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Criminal liability of sexual assault perpetrators with fetishism

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Abstract

The aim of this article is to provide an understanding of the regulation of criminal liability for cases of sexual violence in Indonesia and to examine criminal liability by perpetrators of sexual violence who suffer from fetishistic disorders. The method used in this study uses legal studies with a normative juridical type, with a statutory approach in order to discuss legal issues in this journal. This study found that in essence the regulation of criminal liability for cases of sexual violence in Indonesia is regulated in the Criminal Code and the TPKS Law. However, the Criminal Code does not specifically mention sexual violence but is regulated by the term obscene acts. Furthermore, regarding criminal liability by perpetrators of sexual violence who suffer from fetishistic disorders, it has not specifically been regulated either in the Criminal Code or the TPKS Law. Therefore, it needs to be specifically regulated in the form of an article regarding criminal sanctions for perpetrators of criminal acts of sexual violence who suffer from fetishism. This is needed to provide a sense of justice for the victim and make it clear that even if the perpetrator suffers from a psychological disorder in the form of fetishism, this does not mean that the criminal act that has been committed will be erased. Therefore, criminal acts of sexual violence against people with fetishism need to be criminalized in a form that is specifically regulated in the TPKS Law.

Keywords: Crime, sexual violence, fetishism

1. Introduction

Sexual crime is a problem that often occurs in people's lives. The development and advancement of technology and information trigger the occurrence of various crimes related to sexuality or what is commonly referred to as crimes of decency or sexual harassment^[1]. Sexual harassment is sexually suggestive conduct that demeans, coerces, or intimidates individuals physically or verbally. This can include inappropriate comments, jokes, indecent touching, coercion of sexual intercourse, or other behaviors that exploit individuals without their consent^[2].

Komnas Perempuan divides 15 forms of sexual violence, one of which is sexual harassment. Sexual harassment is a sexual act through physical or non-physical touch with the target of the victim's sexual organs or sexuality which results in discomfort, offense, feeling demeaned and may cause health and safety problems^[3]. Today, perversion is starting to develop and can become a serious problem, this is a lot of sexual deviant behavior from children to adults can be the culprit.

Sexual perversion has many types, including homosexuality (gays and lesbians), transsexualism, sadism, masochism, sodomy, exhibitionism, voyeurism, bestiality, fetishism, incest, necrophilia, sexual transvestism, pedophilia, saliromania, frottage, mysophilia, and phone scatology^[4]. Some types of sexual deviance are familiar to the public, especially the types of sexual deviance that often lead to a crime, such as pedophilia, which is a psychosexual developmental disorder that causes a person to have abnormal erotic desires for children^[5], or sodomy, which is a sexual disorder in which a man likes to have sexual intercourse through the anus of his partner, either a same-sex partner (homo) or with a female partner^[6]. However, nowadays there is a case that is being discussed by the public related to one type of sexual deviation, namely fetishism or commonly referred to as fetish.

Various factors influence the occurrence of deviant sexual behavior in an individual. These factors can be divided into two categories: internal factors, which originate within the individual and are influenced by genetic factors, and external factors, which originate from the individual's external environment. Internal factors may include heredity, while external factors include lack of sexual education from the family, unsupervised exposure to sexually stimulating mass media, the social environment in which the individual interacts, the

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experience of being a victim of sexual abuse or rape, and the use of alcohol or drugs. Parents play an important role in providing meaningful learning related to their children's character development, which can help prevent the onset of deviant sexual behavior^[7].

Fetishism is a type of sexual deviance in which a person experiences sexual stimulation or sexual fantasizing by looking at inanimate objects. Fetishism falls under the type of paraphilia, in that paraphilia is associated with specific sexual fantasies and then seems to involve unusual objects or situations that allow for sexual acts with objects or behaviors that involve the misery or misfortune of others^[8].

One of the cases, a student of Universitas Airlangga known as Gilang (hereinafter referred to as the perpetrator) became the public spotlight after a man with the initials MF revealed his experience as a victim through his personal Twitter account. MF said that the perpetrator asked for help to become a research subject for his final project. The victim was asked to wrap himself in duct tape and jarik cloth for three hours, while being recorded and then sent to the perpetrator. MF claimed to feel short of breath when she was wrapped in duct tape and jarik cloth. After MF's tweet went viral on Twitter, similar confessions from other victims who experienced the same thing emerged. According to police investigations at Surabaya Police Station, there have been 25 victims since 2015. In addition, the perpetrator also threatened to commit suicide if the victims refused to wrap themselves^[9].

Based on the above, it shows that there is still a problem of norms, namely the absence of norms in Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence related to criminalization for perpetrators of sexual violence by fetishists. Furthermore, if there is a criminal act of sexual violence by a fetishistic person, there will be difficulties in the application of the law because there is no regulation governing the criminal act of sexual violence by a fetishistic person, therefore it is deemed important to conduct research related to Criminal Liability by Perpetrators of Sexual Violence by Fetishistic Persons.

This paper is original; which has the hope that it can contribute and play a role in the process of improving or developing science. Some previous studies that have conducted studies on criminal acts of sexual violence include first, found in the Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance has the title "Legal Protection of Victims of Sexual Violence Fetish Jarik". Second, it was found in the Indonesian Journal of Legal Development entitled "A Treatise on the Challenges of Law Enforcement of Sexual Violence Crimes after the enactment of Law Number 12 of 2022". The third is the Surya Kencana Dua Journal: Dynamics of Legal and Justice Issues entitled "Juridical Implications of Regulating the Rights of Victims of Sexual Violence in Law Number 12 of 2022 concerning Crimes of Sexual Violence"^[10]. The purpose of this paper is to provide an understanding of the regulation of criminal liability for cases of sexual violence in Indonesia. As well as, to examine criminal liability by perpetrators of sexual violence with fetishistic disorders.

2. Research Methods

This journal uses the "juridical-normative" type. This type of research is used in the study of secondary materials. In the nature of normative fiqh, writing is also said to be a procedure that from a normative point of view starts from

the logic of fiqh to obtain the truth related to it^[11]. This paper is conducted with a statute approach in the process of studying the problem of this paper. This paper uses legal sources in the form of "primary, secondary and tertiary legal materials". This article is descriptive and analytical and provides an overview of the problems that arise and analyzes related legal products to provide a discussion of the issues raised in this article.

3. Results and Analysis

3.1 Regulation of Criminal Liability for Sexual Violence Cases in Indonesia

Sexual harassment is behavior that is immoral, disrespectful, and disrespectful, and can cause physical and psychological damage to the victim. It is considered a crime and is legally prohibited in many countries around the world. As ethically responsible individuals, we should always respect the privacy of others and avoid sexually threatening or damaging behavior^[12].

In general, sexual harassment is not directly mentioned in the Criminal Code, but obscene acts are regulated in the Criminal Code (Law No. 1 of 2023 concerning the Criminal Code). Where this act has been regulated in Article 414 of the Criminal Code to Article 423 of the Criminal Code. Obscene acts are acts or behaviors that are indecent or acts that deviate from politeness, including performing an inappropriate act such as groping inappropriately or having sexual intercourse by force. Obscene conduct can encompass any type of sexual behavior that violates the law or social norms including sexual harassment, rape, pornography and other sexual acts that are unwanted by the individuals involved. The term obscene is used to describe sexual behavior or conduct that violates cultural or social norms or applicable legal provisions.

Specifically, the crime of sexual violence is regulated in Law No. 12 of 2022 on the Crime of Sexual Violence (UU TPKS). The TPKS Law is a law that regulates all provisions related to sexual violence in Indonesia. Prior to the TPKS Law, provisions on sexual violence were contained in several separate laws such as the Criminal Code, Child Protection Law, Domestic Violence Law, TPPO Law, and Pornography Law.

The TPKS Law exists to regulate all forms of sexual violence, protect the rights of victims, and provide integrated legal procedures. The law comprehensively covers the rights of victims, including procedural rights in case handling, protection from degrading treatment and abuse by law enforcement officials, as well as the right to recovery through medical, mental and social rehabilitation, social empowerment, restitution, compensation, and financial assistance to ensure victims receive effective recovery^[13]. The TPKS Law also guarantees the provision of integrated services for victims. In addition, there are special provisions that regulate the rights of victims in cases of electronic-based sexual violence, including rapid response in removing content involving victims^[14].

Indonesian society has a negative view of victims of sexual violence. Therefore, the Law on Sexual Violence (UU TPKS) regulates the protection and fulfillment of rights for victims, victims' families, and witnesses. The purpose of this protection and fulfillment of victims' rights is to change the condition of victims to be more just, dignified, and prosperous. In addition, the TPKS Law also regulates the monitoring of efforts to eliminate sexual violence. This

monitoring aims to measure the extent to which the state is responsible for protecting, fulfilling, and respecting human rights, especially the rights of victims of sexual violence.

As a breakthrough in procedural law that has a *lex specialis* nature from KUHAP, the TPKS Law was born with the hope of overcoming obstacles in achieving justice for victims in the criminal justice system. This breakthrough includes the expansion of types of evidence, assistance for victims and witnesses, restitution arrangements, as well as protection and handling of victims from reporting to implementing decisions. In the context of criminal procedural law, there is also a prohibition of settlement outside the judicial process, regulation of examination procedures which basically guarantees comfort for victims, improving the qualifications of law enforcement officials and service officers, and coordination to ensure the fulfillment of victims' rights to handling, protection and recovery.

Problems arise when sexual violence is perpetrated by a fetishistic person. Fetishes are a form of deviant sexual behavior, in which a person has stimulation to certain unusual objects. Theoretically, there are two underlying factors that cause a person to have a deviant sexual orientation or behavior, namely psychological conditions and past experiences^[15]. The non-regulation of the crime of sexual violence by fetishists will provide an opportunity for the perpetrator to get off scot-free on the grounds of psychological disorders or lighten the punishment for the perpetrator. This will certainly cause pain and injustice to both the victim and the victim's family. Worse, it will affect the psychology of the victim, and increase the chances of sexual violence by fetishists to reoccur. This makes it important to criminalize sexual violence by fetishists.

3.2 Criminal Responsibility by Perpetrators of Sexual Violence with Fetishistic Disorder

Criticism of individuals who engage in deviant sexual behavior due to fetishistic disorder should be reinforced by the decision to consider it a criminal act. These indecent sexual acts are degrading and not in line with the values of Pancasila as they violate human rights. Sexual harassment by individuals who experience fetishistic disorder severely violates social norms and is contrary to the principles of Pancasila.

The unavailability of laws governing fetishistic sexual deviance is due to the restrictions in the definitions contained in the Criminal Code and other regulations outside the Criminal Code. Although the rules on fornication and rape cannot be directly applied in the case of fetishism due to its limited legal scope, a comprehensive legal framework is still needed. This is because the sexual behavior is unnatural, so the perpetrator can be prosecuted legally to provide justice and legal certainty. The aim is that this issue can be dealt with effectively and prevent recurrence in the community, and the perpetrators can be criminally prosecuted.

The current TPKS Law does not provide a comprehensive explanation of deviant sexual acts committed by individuals with fetishistic disorders. This can be seen when analyzed in article 5 and article 6^[16], where the definition given only states that an act is considered immoral when it is committed either physically or non-physically, directed at the sexual organs. Although the law recognizes both physical and non-physical sexual abuse, there is an

understanding that the material elements of the law cannot be applied when sexual acts are directed at non-sexual organs. A law should reflect the following principles.

1. **Lex Certa:** Which emphasizes that lawmakers must describe criminal acts with precision and detail to prevent ambiguous formulations, as ambiguity or imprecision in formulation can lead to legal uncertainty.
2. **Lex Stricta:** The aim is to ensure legal certainty, whereby the law must be formulated precisely to avoid ambiguous interpretations that could lead to legal uncertainty. The law must also be clearly defined to prevent the extension of the interests of the subject of the act, and to ensure that the criminal formulation does not allow analogies^[17].

As a step forward from the aforementioned problems, it is imperative to break out of the current status quo by advising law enforcement officials to break free from the fixation on formal procedures. This can only be achieved with the help of a progressive legal paradigm that is determined to vigorously pursue truth, humanity and justice. Law enforcement is an expression of intellectual and spiritual wisdom. In simple terms, the application of law enforcement involves perseverance, empathy, confidence, and contribution to the problems faced by the nation, as well as the fortitude to find solutions that benefit all parties. The optimal solution to such problems can be found through legal discovery by judges.

Judges can interpret legal language in a way that preserves its original meaning. In situations where there are legal provisions that can be directly established in current actual events, legal interpretation will take place. Therefore, based on the background of the problem described above, this research will examine how to implement Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence against sexual harassment committed by people with fetishistic disorder where judges can make legal discoveries through the method of interpretation in a manner that is based on the progressive legal thinking paradigm. This can be used as long as there is no further regulation regarding the criminal act of sexual violence by people with fetishistic disorder.

Furthermore, the TPKS Law needs to be specifically regulated in the form of an Article regarding criminal sanctions for perpetrators of sexual violence with fetishistic disorders. This is needed to provide a sense of justice for victims and to make it clear that even though the perpetrator has a psychological disorder in the form of fetishism does not mean that the criminal act has been committed. Therefore, the crime of sexual violence against people with fetishistic needs to be criminalized in the form of being specifically regulated in the TPKS Law.

4. Conclusion

In essence, the regulation of criminal liability for cases of sexual violence in Indonesia is regulated in the Criminal Code and the TPKS Law. However, the Criminal Code does not specifically mention sexual violence but is regulated by the term obscene acts. Furthermore, regarding criminal liability by perpetrators of sexual violence with fetishistic disorders specifically has not been regulated in either the Criminal Code or the TPKS Law. Therefore, it is necessary to specifically regulate in the form of an Article regarding criminal sanctions for perpetrators of sexual violence against people with fetishistic disorders. This is needed to

provide a sense of justice for victims and make it clear that even though the perpetrator has a psychological disorder in the form of fetishism, it does not mean that it eliminates the criminal act that has been committed. Therefore, the crime of sexual violence against people with fetishistic needs to be criminalized in the form of being specifically regulated in the TPKS Law.

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Legislation

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