their environment.⁴ The terminology of children's mischief in Law of the Republic of Indonesia Number 11 Year 2012 pertaining to child criminal justice system points out that an action can be categorized as mischief if it contradicts with the law.⁵ Children's misconduct that violates the law should not be viewed in the similar way we view a misconduct committed by adults. Children who do a crime has their own characteristics, thus they need to be given a special protection. The Constitution of the Republic of Indonesia, article 28 B, clause (2) states that "each child deserves life sustainability, growth and development as well as has a right to have a protection against violence and criminalization. Legal protection toward children is a particular effort to ensure them to exercise their right and obligation. According to Arif Gosita, child protection is an attempt to protect children to enable them to get their right and obligation."⁶ Meanwhile, Imam Jauhari define the child protection as any efforts consciously conducted by every person or government or private institution that aims at providing security, satisfaction, physical, mental, and social prosperity fulfillment of children and adolescent according to their interest and right.⁷

In the article 59, Law of the Republic of Indonesia Number 35, 2014 pertaining to child protection, it has been determined that government, local government, and other state institutions are obliged and responsible for the provision of protection, particularly for children. Besides, states and international community have been exerting an effort to search for the best alternative to settle a crime committed by a child. Article 37 in convention on the Rights of the Child determines that children cannot become a target of persecution or other inhuman abuses, a humiliating law, death penalty, or life sentence. In the minimum standard of united nations regarding judiciary administration for children (The Beijing Rule), number 40/33, 1985 states that apprehension, detention, and punishment/imprisonment must be the last choices to handle children who have violated the law (ultimum remedium) and these punishments should be given in a short time. Micheal D.A. Freemaan asserts "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"⁸ Thus, children who commit a crime still need to be given a protection so that they will not receive the same treatment as adults do. Based on the above discussion, the objective of this study is to describe why children who involve in a sexual harassment should be provided with a special protection.

II. RESEARCH METHOD

This study is a normative law research, which mainly concerns with the rule and principles of law. Based on a normative research, the approach utilized in this study is a normative and conceptual approach. The data was collected through literature review by conducting an analysis on secondary data. Secunder data in a legal research can be differentiated as primary legal materials, secondary legal materials, and tertiary legal materials. As for secondary legal materials, they relate to primary legal materials and help to analyze and comprehend primary legal materials. Secondary legal materials comprises draft of regulation, the result of bachelor's academic paper, and other result results.

III. DISCUSSION

3.1 Legal Protection

Legal protection is a mechanism that is desperately needed by every human being since it deals with the right and obligation that he or she has. According to Satjipto Raharjo, Legal protection is considered as an attempt to secure someone's interest by providing him or her with a power to do a particular action in order to fulfill his or her interest.⁹ Meanwhile, Philipus M. Hadjon argue that legal protection is an action to protect or help a legal subject by employing legal tools.¹⁰

⁴ Ny. Singgih Gunarso dan Singgih Gunarso. *Psikologi Remaja*, (Jakarta: Gunung Mulia, 1985), p. 30.

⁵ Law of the Republik of Indonesia Number 11 Year 2012, Concerning Child Criminal Justice, article 1, number 2: Children who have to undergo a legal process are those who violate the law, those who become victims of a crime, and those who become witnesses of a crime. Number 3 emphasizes that children who violate the law and who are considered as children are those aged 12 (twelve) years old, but they have not reached the age of 18 yet (eighteen), assumed to have committed a crime

⁶ Arief Gosita, *Masalah Korban Kejahatan*, (Jakarta: Akademika Presindo, 1993), p. 52

⁷ Iman Jauhari, *Hak-Hak Anak Dalam Hukum Islam*, (Jakarta: Pustaka Bangsa Press, 2003), p. 10.

⁸ Michael D.A. Freemaan, *Upholding The Dignity And Best Interests of Children : The Internasional Law And the Corporal Punishment of Children*, (London: University College, 2010), p. 5

⁹ Satjipto Raharjo, *Sisi-sisi Lain dari Hukum di Indonesia*, (Jakarta: Kompas, 2003), p. 121

¹⁰ Philipus M. Hadjon, *Pengantar Hukum Administrasi Indonesia*, (Yogyakarta: Gajah Mada University Press, 2011), p. 10

Legal protection provided to children is an attempt to enable every child to exercise their right and obligation. According to Arief Gosita, child protection is an effort to protect children to be able to fulfill their right and obligation.¹¹

Imam Jauhari gives a definition of child protection as follow:

- a. All efforts consciously conducted by every human being or government and private institutions that aim at security provision, satisfaction, physical, mental, and social prosperity fulfillment for children and adolescents based on their interest and right.
- b. All collective efforts consciously done by individuals, family, society, and other agencies that deal with spiritual and physical well-being of children aged 0-21 years old who are both married and unmarried based on their human right and interest, thereby enabling them to develop as optimally as possible.¹²

Therefore, child protection must be upheld in every aspect of social life. Such protection is a legal action that brings a legal cause. Hence, this child protection should be carried out responsibly. According to Imam Jauhari, "Implementation of child protection in Indonesians based on Pancasila and UUD 45 as well as United Nation Childrens Right Convention comprising foundational principles such as children's non-discrimination, best interest, right to live, right to grow and develop, and right to opinion being heard and valued."¹³

3.2 Children as Criminal Offenders

Child crime is a crime committed by children. Child crime can be related to Juvenile Delinquency which is known to have various terminologies in Indonesia, namely child's mischief, adolescence mischief, or lost cadets. The use of terminology 'children as criminal offender' is congruent with the definition of children as has been stipulated in the article 1, number 3, Law of the Republic of Indonesia Number 11, 2012 regarding child protection. The term 'children as criminal actors' refers to law-facing children.

Children as criminal offenders terminology is known as juvenile delinquency in the criminology study. According to Ny. Singgih Gunarso, a misconduct committed by children is known as child mischief. In definition, mischief should contain action or behavior that violates existing law and moral values. Child mischief has an asocial purpose, meaning that such mischief may direct children to commit something contradictory with social norms and values of their environment.¹⁴ According to Romli Atmasasmita, delinquency is not identical with mischief and juvenile term is not similar to children, either. Juvenile delinquency term has a wider definition than that of mischief or children. Thus, Romli tends to use child delinquency instead of child crime.¹⁵ Children in conflict with the law, previously termed as a bad boy, taken from the term Juvenile delinquency. Juvenile delinquency is "An act or acts committed by a child who is considered to be contrary to the legal provisions in force in a country and by the people themselves perceived and interpreted as misconduct". Using the term "bad boy" and not "evil child" with the consideration that when a child is actually doing something naughty child is the victim of an adult, the environment and culture in which he grew up. There are internal factors and external factors that allow children to do mischief.¹⁶

Soedjono contends that child delinquency has three definitions:

1. An action done by adults is categorized as a crime, yet if it is done by children, it is called delinquency, such as theft, robbery, and kidnapping.
2. A child's action contradictory with his or her community norms that can cause disturbance, such as illegal racing, group fighting, and so forth.
3. Children who are in need of help and protection, for instance abandoned children, orphans, and etc. If they are left to live their life without other's control and supervision, they will become bad people as they grow.¹⁷

Nasir Jamil differentiates two categories of children's behavior that force them to deal with legal process, namely:

1. Offence status is a child mischief and if done by adults, such action is not viewed as a crime, such as disobedience, school truancy, or running away from home.

¹¹ Arief Gosita, *Loc.Cit.*

¹² Iman Jauhari, *Op.Cit.*, p. 10

¹³ Iman Jauhari, A Comparison of Child Protection Law between Indonesia and Malaysia, *IOSR Journal Of Humanities And Social Science*, Volume 20, Issue I, Ver.IV (Jan.2015), p. 1

¹⁴ Ny.Singgih Gunarso dan Singgih Gunarso. *Psikologi Remaja*, (Jakarta: Gunung Mulia,1985), p. 30

¹⁵ Romli Atmasasmita, *Problema Kenakalan Anak-Anak/Remaja*, (Jakarta: Armico, 1983), p. 17.

¹⁶ Iman Jauhari, Diversion in Solving Child Cases (A Research in East Aceh – Indonesia), *IOSR Journal Of Humanities And Social Science*, Volume 20, Issue 6, Ver. III (Jun. 2015), p. 8

¹⁷ Soedjono Dirdjosisworo, *Penanggulangan Kejahatan*, (Bandung: Alumni: 1984), p.150.

2. Juvenile delinquency is a child mischief behavior and if done by adults, it is categorized as a crime or law violation.¹⁸

Despite this, it is very extreme if a mischief committed by children is considered as a crime because basically children have an unstable psychological condition. The process of psychological development can result in a critical and aggressive behavior and tend to encourage children to cause social disorder.

3.3 Sexual Harassment

Sexual harassment (violence) toward children can be defined as the relationship or interaction between a child and someone who is older or a child with more rationale or adult such as a foreign person, sibling, or parents in which that child is used as an object that can fulfill an actor's sexual desire. That action is done through force, threat, inducement, lie, or pressure.

Article 8, Law of the Republic of Indonesia number 23, 2004 concerning the abolition of domestic violence emphasizes that sexual harassment include:

- a. A coercion of sexual intercourse on a particular family member(s)
- b. A coercion of sexual intercourse done by a particular family member(s) with others for commercial purpose or others.

Meanwhile, the articles that can be used for children who commit sexual harassment is stipulated in Law of the Republic of Indonesia Number 35, 2014 concerning child protection. Article 76 D emphasizes that each person is banned to commit violence or threat of violence to force children have a sexual intercourse with him or her or others. Nevertheless, article 76 E determines that each person is prohibited to do violence or threat of violence, force, make a trick and lie or seduce children to do sexual intercourse or let others to rape children.

The sanction that can be given to actors who violate the article 86 D has been set on the article 81 (1). Every person who violates the rule of law that has been stated in the article 76 D is given at least a 5-year sentence or a maximum of a 15-year sentence and compelled to pay for Rp. 5.000.000.000,00 (five billion rupiah) fine.

3.4 The Urgency Of The Legal Protection For Children Involving In Sexual Harassment

Child action which violates the law should not be equated to a crime committed by adults. Children who commits sexual harassment has certain characteristics and the legal consequence caused by this law violation is very complex as it has a negative impact not only at the present time but also in their future. Therefore, such children should be given a special protection. Such protection as regulated in the article 59, clause (2) letter b should be conducted as follow:

- a. Giving Human treatment by paying attention to the need based on the age of a child
- b. Separating from parents
- c. Giving legal assistance and other helps effectively.
- d. Enacting recreational activities
- e. Being free from torture, punishment, or other cruel and inhuman treatments that can degrade their dignity
- f. Avoiding death penalty and/or life sentence
- g. Avoiding arrest and detention, except that those can be taken as the final solutions, yet for a short time
- h. Objectively and impartially providing justice in the juvenile court, done in a closed-door meeting
- i. Avoiding revealing the child's identity
- j. Giving a guardian in lieu of the child's parents that can be trusted by him or her
- k. Giving social advocacy
- l. Providing a privacy
- m. Giving the access, especially for disabled children
- n. Providing education
- o. Providing health care
- p. Giving other rights based on the constitution

The issue related to the protection of a child who committed delinquency is very crucial because children are the next generation in the future. The objective of the child criminal law is to heal the children's psychological condition that has been disturbed due to a crime which they have done. Therefore, the purpose of the criminal law is not merely to punish guilty children, but also to educate and make them realize about a delinquency that they have committed. This is very important considering that what they have done have violated the law. Therefore, giving criminal penalty is not the only step to tackle children who have involved in

¹⁸ M. Nasir Djamil, *Anak Bukan Untuk Dihukum*, (Jakarta: Sinar Grafika, 2013), p. 33

a delinquency.¹⁹ From this viewpoint, we need to give protection to children who have committed a delinquency so that they will not receive the same treatment as adults, considering the former's psychological condition that still needs to be guided in order to avoid them from being pressured. The protection of children's right is basically related to the arrangement in the legislation. The wisdom, effort, and activities that can ensure the protection of the children's rights are mainly based on the consideration that children are vulnerable class of society.²⁰ Giving protection to children is a right choice because they are categorized as vulnerable groups. Giving protection to children is also essential as the violation of child protection is basically paramount to the human right violation.²¹

According to Paulus Hadisuprpto,²² in the context of handling a crime committed by young people and child delinquency, social welfare policy is not the only main objective and social defence policy is as an ultimate purpose, but it specifically aims at the political welfare of the children or the political policy to protect the right of the children who have done delinquency.

The main objective is to realize children's welfare which is actually an integral part of overall social prosperity. It is not to be understood that children's welfare and interest is less important than the interest of a wider society, yet we must view that prioritizing the children's welfare and interest is basically an essential part to bring a social prosperity. The nature of criminal law is to realize a public order. It basically has two main aims, that is to influence behavior and to settle a conflict.²³

Prioritizing children's welfare is pivotal because:

- a) Children are the potency of a nation as well as the successors who will realize the ideal of the nation that has been made by previous generations
- b) To make every child able to be responsible, he or she should have an opportunity to grow and develop ideally.
- c) In the society, there are some children who experience the economic, social, physical, and spiritual obstacles to gain welfare.
- d) Children are not able to take care of themselves yet
- e) Getting rid of the obstacles can only be done if the children's welfare is guaranteed.²⁴

Michael D.A. Freemaan asserts that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."²⁵

Therefore, the principle "solely for the interests of the children" is the most urgent principle in coping with the children's delinquency cases. This is based on and influenced by philosophical thought of punishment called philosophy of determinism. This philosophy has a stance that imposing a sanction to a child who commit delinquency is based on the thought that this behavior relies very much on the condition and specific characteristics that the children have. It means that the definition of sanction given to children is not the same as that of sanction given to adults who commit a crime. Children who do delinquency cannot be held fully responsible as the basic principle of culpability cannot be found wholly, unlike adults.²⁶

The protection for the children who commit sexual harassment is closely related to the psychological and physical condition of a child. Such protection is also a complex problem in determining the children's future. Environment will influence their psychology that is developing to be more mature and shape their personality in the future. Over the course of the children's development, it is very important to give them protection so that the children will develop well and become an example in the society, who can finally be reaccepted as a community member in their environment.

¹⁹Marlina, *Peradilan Pidana Anak di Indonesia*, (Bandung: Refika Aditama, 2009), p. 158

²⁰ Maidin Gultom, *Perlindungan Hukum Terhadap anak dalam Sistem Peradilan Pidana Anak di Indonesia*, (Bandung: Refika Aditama, 2008), p. 35

²¹ Rika Saraswati. 2015, *Hukum Perlindungan Anak di Indonesia*, (Bandung: Citra Aditya Bakti, 2015), p. 26

²²Paulus Hadisuprpto, *Juvenile Delinquency. Pemahaman dan Penanggulangannya*, (Bandung: Citra Aditya Bakti, 1997), p. 63

²³Roeslan Saleh, *Pertanggungjawaban Hukum Pidana*, (Jakarta: Ghalia Indonesia, Cet. I, 1982), p. 30.

²⁴ Maidin Gultom, *Op.Cit.*, p. 75

²⁵ Michael D.A. Freemaan. *Loc.Cit.*

²⁶Nashriana, *Ilmu Hukum Pidana Anak: Dari Filsafat Pemidanaan, ke Teori Pertanggungjawaban Pidana, Dogmatika Hukum dan Praktik Hukum*, (Palembang: Fakultas Hukum Universitas Sriwijaya, 2010), p. 32

IV. CONCLUSION AND CONTRIBUTION

4.1 Conclusion

The protection for the children who commit sexual harassment is closely related to the psychological and physical condition of a child. The imposing of the sanction toward children is solely for their interest because this principle is the most urgent in handling children's delinquency cases. It means that the definition of sanction given to children is not the same as that of sanction given to adults who commit a crime. Children who do delinquency cannot be held fully responsible as the basic principle of culpability cannot be found wholly, unlike adults.

4.2. Contribution

It is expected that parents and government should supervise the children since they are still young to prevent them from committing delinquency that can harm other people. It needs a dominant role of the parents in supervising the children's delinquency action since they are still young. Moreover, government should create a children-friendly and secure environment for the children in order to provide them with security.

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