

# Considerations of the Public Prosecutor in Filing Charges and Demands for the Defendant in Sexual Violence Cases against Individuals with Intellectual Disabilities

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## Abstract

*In handling cases of sexual violence experienced by persons with intellectual disabilities, the Public Prosecutor must have great skills in understanding the laws and regulations that will be used in drafting charges in court. The purpose of this study is to examine the consideration of the Public Prosecutor in filing charges and charges in case number PDM–020/Eku.2/BTM/01/2022. The research method used is a normative legal research method with a statutory approach and a conceptual approach. The results of the study show that First, the Public Prosecutor uses/determines the charges against the maker/sexual violence for persons with intellectual disabilities in case Number: PDM–020/Eku.2/BTM/01/2022, based on objective factors and subjective factors. Objective factors refer to factors that relate to the rules of laws and regulations. Subjective factors are factors that are related or related to the perpetrator and criminal responsibility which he has carried out. Criminal liability. Second, the Public Prosecutor's claim in case Number PDM–020/Eku.2/BTM/01/2022 is in accordance with the principle of legal certainty. However, the legal certainty provided by the Public Prosecutor does not necessarily provide benefits for victims with intellectual disabilities.*

**Keywords:** *Defendant; Sexual Violence; Person with Disabilities.*

## Abstrak

Dalam menangani kasus kekerasan seksual yang dialami oleh penyandang disabilitas intelektual, Jaksa Penuntut Umum harus memiliki keterampilan yang hebat dalam memahami Peraturan Perundang-Undangan yang akan dipakai dalam menyusun dakwaan di pengadilan. Tujuan penelitian ini adalah untuk mengkaji pertimbangan Jaksa Penuntut Umum dalam mengajukan dakwaan dan tuntutan pada perkara nomor PDM–020/Eku.2/BTM/01/2022. Metode penelitian yang digunakan adalah metode penelitian hukum normatif dengan pendekatan peraturan perundangan dan pendekatan konseptual. Hasil penelitian menunjukan bahwa *Pertama*, Penuntut Umum guna menentukan dakwaan pada pembuat/kekerasan seksual bagi penyandang disabilitas intelektual dalam perkara Nomor: PDM–020/Eku.2/BTM/01/2022, berdasarkan pada faktor objektif dan faktor subjektif. Faktor objektif merujuk pada faktor dimana berhubungan pada aturan peraturan perundangan. Faktor subjektif merupakan faktor yangmana berhubungan atau terkait pada diri pelaku serta pertanggungjawaban pidana yangmana sudah dilaksanakannya. Pertanggungjawaban pidana. *Kedua*, Tuntutan Jaksa Penuntut Umum pada kasus Nomor PDM–020/Eku.2/BTM/01/2022

telah sesuai dengan asas kepastian hukum. Namun, kepastian hukum yang telah diberikan oleh Jaksa Penuntut Umum belum tentu melahirkan kemanfaatan bagi korban penyandang disabilitas intelektual.

**Keywords:** Terdakwa; Kekerasan Seksual; Penyandang Disabilitas.



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## A. INTRODUCTION

Sexual violence involves violations against the honor, dignity, and dignity of individuals, which typically occur in both public and private environments. Sexual violence refers to sexual acts performed with threats and coercion without the consent of one of the parties,<sup>1,2,3</sup> who is then referred to as the victim. In Indonesia, the number of sexual violence cases reaches its peak every year.<sup>4</sup> This crime knows no gender or age boundaries; victims of sexual violence can come from various backgrounds and ages.

Sexual violence is also widely experienced by people with disabilities.<sup>5</sup> The cases of sexual violence against people with disabilities in Indonesia are currently very alarming. The Annual Record Data (CATAHU) for the year 2022 from the National Commission on Violence Against Women (Komnas Perempuan) shows that the group with the highest number of violence cases is individuals with intellectual disabilities. The total number of sexual violence cases in Indonesia reached 22, with 13 of them involving individuals with multiple disabilities. These statistics are consistent with the data from 2020, where the group categorized as the most vulnerable to experiencing sexual violence was women with intellectual disabilities.<sup>6</sup>

<sup>1</sup> Riskyanti Juniver Siburian, "Marital Rape Sebagai Tindak Pidana Dalam RUU-Penghapusan Kekerasan Seksual," *Jurnal Yuridis* 7, no. 1 (July 24, 2020): 149, <https://doi.org/10.35586/jjur.v7i1.1107>.

<sup>2</sup> Tomi Saladin, "TINJAUAN YURIDIS HUKUM KORBAN KEKERASAN SEKSUAL BERBASIS NILAI KEADILAN," *Mahkamah: Jurnal Kajian Hukum Islam* 5, no. 2 (November 2, 2020): 270, <https://doi.org/10.24235/mahkamah.v5i2.7284>.

<sup>3</sup> Anastasia Powell and Nicola Henry, "Policing Technology-Facilitated Sexual Violence against Adult Victims: Police and Service Sector Perspectives," *Policing and Society* 28, no. 3 (March 24, 2018): 291–307, <https://doi.org/10.1080/10439463.2016.1154964>.

<sup>4</sup> Sopi Nurhikmah, "Pendampingan Korban Kekerasan Seksual Terhadap Anak Melalui Pendekatan Pekerjaan Sosial," *Lembaran Masyarakat: Jurnal Pengembangan Masyarakat Islam* 4, no. 2 (2018): 188–204, <https://doi.org/10.32678/lbrmasy.v4i2.2171>.

<sup>5</sup> Siti Rofiah, "Harmonisasi Hukum Sebagai Upaya Meningkatkan Perlindungan Hukum Bagi Perempuan Penyandang Disabilitas Korban Kekerasan Seksual," *Qawwam* 11, no. 2 (2017): 133–50, <https://doi.org/10.20414/qawwam.v11i2.747>.

<sup>6</sup> <https://komnasperempuan.go.id> diakses pada 1 Januari 2023

Intellectual disability refers to a condition in which an individual's intellectual abilities are below average,<sup>7,8</sup> and there are barriers to developing adaptive skills.<sup>9</sup> This condition can be identified before an individual reaches the age of 18.<sup>10</sup> There are several classifications of intellectual disabilities, divided into three categories: mild disability with an IQ range between 55-70, moderate disability with an IQ range between 40-54, and severe disability with an IQ range between 25-39. Additionally, there is a group with an IQ lower than 25, which falls into the category of profound intellectual disability, and they require constant or permanent supervision, with a percentage of less than 1%.<sup>11</sup> When reaching adulthood, individuals with intellectual disabilities have a mental development level comparable to typically developing children aged between 3 to 12 years, depending on the severity of their disability category. Limitations in thinking and adapting to their environment often make people with intellectual disabilities vulnerable targets for sexual violence perpetrators. For individuals with intellectual disabilities, issues related to sexuality are often inaccurate and inconsistent. Many situations arise where individuals with intellectual disabilities frequently experience confusion in facing situations that trigger them to apply behaviors appropriate to the prevailing social norms. From its definition, individuals with intellectual disabilities are a group of people who should receive more attention from both society and the legal system.<sup>12</sup> However, the reality is that we often witness instances of discrimination experienced by individuals with disabilities, particularly in the aspect of law enforcement.<sup>13</sup>

In principle, the application of the law involves the participation of the entire population of Indonesia. However, in practice, law enforcement is carried out by authorized parties. In the context of criminal case handling, law enforcement agencies such as the police, the prosecutor's office, and the courts have the authority and duties that align with their respective legal regulations.<sup>14</sup>

In handling cases of sexual violence experienced by individuals with intellectual disabilities, the Public Prosecutors play a significant role in eradicating such criminal acts. This

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<sup>7</sup> Amalina Salsabil, Langgersari Elsari Novianti, and Hendriati Agustiani, "PENGETAHUAN, SIKAP, DAN KETERAMPILAN IBU MENGENAI PUBERTAS PADA REMAJA PUTRI DENGAN DISABILITAS INTELEKTUAL RINGAN," *JKKP (Jurnal Kesejahteraan Keluarga Dan Pendidikan)* 7, no. 02 (October 30, 2020): 130–43, <https://doi.org/10.21009/JKKP.072.02>.

<sup>8</sup> Eka Maulan Ni'mah and Emmilia Rusdiana, "Perlindungan Hukum Perempuan Penyandang Disabilitas Intelektual Korban Perbudakan Seksual Oleh Legal Resource Center Untuk Keadilan Gender Dan Hak Asasi Manusia (Lrc-Kjham)," *Novum: Jurnal Hukum*, 2022, 136–48, <https://doi.org/10.2674/novum.v0i0.47625>.

<sup>9</sup> Nahdiah Purnamasari, Nur Afifah, and Yudi Hardianto, "Hubungan Peran Keluarga Dengan Kemampuan Motorik Kasar Anak Disabilitas Intelektual," *Jurnal Fisioterapi Dan Rehabilitasi* 6, no. 1 (2022): 9–15, <https://doi.org/10.33660/jfrwhs.v6i1.147>.

<sup>10</sup> Diny Rezki Amelia Rezki Amelia, "Meningkatkan Kelancaran Bicara Pada Anak Disabilitas Intelektual Dengan Terapi Perilaku," *Procedia: Studi Kasus Dan Intervensi Psikologi* 5, no. 2 (2017): 38–44, <https://doi.org/10.22219/procedia.v5i2.16379>.

<sup>11</sup> Ibid.

<sup>12</sup> Anak Agung Istri Ari Atu Dewi, "Aspek Yuridis Perlindungan Hukum Dan Pemenuhan Hak Penyandang Disabilitas," *Pandecta: Research Law Journal* 13, no. 1 (August 2, 2018): 50–62, <https://doi.org/10.22219/pandecta.v13i1.13933>.

<sup>13</sup> Ali Sodiqin, "AMBIGUITAS PERLINDUNGAN HUKUM PENYANDANG DISABILITAS DALAM PERUNDANG-UNDANGAN DI INDONESIA," *Jurnal Legislasi Indonesia* 18, no. 1 (March 31, 2021): 31, <https://doi.org/10.54629/jli.v18i1.707>.

<sup>14</sup> Faisal Santiago, "Penegakan Hukum Tindak Pidana Korupsi Oleh Penegak Hukum Untuk Terciptanya Ketertiban Hukum," *Pagaruyuang Law Journal* 1, no. 1 (2017): 23–43, <https://doi.org/10.31869/plj.v1i1.268>.

requires every Public Prosecutor to possess great skills in understanding the laws and regulations that they will use as investigators and prosecutors in cases of sexual violence against individuals with intellectual disabilities.

It is not uncommon for Public Prosecutors, who act as investigators and prosecutors, to submit demands that are inadequately reflect the existing realities. Yet, Public Prosecutors should rightfully lodge demands against sexual violence perpetrators while considering legal certainty and utility, so that perpetrators are deterred from repeating their actions, and victims receive justice in accordance with their rights.

As in the case of sexual violence against a victim with intellectual disabilities that occurred in the city of Batam, which the author used as the research subject, the Public Prosecutor charged the perpetrator of sexual violence under Article 46 of the Indonesian Law No. 23 of 2004 concerning the Elimination of Domestic Violence.

It can be concluded that there are fundamental factors that serve as the main considerations for the Public Prosecutor to determine the extent of demands to be presented in court. This topic has drawn the author's attention to explore further in a scientific work, leading the researcher to conduct a study that will be elaborated in the form of a thesis with the title: "Considerations of the Public Prosecutor in Filing Charges and Demands for Defendants of Sexual Violence against Individuals with Intellectual Disabilities (Case Study No. PDM-020/Eku.2/BTM/01/2022, Batam State Prosecutor's Office)".

## **B. METHOD**

The author's research utilizes the normative legal method, which employs a normative case study in the form of legal behavioral products. The main subject of the study is the law conceptualized as norms or rules that apply in society and serve as a reference for everyone's behavior.<sup>15</sup> Consequently, normative legal research focuses on the inventory of positive law.

## **C. RESULTS AND DISCUSSIONS**

### **1. The Basis of Consideration for the Public Prosecutor in Filing Charges in Case Number PDM- 020/Eku.2/BTM/01/2022**

In preparing the indictment for general crimes and special crimes, the Batam State Prosecutor's Office refers to the provisions of Article 143 paragraphs 1 and 2 of the Criminal Procedure Code (KUHAP), particularly in Article 143 paragraph 2 letter b of the KUHAP which states that 'the indictment must mention the time (Tempus Delicti) and place (Locus Delicti) where the crime occurred, and it must be prepared carefully, clearly, and comprehensively regarding the alleged offense.' When preparing the indictment, it is important to explain the case chronologically and in the order of the crime's occurrence. The indictment should present events from time to time in a sequential and interconnected manner."

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<sup>15</sup> Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum Sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (April 1, 2020): 20–33, <https://doi.org/10.14710/gk.2020.7504>.

The indictment submitted by the Public Prosecutor to the Batam District Court in the case with case registration number PDM– 020/Eku.2/BTM/01/2022 is presented in a chronological manner, where the time and place are clearly stated in the indictment.

In the case under discussion, the defendant SM is the biological father of the victim witness DR, who was 29 years old at the time the defendant committed the offense against the victim witness. According to the testimony of expert witness Wiwit Setiyowati A, KS, MA, the victim witness has an intellectual disability, where her intellectual development stopped at the age of 12. Although she does not have any psychological disorders, difficult questions need to be asked in easily understandable language. Wiwit Setiyowati A, KS, MA also explained that when the victim witness narrates her account, it can be considered reliable because children with intellectual disabilities like DR will never be able to lie and can express themselves to experts in their own language.

The Public Prosecutor must consider factors that can aggravate or mitigate the defendant to be brought before the court.<sup>16</sup> In this case, the indictment directed to the defendant SM by the Public Prosecutor is an alternative indictment, which contains several charges prepared in layers, where each layer is an alternative and excludes other charges. This means that there are several allegations brought against the defendant, but only one of those charges will be accepted and used in the trial, depending on the evidence and legal considerations adopted by the court. In other words, the alternative indictment is applied if the alleged crime committed by the defendant is not proven in the first or main indictment.<sup>17</sup> In this matter, the Public Prosecutor has the ability to prove the second or subsidiary indictment related to the facts revealed in the trial and containing elements of the crime that correspond to the charges presented by the Public Prosecutor. The defendant SM is charged by the Public Prosecutor with an alternative indictment consisting of Article 46 of the Indonesian Law No. 23 of 2004 concerning the Elimination of Domestic Violence, and Articles 285, 286, and 289 of the Criminal Code (KUHP).

a. Article 46 of the Indonesian Law No. 23 of 2004 concerning the Elimination of Domestic Violence

Based on the interview results with the Public Prosecutor, Mrs. Mega Tri Astuti, S.H., who was handling a case at the Batam City State Prosecutor's Office at the time, it is known that she decided to provide an alternative charge to the defendant, SM. In the interview conducted by the author, the Public Prosecutor stated that she had several specific considerations in determining the use of an alternative charge against the defendant, SM. "The defendant is charged with 4 articles. In the first charge, I used the Domestic Violence Eradication Law because the victim is the biological child of the defendant."

The Public Prosecutor analyzes juridically based on evidence, such as witness testimonies, letters, and the defendant's statements, to make considerations in the presented

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<sup>16</sup> Aradila Caesar Ifmaini Idris, "Eksaminasi Terhadap Putusan Pengadilan Tindak Pidana Korupsi Pada Pengadilan Negeri Jakarta Pusat Atas Nama Terdakwa Amir Fauzi (Putusan Nomor: 127/Pid.Sus/Tpk/2015/Pn.Jkt.Pst)," *INTEGRITAS* 3, no. 1 (March 6, 2017): 191, <https://doi.org/10.32697/integritas.v3i1.162>.

<sup>17</sup> Antonius Ndruru, "Penerapan Pemidanaan Di Bawah Ancaman Minimal Pada Tindak Pidana Penempatan Tenaga Kerja Indonesia Di Luar Negeri," *Jurnal Panah Keadilan* 1, no. 2 (2022): 34–51, <https://doi.org/10.57094/jpk.v1i2.450>.

charges. In this case, the Public Prosecutor utilizes the Birth Certificate to prove that the victim is indeed the biological child of the defendant, thereby using Article 46 of the Republic of Indonesia Law No. 23 of 2004 concerning the Eradication of Domestic Violence, which is deemed appropriate. At the time the Defendant committed the act against the victim witness, the victim witness was 29 (twenty-nine) years old, according to Birth Certificate No. 2441/1989 dated October 24, 1989, the victim witness was born on June 26, 1986, and is indeed the biological child of the defendant.

b. Article 285 of the Indonesian Criminal Code (KUHP) concerning Rape

The consideration of the Public Prosecutor in presenting the second charge under Article 285 of the Criminal Code is based on the testimony of witnesses that the defendant used force and threats against the victim when committing the act. According to an expert witness, the victim suffered severe trauma when encountering the defendant because the Defendant frequently threatened and forbade the victim witness, DR, from reporting the act of sexual intercourse that had been committed to the witness RS (Defendant's Wife) because the Defendant would beat them with a belt or belt if they reported the Defendant's actions to the witness RS (Defendant's Wife). "the Defendant is also charged under Article 285 of the Criminal Code, as according to the testimony of witnesses, during the time the defendant committed the rape against the victim, the defendant inserted his genitalia into the victim's genitalia using threats and coercion against the victim."

c. Article 286 of the Indonesian Criminal Code (KUHP) concerning Rape

The Public Prosecutor then conducts a juridical analysis based on the available evidence, such as witness statements, expert opinions, documents, clues, and the defendant's statements, to make considerations in the indictment. The expert's testimony explains that the victim has intellectual limitations, also referred to as Intellectual Disability, and the expert clarifies that this condition means the individual lacks intellectual abilities compared to others of the same age category.

The expert further emphasizes that children with intellectual disabilities need protection and assistance as they are more vulnerable to both internal and external influences from people close to them. They tend to be more obedient, less fearful, and more easily influenced, thus requiring safeguarding. During the expert's assessment, the victim was 30 years old, but in terms of social maturity, the expert likened the victim's mental age to that of an 8-10-year-old child. The victim had normal physical appearance but had defects in the right hand and leg, which were caused by fever and convulsions experienced after birth and during infancy.

The expert also presented that the victim has excellent communication skills, and mentally and emotionally, the victim is stable. The victim is capable of expressing various emotions, such as sadness, happiness, etc., and can communicate effectively under any circumstances. When recounting the events, the victim's consistency can be trusted, as individuals with intellectual disabilities lack the ability to lie, and they are unable to deceive during tests of intellectual capabilities.

d. Article 289 of the Indonesian Criminal Code (KUHP) concerning Sexual Assault

Fact was revealed during the trial that the defendant not only committed the crime of rape but also engaged in the act of sexual abuse. There is a distinction between rape and sexual abuse. In terms of the law, these two actions are regulated by different laws or rules. Rape involves sexual intercourse, while sexual abuse involves lewd acts, and these lewd acts are not sexual intercourse.<sup>18</sup> "The defendant is also charged under Article 289 of the Indonesian Criminal Code (KUHP), as he not only committed rape against the victim but also engaged in sexual abuse, such as touching the victim's breasts and other similar acts. Therefore, Article 289 of the Criminal Code is the most appropriate provision."<sup>19</sup>

The Public Prosecutor must be able to prove the charges brought against the defendant in the Indictment he/she has prepared. Therefore, there are 2 (two) factors influencing the Public Prosecutor in determining an alternative indictment for the defendant SM, namely objective and subjective factors. These factors will assist the Public Prosecutor in proving the allegations against the defendant in the prepared Indictment. The objective and subjective factors will aid the Public Prosecutor in the process of evidence presentation in the trial.

#### 1) Objective Factors

Objective factors refer to the elements related to the legal provisions used in the indictment against the defendant, SM. This includes the nature and form of the alleged criminal act committed by the defendant. In this context, objective factors are crucial to assess whether the defendant, SM, fulfills the elements of the charged articles mentioned in the indictment or not. During the trial process, evidence and legal arguments will be evaluated to determine whether the defendant objectively meets the elements of the criminal offense charged in accordance with the legal provisions mentioned in the indictment. Therefore, the Prosecutor conducts a juridical analysis of the charged articles, namely article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence, discuss about Element "Any Person" and element "Committing sexual violence against a person residing within the household".

Moreover article 285 of the Criminal Code Regarding Rape discusses Element "Anyone who, through violence or threat of violence, compels a woman, not his wife/outside of marriage, to engage in sexual intercourse with him" In this case, the element that the woman is not his wife or outside of marriage is satisfied, and it has been proven that the defendant forced the victim to engage in sexual intercourse with him. This is evident from the trial's factual evidence, including expert testimonies, documents, and witness statements. This is further supported by the results of the Visum Et Repertum (Forensic Medical Examination Report) Number: 040/RSB/KSI/VR/XI/2015 dated October 24, 2015, examined and signed under oath by Dr. Yanuarman, SpOG (K) FM, the doctor who conducted the examination at Kasih Sayang Ibu Hospital. The examination concluded that there were tears in the hymen at the 3, 6, and 9 o'clock positions with smooth edges. Article 286 of the Criminal Code

<sup>18</sup> Nyonya Mercy, "Perlindungan Korban Pencabulan Dan Perkosaan," 2023, <https://jangkargroups.co.id/perlindungan-korban-pencabulan-dan-perkosaan/>.

<sup>19</sup> Hasil Wawancara dengan Narasumber Jaksa Penuntut Umum Mega Tri Astuti, S.H. tanggal 17 April 2023 di Kejaksaan Negeri Batam

Regarding Rape discusses element "Which he knows", element "Anyone who engages in sexual intercourse outside of marriage with a woman who is in a state of unconsciousness or who is in a helpless state." Among the above elements, only the element that the woman is not his wife or outside of marriage is satisfied. The victim was not in an unconscious or helpless state, even though the victim has an intellectual disability. While an individual with an intellectual disability has limitations in intellectual function and adaptation to their environment, it does not fall within the category of helplessness as intended in Article 286 of the Criminal Code.

The last, article 289 of the Criminal Code Regarding Sexual Assault discusses element "Anyone who, through violence or threat of violence, compels a person to commit or endure indecent acts" This article differs from rape as formulated in Article 285 of the Criminal Code, where rape requires sexual intercourse, whereas indecent acts do not necessarily involve sexual intercourse. In this case, considering the trial facts and witness testimonies, it has been proven that the defendant committed indecent acts against the victim, specifically by forcing the victim to touch the victim's breasts.

## 2) Subjective Factors

Subjective factors relate to the perpetrator's individual characteristics and their criminal liability.<sup>20</sup> Criminal liability is determined if there are prior criminal actions, including aggravating and mitigating circumstances for the defendant, SM: "Mitigating factors include the defendant's lack of previous legal issues and the hope that they will regret their actions and refrain from repeating them. Aggravating factors arise from the defendant's disturbing behavior that disturbs the community, compounded by the fact that the victim is the defendant's own child and is also an individual with intellectual disabilities."<sup>21</sup> Aggravating Circumstances the defendant's actions have disturbed the community. The defendant's actions were committed against their own child who has an intellectual disability. Mitigating Circumstances that the defendant has no prior criminal record.

## 2. The Demands of the Public Prosecutor in Case Number PDM-020/Eku.2/BTM/01/2022 Reviewed in Light of the Objective of Legal Certainty

There is a distinction between the indictment and the demands put forth by the Public Prosecutor. The Public Prosecutor presents an alternative indictment, including Article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence, and Articles 285, 286, and 289 of the Criminal Code. The provision of an alternative indictment for the defendant applies when the criminal actions attributed to the defendant are not proven in the primary or initial indictment.<sup>22</sup> In such cases, the Public Prosecutor can substantiate the second

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<sup>20</sup> Maswita Maswita, M. Sakti Pulungan, and Indra Gunawan Purba, "Tinjauan Yuridis Tentang Penganiayaan Akibat Rasa Sakit Hati (Kajian Kepada Putusan Nomor : 2142/Pid.B/2021/PN Medan)," *Jurnal Normatif 2*, no. 2 (December 31, 2022): 190–96, <https://doi.org/10.54123/jn.v2i2.228>.

<sup>21</sup> Hasil Wawancara dengan Narasumber Jaksa Penuntut Umum Mega Tri Astuti, S.H. tanggal 17 April 2023 di Kejaksaan Negeri Batam

<sup>22</sup> Ahnaf Dzaky Rheinanda, "Eksaminasi Dakwaan Jaksa Terhadap Tindak Pidana Suap Oleh Samin Tan (Ultimate Beneficiary Owner PT. Borneo Lumbang Energy & Metal, Induk Perusahaan PT. Asmin Koalindo Tuhup (PT. AKT))," *NOVUM: JURNAL HUKUM*, 2023, 209–21, <https://doi.org/10.2674/novum.v0i0.51960>.



or subsidiary indictment. Since during the trial, the Public Prosecutor successfully proved the allegations in the primary indictment, in their demands, the Public Prosecutor relies only on one article from the primary indictment, specifically Article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence.

During the prosecution, the Public Prosecutor must proceed with conviction based on valid evidence, for the sake of justice and truth, guided by the Divine Essence, in order to establish legal certainty and uphold the justice and truth expected by society as a whole. Before delving into the research findings and discussions concerning legal certainty within the demands of the Public Prosecutor in case number PDM–020/Eku.2/BTM/01/2022, a brief overview of the Public Prosecutor's demands will be presented.

After examining the trial facts, the Public Prosecutor demands with one article, namely Article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence, as well as Articles 285, 286, and 289 of the Criminal Code. The demands of the Public Prosecutor state:

- 1) Declare the Defendant SM to be proven guilty beyond a reasonable doubt of committing the criminal act "Any person who commits sexual violence against a person residing within the household," in violation of Article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence, as stated in the First Charge of the Public Prosecutor;
- 2) Impose a sentence on Defendant SM with 11 (eleven) years of imprisonment, reduced by the time the Defendant has been in temporary detention, with an order to keep the Defendant in custody;
- 3) Oblige Defendant SM to pay restitution to the victim witness Dewi Retnowardani in the amount of IDR 101,146,465.00 (one hundred one million one hundred forty-six thousand four hundred sixty-five Indonesian Rupiah), subsidiary to 10 (ten) months of detention;

Based on the provided elaboration and to determine whether the Principle of Legal Certainty has been applied in the demands of the Public Prosecutor in case number PDM–020/Eku.2/BTM/01/2022, the author will briefly explain the concept of Legal Certainty.

Legal certainty refers to a condition where the law functions as rules that must be obeyed.<sup>23,24</sup> Legal certainty revolves around the clarity of legal norms, making them guidelines for individuals within society who are subject to those regulations. The concept of legal certainty can be understood as having clarity and definitiveness about the application of the law within society.<sup>25</sup> The principle of legal certainty provides protection to seekers of justice from

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<sup>23</sup> Nurmalita Ayuningtyas Harahap, "Harmonisasi Ketentuan Hukuman Disiplin Pegawai Asn Untuk Menjamin Kepastian Hukum," *Mizan: Jurnal Ilmu Hukum* 11, no. 2 (December 17, 2022): 185, <https://doi.org/10.32503/mizan.v11i2.2729>.

<sup>24</sup> Darmi Wati, "PEMBAGIAN HARTA BERSAMA DITINJAU DARI ASAS KEPASTIAN HUKUM (Studi Putusan Mahkamah Agung Nomor 266K/AG/2010)," *JURNAL HUKUM DAS SOLLEN* 1, no. 4 (December 13, 2018), <https://doi.org/10.32520/das-sollen.v1i4.329>.

<sup>25</sup> Suheflihusnaini Ashady and Aryadi Almau Dudy, "Problematisasi Kepastian Hukum Terhadap Penerapan Restorative Justice Dalam Penanganan Perkara Tindak Korupsi Dana Desa," *Unizar Law Review* 6, no. 1 (June 24, 2023), <https://doi.org/10.36679/ulr.v6i1.34>.

arbitrary actions,<sup>26,27</sup> enabling individuals to obtain what is expected under specific circumstances. This statement aligns with Van Apeldoorn's assertion that legal certainty has two aspects: the ability to determine the law in concrete situations and legal security. The presence of the principle of legal certainty safeguards seekers of justice by ensuring that they are aware of what constitutes the law in a given matter before initiating legal proceedings. Legal certainty is also crucial because unclear or uncertain laws would lose their meaning and fail to serve as behavioral guidelines for everyone.<sup>28</sup>

Based on the case position that the author has outlined, as presented in the Literature Review, the defendant SM committed the criminal act of sexual violence against their own child who has an intellectual disability. The Public Prosecutor has charged the defendant under Article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence, which stipulates: "Anyone who commits a sexual violence act as referred to in Article 8 letter a, shall be punished with imprisonment for a maximum of 12 (twelve) years or a fine of up to IDR 36,000,000.00 (thirty-six million Indonesian Rupiah)." The content of Article 8 letter a referred to in Article 46 of Indonesian Law No. 23 of 2004 concerning the Eradication of Domestic Violence, as stated above, is: "Coercion of sexual relations carried out against a person residing within the household."

According to expert testimony, the victim, DR, who has an intellectual disability, possesses an IQ and mental capacity equivalent to that of children aged 8-10 years. Therefore, the author asserts that the defendant should have been subjected to Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Expert witness Wiwit Setiyowati, A.KS, MA, provided testimony under oath stating that the victim is a person with an intellectual disability and that individuals with such limitations, like the victim, lack the ability to fabricate nonexistent events or to lie. The expert witness explained that during the assessment and observation process, although the victim was 30 (thirty) years old, their mental capacity was similar to that of a child aged 8 (eight) to 10 (ten) years.

In an interview with the Public Prosecutor handling the related case, it was clarified that individuals categorized as children under Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection are those who have not yet reached the age of 18 (eighteen) years, including those still in the womb. "In the context of the law, an individual is categorized as an adult based on their chronological age, not their mental capacity or IQ. Even if they have the mental capacity of a child, once they are above 18 years of age, they are still classified as an adult."

The definition of a child with disabilities is stated in Law Number 35 of 2014 concerning Child Protection, which reads: "A Child with Disabilities is a child who has long-term physical,

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<sup>26</sup> Lia Pratiwi, "Legal Certainty Value in Pre-Accusation Institute to Optimize Justice for Justice Seekers: Reconstruction of Pre-Accusation in the Criminal Procedure Code," *Open Journal for Legal Studies* 3, no. 1 (April 12, 2020): 23–34, <https://doi.org/10.32591/coas.ojls.0301.02023p>.

<sup>27</sup> Sardjana Orba Manullang et al., "Legal Certainty Aspects in Regulation of the Attorney General Number 15 of 2020 Concerning Termination of Prosecution Based on Restorative Justice," *LEGAL BRIEF* 11, no. 5 (2022): 3291–98, <https://doi.org/10.35335/legal.v11i5.651>.

<sup>28</sup> Muammar Alay Idrus, "Keabsahan, Kepastian Hukum Dan Perlindungan Hukum Atas Perwakafan Yang Tidak Tercatat ( Studi Kasus Praktek Perwakafan Tanah Di Kecamatan Sukamulia)," *Jurnal IUS Kajian Hukum Dan Keadilan* 5, no. 1 (April 20, 2017): 30, <https://doi.org/10.29303/ius.v5i1.342>.

mental, intellectual, or sensory impairments, which, when interacting with their environment and society, may encounter hindrances that make it difficult to fully and effectively participate based on equal rights."

However, the age category for children with disabilities is not explicitly detailed in the law, leading to confusion in law enforcement. As evident in the case under discussion, the victim has an intellectual disability despite being 30 (thirty) years old, yet their cognitive and adaptive abilities resemble those of children aged 8-10 years. The lower cognitive ability of individuals with intellectual disabilities has a negative impact on their adherence to social norms. This situation leads to challenges for individuals with intellectual disabilities in comprehending their environment, rendering them unable to employ appropriate strategies to react to their surroundings. This vulnerability increases their susceptibility to deception compared to individuals without intellectual disabilities." As previously mentioned, intellectual disabilities are closely associated with impaired cognitive development. These limitations result in individuals with intellectual disabilities having reduced abilities to engage in complex reasoning, unlike individuals without intellectual disabilities who typically possess such capabilities.<sup>29</sup>

When a victim of violence has an intellectual disability and is considered a "mature child" based on chronological age but has a mental condition indicating an age below 18, there's a need for justice in ensuring their rights and fairness. The meaning of being a child for a victim with an intellectual disability should have a distinct definition separate from someone without disabilities. Defining what constitutes a child in the case of victims with intellectual disabilities would help clarify decisions regarding sanctions and deterrence for perpetrators of violence against individuals with such conditions. The existing discrepancy between chronological age and mental age in handling cases results in disparities in the application of laws and treatment of victims seeking justice.

The clarification of age in Child Protection Laws, which originated from Law Number 23 of 2002 and was later updated to Law Number 35 of 2014, and further revised in Law Number 16 of 2019, does not mean the previous laws are revoked; rather, the updates refine the provisions, and certain articles remain applicable until today. This includes the definition of a child in Article 1 point 1. However, the limitation on the definition of a child results in individuals above the stipulated age being considered adults and not children anymore, thus rendering the law unable to govern their interests. This aligns with the principle of *lex specialis derogate legi generalis*, where child-related issues within this law remain its domain, despite the fact that the definition of a child in Indonesia varies across different contexts.

The diverse definitions of a child entail variations in the context of adulthood age limits in Indonesia, some of which are as follows:

**Table 2.1** Child Definitions According to Laws

No.	Aturan	Definisi
1	Article 330 of the Civil Code	who has not yet reached the age of 21 and has not been previously married.

<sup>29</sup> Andi Nur Fitri Balasong, "Memahami Individu Dengan Sindrom Down Di Tengah Masyarakat Dan Agama," *MIMIKRI* 8, no. 2 (2022): 286–310.

2	In Article 98 paragraph (1) of the Compilation of Islamic Law	Being able to stand on one's own or being an adult is at the age of 21, as long as the child is not physically or mentally impaired, or has never been previously married.
3	Decree of the Director General of Agrarian Affairs of the Directorate of Land Registration (Kadaster) No. Dpt.7/539/7-77, dated 13-7-1977	Dividing the concept of adulthood into three, namely political adulthood with a minimum age of 17 years to participate in elections, sexual adulthood with a minimum age of 18 years to enter marriage according to the latest Marriage Law, and legal adulthood where a specific age limit under the law is considered capable of acting in legal matters.
4	Article 47 paragraph (1) of Law No. 1 of 1974 concerning marriage.	Those who have not reached the age of 18 or have not previously entered into marriage are under the authority of their parents as long as that authority is not revoked. Article 7 paragraph (1) states that marriage is only permitted if the male party has reached the age of 19 and the female party has reached the age of 16, which was later amended in the Republic of Indonesia Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, setting the minimum age for both men and women to marry at 18 years old. This change follows Constitutional Court Decision No. 22/PUU-XV/2017, where one of the considerations of the Constitutional Court in that decision was "However, when the differentiation in treatment between men and women impacts or obstructs the fulfillment of basic rights or constitutional rights of citizens, both civil and political rights, as well as economic, educational, social, and cultural rights, which should not be differentiated solely based on gender, then such differentiation clearly constitutes discrimination."
5	Article 1 number 3 of the Republic of Indonesia Law No. 11 of 2012 concerning the Juvenile Justice System	A child who is 12 (twelve) years old but not yet 18 (eighteen) years old, who is suspected of committing a criminal act.
6	Article 1 Point 26 of the Republic of Indonesia Law Number 13 of 2003 concerning Employment	a child is any person who is under 18 (eighteen) years old.
7	Article 1 Point 2 of Law Number 4 of 1979 concerning Child Welfare	An individual who has not yet reached the age of 21 and has never been married.

Legal certainty is intended to ensure that every legal norm can be formulated with sentences that do not contain varying interpretations.<sup>30,31</sup> In practice, many legal events arise where, when faced with the substance of the governing legal norm, it is sometimes unclear or incomplete, leading to different interpretations. In reality, an individual with intellectual

<sup>30</sup> Lutfi Walidani and Habib Adjie, "Perlindungan Hukum Kreditur Terhadap Pelaksanaan Eksekusi Hak Tanggungan (Analisis Putusan Mahkamah Agung Republik Indonesia Nomor 2859K/PDT/2011)," *Hukum Dan Masyarakat Madani* 8, no. 2 (November 17, 2018): 117, <https://doi.org/10.26623/humani.v8i2.1377>.

<sup>31</sup> I Wayan Agus Vijayantera, "Perubahan Batas Umur Minimal Melangsungkan Perkawinan Sejak Diterbitkan Undang-Undang Republik Indonesia Nomor 16 Tahun 2019," *Jurnal Pendidikan Kewarganegaraan Undiksha* 8, no. 3 (2020): 84–97, <https://doi.org/10.23887/jpku.v8i3.28606>.

disabilities who has surpassed the chronological age of childhood, due to having reached the age limit defined by the law, may not receive legal benefits.

According to the author, the demands of the Public Prosecutor in case number PDM-020/Eku.2/BTM/01/2022 are essentially in line with the principle of legal certainty. The Prosecutor has proven that the defendant's actions are indeed substantiated through witness testimonies, expert opinions, the defendant's statement, letters, instructions, and evidence presented during the trial, indicating that the defendant, Mr. SM, is indeed the biological father of the victim, Ms. DR, and that he committed sexual violence within the context of the household. Thus, by invoking Article 46 of the Republic of Indonesia Law No. 23 Year 2004 concerning the Elimination of Domestic Violence, it is considered appropriate and in accordance with the principle of legal certainty, as it ensures that individuals can engage in behavior that aligns with the prevailing laws.

However, according to the author, the legal certainty provided by the Public Prosecutor may not necessarily result in benefits for the victim with intellectual disabilities. Benefit is the most important aspect within the realm of legal objectives. Looking at the definition of "manfaat" (benefit) in the Indonesian dictionary, it can be terminologically interpreted as purpose or advantage. Legal benefit entails achieving order and tranquility in society through a well-structured legal framework. Satjipto Raharjo explains that the theory of legal utility can be seen as a tool for society to create order and organization. Utility in law means that the law should provide benefits to both those who have suffered harm and those who have not. Both parties should experience benefits from every legal decision made.

In assessing the success of law enforcement in Indonesia, utility is an indispensable factor. According to Utilitarianism, law enforcement is based on specific benefits, not just as a means of retribution against criminal acts. The aim of law enforcement is not solely to seek revenge or punishment for wrongdoers, but also to serve beneficial purposes. In this context, utility is defined as the creation of happiness. In the Utilitarian view, just laws are those that can bring happiness to as many individuals as possible. Therefore, the success of law enforcement can be measured by how well it creates happiness and utility for the broader society. This principle emphasizes the importance of considering the consequences of laws and their enforcement efforts in achieving social happiness.<sup>32</sup>

Individuals with intellectual disabilities, due to their below-average mental capabilities, are vulnerable to becoming victims of crimes. It is evident that individuals with intellectual disabilities who become victims of violence, including sexual violence, require specialized legal protection, beginning with more supportive and progressive legislation to ensure ideal legal certainty and benefit. The author asserts that the definition of a child should not only be based on physical or chronological age but also on psychological or mental aspects.

Efforts should be made to establish more effective laws while considering the principles of legal certainty and benefit. This is because the purpose of the law is to achieve order and justice. Proper law enforcement should prioritize not only legal certainty but also consider benefit and justice. In implementing law enforcement in Indonesia, it's important to take a broader perspective, including the impact and benefits it brings to society as a whole. Thus,

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<sup>32</sup> Hasaziduhu Moho, "Penegakan Hukum Di Indonesia Menurut Aspek Kepastian Hukum, Keadilan Dan Kemanfaatan," *Warta Dharmawangsa* 13, no. 1 (2019), <https://doi.org/10.46576/wdw.v0i59.349>.

efforts can be made towards effective, fair law enforcement that maximizes usefulness and benefits for the entire community.

In Indonesia, harmonization among elements that complement each other in the law is not widely practiced. Law enforcement agencies often view the law as limited to legal provisions and tend to prioritize compliance with formalities in addressing social phenomena. However, in law enforcement, it's important to consider the element of efficiency in its implementation and to give equal attention to legal substance, not just formality. The principle of "substance over form" becomes crucial, where the content or substance of the law should take precedence over mere formalities. By considering both substance and efficiency, it is hoped that law enforcement can be more effective, fair, and provide greater benefits to society.

#### **D. CONCLUSION**

The Prosecutor/Plaintiff/Public Prosecutor, in order to determine the charges in cases of sexual violence against individuals with intellectual disabilities in case number: PDM–020/Eku.2/BTM/01/2022, bases the decision on objective and subjective factors. The objective factors refer to factors that relate to the legal regulations applied in the indictment against the defendant SM, whether the defendant SM fulfills the elements/articles that are charged or not in the Indictment Letter, through legal analysis conducted by the Public Prosecutor. The subjective factors pertain to the perpetrator's personal attributes and the criminal responsibility that has been executed. Criminal responsibility is carried out if there were prior malicious acts performed, encompassing matters that could aggravate or mitigate the defendant SM's actions in relation to the perpetrator themselves, as well as the criminal responsibility that has been undergone. Criminal responsibility is executed if a prior criminal act has taken place, encompassing matters that could aggravate or mitigate and factors that grant leniency to the defendant SM. The demand of the Public Prosecutor in case number PDM–020/Eku.2/BTM/01/2022 is in accordance with the principle of legal certainty, as the Public Prosecutor has provided evidence that substantiates the actions, supported by testimonies of witnesses, expert explanations, the defendant's statements, letters, instructions, and the use of physical evidence presented during the trial, that the defendant SM is indeed the biological father of the victim DR and that the defendant has committed sexual violence within the household, thus submitting Article 46 of the Indonesian Law No. 23 of 2004 concerning the Elimination of Domestic Violence, which is considered appropriate and in line with the principle of legal certainty as it guarantees individuals to act according to the established laws. However, the legal certainty provided by the Public Prosecutor may not necessarily result in benefits for victims with intellectual disabilities. The author's suggestion is to propose the necessity for more specific and progressive legal regulations to protect victims with intellectual disabilities. Further research can be conducted to identify legal loopholes that require improvement and provide concrete recommendations to enhance legal protection for this group.

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