

# Reconstruction of the Legal Definition of Children to Protect Sexual Violence Victim with Intellectual Disabilities Based on Justice Insight

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## Abstract

This study aims to determine the weaknesses of regulations regarding child protection for persons with intellectual disabilities who are victims of sexual violence in Indonesia and to reconstruct the meaning of children in order to protect the rights of persons with intellectual disabilities who are victims of sexual violence in Indonesia. This study uses a constructivism paradigm based on literature review with juridical research methods. The results showed that the laws and regulations on child protection regarding the age limit of children are that it only refers to international conventions, without paying attention to the existing living laws in Indonesia, namely Customary Law and Islamic Law. Third, the reconstruction of mental age norms in the Child Protection Law can be further developed by making norms in the form of the draft of Article 1 point 1a that states that a child is someone whose mental age is under 18 (eighteen) years old according to a psychological expert's examination, for a person with intellectual disabilities as a victim of violence, the basis for the application of this norm is juridically existed in Article 28H paragraph 2 of the 1945 Constitution and socio-philosophically, through the theory of social justice developed by John Rawls with the principle of fair equality of opportunity.

**Keywords:** Children, Intellectual Disabilities, Sexual Violence, Justice Insight.

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## INTRODUCTION

In Indonesia, violence against children often occurs. Although in 2017 the number of complaints against violence has decreased as stated by the Indonesian Child Protection Commission (KPAI) that in 2017, cases related to children at that year reached 3849 while in 2016 it reached 4620, especially for Children who are in conflict with the Law is in the top rank with most complaints of 1209 cases. Furthermore, complaints came from family problems and alternative care which amounts to 593 cases. Then pornography and cybercrime are in third place (514), cases related to education (358), and the fifth is trafficking and exploitation (293). Additionally, there were 530 cases of children as perpetrators of violence and 477 cases of children as victims of violence [1].

Based on Article 1 paragraph (2) of Law no. 11 of 2012 concerning the Criminal Justice System for Children, what is meant by children in conflict with the law, is as follows: "Children in conflict with the law are

children in conflict with the law, children who are victims of criminal acts, and children who are witnesses of a crime". The age limit for criminal responsibility for children is 12 (twelve) years old but not yet 18 (eighteen) years old (article 1 number 3 Law No.11 of 2012).

Based on the description of the data, the condition of children, in general, is still limited, even though if it is further elaborated, could raise some question, what if this "children" in this case, is a person who has mental disabilities and isn't in the age categories? This problem should be addressed as KPAI recorded that in 2017, they received 4 complaints about "children" with special needs, whereas according to the census data of the Ministry of Social Affairs (Kemensos) of the Republic of Indonesia, in 2012 the number of Persons with Disabilities in Indonesia reached 6,008,640 people, while in the 2015 Population Census Data, it was increased to 15,725,698 people where both of the data shows that at least 30 percent of them are children, mental age-speaking. The trend of

violence against women in Indonesia for a period of 12 years (2007 - 2018) according to the annual notes (Catahu) of the National Commission on Violence against Women (Komnas Perempuan) shows an extraordinary increase in cases. According to Catahu 2019, the number of cases of violence against women in 2018 (406,178) increased by 14% (348,446) from 2017 (348,446), from the Komnas Perempuan Catahu data, of course, it also includes the victims as women with mental disabilities who could be categorized as a child [2].

Sexual violence is the type of violence mostly experienced by women with disabilities totaled as much as 64% based from the data obtained from Komnas Perempuan, where the remaining 36% are psychological, economic, and physical violence, and of the 89 victims recorded, 60% are of intellectual disabilities (gahita), 13% are speech disabilities, 8% deaf and speech disabilities), 7% deaf disabilities, 6% blind disabilities, 3% psychosocial disabilities, 2% physical disabilities and 1% cleft lip disabilities [3].

In terms of numbers, only a few are reported, but the phenomenon of violence that occurs is like an iceberg, because it seems that little is reported but it turns out that very much has not been revealed, let alone reported. Then what is the condition of violence that occurs against and persons with disabilities who are "adults with the status of children"? The use of the term "adults with the status of children" means that there is an adult who according to his chronological age is indeed an adult but his mental condition or mental age is still under 18 years old.

The focus of the study in this research is to raise basic issues regarding the injustice of law application for persons with intellectual disabilities who are victims of sexual violence, where, in handling and fulfilling their rights to the law they still do not pay attention to the interests of victims, especially the imposition of articles on perpetrators, still use general legal regulations and even do not. There are also few victims whose rights are not protected on the grounds that "the victim is an adult (Physical Age-Speaking) and understands his actions" even though the examination of his mental age is under 18 years old or in other words, he or she is still underage, which should use the principle of *lex specialis derogat legi generalis* in its handling, namely based on Law Number 8 of 2016 concerning Persons with Disabilities and Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection where the discussion of this problem will be divided in to 2 main problems as follows:

1. What are the weaknesses in regulating child protection for persons with intellectual disabilities as victims of sexual violence in Indonesia?
2. How to reconstruct the regulation of the definition of children in order to protect the rights of persons

with intellectual disabilities who are victims of sexual violence with justice insight?

## METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in social science is a critique of the positivist paradigm. According to the constructivism paradigm of social reality that is observed by a person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of a non-doctrinal research that seeks to describe and seek answers fundamentally about cause and effect by analyzing the factors that cause the occurrence and appearance of a particular phenomenon or event.

The method of approach in research using the method (Socio-Legal Approach). The sociological juridical approach (Socio-Legal Approach) is intended to study and examine the reciprocal relationship that is associated in real terms with other social variables [4].

Sources of data used include primary data and secondary data. Primary data is data obtained from field observations and interviews with sources, While Secondary Data is data consisting of:

1. Primary legal materials, namely binding legal materials in the form of prevailing laws and regulations and have something to do with the issues discussed [5].
2. Secondary legal material, namely legal material whose nature provides an explanation of the primary legal material.
3. Tertiary legal materials are legal materials that provide further information on primary and secondary legal materials.

Research that is associated with the socio-legal approach is research that analyzes problems that are carried out by combining legal materials (which are secondary data) with primary data obtained in the field, supported by prior to secondary legal materials, in the form of writings of experts and existing legal policies [6].

## RESEARCH RESULT AND DISCUSSION

### Weaknesses in Regulating Child Protection for Persons with Intellectual Disabilities as Victims of Sexual Violence in Indonesia

During the 2008-2020 period, Komnas Perempuan has issued a red note regarding the high escalation of victims of sexual violence in Indonesia. Based on his records, the increase in the number of victims of sexual violence in adult women increased by more than 700%, girl victims increased by 65%, victims of online sexual harassment increased by 300%, and groups with disabilities increased by 47% in 1 (one) year from 2019- 2020 [7]. Then, based on data from the

Women and Children Advocacy Institute, it was found that during the COVID-19 pandemic, the spike in online-based sexual violence cases also increased, which within half a year there were 4 (four) cases. This number is considered high because if we compare it to the 2019 report, in a year the number of cases is 2 cases. This phenomenon is also coming from the data from victims who are willing to report and from other people who report these immoral acts, and not including victims who do not report themselves as victims of sexual violence. Simply put, the problem of sexual violence is still an iceberg phenomenon in Indonesia.

In relation to the Intellectual disability person as a victim of sexual violence, what must be understood first is the definition of this term. the Intellectual disability is a condition when a person is born with intelligence and mental abilities below average and does not have sufficient skills to carry out daily activities. Intellectual disability groups can indeed learn new abilities, but they learn them more slowly than people in general. In the world of psychology, intellectual disabilities have various levels from mild to severe. In the perspective of Victimology, groups with mental and intellectual disabilities are groups that are much more vulnerable to becoming targets of criminals. This is actually not surprising because if a person's mental health or intellectual intelligence is lower, then this can run in parallel with his daily adaptability, which will also be low, this is what lures criminals to exploit the shortcomings of groups with disabilities to gain benefits from them. This fact is also proof that there is a probability and vulnerability that is equally potential for everyone without exception, especially for people with disabilities. Based on the BPS Inter-Census Population Survey (SUPAS), the total number of people with disabilities in Indonesia as a whole in 2015 was 21.5 million people with details of 36% or 7.7 million people with intellectual disabilities, then in 2016, the number of people with disabilities with over age 15 years is 22.8 million people [8] although the number is small if compared to normal people, the handling of this minority group is still marginalized both because of discriminatory treatment from the community and policies and/or regulations from the Government that has not fully sided with them fairly. According to data from the Center for Improving Qualified Activity in Live of People with Disabilities (CIQAL) on 29 cases of violence against groups with disabilities, none of them ended in criminal law, thus there is an urgency for the State to pay attention to the rights and interests of victims of sexual violence with disabilities, as the actualization of legal protection in guarding the realization of just human rights in Indonesia.

A person with a disability can easily become a victim of a crime or the target of people who want to take advantage of it in any way and he or she may not know or be aware that he is a victim. The reality in life in society is that people with disabilities are easy to

become targets of crime, A person with a disability does not have the ability to report cases and problems that are happening to him, people with disabilities are easily influenced and think that they are only treated fairly and do not realize that they are victims of crimes, and a person with a disability thinks the perpetrator is a "friend" because usually, the perpetrator of the crime is the closest person to the victim [10]. A person with a disability will not be able to realize when an incident has happened to him in a dangerous situation. People with disabilities are considered by many to be legally inadequate to become Witnesses. Realities like this should be of concern to the state as stated in the 1945 Constitution in protecting children against persons with intellectual/mental disabilities who have been victims of sexual violence so far.

When a person with a disability has become a victim of violence or crime from a perpetrator and undergoes a legal process in several cases, law enforcement officials do not trust the information conveyed by a person with a disability as a victim because a person with a disability has an attitude and shows the opposite faces and expressions (such as smiling and laugh) which greatly differs from victims of violence in general (fear and trauma). The statements of victims of persons with disabilities that sometimes change, make officers confused and the language conveyed by victims of violence is not understood, and persons with disabilities who are unable to tell also in providing information are reasons why law enforcement officials have difficulty in reconstructing cases and evidence. There is an assumption that if a person with a disability is a victim, means that person is deemed incapable of providing accurate information as a witness, thus a judicial process can stop or the perpetrator will receive light or even not guilty in a court decision.

Furthermore, in Law Number 35 of 2014 article 1 number 1 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. If a person is mentally unable to be proficient in their daily life and their thoughts are not yet mature because someone has an intellectual/mental disability, there should be separate rules, meaning that in Law Number 35 of 2014 article 1 number 1 states "A child is someone who is not yet aged. 18 years including children who are still in the womb " does not answer the needs of someone who is actually an adult, physically-speaking, but with the mindset/reasoning, emotional and intellectual level, in the level of a child. It makes sense as people with mental and intellectual disabilities are very prone to be used as perpetrators of criminal acts (for example, as spies, couriers, selling merchandise stolen by other people). A person with intellectual/mental disabilities here should get more attention when it comes to the law whether that person is a victim or a perpetrator.

This happens because people with mental or intellectual disabilities are unable to understand and distinguish between good and bad deeds, and tend to have a desire to be accepted in the social environment. This condition encourages people with mental and intellectual disabilities to often agree to take action in order to gain friendship. Several studies have found that the majority of intellectuals with disabilities commit violations of the law because they are directed by other criminals without understanding their involvement and the consequences of that involvement. A person with a disability only has the ability to reason or a limited mindset with a normal human being in general, which sometimes can be used by someone who wants to act arbitrarily against the person with intellectual/mental disabilities.

In addition, intellectual disabilities also receive minimal special handling (education, therapy, assistance) related to their behavior that is prone to breaking the law. This has an impact on repeating the behavior of persons with disabilities without understanding that the behavior is against the law.

In cases of sexual violence, people with mental and intellectual disabilities who are victims are likely not to understand that they are victims. There are even conditions where the victim may feel addicted to the perpetrator's actions until it occurs repeatedly or makes persons with disabilities dependent on the perpetrator. This is done by victims with intellectual disabilities because they are still incapable of reasoning and thinking that the act is an act that should not be done, only because of their biological desire without ethical considerations or violations of social norms.

In UNICEF's view of a convention it clearly defines a child as every human being under the age of 18 years unless, under the law that applies to children, the majority is achieved earlier. Therefore, A person with intellectual/mental disabilities according to the convention can be categorized as a child because their mental age is not yet capable of activities in the social life of their community.

The author argues, that from the description above, the weaknesses of the protection arrangements for persons with intellectual disabilities who are victims of sexual violence lies in terms of the material content of regulations that are substantive in the age limit of children. the fact that drafting these statutory regulations regarding the age limit of children still refers to international conventions that provide age limits based on calendar age standards alone, of course, contradict each other due to the principle of more protection and special treatment as regulated in the Law on Persons with Disabilities and also the principle of equality of opportunity, has not been able to answer the specific mental age for persons with disabilities who are

victims of sexual violence in order to get special treatment and extra protection.

In addition, lawmakers also do not pay attention to and include the values and norms of adult age limits in living laws in Indonesia, especially Customary Law and Islamic Law, both of which can answer the needs of the problems raised in this study so as to realize a sense of justice and benefit for persons with intellectual disabilities as victims of sexual violence.

### **Reconstruction of The Regulation of The Definition of Children in Order to Protect the Rights of Persons with Intellectual Disabilities who are Victims of Sexual Violence with Justice Insight**

Sociologically, the existence of victims of sexual violence as persons with intellectual disabilities is still treated properly as adults as based on their physical age, they are considered as adult, regardless of mental age conditions which may still be categorized as immature or still children, this is in accordance with the conditions in the norm that it applies that the limitation on a person's maturity as regulated in the Child Protection Law if he is over 18 (eighteen) years (of physical age) then he or she is no longer a child. This sociological and juridical foundation is what causes problems to achieve justice based on the theory of justice is difficult to materialize.

Before going further into the area of expected norm reconstruction, the author argues why the reconstruction process in this study's goal is to generate new norms with the theory of justice approach developed by John Rawls [11], first and foremost with an approach to finding a theory of justice that can accommodate the needs of marginalized groups with special needs. however, it can be supported in the formation of legal norms due to the vacuum of law in addressing the main problems of this research and of course, it cannot be separated from affirmative action efforts as a step towards realizing equality of opportunity for marginalized groups and the general public. In addition, it also needs to be recognized that John Rawl is an expert in political philosophy, he constructs the concept of social justice in North America with a liberal ideology, where the basic structure of society (family) is used as a sample of the foundation of his theoretical building, some scientists claim John Rawls is a legal positivism exponent so that it is grouped into adherents of formal justice teachings.

The principle of individual freedom in a community is made a priority for John Rawl over other main principles in building social justice because the background of the liberal democratic political system dominates the thoughts that construct his theory, namely in North America which has a liberal ideology which emphasizes individual freedom in determining alternative choices in political activity. According to

him, social justice in politics can be realized only by creating individual freedom in determining the alternative choice.

The reason John Rawls uses the basic structure of society (family) as the main subject (sample) in building his theory of social justice is that the basic structure of society already contains a social position where humans are born in their society already in different positions and hopes for the future, some of which are part of it. determined by the political system, social conditions, and economics. The basic structure of society has defined rights and obligations that affect the future, aspirations, dreams of everyone, and the possibility of achieving them. Therefore, the principal institutions of society are actually the source of various "deep" limb because they are already the starting points of good fortune for one or misfortune for the other.

John Rawls's theory of social justice is then further formulated in more detail in the form of substantive principles, as follows:

1. Equality, it is meant that every individual in the community has the same rights and obligations;
2. Balance, it is meant that every individual in the community has equal rights and obligations;
3. Freedom, is meant that every individual in the community has broad basic freedoms as broad as the basic freedoms of other individuals in that community.

The realization of these three principles can be materialized in society if there is no social inequality, as stated by the author in this study, because there are still social inequalities, especially for people with intellectual disabilities who are victims of sexual violence, so that to achieve social justice, equal opportunity is needed.

In relation to the possibility to reconstruct the meaning of children in order to protect the rights of persons with intellectual disabilities who are victims of sexual violence in Indonesia, according to the authors, this reconstruction is possible because there is still a legal vacuum to answer this problem. To include mental age into a norm, it can be done in the Child Protection Law where Article 1 point 1 which states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb, this provision can be further developed by making norms in the form of draft Article 1 point 1a which states that a child is someone whose mental age is below 18 (eighteen) years old according to the examination of a psychologist, as for someone with an intellectual disability who is a victim of violence. The main reason for the development of the article in question is because it is necessary to have a psychological examination based on a legal psychology approach in analyzing the problem of determining the mental age of a victim of sexual violence with a disability. where in the field of

Psychology, uses the intelligence test to measure the victim's IQ.

The limitation of a person with intellectual disabilities, also known as people with mental or intellectual disabilities, are those who have an IQ below 70. The main measure is, that their physical age does not match the mental age or their behavior. Some of them are still able to educate (can read and write basic arithmetic), are able to practice (can do something routinely), but there are also those who need full assistance and care from other people who are said to be able to care for them.

One of the test methods used is the Binet Simon Test in Clara [12], an intelligence test that was first published in 1905 in Paris-France, to measure a person's mental abilities. Alfred Binet describes intelligence as something functional. Intelligence according to Binet fall in to three components, namely the ability to direct thoughts or actions, the ability to change the course of action when the action has been carried out and the ability to self-criticism. The Binet test used in Indonesia today is the Stanford Binet Intelligence Scale Form L-M, which is the third revision of Terman and Merrill in 1960.

It should be noted and it becomes a complete understanding, that persons with intellectual disabilities are not mental illnesses or those related to psychiatric problems. Mental illness is directly related to personality disintegration. Everyone has the opportunity to experience mental illness. Meanwhile, intellectual disabilities concern their abilities and intelligence. Their intelligence is below average, but they still have potential and even in certain fields they have advantages. Even if determining someone with intellectual disabilities or not is measured by mental age based on the level of intelligence, it is one of the benchmarks in addition to other psychological and physiological benchmarks typology from the medical side regarding intellectual disability, namely [13]:

1. Down Syndrome, people with intellectual disabilities who have physical characteristics including small/large head, flat/ long narrow eyes, narrow forehead, flat nose, thick lips which tend to open, straight and thick hair, short joints, the penis and scrotum tend to be small, (the knuckle of the hand tends to be short, the knuckles are fat, the distance of the eyebrows is close, and the body tends to be fat)
2. Cretinism/stunted, people with intellectual disabilities who have the appearance of a small and short body than people their age.
3. Microcephali, people with intellectual disabilities with a head that is smaller than the size of people their own age.
4. Macrocephali, a person with intellectual disabilities with a large head compared to the size of people his age.

5. Schapochepali, an intellectual disability with a flattened head.
6. People with other intellectual disabilities, people with intellectual disabilities who do not have certain physical characteristics conspicuously, especially those with mild intellectual disabilities.

The basis for the reconstruction of the regulation of the meaning of children adding new norms is certainly possible because normatively there are constitutional provisions regarding the principle of equal opportunity to support the realization of the norms referred to, as in Article 28 H paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which are then by the author supported by the fact that philosophically, the theory of social justice developed by John Rawls with the principle of fair equality of opportunity [14], as well as sociologically with many people with intellectual disabilities, victims of sexual violence who do not get justice because they are treated generally as regulated in the Criminal Code. Special treatment and more protection using the Child Protection Law certainly not only aggravates the perpetrators of sexual crimes against persons with disabilities, victims of sexual violence, but also victims and/or their families can claim the right of restitution as set forth for victims in the Child Protection Act.

For the reconstruction of the meaning of children in order to protect the rights of persons with intellectual disabilities as victims of sexual violence in Indonesia, based on the values of John Rawls's Social Justice, is that the Child Protection Law Article 1 point 1 which states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb, must be further developed by making norms in the form of a draft of Article 1 number 1a which states that a child is a person whose mental age is below 18 (eighteen) years old according to the examination of a psychologist for Violence Victim with intellectual disabilities. The basis for reconstructing the meaning of children by adding new norms is of course possible because normatively there are constitutional provisions regarding the principle of equal opportunity to support the realization of the intended norm, as in Article 28 H paragraph (2) of the 1945 Constitution of the Republic of Indonesia, as it also further supported philosophically by the social justice theory developed by John Rawls with the principle of fair equality of opportunity, as well as sociologically with the fact that many people with intellectual disabilities fell victims of sexual violence who do not get justice because they are treated generally as regulated in the Criminal Code. If this treatment is used, not only this will aggravates perpetrators of sexual crimes against persons with disabilities as victims of sexual violence more, but the victims and/or their families can demand restitution rights provided for victims based from the Child Protection Act.

## CONCLUSION

1. The Weaknesses in the regulation of protection for persons with intellectual disabilities who is a victim of sexual violence based on analysis of the Child Protection Law and the Law on Persons with Disabilities, especially in terms of the substance of the content of the regulations, is that the substance of which is the age limit of children, where legislators draft legislation. The legislation regarding the age limit of children still refers to international conventions that provide age limits based on physical age standards alone, this is of course contradictory due to the principle of more protection and special treatment as regulated in the Law on Persons with Disabilities as well as the principle of equality of opportunity apparently has not been able to answer about the special mental age needs for persons with disabilities as victims of sexual violence in order for them to get special treatment and extra protection. In addition, lawmakers also do not pay attention to and incorporate the values and norms of adult age limits in living law in Indonesia, especially customary law and Islamic law, both of which can answer the needs of the problems raised in this study so as to create a sense of justice and benefits for persons with intellectual disabilities as victims of sexual violence.
2. The reconstruction of the regulation of the meaning of children in order to protect the rights of persons with intellectual disabilities who are victims of sexual violence in Indonesia is possible because there is still a legal vacuum to answer these problems. This can be done by including mental age as a norm in the Child Protection Law Article 1 point 1 which initially states that a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb, this provision can be further developed by making The norm in the draft form of Article 1 point 1a states that a child is also a person whose mental age is below 18 (eighteen) years old according to a psychological expert's examination, for a person with intellectual disabilities who is a victim of violence. The basis for reconstructing the meaning of children adding new norms is of course possible because normatively there are constitutional provisions regarding the principle of equal opportunity to support the realization of the intended norm, as in Article 28 H paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which are philosophically supported by social justice theory developed by John Rawls with the principle of fair equality of opportunity, as well as sociologically as there are many people with intellectual disabilities as victims of sexual violence who do not get justice because they are treated generally as regulated in the Criminal Code. If this treatment is used, not only this will aggravates perpetrators of sexual crimes against persons with disabilities as victims

of sexual violence more, but the victims and/or their families can demand restitution rights provided for victims based from the Child Protection Act

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