

## THE ACT OF SALE OF A POSTPARTUM CHILD BY THE CHILD'S BIRTH MOTHER

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### Abstract

Children are the next generation and determinants of the future of the nation as well as a mirror of life attitudes in the future. Therefore, they need to get the opportunity to grow and develop their physical need and mental and social skills properly. However, sometimes they face serious problems, such as getting pregnant out of wedlock when they are 13 years old. The problem occurs because of something undesirable, and for that reason, they are not ready to become parents. Thus, they commit acts of minor trafficking that are contrary to the provisions of Article 76f juncto Article 83 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Minor trafficking is a crime that violates human rights, whose perpetrators are not only adults but also children, and most of them are victims of criminal acts. The minors who committed criminal acts need to be taken seriously and their criminal liability is different from adults. Therefore, minors who are in conflict with the law still get specific protection regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

**Keywords:** Minor Trafficking, Criminal Liability, Juvenile Criminal Justice System

## INTRODUCTION

Children who have committed criminal offenses are caused by several factors, namely an emotional urge or inner conflict so that they vent their inner conflict. With a lack of guidance, children are more easily trapped in bad actions that can ultimately harm themselves and actually they really need the right guidance and direction so they don't do the wrong thing. Where most children are victims of criminal acts but now turn into perpetrators, so it needs to be taken seriously and because the perpetrators of these criminal acts are children, the responsibility is different from adults.

A trafficker is defined as a person who commits or is involved in and approves of the activities of recruitment, transportation, trade, shipping, receiving or harboring or a person from one place to another for the purpose of profit. A trafficked person (victim of trafficking) is someone who is directed, brought, bought, sold, transferred, received or hidden, as mentioned in the definition of trafficking in humans including children (Elsa R.M. Toule and Sherl Adam, 2013). The sale of children is a form of crime that can be committed by a person or group of people or an institution against people whose age has not reached 18 years, including fetuses still in the womb (Anis Soraya, 2015).

The government has regulated specific regulations regarding the prohibition of child trafficking contained in Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection Article 76 F which reads "Every person is prohibited from placing, allowing, committing, ordering to commit, or participating in the abduction, sale, and/or trafficking of children." and criminal sanctions are contained in Article 83 which reads "Every person who violates the provisions referred to in Article 76F shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of at least Rp60,000,000.00 (sixty million rupiah) and a maximum of Rp300,000,000.00 (three hundred million rupiah)".

There was a case starting in August 2019 where a rape occurred in the Maliang area. A father with the initials BR raped his 13-year-old biological daughter YY twice, the first time in the third week and the second time in the fourth week of August 2019, the incident occurred in BR's garden. When BR raped YY, Badiah Ola (BR's wife and YY's biological mother) went to relieve herself on the beach which is approximately 250 meters from where BR and YY were.

As a result of this act YY became pregnant, during her pregnancy she lived in her family home, together with Badiah Ola and Shinta (Badiah Ola's younger sibling). Not many people knew YY was pregnant, only Shinta and Badiah Ola's close friend WP. WP had been a close friend of Badiah Ola's since high school and was her confidant. WP often visited YY and helped take YY to the gynecologist.

On May 28, 2020 YY gave birth to a baby girl with the initials AP, normally with the help of Badiah Ola and Shinta with makeshift maternity equipment at home. WP was also at Badiah Ola's house when YY gave birth, WP held AP with a happy and emotional face, when he saw the look on WP's face, YY's thought came to sell AP to WP.

3 days after giving birth, on May 31, 2020, YY took AP out of the house to go to WP's house with the aim of selling AP without the knowledge of Badiah Ola or Shinta at a price of Rp 1,000,000 (One Million Rupiah). WP was very happy and gave Rp. 1,000,000 (One Million Rupiah) to YY. After YY sold the baby, Badiah Ola (YY's biological mother) asked about the baby's whereabouts, but YY said that she left the baby by the side of the road. Badiah Ola was angry with her and immediately went to look for the baby, assisted by Shinta. After a day the baby was not found, Shinta reported the incident to the police because she thought the baby was missing and someone had taken it. YY was forced to be honest and finally told WP that she sold her baby. The reason was that YY did not want to take care of and raise her baby considering she was still underage. YY was ashamed and afraid of being talked about by her friends if they found out that she was pregnant and had given birth to a baby at a young age. Especially if she found out that the baby was the result of being raped by her biological father. YY is threatened with being charged by the police with Article 2 paragraph (1) and Article 17 of Law Number 21 of 2007 concerning Eradication of Trafficking in Persons.

## RESEARCH METHOD

The research method was conducted through a normative juridical approach. Normative juridical is a legal research method conducted by examining library materials or secondary materials only (Soerdjono and Sri, 2009). This type of research is used to obtain answers to problem formulations by means of literature studies, namely examining legal materials such as primary legal materials used are Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection and Law of the Republic of Indonesia Number 11 of 2012 concerning the Child Criminal Justice System and secondary legal materials such as books, articles, journals, papers, research results, and other materials. Secondary legal materials such as books, articles, journals, papers, research results, and so on that are relevant to the issues to be discussed.

## RESULTS AND DISCUSSION

The definition of a child in various juridical provisions in Indonesia is very diverse, but most regulations state that a child is someone who is not yet 18 years old. Article 1 paragraph (1) of Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection as amended by Law of the Republic of Indonesia Number 35 of 2014 states that "a child is someone who is not yet 18 (eighteen) years old including children who are still in the womb" (Ni Ketut Ayu Suwandewi and Made Nurmawati, 2018). Based on the above case, YY's age on birth certificate Number: 5305-LT\_17062015-0019 was born in Mali, May 1, 2006, where at the time YY sold the child on May 31, 2022, so YY was 14 years old. Meanwhile, AP, who was a victim of child trafficking, was 3 days old at the time, as seen in the case above YY gave birth to AP normally on May 28, 2020 at home with makeshift maternity equipment with the help of Badiah Ola and Shinta. So that at that age the status of YY and AP according to Article 1 number 1 of the Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection can be categorized as children.

The rights of children are based on Pancasila and based on the 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child, namely the principle of the best interests of the child and the principle of the right to life, survival and development.

The principle of the best interests of the child is a principle that emphasizes that in all actions relating to children carried out by the government, society, the best interests of the child must be the main consideration. The principle of the right to life, survival, and development is that every child has the right to live safely, peacefully, happily, physically and mentally prosperous, and is entitled to the fulfillment of their basic needs to grow and develop properly, and the right to achieve a standard of living that is appropriate for the physical, mental, spiritual, moral, and social development of children which must be fulfilled by the parties mentioned by the Child Protection Law (Liza Agnesta Krisna, 2021).

A criminal offense is an act that is prohibited and threatened with criminal sanctions for those who violate the applicable laws (Moeljatno, 1983). The basis for the existence of a criminal offense is the principle of legality. The principle of legality is regulated in Article 1 paragraph (1) of the Criminal Code: "No act can be punished, except on the strength of criminal rules in existing legislation, before the act is committed". So it can be said that the principle of legality is a principle that determines that no action is prohibited and threatened with punishment, if previously the action has not been regulated in advance in the law.

Based on the above case on May 31, 2020 at 08.35 WITA, YY took AP out of the house to go to WP's house located at Jalan Durian VI, Moru with the aim of selling AP to WP for a price of Rp 1,000,000 (one million rupiah) WP agreed with YY and gave money of Rp 1,000,000 (one million rupiah) to YY. Based on the description above, YY who is 14 years old based on birth certificate Number: 5305-LT\_17062015-0019 born in Mali, May 1, 2006, has committed an act that has been prohibited in the law, namely selling AP to WP and getting profit from selling AP amounting to Rp 1,000,000 (one million rupiah). Where the prohibition of the sale of children has been regulated in the provisions of Article 76F juncto Article 83 of the Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection.

Article 76F of Law of the Republic of Indonesia Number 35 of 2014 on the Amendment to Law of the Republic of Indonesia Number 23 of 2002 on Child Protection, stipulates that "Every person is prohibited from placing, allowing, committing, ordering to commit, or participating in the abduction, sale, and/or trafficking of children". Violation of this Article is threatened with criminal sanctions as stipulated in Article 83 of Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection which stipulates that "Every person who violates the provisions referred to in Article 76F shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 15 (fifteen) years and a fine of at least Rp.60,000,000.00 (sixty million rupiah) and a maximum of Rp.300,000,000.00 (three hundred million rupiah)". Based on the description above, the principle of legality has been fulfilled.

There are several elements in Article 76F of Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection as follows:

1. Every person
2. Placing, allowing, committing, ordering to commit, or participating in the abduction, sale and/or trafficking of a child. Regarding the first element, namely every person based on Article 1 paragraph (16) of Law

Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection "Every person is an individual or

corporation". So that he can be held criminally responsible for the criminal acts he committed. In relation to the case on May 31, 2020 YY brought AP to WP's house located at Jalan Durian VI, Moru with the aim of selling AP to WP at a price of IDR 1,000,000 (one million rupiah). So that the legal subject in this case is an individual, namely YY, because YY is the person who sells children and benefits from the criminal acts he commits. Based on this description, the element of every person has been fulfilled. In the second element, namely placing, allowing, doing, ordering to do, or participating in the abduction and/or trafficking of children.

Based on the Big Indonesian Dictionary (KBBI) "placing is, putting, putting, installing, giving somewhere". Based on the above case on May 31, 2020 at 08.30 WITA YY secretly took AP out of the house without anyone's knowledge, with the aim of selling AP to WP. YY went to WP's house on Durian VI Moru Street, to place AP at WP's house with the aim of selling AP to WP and getting a profit of Rp 1,000,000 (one million rupiah) on mutual agreement, WP agreed and gave Rp 1,000,000 (one million rupiah) to YY. So that the element of placing has been fulfilled because in the case above it is said that YY took AP out, namely to WP's house with the aim of selling AP to WP, which means that YY placed AP at WP's house for a price of Rp 1,000,000 (one million rupiah). And based on Article 55 paragraph (1) to 1 of the Criminal Code (KUHP) there is the role of the perpetrator of the criminal offense, as follows:

1. Pleger
2. Doen Pleger
3. Medepleger

In this case the person who commits (Pleger) is a person who commits his own actions where his actions fulfill the formulation of the offense (Soenarto Soerodibroto, 2009). Based on the above case on May 31, 2020 at 08.35 WITA YY took AP out of the house without anyone's knowledge to go to WP's house located at Jalan Durian VI Moru, which aims to sell AP to WP at a price of Rp 1,000,000 (one million rupiah) on mutual agreement WP agreed and gave Rp 1,000,000 (one million rupiah) to YY. Based on the description above, YY is included in the first category of the role of the perpetrator, namely the person who commits (Pleger) a criminal act where YY has violated the provisions of the Law and has also determined the criminal sanctions. YY in this case acts as a person who commits the criminal act of selling children which has violated Article 76F in conjunction with Article 83 of the Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection. Based on this description, the element of the person who commits (Pleger) the sale of children has been fulfilled.

Criminal responsibility is a form that determines whether a person is acquitted or can be convicted of a criminal offense that he has committed (Hanafi and Mahrus, 2015). However, criminal responsibility does not only look at the act itself but also whether the person has the elements of guilt. If the person commits a criminal act and fulfills the elements of guilt, then he/she can be held criminally liable. Speaking of guilt, there are several elements of guilt, namely the existence of a criminal act, being able to be responsible, the existence of guilt in the form of intent or negligence (*culpa*), and no excuse for forgiveness (Moeljatno, 2008).

Thus, to determine YY can be subject to criminal liability, it must fulfill the elements of guilt, as follows:

The first element is the existence of a criminal act according to Moeljatno, a criminal act is an act prohibited by a rule of law and accompanied by threats or sanctions in the form of certain penalties, for those who violate the prohibition. (S.R. Sianturi, 2000). In relation to the case, on May 31, 2020 at 08.35 WITA YY took AP out to WP's house located at Jalan Durian VI Moru with the aim of selling AP to WP at a price of Rp 1,000,000 (one million rupiah) and WP agreed and gave the money of Rp 1,000,000 (one million rupiah) to YY. Thus, the unlawful act committed by YY was the sale of a child, where YY sold AP for a price of Rp 1,000,000 (one million rupiah). These actions constitute a criminal offense, namely violating the provisions of Article 76 F juncto Article 83 of the Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to the Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection, because YY committed the sale of children. Based on this description, the element of criminal act is fulfilled.

The second element is being able to be held responsible as stipulated in Article 44 of the Criminal Code (KUHP) which reads "Whoever commits an act for which he cannot be held responsible because his soul is defective in growth or impaired due to illness, shall not be punished". Based on the above case where when YY took AP out of the house to go to WP's house located at Jalan Durian VI Moru with the aim of selling AP to WP and getting a profit of Rp 1,000,000 (one million rupiah) and the reason YY sold AP to WP was because YY did not want to care for and maintain AP because she was embarrassed and afraid of what her friends or other people would say if they knew YY had a child at a

young age and YY initially did not admit her actions but finally she was honest that she sold AP to WP when examined by the police. Based on the description of the case above YY can be said to be capable of responsibility, because when YY decided to sell AP to WP he was in good health and did not have a defective soul in his body or was not disturbed by illness, this was evidenced by YY's awareness when he finally told the police about his actions, YY also did not suffer from idiotism, imbecility, blindness, deafness, dumbness, or insanity. So the element of being able to take responsibility is fulfilled.

The third element is the existence of fault. There are 2 (two) forms of fault, namely in the form of intent (*dolus*) and negligence (*culpa*). According to *Memorie van Toelichting* (M.v.T) what is meant by *opzet willens en wetens* (willed and known) is "a person who commits an act intentionally must will the act and must know the consequences of the act". It can be said that intentionally means intending and knowing what is done. The person who commits the act intentionally intends the act and in addition, knows or realizes about the thing done (Yudi Krismen, 2018). Intentionality is divided into 3 (three) forms, namely intentionality as an intention to achieve a goal, intentionality with conscious certainty, and intentionality with conscious possibility (Laurences Aulina & Kenny Wiston, 2020). In relation to the case above, the form of error committed by YY is intentionality as an intention. Intentionality as an intention is the desire to realize an action, the desire not to do or neglect a legal obligation, and also the desire for the consequences of the action to arise. So that when someone takes action to cause a desired result, realizing that the result is certain or may arise because of the action that has been taken, one can say that the person has intentionality as an intention (Moeljatno, 1983).

Based on the above case on May 28, 2020 YY gave birth to AP normally at home with the help of Badiyah Ola and Shinta, when YY gave birth WP was at the house and when WP held AP there were happy and emotional faces, which finally crossed YY's mind to sell AP to WP, after 3 days, namely May 30, 2020 at 08.35 WITA YY went to WP's house to place AP at WP's house located at Jalan Durian VI, Moru with the aim of selling AP to WP for a price of Rp 1,000,000 (one million rupiah) and WP agreed and gave the money of Rp 1,000,000 (one million rupiah) to YY. So it can be said that YY intended and knew of a prohibited act of placing AP for sale to WP and intended the act to benefit from the proceeds of selling AP to WP by setting a price of Rp 1,000,000 (one million rupiah). Besides that the act of selling a child committed by YY to AP was known and prohibited in the provisions of Article 76 F juncto Article 83 of the Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to the Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection. Based on this description, the element of having a form of guilt in the form of intent is fulfilled.

The fourth element of no excuse is the reason that negates the element of guilt in the perpetrator, the act committed remains unlawful so that it remains a criminal act (Dean Praditya Kermite & Jeany Anita Kermite & Fonny Tawas, 2021). The various excuses in the Criminal Code (KUHP), namely the inability to take responsibility, are regulated in Article 44 of the Criminal Code (KUHP), force is regulated in Article 48 of the Criminal Code (KUHP), excessive force defense is regulated in Article 49 paragraph (2) of the Criminal Code (KUHP), and carrying out official orders without authority is regulated in Article 51 paragraph (2) of the Criminal Code (KUHP) (Daffa Dhiya, 2021). Based on the above case, it can be seen that since YY gave birth, namely on May 28, 2020, when YY saw WP holding AP with a happy and emotional face, YY's mind crossed to sell AP to WP, then after 3 days, namely on May 30, 2020 YY took AP secretly without the knowledge of Baidah Ola or Shinta, YY went to WP's house with the aim of selling AP to WP for a price of Rp 1.000,000 (one million rupiah) by mutual agreement, WP agreed and gave Rp 1,000,000 (one million rupiah) to YY, initially YY did not admit his actions but finally he was honest that he sold AP to WP when he was examined by the police.

So based on the description of the case above, it can be said that YY does not have a defective soul or mental disorder due to illness, this is evidenced by his awareness when he finally told the police about his actions, YY also does not suffer from idiotism, imbecility, blindness, deafness, dumbness, or insanity. YY sold AP to WP on his own volition without being forced or requested by others, so there are no things that can release YY's actions from criminal liability in the form of excuses because YY does not have a defective soul or mental disorder due to illness referred to in the provisions of Article 44 of the Criminal Code (KUHP), There is no influence of coercion as referred to in Article 48 of the Criminal Code, there is no forced defense that exceeds the limit as referred to in Article 49 paragraph (2) of the Criminal Code, and there is no official order due to authority as stipulated in Article 51 paragraph (2) of the Criminal Code. Based on this description, the element of no excuse is fulfilled.

Based on the fulfillment of the elements of criminal responsibility and the elements of guilt when associated with YY's actions, in this case YY can be subject to criminal responsibility.

The criminal provisions for children are regulated in Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System. According to Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, children who can be convicted

are divided into three categories, namely, children who are not yet 12 years old, children who are 12 years old but not yet 14 years old, and children who are 14 years old but not yet 18 years old. Children in conflict with the law who are not yet 14 years old can only be subject to action not punishment. Meanwhile, children who are 14 years old but not yet 18 years old can undergo legal proceedings. Based on the above case, YY as the person who sold the child, is still classified as a 14 year old child based on birth certificate Number: 5305- LT\_17062015-0019, YY was born in Mali on May 1, 2006. When YY sold the child on May 31, 2020, when YY sold AP, YY was 14 years old. So YY at the time of selling the child was 14 years old so that YY could undergo the trial process.

The types of criminal sanctions regulated in the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System are by referring to Article 71 as follows:

1. Basic punishment for children consists of:
  - a. Warning punishment:
  - b. Punishment with conditions, consisting of :
    - i. Development outside the institution
    - ii. Community service
    - iii. Supervision
  - c. On-the-job training
  - d. Institutionalization
  - e. Prison
2. Additional punishment consists of:
  - a. Forfeiture of profits obtained from criminal offense; or
  - b. Fulfillment of customary obligations
3. If the material law imposes cumulative punishment in the form of imprisonment and fine, the fine shall be replaced with vocational training. Article 82 paragraph (1) of Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, Actions that can be imposed on children include:
  - a. Return to parents/guardians;
  - b. Surrender to someone;
  - c. Treatment in a mental hospital;
  - d. Treatment at LPKS;
  - e. Obligation to attend formal education and/or training held by the government or private entities;
  - f. Revocation of driving license; and/or
  - g. Correction of the consequences of a criminal offense.

Based on the above case, YY was born in Mali on May 1, 2006, according to birth certificate number 5305-LT\_17062015- 0019. However, on May 31, 2020 YY committed the crime of selling a child, at which time YY was 14 years old. YY sold AP who was 3 days old, where on May 28, 2020 at 08.50 WITA YY gave birth to AP. And on May 31, 2020 at 08.35 WITA YY sold AP to WP and YY received a profit of Rp. 1,000,000 (one million rupiah) which YY will use to continue her schooling, the reason YY sold AP was because YY was embarrassed to be talked about if her friends or neighbors found out that YY gave birth to a child as a result of intercourse committed by her biological father with the initials XX.

Based on the description of the case above, it can be concluded that YY did not commit repeated criminal acts, the circumstances and actions of YY did not endanger the family and society, so YY can be subject to basic criminal sanctions in the form of institutional guidance, additional punishment in the form of deprivation of benefits obtained from criminal acts and actions in the form of obligation to attend formal education and / or training held by the government or private bodies. With the aim of not harming children mentally and physically so that they can overcome their problems, realize their mistakes, and can get a life with a better future.

## CONCLUSION

In this case YY who committed the criminal act of selling children which has been prohibited in the provisions of Article 76F in conjunction with Article 83 of the Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to the Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection, when he was 14 years old. So that it can be said that the age of children in conflict with the law.

YY's actions can be subject to criminal liability because it has fulfilled the principle of guilt, namely YY committed the criminal act of selling children, is capable of being responsible because YY has been studying well until class VIII (eight), there is a mistake in the form of intentionality with the intention of

getting money for her school fees which had been delayed, and there is no excuse in accordance with Article 48 and Article 49 paragraph (2) of the Criminal Code.

Because YY is still classified as a child, YY can be subject to Article 71 paragraph (1) letter d in conjunction with Article 80, Article 71 paragraph (2), and Article 82 paragraph (1) letter e of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System. Therefore, YY can be subject to basic criminal responsibility in the form of institutionalization, additional criminal responsibility in the form of deprivation of benefits obtained from criminal acts, and action in the form of obligation to attend formal education and/or training held by the government or private entities.

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