

AN ANALYSIS OF LEGAL PROTECTION FOR WOMEN WITH MENTAL DISORDERS AS VICTIMS OF SEXUAL VIOLENCE

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ABSTRACT

The purpose of this study was to determine the regulation of legal protection for women with mental disorders as victims of sexual violence and to analyze criminal liability for perpetrators of sexual violence against women with mental disorders. The type of research used is normative legal research. The legal materials used consist of primary legal materials, secondary and tertiary legal materials normatively based on a conceptual approach, and laws and regulations. The results of the study showed that people with mental disorders (ODGJ) who are victims of crime will still be given legal protection in accordance with the provisions contained in Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims and Law Number 18 of 2014 concerning Mental Health. Accountability for perpetrators of sexual violence against women with mental disorders can be carried out by public prosecution and regulated in related regulations in the Criminal Code (KUHP). The conclusion of this study is that the government and law enforcement officers should handle and provide legal certainty to victims and not hinder or stop the process of resolving cases of sexual violence. Perpetrators of sexual violence should also receive the fairest legal consequences.

Keywords: People with Mental Disorders, Legal Protection, Sexual Violence

INTRODUCTION

People with mental disorders (ODGJ), according to Law Number 18 of 2014 concerning mental health (or hereinafter referred to as the Mental Health Law), are people who experience disorders in thoughts, behavior, and feelings that are manifested in the form of a collection of symptoms and/or significant behavioral changes and can cause suffering and obstacles in carrying out people's functions as human beings.

In Indonesia, the negative stigma against ODGJ in society is still high. This stigma is not only directed at people with mental disorders but also at the sufferer's family. The stigma directed at ODGJ can be in the form of neglect of sufferers, prejudice, and even discrimination against people with mental disorders. The neglect that is made is related to the community's understanding of the mental disorder. While prejudice is the attitude of society towards people with mental disorders that tends to lead to negative things towards ODGJs. ODGJs often also

experience discrimination, which can be in the form of discrimination against public services or discrimination against ODGJs' rights in society.¹

Women who experience mental disorders when experiencing sexual harassment may consider it a game, or being joked with, or if touched, then only feel ticklish, and so on, especially when they do not see it so that it even poses a risk for them, namely pregnancy. Sexual harassment is also received by women with mental disorders, of course. If there are no witnesses who see and hear the story or even their cries when they want to complain, this is a mystery.

However, if there are other people or witnesses who see the act, then women with mental disorders who experience sexual violence can be protected by reporting the perpetrator so that the woman gets legal guarantees and certainty for her. Legal protection should see the stages, namely, legal protection is born from a legal provision and all legal regulations provided by society, which is basically an agreement of the society to regulate the behavioral relationship between members of society and between individuals and the government, which is considered to represent the interests of society. As in a crime as a social phenomenon, it is influenced by various aspects of life in society, such as politics, economics, social culture, and matters related to state defense and security efforts.²

Legal certainty is an absolute requirement; if it is desired that the law can carry out its duties as well as possible, justice is used as a guideline for the truth of the contents of the law. Justice and legal certainty contradict each other and create disputes that can be eliminated; however, both are needed so that the law can carry out its duties properly and achieve its goals. An example of a case of sexual violence in the form of rape is a case that occurred in the Singosari area, Malang, East Java. A man who molested a person with a mental disorder (ODGJ) in Malang and was not sentenced to prison. This action was revealed through a CCTV video recording of alleged sexual harassment of a woman. The 1.29-minute video went viral on social media. The immoral incident is said to have occurred in Jalan Mandoroko in front of a shop. In the video, a man and a woman are seen sitting together. They appear to be sitting in front of a shop with the lights off. The perpetrator then approached and carried out his obscene actions; the perpetrator tried several times to kiss the victim and groped the victim's breasts and

¹ Weny Lestari, Yurika Fauzia Wardhani. April 2014. "*Stigma dan Penanganan Penderita Gangguan Jiwa Berat yang Dipasung*". *Buletin Penelitian Sistem Kesehatan*. Vol 17. No 2. Surabaya: Badan Litbang Kemenkes RI.

² Adang, Yesmil Anwar. 2010. *Kriminologi*. Bandung: PT. Refika Aditama

seemed to force the victim to have sex. Feeling harassed, the victim seemed to try to avoid and fight back, but the perpetrator still tried to approach and hug the victim. Not long after, the shop lights that were previously off then turned on brightly. This shocked the perpetrator, and he immediately headed for his parked motorbike to escape.³

This investigation also gave results. Therefore, the perpetrator with the initials TOS (33) is a resident of Morotanjek Hamlet, Purwosari Village, Singosari, Malang Regency. The perpetrator was then arrested and immediately taken to the police station. Although he had been arrested, the case did not continue. The perpetrator was not prosecuted or detained. The perpetrator only made a stamped statement. The police argued that the victim was an ODGJ.

Mental disorders experienced by ODGJs do not necessarily eliminate their rights as human beings. ODGJs have the right to a decent life and the right to live without torture and discrimination. Article 3 Paragraph (2) of Law Number 39 of 1999 concerning Human Rights (HAM Law) states that, "Everyone has the right to recognition, guarantees, protection, and fair treatment and to receive legal certainty and equal treatment before the law." The rights stated in the law apply to everyone without being reduced under any conditions. Article 28 G, paragraph 1, of the 1945 Constitution of the Republic of Indonesia, regulates the protection of everyone and the right to a sense of security and protection from threats. In addition, ODGJs also have the right to be free from all torture, no different from society in general. The right to be free from torture is stated in Article 28 G, Paragraph 2, of the 1945 Constitution of the Republic of Indonesia. As stated in the Regulation of the Chairperson of the Witness and Victim Protection Agency Number 6 of 2010 concerning Procedures for Providing Protection for Witnesses and Victims, it only contains the form, implementation procedures, and supervision of providing protection to witnesses and victims. The role of the social service for people with mental disorders is to restore the social function of people with mental disorders, such as returning the sufferer and helping the community around the sufferer's residence to be able to accept them back. The social service also provides moral assistance for families of people with mental disorders, but it does not rule out the possibility that out there there are rape victims who suffer from mental disorders, but there are no reports because they have been handled by the police.

³ Tim Detik Jatim, <https://www.detik.com/jatim/hukum-dan-kriminal/d-6291856/aksi-bejat-pria-cabuli-perempuan-odgj-di-malang-tak-diganjar-dibui> : 2022, Diakses tanggal 6 Desember 2023

The authority of the social service is limited to providing social rehabilitation and facilitating people with mental disorders and other victims. While we do not guarantee that all reports related to rape crimes against people with mental disorders. Therefore, legal protection is needed for female victims of rape crimes who suffer from mental disorders. It is emphasized in Article 1 number (8) of Law Number 31 of 2014 concerning Protection of Witnesses and Victims that: "Protection is all efforts to fulfill rights and provide assistance to provide a sense of security to Witnesses and/or Victims, which must be implemented by LPKS (Witness and Victim Protection Agency) or other institutions in accordance with the provisions of this Law." This means that every victim of a crime has the right to proper legal protection, as well as ODGJs as victims of a crime. ODGJs who are victims of criminal abuse need to receive protection as victims. The protection that has been regulated in the regulations does not fully accommodate the rights of ODGJs. Strict legal regulations are needed to fulfill the rights of ODGJ, especially legal protection when an ODGJ becomes a victim of a crime.

It is a normative legal research with a conceptual approach and legislation. The collection of legal materials is carried out by means of examination, marking, reconstruction, and systematization. Analysis of legal materials is carried out qualitatively and systematically in order to obtain answers to the problems studied.

METHOD

This is a normative legal research, using a conceptual approach and legislation. The nature of the analysis is qualitative descriptive. Collection of legal materials is made through document or literature studies, processing of legal materials carried out by means of examination, reconstruction, and systematics. Analysis of legal materials is carried out qualitatively and comprehensively.

RESULTS AND DISCUSSION

A. Legal Protection Regulations for Women with Mental Disorders Who Are Victims of Sexual Violence

Article 28G Paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that "Everyone has the right to protection of themselves, their families, their honor, their dignity, and their property under their control, and has the right to a sense of security and protection from the threat of fear to do or not do something that is a basic human right." This article shows

that everyone without exception has the right to protection. Like wise with ODGJs, the deficiencies and limitations of ODGJs do not make their rights as human beings disappear or can be violated.

The regulations governing legal protection for ODGJs who are victims of sexual violence are:

a. Law Number 18 of 2014 concerning Mental Health

Law Number 18 of 2014 concerning Mental Health (Mental Health Law) states that the state guarantees that every person lives in physical and mental prosperity and receives health services. The existence of this mental health law is a form of state responsibility for fulfilling the rights of people with mental disorders that are considered suboptimal.

Efforts made to realize optimal mental health are referred to as mental health." Efforts based on Article 1 of the Mental Health Law are activities aimed at realizing an optimal level of mental health for individuals, families, and communities with a promotive, preventive, curative, and rehabilitative approach that is carried out comprehensively, integrated, and continuously.

Mental health efforts aim to ensure that every Indonesian citizen, without exception, gets a decent quality of life and gets a healthy mental life, free from all fear, pressure, or other disorders that can interfere with their mental health. In addition, mental health efforts are also expected to fulfill the rights of ODMK (People with Mental Problem) and ODGJs as Indonesian citizens. In Article 4 of the Mental Health Law, it is stated that mental health efforts are carried out in 4 ways, namely through promotive, preventive, curative, and rehabilitative activities.⁴

b. Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims

The definition of a victim according to the Law on Protection of Witnesses and Victims is a person who experiences physical, mental, and/or economic suffering caused by a criminal act. Every victim of a criminal act has the right to receive protection. Protection in the Law on Protection of Witnesses and Victims is defined as all efforts to fulfill rights and provide assistance to provide a sense of security to witnesses and/or

⁴ Kharisma Salsa Bila, Sulistyanta. 2022. *Perlindungan Hukum Orang Dengan Gangguan Jiwa (ODGJ) Sebagai Korban Tindak Pidana Penganiayaan Dalam Prespektif Viktimologi*.

victims, which must be implemented by the LPSK or other institutions in accordance with the provisions of this law.

The weakness of the Law on Protection of Witnesses and Victims is that it does not regulate how law enforcement provides protection to witnesses and victims. Another thing that hinders the development of the performance of the LPSK is the lack of information or socialization for the community, so that there is minimal public knowledge of the presence of the LPSK even though the Law on Protection of Witnesses and Victims has been enacted. Therefore, providing information to the wider community is very important, especially to provide information to witnesses and victims about the presence of the LPSK. In this weakness, the Witness and Victim Protection Law does not specifically explain the protection of rape victims who suffer from mental disorders.⁵

From the perspective of the victim itself, there are also two sides; namely, the first side is the absence of appropriate legal protection for rape victims who suffer from mental disorders because there are no articles or laws that regulate them firmly and clearly.⁶

But it also needs to be reviewed from the perspective of power motive and coercion (coercive-sexual motive) as well as gender bias and others. The main step to monitor the modus operandi of perpetrators of rape against ODGJs is to carry out the Modus Operandi approach; in his journal, Sabda Tulliah quoted several thoughts from Rachel Boba about the characteristics of the modus operandi, namely:

1. What: What type of sexual violence
2. Who: Who is involved in sexual violence
3. Where: Where sexual violence occurs
4. When: When sexual violence occurs
5. Why: Why is sexual violence committed
6. How: How is sexual violence committed?

This modus operandi pattern is further explained. This theory has also helped justify the power motive and coercive motive in every act of violence. The power motive of an act of violence contains the role of a person as a perpetrator who is very dominant over the role of another person as a victim.

⁵ Agus Takariawan. 2016. *Perlindungan Saksi dan Korban*. Bandung: Pustaka Reka Cipta

⁶ Satijpto Rahardjo. 2000. *Ilmu Hukum*. Bandung: PT. Citra Aditya Bakti.

Sexual violence is a crime that is quite complex in its causes and does not stand alone; it can be caused by supportive conditions, the presence of victims who can indirectly encourage the perpetrator, or there are other elements that influence. The role of the perpetrator and the position of the victim are also supported by environmental influences, such as being far from the crowd, quiet, or in a closed place. As is the case with ODGJs, who have minimal supervision from others and are often in quiet places.⁷

Sexual violence against ODGJs is abnormal behavior that is bad and violates norms; this behavior is included in behavior that is socially unacceptable or violates social norms and is also dangerous behavior. It is said so because the behavior of rape itself is behavior that is not considered normal in the community, which is clearly socially unacceptable because it violates the norms that exist in society.⁸ In such a context, criminology, as stated by its experts, prioritizes prevention as its main target, so its presence, in addition to preventing the emergence of potential criminals, also prevents someone who has committed a crime from repeating their crime. The problem of overcoming crime can be done by acting on the "intention" of the criminal through a conscious "injection" to obey the law or by eliminating the opportunity for the criminal to realize his actions. Eliminating the opportunity for someone to commit a crime is certainly the potential victim who plays a dominant role. As for the prevention for those who have already committed a crime, the criminalization process will correct the "evil nature" of the perpetrator through punishment that is commensurate with his actions.⁹

B. Criminal Responsibility for Perpetrators of Sexual Violence Against Women with Mental Disorders

In English, criminal responsibility is called responsibility or criminal liability. The concept of criminal responsibility is actually not only concerned with the law but also with moral values or general morality adopted by a society or groups in society; this is done so that criminal responsibility is achieved by fulfilling justice. Criminal responsibility is a form to determine whether a suspect or defendant is held responsible for a criminal act that has occurred. In other words, criminal responsibility is a form that determines whether a person is acquitted or convicted.

⁷ Sabda Tuliah. 2018. *Kajian Motif Pelaku Kekerasan Seksual Terhadap Anak Melalui Modus Operandi Di Lingkungan Keluarga*. eJournal Sosiatri Sosiolog. Vol. 2.

⁸ A.S. Alam, Amir Ilyas. 2018. *Kriminologi Suatu Pengantar*. Jakarta: Prenamedia Group

⁹ Ida Bagus Subrahmaniam Saitya. 1 Maret 2019. "Faktor-Faktor Penyebab Terjadinya Kekerasan Seksual Terhadap Anak". Dalam Jurnal Vyavahara Duta Vol.14.

According to Chairul Huda, the basis for a criminal act is the principle of legality, while the perpetrator can be punished on the basis of error; this means that a person will have criminal responsibility if he has committed an act that is wrong and contrary to the law. In essence, criminal responsibility is a form of mechanism created to react to violations of a certain act that has been agreed upon.¹⁰

The case raised by the author contains an act of sexual violence in the form of physical sexual harassment revealed through a CCTV video recording of alleged sexual harassment of a woman. The 1.29-minute video went viral on social media. The immoral incident is said to have occurred in Jalan Mandoroko in front of a shop. In the video, a man and a woman are seen sitting together. They appear to be sitting in front of a shop with the lights off. The perpetrator then approaches and carries out his obscene actions; the perpetrator tries several times to kiss the victim and gropes the victim's breasts and seems to force the victim to have sex. Feeling harassed, the victim appears to try to avoid and fight back, but the perpetrator still tries to approach and hug the victim. So in this case it can be defined as an act that fulfills the elements of a criminal act of sexual violence in the form of physical sexual harassment. When viewed in criminal law, the perpetrator's actions can be prosecuted under the provisions of Article 281 of the Criminal Code. Article 281 of the Criminal Code states that "threatened with a maximum imprisonment of 2 years and 8 months or a maximum fine of Rp4,500,000.00 (four million five hundred thousand rupiah): a. anyone who intentionally and openly violates morality; b. anyone who intentionally and in front of other people who are there against his will, violates morality."

In this context, it is necessary to look at the subjective and objective elements of the crime contained in the provisions of Article 281 of the Criminal Code. The subjective and objective elements contained are as follows:

1. Whoever

Whoever is the perpetrator or subject of the crime (delict). In another sense, it means that the perpetrator can be anyone. And it should be remembered that in the current Criminal Code system, only humans (natuurlijk person) can be the subject of a crime.

2. Intentionally

The element of intentionally (dolus/opzet) includes three intentional intentions, namely:

¹⁰ Chairul Huda.2006. *Dari Tindak Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggung jawab Pidana Tanpa Kesalahan*. Cetakan ke-2. Jakarta: Kencana

- a. Intentionally as an intention where the act committed and the consequences that occur are the perpetrator's goals.
 - b. Intentionally as a conscious certainty/necessity where the consequences that occur are not the consequences that are the perpetrator's goals, but to achieve the truly intended consequences, other actions must be carried out.
 - c. Intentionally as a conscious possibility/conditional where the perpetrator is aware of the possibility of other consequences that are actually not desired, but this awareness does not make the perpetrator cancel his intention, and it turns out that the unintended consequences actually occur.
3. Open (in public)

Meanwhile, S.R. Sianturi, in his book entitled *Criminal Acts in the Criminal Code and Their Descriptions*, explains that what is meant by "open" or "openly" (openbaar or almost the same as openlijk) is in a place where the public can come to that place or a place that can be seen, heard, or witnessed by the public (who are in that place or in another place). Or it can be interpreted as a place where other people can see, hear, or witness it.

4. Violating morality

Acts that violate morality are acts related to sexual relations between women and men to increase and satisfy lust or passion, which are carried out in public and are seen as excessive acts, and if other people see, can cause feelings of displeasure and shame.¹¹ According to R. Soesilo in his book, the Criminal Code (KUHP) and its Complete Commentaries Article by Article (p. 204), examples of immoral cases are having sex, touching a woman's breasts, touching a woman's genitals, paying attention to a woman's genitals or a man kissing and so on (Soesilo, 1995). In the case that the author raised, the perpetrator was only arrested and not prosecuted; the perpetrator only made a stamped statement. The police argued that the victim was a mental disorder sufferer. While in the case there was already evidence in the form of CCTV footage and witnesses from the shop owner. Because according to the Criminal Procedure Code, there are various types of valid evidence to impose criminal penalties on

¹¹ R. Soesilo.1995. *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia.

perpetrators of criminal acts. In Law Number 8 of 1981, Article 184 of the Criminal Procedure Code:

1. Witness Statement
2. Expert Statement
3. Letter
4. Instructions
5. Defendant's Statement

Article 5 Paragraph 1 of the Electronic Information and Transactions Law explains that there are two types of evidence, namely electronic evidence and printed results of electronic evidence. Both types of evidence are an extension of valid evidence. What is meant by expansion here is that electronic evidence and/or printed results of the evidence are used as additional evidence and to expand the scope of the evidence used.

Various types of electronic evidence, such as CCTV recordings, recordings of messages, emails, and other electronic documents, can be used as valid evidence.¹² People with mental disorders who experience sexual violence are also victims who have rights. Victims are entitled to a number of rights. Victims are generally entitled to a number of rights, namely the right to participation, the right to representation, and the right to participate in determining the form of protection and security provided by the state. The right to representation includes the right to be heard from the statement or the suffering experienced in court. The right to protection includes the victim's right to obtain physical or psychological protection during or after the trial process. The right to reparation is related to the victim's right to obtain restitution from the perpetrator and compensation from the state.

In addition to the lack of legal protection for victims, the imposition of sanctions for perpetrators of sexual violence against ODGJs also has various obstacles, one of which is if the ODGJ is asked for information, the information is inconsistent so that it requires an expert; in addition to that, to carry out legal ensnarement against the perpetrator, strong evidence is needed to prove that the ODGJ experienced sexual violence. The act of rape against people with mental disorders is a criminal offense, which is, of course, regulated in the law; this is the application

¹² Redaksi Justika. *Macam-Macam Alat Bukti Yang Sah* [https://blog.justika.com/pidana-dan-laporan-polisi/alat-bukti-yang-sah-menurut-kuhp/_\(2022\)](https://blog.justika.com/pidana-dan-laporan-polisi/alat-bukti-yang-sah-menurut-kuhp/_(2022)). Diakses tanggal 11 Maret 2024

of one of the functions of law, namely law as a means of social control. The function of law as a means of social control includes all the forces that create and maintain social ties. Law as a means of social control is useful for maintaining existing order as a guideline for social control. In viewing law as a tool for human social control, law is one of the tools of social control. Other tools still exist because the existence of other social institutions is still recognized (for example, beliefs, morality).

The Criminal Code adheres to the neoclassical school, which, among other things, accepts the application of mitigating circumstances for perpetrators of crimes involving physical, environmental, and mental. Likewise, it is possible that aspects that mitigate the punishment for perpetrators of crimes involving physical, environmental, and mental. Moreover, it is possible that aspects that mitigate the punishment for perpetrators of crimes with partial responsibility, in special cases, for example, their souls are disabled (insane). That the regulation of the Criminal Code is oriented towards the perpetrators and even the victims tend to be forgotten. In fact, the victim is one aspect that really experiences suffering due to the actions of the perpetrator. Protection of victims, especially victims with special needs, should be explicitly regulated in the Criminal Code.¹³

In addition, law enforcement officers have to strengthen the disclosure or investigation system in proving cases of sexual violence. The many difficulties in handling cases of sexual violence cause many cases not to be brought to court; in fact, we often see news that reports of victims of sexual harassment or violence are rejected by law enforcement officers because of the difficulty of proof. The difficulty in the proof process is because when sexual violence occurs, it is generally carried out without the presence of other people.

This should be addressed because it results in perpetrators not getting consequences, victims being neglected, and the potential for sexual violence cases to reoccur. As best as possible, law enforcement officers should handle and provide legal certainty to victims and not slow down or stop the process of resolving sexual violence cases. Perpetrators of sexual violence also have to continue to receive the fairest legal consequences regardless of the position, whereabouts, and standing of the perpetrator. Because in reality, this sexual crime could possibly decrease if the legal process and product can truly punish perpetrators of sexual violence with appropriate punishment, and society provides social support to victims.

¹³ Gatot Sugiharto, Aditia Arief Firmanto, dan Nurlis Effendi. 2020. *Kejahatan Pemerkosaan Penyandang Disabilitas Dalam Perspektif Kriminologi Di Lampung*. Vol. 1 No.1.

More definite regulations in classifying what constitutes sexual violence are very much needed; this also requires a commitment from law enforcement officers to have an open mind and pay more attention to victims.

CONCLUSION

Legal protection for women with mental disorders who are victims of sexual violence is a very important thing to consider, and the shortcomings or limitations of ODGJs do not make their rights as human beings lost or able to be violated. The regulations governing the protection of ODGJs who are victims of sexual violence are based on Law Number 18 of 2014 concerning Mental Health and Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims. Then the way to resolve cases of sexual harassment or sexual violence experienced by women with mental disorders, the perpetrator's responsibility can be demanded with the provisions of Article 281 of the Criminal Code. However, a more definite regulation in classifying what is included in sexual violence is very much required; this also needs a commitment from law enforcement officers to have an open mind and more attention to the victim.

Cooperation from various parties is needed. Lack of education about ODGJs in the community and family environment can hinder the fulfillment of ODGJs' rights when placed as victims of criminal acts. The government and authorities have an obligation to provide counseling and education to the community aimed at reducing negative stigmas in society about ODGJs. There needs to be a more specific regulation that regulates protection and legal handling for people with mental disorders, especially in Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims, especially for female ODGJs, which globally is not only a criminal offense of ordinary harassment but also a neglect of human rights.

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