

# The Use of Legal Psychology in Determining Sexual Misconduct Perpetrator's Bad Intention Towards Children

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## Abstract

**Purpose:** The aim of the study is to discover bad intention (*mens rea*) of sexual misconduct perpetrator by using legal psychology in finding legal obscurity of trial-proving within child protection act

**Methodology/approach:** The research is conducted as legal research, namely normative research that applies the statute approach and conceptual approach towards the object of the study based on primary and secondary sources of law.

**Results/findings:** Discovering and solving legal obscurity in bad intention within sexual harassment regulation, then legal psychology can be utilized by law enforcement to prove and decide criminal act of a subject by analyzing its criminal mindset while recognizing its culpability mental state

**Limitations:** the use of legal psychology only relating to criminal law field of study

**Contribution:** This study contributes to legal practitioners, especially prosecutors and judges, especially in criminal law.

**Keywords:** *legal psychology, mens rea, bad intention, trial proving;*

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## 1. Introduction

The criminal justice system exists to solve the society problem (Pratiwi 2023), hence the need of proper trial proving. The practice of trial-proving has evolved but devolved as time goes by (EU JULE, 2023). Whereas the involvement of information technology in civilization has not been able to be denied including in trial-proving, some basic principle of trial-proving tends to be forgotten (Pakpahan & Prasetyo, 2022). For an instance, the main principle of criminal trial-proving procedural law as set in Section 183 Criminal Procedural Law ruled that the court must find the defendant to be guilty based on the two evidence that cause judges' confidence (Pakpahan et al., 2022). Such principle has been applied in sexual misconduct cases, in which its nature needs more medical forensic such *visum et repertum* of the victim yet somehow the failure in presenting such evidence automatically negates the legal proving of the charge (Aisyah and others 2022). Hence, the latest regulation regarding sexual misconduct namely Act 12 of 2023 regarding Sexual Harassment Act has regulated a specific or unique trial-proving by allowing the testimony of sexual victim to be considered enough as evidentiary witness unlike the two witness prerequisites in other trial-proving rules of evidence (Pakpahan, 2022).

The development of trial-proving would relate to the elements of criminal act which was argued by Coffey that most criminal act consists of the purposefully intent (Coffey, 2020). The existence of intention in criminal act would deem to be contemplated due to the nature of humanity within criminal subject and consideration of judges in deciding whether the perpetrator is guilty of a criminal act (Sell & Szyner, 2023). Criminal Code as the primary source of law for criminal acts has discussed the existence of bad intention as one of the elements of criminal act whether it is implied or explicitly written in it. Therefore, law enforcement tends to analyze bad intention based on the concurring issue and its practice (Coffey, 2020). Yet, discovering intention is not a matter of analyzing only based on the

facts since intention is more of an inherent and implied within the perpetrator's self that cannot be determined outside of themselves(Coffey, 2020).

Bad intention in sexual harassment has not been formulated explicitly in several criminal regulations, such as Section 285 Criminal Code, Section 81 sub-section 1 Act 35 of 2014 regarding Child Protection Act, or even the latest regulation namely Act 12 of 2022 regarding Sexual Harassment Act. Instead, it is simply written as 'doing' or 'enacting' a criminal act. Yet, despite of the lack of written aspect of 'bad intention' in the formulation, intention and motive still exist to determine whether the perpetrator can be held liable for a criminal act (Abudukelim, 2023). The consequence of not analyzing bad intention vividly may breach the basic principle of law itself, namely justice, legal certainty and usefulness(Yuherawan and others 2023). For instance, the most recent research by Alifa showed that there's a disparity in sexual misconduct cases that sets out quite the difference of imprisonment based on the subjectivity of the sexual misconduct perpetrator(Alifa 2018). Had the judges use legal psychology to analyze perpetrator's bad intention, then the judges would be recognized in determining decision in an objective manner.

Considering the lack of clarity in the written regulation regarding bad intention in determining sexual misconduct criminal act, the analysis of bad intention based on legal psychology may become legal basis for law enforcement to strengthen legal certainty in determining whether the perpetrator is capable and intended to enact criminal act(Bhayani & Nayak, 2023). The research problem can be formulated into how legal psychology can analyze bad intention of sexual misconduct perpetrator. The motivation of the study is to discover how legal psychology can analyze bad intention of sexual misconduct perpetrator.

## 2. Literature review and hypothesis/es development

For this research, the researcher has focused mainly on two legal theories as literature review, namely legal psychology and trial proving. Legal psychology theory focuses on the development of forensic psychology especially in terms of legal practice(Melentieva, 2016). Davis argued that legal psychology can be used to interpret the condition of legal matter by analyzing the psych of subject while minimizing bias(Davis et al., 2014). Some aspect of legal psychology argues the importance of bringing up social and cognitive principles of psychology in legal perspective(Melentieva, 2016). Legal psychology studies people's mindset and behavior to understand the legal purpose of a legal action. Some studies in legal psychology even focuses on the intention of whether it is good or bad. Jonathan Mind as a dark psychology even tells the importance of understanding bad intention may be the reason in pushing the action that may damage or cause harm in a crime(Mind, 2019).

Another legal theory applied in this research is known as trial proving. Trial exists for the purpose of gaining absolution on a legal matter. Such absolution can only be achieved through proper proving from the claimant be it context of criminal law or civil law. The burden of proof as held by the claimant is known as trial proving to prove whether the claim is correct or incorrect and sufficient or insufficient(Pakpahan et al., 2022). There are several previous researches or studies that have discussed something similar to this study. The studies will be presented in the form of table along with the research gap:

No.	Name of the Research	Research Gap
1	Dijan Widijoati and Rizky Purnomo Adji, "Legal Psychology of Judges to Determine the Defendant's ability to commit a crime", Journal Advances in Economics, Business, and Management Research, Volume 130, 2020, 60-63 (Widijoati & Adji, 2020)	The research discusses the use of legal psychology to analyze ability and capability of a crime perpetrator, while this research discusses discovering the intention of crime perpetrator.
2	Alba Luz Robles Mendoza, "Legal psychology from social psychology historical introduction of forensic psychology", Forensic Research & Criminology	The research discusses the history of legal psychology that roots from social psychology, whereas this

	International Journal Volume 11 No. 1 2023(Mendoza, 2023)	research discusses the use of legal psychology in discovering the intention of crime perpetrator
3	Rafsanjani, J. dkk., “The Existence of Community Service Punishment in a Progressive Legal Perspective”. Jurnal Penelitian Hukum de Jure Volume 23 No. 2 2023(Rafsanjani et al., 2023)	The research discusses the role of forensic psychology in determining reason for community service punishment, whereas this research does not discuss regarding the standing of punishment instead it focuses on determining the intention of the crime perpetrator
4	Ratnawati, “Children’s Recidivist Who Conducted Criminal Act: Legal Psychology Perspective”, Hasanuddin Law Review, Volume 6 No. 2 2020 (Ratnawati, 2020)	The research discusses child’s reason for perpetrating crime simultaneously using legal psychology, meanwhile this research discusses the intention of crime perpetrator namely adult perpetrator to determine bad intention through legal psychology.
5	Ojebiyi, “Assessing Expert Forensic Psychologist Roles in Criminal Court Case Analysis”, International Journal of Forensic Research Volume 4 No. 1 2023 (Ojebiyi, 2023)	The research discusses the role of forensic psychologist in terms of trial-proving so that it can be used by judges, whereas this research lets judges and other law enforcement related to trial-proving in using legal psychology to prove whether the crime perpetrator has bad intention.
6	Otgaar, dkk, “If Generalization Is the Grail, Practical Relevance Is the Nirvana: Considerations from the Contribution of Psychological Science of Memory to Law”, Journal Psychology of Archive Volume 19 No. 2 2023 (Otgaar et al., 2023)	The research discusses how practical psychology may assist in law-making that produces the existence of forensic psychology, whereas this research discusses the use of legal psychology in discovering the intention of crime perpetrator
7	Sidhartha Sekhar Dash and Ronak Modi, “Role of Psychology in Legal Studies”, in JETIR Volume 6 No. 5, 2019 (Dash & Modi, 2023)	The research discusses the role of psychology that provides understanding in law, whereas this research discusses the use of legal psychology in discovering the intention of crime perpetrator
8	Nazhakaiti Abudukelim, “The Legal Psychology: The Intricate Intersection of Law and Human Behavior”, Journal of Forensic Psychology Vol. 8 No. 4 2023 (Abudukelim, 2023)	Th research discusses in depth analysis of legal psychology in analyzing relation of law and human behavior, whereas this research discusses specific issue regarding bad intention in sexual misconduct
9	Smalarz, L., dkk, “Counterintuitive Race Effects in Legal and Nonlegal Contexts”, Journal of Research in Crime and Delinquency 2023 Volume 124 No. 1 (Smalarz et al., 2023)	The research discusses psychology of race treatment in terms of application of law, whereas this research discusses the use of legal psychology in discovering bad intention of crime perpetrator
10	Kovera, M., “Racial disparities in the criminal justice system: Prevalence, causes, and a search for	The research discusses psychology of race treatment in terms of application of law, whereas this research

	solutions”, Journal of Social Issues, Volume 75 No. 9, 2019 (Kovera, 2019)	discusses the use of legal psychology in discovering bad intention of crime perpetrator
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Based on the table of previous researches, it can be argued that this research has shown its originality in focusing the distinctiveness of legal psychology rather than forensic psychology especially in the use of law practice. The use of legal psychology can be applied in analyzing the bad intention of sexual misconduct perpetrator considering its nature that can be seen from various aspects that may assist in supporting objective manner of the judges.

### 3. Methodology

This research is conducted as normative legal research. The problem discussed in this research is based on the type of problem namely legal obscurity within the trial proving (Marzuki, 2011). Therefore, the research approach taken is namely conceptual approach, statute approach, case approach. The source of law data conducted for this research is statutes namely criminal code and Act 12 of 2022 regarding Sexual Harassment as the primary source of law. Secondary source of law for this research is taken from books and journals. The analysis conducted for this research is using deductive research namely analyzing from general premises to conclude to specific premise and conclusion to answer legal problem.

### 4. Results and discussion

#### 4.1 Legal psychology's purpose in criminal law

Criminals conduct their action differently due to the subjective and objective condition. Subjective condition relies on the subject, whereas the objective condition depends on the external factors that may push a subject to become a criminal. While the science has developed criminology to understand the minds of criminals in executing the criminal, legal psychology focuses on the reason and self-behavioral personality in understanding types of people that may or may not conduct criminal act.

Legal psychology differs the characteristic of criminal subject based on the perpetrator's behavior and mindset that push the perpetrator to perpetrate criminal act. Ronald Holmes has announced legal psychology theory that there are four types of criminal mindset in conducting criminal act, namely visionary criminal type, mission-oriented criminal type, hedonistic criminal type, and power-oriented type. Another point brought in legal psychology is that despite of all these criminal mindset types, there is one significant persistent trouble that pushes perpetrator into executing criminal act, which is having a tunnel vision. Tunnel vision theory in legal psychology holds the meaning of external factors that keeps on or persistently impelling the subject into perpetrating criminal act.

Another theory that has been developed by legal psychology is that it is possible in determining subject's mindset from geographic profiling or criminal spatial mapping. This theory helps law enforcement in understanding that some area and its particularities may affect and influence different characters of criminal, not to mention that the area may become the comfort zone for criminal to conduct criminal act confidently. These theories of legal psychology may seem to be farfetched but has been well utilized in the practice of law enforcement as Widiyoati said. Legal psychology strengthens the trial proving and judge's belief whether the perpetrator indeed did the criminal act or did not do the criminal act. Yet it becomes a question whether the use of legal psychology necessary in criminal law especially in trial proving.

Criminal law being a public law means that the law must take account the importance of the people in general. In another term, keeping the public safe and stable is one of the main functions of criminal law. However, the positioning of criminal law as public law tends to be focused on one point rather than the other. Pakpahan and Prasetyo argued that criminal law in Indonesia only focuses on retributive justice rather than restoring the peace as the dignified justice would try to achieve.

Criminal law following the principle of dignified justice would mean understanding the criminal whether the subject has inherently the means and intention to conduct the criminal act. Hence, Dash and Modi argued that legal psychology is important to be utilized in criminal law to assess perpetrator motivation, its cognition, and decision-making. When legal psychology is applied in analyzing the criminal subject, hence it would become the parameter or supporting evidence in making trial-proving or fortifying judges' belief in making decision.

To stress the importance of legal psychology, Abudukelim argued that many legal processes that involve legal decision-making is heavily influenced by the practice of legal psychology. Despite of practitioner not knowing the theories of legal psychology, yet legal psychology assists law enforcement in understanding how biases, emotions, and cognitive processes may push perpetrator in enacting criminal act.

#### **4.2 Legal psychology in determining bad intention for sexual misconduct criminal acts**

As stated by Abudukelim previously that legal psychology is useful for utilizing analysis of emotion, bias, and cognitive process of perpetrator (Abudukelim, 2023). Such use of legal psychology has been practiced in criminal law situation in Indonesia. For instance, the emotion and cognitive process in a criminal act can be formulated or must be proven as regulated in theft of Section 362 Criminal Code (Rafsanjani et al., 2023). In the ongoing law development, criminal law grows differently compared to civil law in Indonesia. While bad intention in criminal law is not stated explicitly, civil cases in Indonesia relies on the explicitness of bad intention (Adji, 2014). Indonesian civil law specifically regarding breach of contract (Section 1320 *Burgerlijk Wetboek*) or unlawful conduct (Section 1365 *Burgerlijk Wetboek*) explicitly regulates one of the required elements of these act as bad intention (Ratnawati, 2020).

The obscure reference of bad intention in criminal regulation can be found in the categorization of bad intention into deliberation (Widijoati & Adji, 2020). Grammatically, deliberation and bad intention has different meaning. Deliberation means the thought of considering many considerations that may cause good intention or bad intention, whereas bad intention has the meaning of realizing bad impact of a certain act but keep on conducting it in the hope of the bad outcome happens (Bhayani & Nayak, 2023). The consequence of putting deliberation as an element of criminal act means that law enforcement especially for police and prosecutor must carry the burden of proof whether there has been good intention or bad intention in the thought of the accused (Praksh, 2023). Such analysis requires special analysis that may refer to the in-depth investigation from criminologist to prove. While some legal expert might argue that it gives legal certainty, yet having deliberation as an element of criminal act would prove to be taking the time and might not be precise since Moeljatno argued that what makes a criminal act to be unlawful is the bad outcome and the bad intention.

Therefore, an important aspect of analyzing criminal act is analyzing whether there is a bad intention which is used as the ground in executing or decision-making of criminal act (Sell & Sznycer, 2023). Examining the existence of bad intention in sexual misconduct and sexual harassment is also important considering that the description of criminal act in Section 81 Act 17 of 2016 regarding Child Protection and Section 6 of Act 12 of 2022 regarding Sexual Harassment Criminal Act does not explicitly saying bad intention. Section 81 Child Protection Act only regulates that every subject that uses force or threat to have sexual intercourse with child will be imprisoned for 5 years to 15 years, whereas Section 6 Sexual Harassment Act regulates every subject that enact sexual conduct with the purpose of lowering opponent's dignity will be imprisoned for maximum of 4 years. Comparing these regulations, Child Protection Act did not regulate the essence of criminal act which is the bad intention. On the other hand, Sexual Harassment Act has tried to interpret bad intention into lowering dignity (Pakpahan et al., 2022).

Children victims become even more crucial in protecting due to their priority and basic human foundation that children will bear the future of the society (Nurmala and Hanapi 2023), hence acknowledging the probability of innocence-abusing conducted by adult would prove to be pivotal and required to do so in the system of law.

Bad intention in sexual harassment and sexual misconduct should be analyzed not only through normative analysis but also legal psychology analysis (Mendoza, 2023). The legal psychology to analyze bad intention firstly must examine what type of mindset the accused are, whether they are visionary criminal type, mission-oriented criminal type, hedonistic criminal type, and power-oriented type (Pebrianto 2023). Visionary means that the accused has a vision of making a bad consequence, mission-oriented means that the accused know what steps to take no matter the consequence, hedonistic means enjoying the subject self despite of putting others at disadvantage, and power-oriented means the accused just wants to be at top even if it must inflict bad consequence to the other (Abudukelim, 2023). If prosecutors or judges able to examine so, next action would be deciding what kind of bad intention the accused has based on the culpability level, namely purposely, knowingly, recklessly, negligently, and strict liability (Akib and others 2023).

If the accused has strict liability, then it could not be decided that he has bad intention. If the accused purposely conduct it, then the subject is consciously known what the consequence hence it is bad intention (Costanzo & Krauss, 2012). If the accused knowingly conduct it, the subject knows the possibility of the consequence might happen and it is bad intention. If the accused recklessly conduct it, the subject disregards the the possibility of bad consequence.

A note to be taken is that there is an opinion by Mueller (Mueller, 1955) that if *mens rea* or bad intention becomes an explicit element of criminal act then it would only bring difficulties such as trial process will become overburdened and there could be fabrication of truth to deny bad intention(Mendoza, 2023). Hence, the use of legal psychology in analyzing bad intention could be useful for judges to ensure their belief whether to consider the accused as truly guilty or not. Another point to also be considered is as pointed out by Jonathan Mind that sometimes-identifying bad intention would tend to be difficult considering that there are people who is inherently evil (Mind, 2019). Identification of such people can be done easily if the judge or prosecutor can prove whether the accused reason of doing it is because he/she simply can or able to do it.

To finalize this discussion, some practice of legal psychology has been applied by judges in trial. Out of the context, apparently the explicit mention use of legal psychology happens in religious matters as discussed in decision number 4840/Pdt.G/2019/PA.Cbn in which it argues the logic and probability of a legal subject in conducting a legal action, whereas in criminal context, decision number 565/Pid.Sus/2021/PN JKT.SEL discussed how to analyze intention through identifying their background eventhough the decision did not deliberately mention legal psychology. Using legal psychology in the decision hopefully will assist judges to assess objectively unwritten rule of deliberation aspect of criminal occurrence.

## **5. Conclusion**

Following the objective of the study namely discovering and solving legal obscurity in bad intention within sexual harassment regulation, legal psychology in formulating “every subject that has bad intention that conduct sexual misconduct” in the regulations can be utilized by law enforcement to prove and decide criminal act of a subject by analyzing its criminal mindset while recognizing its culpability mental state.

### **Limitation/s and study forward**

The limitation of this study is for the use of legal psychology only relating to criminal law field of study. Furthermore, the discussion of legal psychology in criminal law also limited to bad intention in sexual misconduct and sexual harassment, hence the use of legal psychology in other criminal act analysis might differ. The future scope for the study might explore the use of legal psychology in analyzing types of criminal acts by different types of criminal subjects.

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