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Formula of The Adultery Offense In The New National Criminal Code (Law Number 1 of 2023) To Juvenile Perpetrator: Would It Make The Juvenile Criminal Justice System Getting Aggravate?

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Abstract: The criminalization of immoral acts through Law Number 1 of 2023 concerning the New Criminal Code (KUHP) is in the spotlight. According to article 411 of the New Criminal Code, every person who has sexual intercourse with someone who is not their husband or wife is punished for adultery, including those who are not married. The criminalization of perpetrators who are not in a sexual marriage will have the potential to ensnare underage teenagers who have had premarital relations. The 2017 Indonesian Demographic and Health Survey (SDKI) (conducted every 5 years) revealed that among women and men who had had premarital sexual relations, 59% of women and 74% of men were teenagers aged 15-19 years. The expansion of the formulation of the offense of adultery will certainly affect the juvenile criminal justice system (SPPA) considering that currently the implementation and regulation of SPPA is still weak and far from ideal. This research aims to outline how the possible influence of the formulation of the regulation of the crime of adultery or overspill according to the new Criminal Code could greatly influence the juvenile criminal justice system in Indonesia. Using normative juridical methods and a "comparative" approach to answer the formulation of the crime of adultery in the New Criminal Code which can ensnare minors or teenagers will it can make the juvenile criminal system in Indonesia more difficult.

Keywords: Adultery, New Criminal Code, Juvenile Criminal Justice System

INTRODUCTION

The criminalization of immoral acts through Law Number 1 of 2023 concerning the New Criminal Code (KUHP) has been the subject of much attention. According to Article 411 of the New Criminal Code, every person who has sexual intercourse with a person who is not his/her husband or wife shall be punished for adultery with a maximum imprisonment of 1 (one) year or a maximum fine of category II, including perpetrators who are not bound by marriage. The criminalization of acts that originate from violations of moral norms and decency will potentially ensnare children who have had pre-marital sexual relations.

The 2017 Indonesian Demographic and Health Survey (IDHS) (conducted every 5 years) revealed that around 2% of female adolescents aged 15-24 years and 8% of male adolescents of the same age admitted to having had sexual intercourse before marriage, and 11% of them experienced unwanted pregnancies. Among females and males who had premarital sexual intercourse, 59% of females and 74% of males in the age range of 15-19 years had had premarital sexual intercourse (PMK, 2021). The dilemma of this condition will be an important discussion for underage criminal offenders. The criminalization arrangement in Law Number 1 Year 2023 on the New Criminal Code (KUHP) may contradict the government's efforts to promote preventive and curative approaches as has been built through various existing policies. The criminalization of adultery also applies to children or adolescents who are certainly not bound by marriage to have sexual relations. So it will certainly have the potential to increase the number of children who can be convicted. This is worrying even though the SPPA Law does not exist in a vacuum. The SPPA Law introduces new procedures for handling crimes against children or adolescents but in its implementation, SPPA remains inseparable from criminal law and criminal procedural law which still cannot reach children in conflict with the law (Putri K. Amanda, 2017).

The implementation of the juvenile criminal justice system has received a lot of criticism from various circles, stating that the implementation of the juvenile criminal justice system is still far from being able to realize the goals of child welfare and the best interests of the child. There are several studies related to the implementation of juvenile criminal justice that show that the criminal court process for children has a negative impact on children because of the imposition of imprisonment on children (Setya Wahyudi; Ufran, 2011). So that the criminalization of perpetrators who are not bound by marriage can potentially ensnare children who are vulnerable to being involved in delinquent behavior.

The shift in the meaning of *overspel* or *diesbut* as “adultery” can be inaccurate, because it does not only contain intercourse for those who are married (adultery) but also for people who have sexual relations outside of marriage or are not yet married to someone else (fornication). Whereas fornication is the translation of *on touch*, not *overspill* as written in the Dutch language (Neng Djubaedah, 2010). In this offense of decency, the old Criminal Code has actually been very precise in providing a clear boundary as an act of sexual intercourse committed by a person against another person where one of them has been bound in marriage because as a form of criminal law protection in providing guarantees for the protection of the inner and outer bonds of marriage / or the preservation of the spirit of marriage so that when one party commits an act of adultery, the Criminal Code provides an opportunity for one party to prosecute him. This demand is not absolute (Optional) because it is determined by one of the spouses who is considered to be a “victim” and not someone else. The protection of marriage or family is the philosophy of criminalizing the act of “adultery”. (Maria Carnelly: 2013). According to Asfinawati, the effort to expand punishment for the offense of adultery is clearly regulated in Article 412 of the new Criminal Code. This expansion clearly indicates that with this formulation the state has entered the realm of what should be the private area of citizens into criminal acts (Asfinawati, 2023).

Supardi Hamid explained in a quote published in an article on the YLBHI website, that this expansion will result in several things, including new victimization situations (secondary victimization); Secondary victimization has the potential to arise from the limits of immoral acts that are multi-interpreted; Secondary victimization can occur in the judicial process, from the police to the court. At the investigation stage, the investigation will only see whether the elements are fulfilled or not (seeing the elements are fulfilled or not) seeing the elements of the formulated act will make it easy to suspect the person who is considered the perpetrator). The potential for criminal cases due to the expansion of meaning will increase against minors or adolescents who are suspected of being perpetrators because

whoever commits a criminal offense, then even if the child will get punishment for the criminal offense he committed (Hamid, 2023).

Based on the aforementioned description, this research intends to elaborate on the possible influence of the formulation of the regulation of the Crime of Adultery or Overspeel under the New Criminal Code because it can greatly affect the juvenile criminal justice system in Indonesia. Using the normative juridical method and “comparative” approach to answer whether the formulation of adultery criminal offense in the New Criminal Code can ensnare minors or teenagers and will be able to aggravate the juvenile criminal justice system in Indonesia.

METHOD

The research method used in this research is juridical normative legal research. Normative legal research is research based on literature or library research, namely research on secondary data (Marbun, Rocky, 2022). Meanwhile, the juridical-normative approach is research conducted on legal principles, norms, and legal rules (Soerjono Soekanto, 2003). Juridical-normative legal research broadly uses an approach by examining legal principles, namely research on the relationship between legal principles and doctrines with positive law and laws that live in a society (Mezak, 2006). Based on the research method used, namely juridical-normative, the data used for writing this research uses secondary data.

RESULTS AND DISCUSSION

The criminal justice system is a judicial network that uses criminal law as its main tool, both substantial criminal law, formal criminal law, and criminal execution law. The criminal justice system has a double functional dimension, on the one hand, it functions as a means for society to restrain and control crime at a certain level (crime containment system), on the other hand, it also functions for secondary prevention, namely trying to reduce criminality among those who have committed crimes and those who intend to commit crimes, through the process of detection, punishment, and criminal execution (Muladi, 1995).

The criminal justice system is essentially a process of criminal law enforcement. Therefore, it is closely related to the legislation itself, both substantive criminal law and formal criminal law, because criminal legislation is basically the enforcement of criminal law in abstract which will be realized in law enforcement in concreto (Arief, 1998). According to Mardjono Reksodiputro, the criminal justice system is a system in society to tackle the problem of crime (Reksodiputro, 1997).

The juvenile criminal justice system differs from the adult criminal justice system in many ways. Juvenile criminal justice encompasses all the activities of examining and deciding cases involving the interests of children. Emphasizing or focusing on the interests of the child must be the center of attention in juvenile criminal justice (Gultom, 2008). One of the inherent features of the juvenile criminal justice system is that legal actors can terminate the judicial process at any time, from the moment certain circumstances become known to those authorized to terminate it (Prakoso, 2010). This is in line with the spirit of the Beijing Rules 17.4 (Darmika, 2019). that “the competent authority shall have the power to discontinue the proceedings at any time”. “Commentary. The power to discontinue the proceedings at any time is a characteristic inherent in the handling of juveniles. Offenders as opposed to adults. At any time, circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case” which means the power to terminate judicial proceedings at any time is a characteristic inherent in the handling of juvenile offenders as opposed to adults. At any time, certain circumstances may come to the attention of the legal authorities which would make a complete cessation of intervention appear to be the best disposition of the case.

According to (Setya Wahyudi; Ufran, 2011), what is meant by the juvenile criminal justice system is a juvenile criminal justice law enforcement system consisting of a juvenile investigation subsystem, a juvenile prosecution subsystem, a juvenile judge examination subsystem, and a juvenile criminal law sanction implementation subsystem based on juvenile material criminal law and juvenile formal criminal law and juvenile criminal law sanction implementation law. In this case, the objectives of the juvenile criminal justice system emphasize the interests of child protection and welfare.

The juvenile criminal justice system is all the elements of the criminal justice system involved in handling cases of juvenile delinquency. First, the police is the formal institution where delinquent children first come into contact with the justice system, which will also determine whether the child will be released or processed further. Second, the prosecutor and the parole board will also determine whether the child will be released or processed to the juvenile court. Third, the juvenile court, the stage when the child will be placed in options, ranging from release to incarceration (Purnianti & Tinduk, 2003). According to Yahya Harahap, the juvenile criminal justice system is a system of controlling juvenile delinquency that consists of institutions that handle child investigations, child investigations, child prosecutions, child courts, and child corrections (M. Yahya, 1993). According to Article 1 point 1 of Law No. 11/2012, what is meant by the Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving the sentence.

The provisions of Article 64 Letter e of Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection contain the objectives of the juvenile criminal justice system, which states “freedom from torture, punishment, or other cruel, inhumane and degrading treatment”, then in letter f states “avoidance of imposition of the death penalty and/or life imprisonment”, and in letter g states “avoidance of arrest, detention or imprisonment, except as a last resort and within the shortest time” (BPK, n.d.). Strictly speaking, the context dimension above correlates with the best interests of the child, so it is oriented toward the development, protection, and growth of children (Mulyadi & SH, 2023).

Meanwhile, the purpose of the juvenile criminal justice system according to the explanation of Law Number 11 of 2012 is to realize a justice system that truly guarantees the protection of the best interests of children in conflict with the law as the nation's successor. Therefore, children are entitled to special protection, especially legal protection in the justice system, so that it is not only emphasized on the imposition of criminal sanctions for children who commit criminal acts but also focused on the idea that the imposition of sanctions is intended as a means of realizing the welfare of children who commit criminal acts.

The regulation of the crime of adultery in the Criminal Code is regulated by Article 284 which stipulates that the crime of adultery is an act of cohabitation committed by a man and a woman, both of whom or one of whom are married, is an absolute complaint offense (absolute klachtdelicten), punishable by a maximum imprisonment of nine months.

Data from the Ministry of Law and Human Rights (Kemenkumham) shows that the majority of children are still detained in adult facilities. Out of a total of 3,127 children (as of the end of 2018), only 1,427 (46%) were placed in LPKA while the other 1,700 (54%) were placed in adult correctional institutions in separate blocks or cells (lapas). Alternatives to juvenile detention have continued to be implemented such as arrangements for children charged with a single indictment punishable by a maximum imprisonment of 7 (seven) years to be diverted.

Diversion is one of the fundamental substances in Law Number 11/2012 which is intended to avoid and keep children away from the judicial process so as to avoid stigmatization of children in conflict with the law and it is hoped that children can return to the social environment reasonably. According to Article 7 paragraph (1) of Law Number 11

of 2012, it is stated that at the level of investigation, prosecution, and examination of children's cases in the district court, diversion must be sought, and paragraph (2) states that diversion as referred to in paragraph (1) is implemented in the event that the criminal offense committed: a. is punishable by imprisonment under 7 (seven) years; and b. is not a repetition of a criminal offense. If these provisions are connected with Article 3 of the Supreme Court Regulation on Diversion Guidelines which states "Juvenile judges are obliged to seek diversion in the event that the child is charged with a criminal offense punishable with imprisonment under 7 (seven) years and is also charged with a criminal offense punishable with imprisonment of 7 (seven) years or more in the form of a subsidiarity, alternative, cumulative or combination (combined) indictment".

In the field, the diversion process is determined by the APH's interpretation of the criteria and requirements of juvenile cases that can be resolved through the diversion process. The decision of APH to do and not to do diversion is determined by five factors, namely, (1) the type of offense committed by the child, (2) the interpretation of cumulative and alternative charges when the child is charged with more than one offense in one crime, (3) the role of the child in the offense, (4) the availability of the victim, (5) consideration of the interests of the institution/agency concerned. The first and second factors are differences in understanding and interpretation originating from the APH interpretation of the SPPA Law and the technical rules that are used as references, while the other three factors are more sourced from the personal values of APH in carrying out their work. So the success rate of completing juvenile criminal cases can still be a problem.

The expansion of the criminal offense of adultery that will be applied in the new Criminal Code is a scourge for children or adolescents. This is because the sexual behavior of adolescents is currently quite alarming. In PUSKAPA's records, most of the juvenile convicts were male (92.7%) and were charged with the Child Protection Law related to cases of sexual violence against girls (83%). The use of the provisions of PA Law Article 81 (2) of the Child Protection Law focuses on male children or adolescents who intentionally commit violence or threats of violence, force, trickery, a series of lies, or persuade a child (girl) to commit or allow obscene acts and girls are placed as victims.

Reports (PUSKAPA, 2014; ICJR, 2016) show a similar phenomenon, where prosecutors always charge boys who are perpetrators of sexual violence with Article 81 (2) of the Child Protection Law even though cases of sexual violence committed by children usually take the form of teenage dating behavior and then engage in active sexual activity, or together run away from home. This phenomenon becomes a separate problem if Article 411 of the new Criminal Code is applied because the formulation states, "Every person who has sexual intercourse with a person who is not his husband or wife, shall, being guilty of adultery, be punished by a maximum imprisonment of 1 year or a maximum fine of category II".

This makes adultery applicable to everyone who has sexual intercourse with anyone who is not limited by marriage and age. The expansion of the criminalization system in the crime of adultery will potentially ensnare children who have committed pre-marital sexual relations. The incomplete infrastructure for the implementation of the juvenile criminal justice system that is evenly distributed throughout Indonesia will cause children to continue to be placed in detention centers/prisons if the application of restorative justice is not possible. In addition to special prisons for children (LKPA), other equipment is LPKS, which until now is still experiencing development obstacles due to overlapping authority between the Ministry of Social Affairs and the Regional Government. Until now, at least 98 LPKS and 39 RPS have been available throughout Indonesia. Meanwhile, special detention centers for children or LPAS are still not available at all in Indonesia. It is not known what are the obstacles to the construction of LPAS. In addition to this infrastructure, there is also a need for child-friendly rooms intended for when children undergo examinations.

So when examined from a different perspective, it is necessary to strengthen the application of diversion to not only apply legal certainty, justice (*gerechtigheid*), expediency (*zweckmassigkeit*) but can lead to a progressive legal dimension based on the principle of the best interests of the child, children's survival and development, proportionality, deprivation of liberty and punishment as a last resort and avoidance of retaliation considering Law No. 11/2012 was made to make children happy, serve and in the best interests of children so as not to aggravate our juvenile criminal justice system which is still far from ideal.

CONCLUSION

The expansion of the criminal offense of adultery that will be applied in the new Criminal Code is a scourge for children or adolescents. This is because the sexual behavior of children or adolescents is still quite worrying. According to Article 411 of the new Criminal Code, adultery applies to everyone who has sexual intercourse with anyone who is not limited by marriage and age, so the expansion of the criminalization system in the crime of adultery will potentially ensnare children who have had pre-marital sexual relations. The incomplete infrastructure for the implementation of the juvenile criminal justice system that is evenly distributed throughout Indonesia will cause children to continue to be placed in detention centers/prisons if the application of restorative justice is not possible. In addition to the Special Prison for Children (LKPA), the LPKS, which is still experiencing development obstacles due to the overlapping authority between the Ministry of Social Affairs and the Regional Government, can potentially aggravate the juvenile criminal justice system.

Suggestion

In order to avoid overcriminalization of the handling of adultery crimes committed by children or adolescents and aggravate the juvenile criminal justice system, it is necessary to strengthen the application of diversion not only as a manifestation of justice (*gerechtigheid*), expediency (*gerechtigheid*) but can lead to a progressive legal dimension based on the principle of the best interests of the child, children's survival and development, proportionality, deprivation of liberty and punishment as a last resort and avoidance of retaliation considering that Law No. 11/2012 was made to be happy, serve and in the best interests of children so as not to aggravate our juvenile criminal justice system which is still far from ideal.

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