

## Punishment of Child Perpetrators in the Crime of Sexual Intercourse

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Article	Abstract
<p><b>How to cite:</b> Helen Tesselonika Yoci, et al, 'Punishment of Child Perpetrators in the Crime of Sexual Intercourse' (2024) Vol. 5 No. 1 Rechtenstudent Journal Sharia Faculty of KH Achmad Siddiq Jember State Islamic University.</p> <p><b>DOI:</b> 10.35719/rch.v5i1.322</p> <p><b>Article History:</b> Submitted: 12/01/2024 Reviewed: 18/03/2024 Revised: 12/04/2024 Accepted: 20/04/2024</p> <p><b>ISSN:</b> 2723-0406 (printed) <b>E-ISSN:</b> 2775-5304 (online)</p>	<p>As time goes by, children who do not grow and develop like children in general have the potential to commit criminal acts, such as sexual intercourse. In this decision, the public prosecutor has charged 3 (three) articles in Law Number 17 of 2016 concerning the Stipulation of Government Regulations in place of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection with alternative forms. However, the alternative indictment raises questions regarding the accuracy in drafting the articles used, because if the judge cannot prove the child defendant's actions, then he could be released from inaccurate indictment articles. In addition, the child defendant in this decision was sentenced to a crime that was far from the maximum provisions stated in the article on the proven indictment. The judge's actions were deemed to have deviated from the laws and regulations used, namely Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, created legal uncertainty, and reduced the public's sense of distrust towards Law Enforcement Officials.</p> <p><b>Keywords:</b> <i>Punishment, Child Perpetrators, Sexual Intercourse.</i></p> <p><b>Abstrak</b> Seiring dengan perkembangan zaman, anak yang tidak tumbuh dan berkembang seperti anak pada umumnya dapat berpotensi melakukan tindak pidana, seperti salah satunya adalah tindak pidana persetubuhan. Dalam putusan tersebut, penuntut umum telah mendakwakan 3 (tiga) pasal dalam Undang-Undang Nomor 17 Tahun 2016 tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2016 tentang Perubahan Kedua Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak dengan bentuk alternatif. Akan tetapi, surat dakwaan alternatif tersebut menimbulkan pertanyaan mengenai ketepatan dalam penyusunan pasal yang digunakan, karena jika hakim tidak dapat membuktikan perbuatan terdakwa anak, maka ia dapat terlepas dari pasal dakwaan yang kurang tepat. Selain itu, terdakwa anak dalam putusan tersebut telah dijatuhi pidana yang jauh dari ketentuan maksimal yang tertera dalam pasal pada dakwaan yang terbukti. Perbuatan hakim tersebut dinilai telah melakukan penyimpangan terhadap peraturan perundang-undangan yang digunakan, yaitu Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak, menimbulkan ketidakpastian hukum, dan menurunkan rasa ketidakpercayaan masyarakat terhadap Aparat Penegak Hukum.</p> <p><b>Kata Kunci:</b> <i>Hukuman, Pelaku Anak, Kekerasan Seksual.</i></p>

## Introduction

Law is a collection of regulations made by state authorities or the government officially through legal institutions or institutions to regulate human behaviour in society.<sup>1</sup> Legal protection must be provided by a legal state to every citizen without exception. As a rule of law, Indonesia protects every citizen by providing institutions capable of providing justice in the form of a free and neutral judiciary.<sup>2</sup>

The judicial process is a form of legal protection for every level of society, including children. A child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb.<sup>3</sup> Child protection is all efforts made to create conditions so that every child can carry out their rights and obligations for the sake of the child's natural development and growth, both physically, mentally and socially.<sup>4</sup> Law Number 23 of 2002 concerning Child Protection states that every child has the right to obtain protection from:

- a. abuse in political activities;
- b. involvement in armed conflict;
- c. involvement in social unrest;
- d. involvement in events containing elements of violence;
- e. involvement in war; And
- f. sexual crimes.

Nowadays, it is not uncommon to find children who commit criminal acts, one of which is a crime related to morality, namely the crime of sexual intercourse. Sexual intercourse is a combination of male and female genitals which is usually carried out to produce children, so the male's genitals must enter the female's genitals to release semen.<sup>5</sup> Sexual intercourse between men and women can occur due to persuasion, deception, lies, threats of violence, and/or violence.

As in the case of Decision Number 7/Pid.Sus-Anak/2019/PN Bdw regarding the crime of sexual intercourse where the perpetrator and victim are children, it has been proven that children are capable of committing criminal acts that should not be committed. The actions carried out by the child perpetrator caused anxiety for the community, including the family and parties who felt disadvantaged. There is nothing that can justify the actions of the child perpetrator, even though he is still in the category of children who are seen as not yet understanding anything.

The case description of the position of the decision is as follows:<sup>6</sup>

- a. Whereas, on October 25 2019 at approximately 19.00 WIB, the Child Perpetrator invited the Child Victim to date via the *WhatsApp application* and the Child Victim accepted;
- b. That, on September 30 2019 at approximately 15.00 WIB, the Child Perpetrator and the Child Victim agreed to meet on Jalan Dusun Grujugan Kidul, Grujugan District,

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<sup>1</sup> Rudy Hidana et.al, *Etika Profesi dan Aspek Hukum Bidang Kesehatan*, (Bandung: Widina Bhakti Persada, 2020), 11.

<sup>2</sup> Nova Ardianti Suryani, "Perlindungan Hukum Terhadap Anak Sebagai Korban Tindak Pidana Penganiayaan Ditinjau dari Undang-Undang Perlindungan Anak", *Media of Law and Sharia*, Vol. 2, No. 3, (2020): 134-145.

<sup>3</sup>Article 1 number 1 Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection

<sup>4</sup> Maidin Gultom, *Perlindungan Hukum Terhadap Anak dalam Sistem Peradilan Pidana Anak di Indonesia* (Bandung: Refika Aditama, 2010), 33.

<sup>5</sup> R. Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP) serta Komentarnya Lengkap Pasal Demi Pasal* (Bogor: Politeia, 1998), 209.

<sup>6</sup> Decision Number 7/Pid.Sus-Anak/2019/PN Bdw

Bondowoso Regency, and then went to Nasrul (a friend of the Child Perpetrator) who was located in Grujugan Lor Village, RT 29, RW 5, Jambesari Darusolah District, Bondowoso Regency;

- c. The Child Victim was ordered to take 2 (two) white pills by the Child Perpetrator which caused the Child Victim to feel dizzy and the Child Perpetrator took her to Nasrul's room to be seduced and had sex with her;
- d. Whereas, on October 8 2019, the Child Perpetrator invited the Child Victim to meet and told him to pick her up on the Child Victim's motorbike. At approximately 07.00 WIB, the child victim said goodbye to his mother to go to school bringing a change of clothes;
- e. After the Child Victim picked up the Child Perpetrator on the side of the road in Grujugan Lor Village, Jambesari Darusolah District, Bondowoso Regency, the Child Perpetrator invited the Child Victim to go to Bondowoso Square. When they arrived at Bondowoso Square, they were ticketed by the police and the child victim's motorbike was confiscated;
- f. Finally, the Child Perpetrator invited the Child Victim to walk to Deli (the Child Perpetrator's friend)'s house to rest there. That evening at around 22.00 WIB, they were picked up by Aznil (a friend of the Child Offender) on a motorbike to go to Aznil's house;
- g. When he arrived at Aznil's house, the child perpetrator immediately took the child victim to Aznil's room to be sexually assaulted a second time;
- h. That due to the actions of the Child Perpetrator, the Child Victim felt pain and soreness in his genitals when urinating. Based on the results of *the Visum et Repertum* with Number VER/94/X/2019/Rumkit dated 10 October 2019, the child victim's genital lips were within normal limits and the hymen was not intact, old wounds were found at twelve o'clock, two o'clock, three o'clock, five o'clock, six o'clock, and nine o'clock.

Based on this decision, the public prosecutor has brought alternative charges against the child perpetrator, namely:

- First, Article 81 paragraph (1) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection; or
- Second, Article 81 paragraph (2) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection; or
- Third, Article 82 paragraph (1) jo. Article 76E of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection;

Choosing a form of indictment that is tailored to the form or pattern of the criminal act revealed as a result of the investigation is something that needs to be considered before preparing the indictment.<sup>7</sup> The judge's assessment and decision regarding the actions committed by the defendant are closely related to the choice of form and composition of the indictment. This relates to the indictment on accusations as a basis for the defendant and/or his legal advisor in carrying out a defence.

Based on Article 6 letter a of the Criminal Procedure Code (hereinafter abbreviated as KUHAP), a prosecutor is an official who is authorized by law to act as a public prosecutor and

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<sup>7</sup> Freddy Simanjuntak, et.al, "Penerapan Surat Dakwaan oleh Jaksa Penuntut Umum Berdasarkan Hukum Positif Indonesia", *Doktrina: Journal of Law*, Vol. 3, No. 2, (2020): 126.

implement court decisions that have obtained permanent legal force. The role of a prosecutor is very important in bringing criminal charges against perpetrators, including child perpetrators, and prosecuting them.

The composition of the alternative indictment submitted by the public prosecutor has irregularities. There are 2 (two) articles that are not suitable for alternative purposes, because these two articles have the same criminal offense qualifications, only the way to carry it out is different. Suppose the public prosecutor is not careful in preparing and choosing the form of the indictment. In that case, it will have fatal consequences for legal certainty and justice, because the indictment is the benchmark for the judge in handing down a decision against the defendant.

After going through various series of trials, the final stage of a trial is the delivery of a decision by the judge. The judge considers the reasons for the decision and how long the prison sentence will be imposed on the defendant.<sup>8</sup> Apart from that, judges have freedom that is not absolute in making minimum and maximum criminal provisions regarding the punishment that will be given to the defendant in accordance with the provisions of statutory regulations.

The existence of regulations regarding the minimum and maximum provisions for imprisonment has the aim of providing a deterrent effect to perpetrators of criminal acts, implementing preventive and repressive efforts so that in the future there will be no similar incidents, and most importantly is to realize legal objectives consisting of legal certainty, justice and legal benefits. Indonesia as a legal country that refers to statutory regulations is obliged to provide maximum legal protection to its citizens. If there are inequalities and deviations in statutory regulations, then the purpose of the law is just wishful thinking.

The judge's decision in this case was not in accordance with the provisions of the laws and regulations used by the public prosecutor. The judge's imposition of a prison sentence is very far from the minimum limit set out in the Child Protection Law. Based on the judge's considerations contained in the decision, the judge has stated that the elements of the indictment prepared by the public prosecutor have been fulfilled, so that it is appropriate for the judge to impose an *ultimum remedium* on the child defendant by referring to the minimum prison sentence provisions in the article indicted.

## Research Methods

Research methods are scientific methods used to solve problems or find answers that can be scientifically justified.<sup>9</sup> Research methods are also applied in legal research, namely research that is based on certain methods, systematics and thinking which aims to analyze law, both law as a science or dogmatic rules and laws related to behavior or people's lives.<sup>10</sup> This research uses a normative juridical research type, namely research that examines norms, rules, legal principles, legal theory, and other literature to answer the legal issues being studied.<sup>11</sup> The approach methods used in this legal research are the statutory approach and the

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<sup>8</sup> Wijayanti Puspita Dewi, "Penjatuhan Pidana Penjara atas Tindak Pidana Narkotika oleh Hakim di Bawah Ketentuan Minimum Ditinjau dari Undang-Undang Nomor 35 Tahun 2009 tentang Narkotika", *Jurnal Hukum Magnum Opus*, Vol. 2, No. 1, (2019): 57.

<sup>9</sup> Jonaedi Efendi dan Johnny Ibrahim, *Metode Penelitian Hukum Normatif dan Empiris* (Depok: Prenadamedia Group, 2018), 2-3.

<sup>10</sup> *Ibid*, 16.

<sup>11</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University, 2020), 21.

conceptual approach. Sources of primary legal materials used include the Criminal Procedure Code, the SPPA Law, and the Child Protection Law. The method of collecting legal materials used in this research is by means of literature study. The data writing technique used in this research is qualitative data analysis, because the legal material used in this research is secondary data in the form of legal documents.

## **Results and Discussion**

### **The suitability of the composition in the form of the Public Prosecutor's Alternative Indictment Letter in Decision Number 7/Pid.Sus-Anak/2019/PN Bdw with the Acts Committed by the Child Defendant**

An indictment is a letter or deed that contains a formulation of the criminal act charged against the defendant which is concluded and drawn from the results of the investigative examination and is the basis and foundation for the judge in the examination before the court.<sup>12</sup> The indictment is one of the most important elements in the examination of criminal cases in court.<sup>13</sup> The importance of an indictment in the criminal process for prosecutors or public prosecutors is that it is the basis for transferring cases, is the basis for evidence or juridical discussion, is the basis for criminal charges, and is the basis for filing legal remedies.<sup>14</sup>

Decision Number 7/Pid.Sus-Anak/2019/PN Bdw discusses criminal acts committed by 15 (fifteen) year old children in Bondowoso Regency. In accordance with the SPPA Law, children who commit criminal acts must undergo applicable legal procedures. The public prosecutor used an alternative indictment with 3 (three) articles in it, which are basically as follows:

That the Child Offender, on Monday, 30 September 2019 at approximately 15.00 WIB and on Tuesday, 8 October 2019 at approximately 22.00 WIB, or at least in September 2019 and October 2019, was located in Grujugan Lor Village, Jambesari Darusolah District, Bondowoso Regency, or at least in another place which is still included in the jurisdiction of the Bondowoso District Court, every person is prohibited from committing violence, or the threat of violence, forcing a child to have sexual intercourse with him or another person, namely against a Child Victim.

Based on the main points of the alternative indictment, it can be seen that the Child Perpetrator had committed the crime of sexual intercourse which resulted in injuries to the Child Victim's genitals. The child perpetrator was charged by the public prosecutor using an alternative indictment consisting of 3 (three) articles, including:

First, Article 81 paragraph (1) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection; or

Second, Article 81 paragraph (2) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection; or

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<sup>12</sup> M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan* (Jakarta, Sinar Grafika, 2000), 332.

<sup>13</sup> Totok Yanuarto, "Akibat Hukum Tidak Dilimpahkannya Turunan Surat Dakwaan Terhadap Terdakwa dan Penasehat Hukum", *Pediaqu: Jurnal Pendidikan Sosial dan Humaniora*, Vol. 2, No. 3, (2023): 11797.

<sup>14</sup> Rizky Mentari, "Argumentasi Penuntut Umum Terhadap Kesalahan Hakim Pengadilan Tinggi Yogyakarta Menilai Jenis Surat Dakwaan Subsidiaritas Sebagai Dakwaan Alternatif (Studi Putusan Mahkamah Agung Nomor 2874 K/PID.SUS/2015)", *Jurnal Verstek*, Vol. 7, No. 2, (2019): 183.

Third, Article 82 paragraph (1) jo. Article 76E of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection.

The description of the elements of each article charged by the public prosecutor includes:

1. Article 81 paragraph (1) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection

- a. Each person

The words "everyone" are equivalent to the words "whoever", which is usually included in a criminal offense formulation, which implies every person as a subject who commits a criminal act. This subject relates to the definition of Children in Conflict with the Law as written in Article 1 number 3 of the SPPA Law, namely children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal act.

- b. It is prohibited to use violence or threats of violence to force a child to have sexual intercourse with him or another person

Child abuse is the repeated act of physical and emotional harm to a dependent child, through compulsion, uncontrolled corporal punishment, degradation, and permanent ridicule.<sup>15</sup> Threats of violence are any unlawful acts in the form of speech, writing, images, symbols or body movements, either with or without the use of electronic or non-electronic means that can cause fear of people or society at large or curb a person's essential freedom or public.<sup>16</sup>

2. Article 81 paragraph (2) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection

- a. Each person

The words "everyone" are equivalent to the words "whoever", which is usually included in a criminal offense formulation, which implies every person as a subject who commits a criminal act. This subject relates to the definition of Children in Conflict with the Law as written in Article 1 number 3 of the SPPA Law, namely children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal act.

- b. Deliberately committing deception, a series of lies, or persuading a child to have sexual intercourse with him or another person

"Deliberately" means wanting and knowing what is done or done.<sup>17</sup> The person who commits an action deliberately wants that action and besides that knows or is aware of what he is doing and the consequences that will arise from it.<sup>18</sup> The Criminal Code does not explain the meaning or definition of deliberate or *dolus intent opzet*.<sup>19</sup>

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<sup>15</sup> Abu Huraerah, *Kekerasan Terhadap Anak* (Bandung: Nuansa Cendekia, 2012), 47.

<sup>16</sup> Article 1 number 4 of Law Number 5 of 2018 concerning Amendments to Law Number 15 of 2003 concerning the Determination of Government Regulations in Lieu of Law Number 1 of 2002 concerning the Eradication of Criminal Acts of Terrorism into Law.

<sup>17</sup> Dian Dwi Jayanti, "Perbedaan 'Sengaja' dan 'Tidak Disengaja' dalam Hukum Pidana", <https://www.Hukumonline.com/klinik/a/difference-intentionally-and-not-intentionally-dalam-Hukum-pidana-lt5ee8aa6f2a1d3>, visited on 14 January 2024.

<sup>18</sup> Marsudi Utoyo et.al, "Sengaja dan Tidak Sengaja dalam Hukum Pidana Indonesia", *Lex Librum: Jurnal Ilmu Hukum*, Vol. 7, No. 1, (2020): 79.

<sup>19</sup> R. Abdoel Djamali, *Pengantar Hukum Indonesia* (Jakarta: Rajawali Pers, 2010), 219.

"Deceit" is an act that is carried out in such a way that the act creates trust or confidence in the truth of something in another person.<sup>20</sup> A "series of lies" is a series of false sentences arranged in such a way that it is a story of something that seems to be true.<sup>21</sup> Then, what is meant by "persuading" (influencing by seduction) is trying to influence other people (children) to comply with the persuader's wishes.

3. Article 82 paragraph (1) jo. Article 76E Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection

a. Each person

The words "everyone" are equivalent to the words "whoever", which is usually included in a criminal offense formulation, which implies every person as a subject who commits a criminal act. This subject relates to the definition of Children in Conflict with the Law as written in Article 1 number 3 of the SPPA Law, namely children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal act.

b. It is prohibited to use violence or threats of violence, force, use deceit, commit a series of lies, or persuade children to commit or allow obscene acts to be committed.

In this case, the legal subject concerned is prohibited from committing these acts against other people, especially children.

Based on the charges submitted by the public prosecutor as described above, the judge chose the second alternative charge, namely Article 81 paragraph (2) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection. However, this alternative indictment raises questions regarding the accuracy of the indictment. This is because there are similarities in the way child perpetrators commit criminal acts.

Description of the elements of Article 81 paragraph (2) jo. Article 76D of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection which was charged by the public prosecutor in the second alternative indictment against Child Offenders has been fulfilled. Apart from that, the alternative form of indictment is not completely wrong, but it is not completely correct either. If we look at the contents of the three articles indicted, the composition of the indictment is inaccurate, because:

1. Article 81 paragraphs (1) and (2) of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection is not appropriate as an alternative, because the two articles have the same criminal offense qualifications, namely "sexual intercourse", it's just that the way to do it is different.

a. Article 81 paragraph (1) Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection using violence or threats of violence.

b. Article 81 paragraph (2) of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection uses violence or threats of violence accompanied by deception, a series of lies, or persuading children.

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<sup>20</sup> Soerodibroto, *KUHP dan KUHP* (Jakarta: Rajawali Pers, 1992), 241.

<sup>21</sup> R. Sugandhi, *Kitab Undang-Undang Hukum Pidana dan Penjelasannya* (Surabaya: Usaha Nasional, 1980), 396-397.

This is not much different from Article 338 and Article 340 of the Criminal Code, namely that it has the same criminal offense qualifications, namely "murder", only has a different method of treatment.

- a. Article 338 of the Criminal Code as Ordinary Murder.
- b. Article 340 of the Criminal Code as Premeditated Murder.

The indictment is a fundamental factor in the criminal trial process, this is because the indictment is the foundation or basis for the public prosecutor to prove the defendant's guilt during the examination at trial.<sup>22</sup> In the indictment, the public prosecutor must be able to prove that the defendant is legally and convincingly guilty of having committed a criminal act. The role of the indictment is very important and cannot be denied regarding its preparation, so it requires precision and accuracy in drafting it, so that there is no cancellation of the indictment, whether it is null and void or can be cancelled.

A person is declared guilty because he is judged to have wrong thoughts as regulated in statutory regulations as an act that is against the law.<sup>23</sup> Every person who violates the laws and regulations must be responsible for their actions, including children. In other words, the existence of criminal responsibility is a determination as to whether someone who has been convinced of their guilt will be acquitted or punished.

Based on the description above, it can be seen that the alternative indictment proposed by the public prosecutor in this decision is more appropriate if the form of the indictment still uses an alternative form, but the structure is changed to:

*First Primair*, Article 81 paragraph (1) of Law Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law jo. Article 76D of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection;

*Secondary*, Article 81 paragraph (2) Law Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law jo. Article 76D of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection;

**or**

**Second:**

Article 82 paragraph (1) of Law Number 17 of 2016 concerning the Stipulation of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law jo. Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection.

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<sup>22</sup> Syahid Prakoso dan Bambang Santoso, "Kesesuaian Penggunaan Dakwaan Subsidair oleh Penuntut Umum dalam Perkara Korupsi Pengadaan Barang dan Jasa dengan Ketentuan KUHAP (Studi Putusan Nomor 44/Pid.Sus-TPK/2018/PN Mdn)", *Jurnal Verstek*, Vol. 10, No. 1, (2022): 55.

<sup>23</sup> Ni Made Nita Prihartanty, Dewa Gede Sudika Mangku, dan Ni Putu Rai Yuliantini, "Penjatuhan Hukuman Pidana Penjara Bagi Anak Pelaku Persetubuhan Anak di Kabupaten Buleleng (Studi Kasus Nomor 6/Pid.Sus-Anak/2021/PN Sgr)", *Jurnal Komunitas Yustisia*, Vol. 5, No. 1, (2022): 301.



Thus, it can be seen that the arrangement of the articles in the second alternative indictment submitted by the public prosecutor against the Child Offender is incorrect due to the reasons above. If seen from the perspective of accuracy in the preparation of the articles for the indictment that will be presented by the public prosecutor against the child defendant, this arrangement is not appropriate, even though the indictment chosen by the judge is in accordance with the actions committed by the child perpetrator. The alternative indictment submitted by the public prosecutor is in accordance with the provisions of the Circular Letter of the Attorney General of the Republic of Indonesia Number: SE-004/JA/11/1993 concerning Preparation of Indictments and has fulfilled the formal and material requirements of the indictment, as regulated in Article 143 paragraph (2) KUHP. It would be more appropriate if the public prosecutor was more careful and careful in drafting the articles that would be charged against the defendant with the aim of ensuring that the defendant would not escape from inaccurate articles of indictment.

### **Qualification of the Judge's Sentence of Criminal Justice to a Child Defendant in Decision Number 7/Pid.Sus-Anak/2019/PN Bdw as "Not Applying the Law" or "Not Applying the Law as It Should Be" as in Article 253 paragraph (1) letter a of the Criminal Procedure Code**

Children who are in conflict with the law, in this case, are children as perpetrators who are faced with a difficult situation where when they have problems with the law, a child must be able to take responsibility for their actions which are against the law.<sup>24</sup> Meanwhile, children as victims must fight to obtain justice for the criminal acts committed against them by child perpetrators. This justice can be obtained from the judge's considerations which will produce a decision that is binding and must be obeyed before any other legal action is submitted by the child perpetrator.

When a judge considers a decision in a case, he certainly looks at important legal instruments in protecting children's rights.<sup>25</sup> The judge's consideration is very important in determining the fate of someone who has been accused and prosecuted by the public prosecutor, because the judge must think about all parts of his thinking carefully and carefully. These thoughts consist of:<sup>26</sup>

- a. Material for juridical thought is in the form of facts obtained during the trial such as statements from witnesses, statements from children, items and evidence that have been collected.
- b. Material for thought non-juridically, namely looking at the sociological and psychological aspects of children which have been written in social research reports.

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<sup>24</sup> Denny Hardi Pranata Saragih, Rizkan Zulyadi, dan Dessy Agustina Harahap, "Akibat Hukum Terhadap Anak Sebagai Pelaku Tindak Pidana Pencurian yang Menyebabkan Kematian (Studi Putusan Nomor: 45/Pid.Sus-Anak/2018/PN.Lbp)", *Juncto: Jurnal Ilmiah Hukum*, Vol. 1, No. 1, (2019): 77.

<sup>25</sup> Brian Khukuh Wijaya, Nur Rochaeti, dan Ani Purwanti, "Dasar Pertimbangan Hakim dalam Menjatuhkan Putusan Kasus Anak yang Berkonflik dengan Hukum (Studi Kasus Putusan Nomor 14/Pid.Sus-Anak/2015/PN Sng)", *Diponegoro Law Journal*, Vol. 5, No. 4, (2016): 4.

<sup>26</sup> Made Agus Indra Diandika dan I Ketut Sudantra, "Dasar Pertimbangan Hakim dalam Menjatuhkan Pidana Penjara Terhadap Anak", *Kertha Wicara*, Vol. 1, No. 5, (2013): 4.

A judge must have the characteristics of a "Deputy of God" in the world who can determine a person's fate in the future with wisdom, broad insight, high integrity, fairness, and must not be influenced by anything when handling a case. The judge has a high position, namely as chairman of the trial, so that in handing down a decision to the defendant, the judge cannot be intervened by other parties and is only based on beliefs that he feels are fair without ignoring the applicable regulations.<sup>27</sup> However, in reality, this sense of fairness cannot be assessed by anyone, because sometimes what is fair for the perpetrator is not necessarily fair for the victim, and vice versa.

Based on this decision, after the judge considers various things, aggravating and mitigating circumstances, the judge is obliged to try the defendant as stated in the decision. Amar in the decision, among others:

- a. Declare that Rendra Martinus bin Raitongas Adi Susanto's child, as mentioned above, has been legally and convincingly proven guilty of committing the crime of "deliberately inducing a child to have sexual intercourse with him" as in the second alternative indictment;
- b. Sentencing the child, therefore, with imprisonment for 10 (ten) months and job training in Brick and Brick Making in Grujugan Kidul Hamlet, Grujugan Kidul Village, Grujugan District, Bondowoso Regency, for 6 (six) months;
- c. Determining that the period of arrest and detention that the child has served is deducted entirely from the prison sentence that has been imposed;
- d. Determining that the child remains in custody;
- e. Determine evidence in the form of:
  - 1 (one) piece of turquoise green short-sleeved t-shirt;
  - 1 (one) long gray cloth trousers;
  - 1 (one) piece of light blue jeans jacket.

Returned to Child Victim Devi Regita Cahyani;

- f. Charge the child to pay court fees in the amount of IDR 5,000.00 (five thousand rupiah).

Based on the verdict, the judge chose the second alternative charge, namely Article 81 paragraph (2) jo. Article 76D of Law Number 17 of 2016 concerning the Determination of Government Regulations in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law jo. Article 76D of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection and imposing a prison sentence of 10 (ten) months and 6 (six) months of work training in Brick and Brick Making in Grujugan Kidul Hamlet, Grujugan Kidul Village, Grujugan District, Bondowoso Regency. In this article, the minimum provisions and maximum provisions for imposing a prison sentence for anyone who violates these provisions are written, namely 5 (five) years and 15 (fifteen) years. However, the judge in this case imposed a sentence on the child perpetrator which was very far from the minimum requirement determined by statutory regulations.

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<sup>27</sup> Lilik Mulyadi, *Kekuasaan Kehakiman* (Surabaya: Bina Ilmu, 2007), 125.

The application of law is always related to how the law that has been created is implemented by law enforcers in practice, one of whom is a judge. A law is declared not to be a law if the law is not implemented properly. The application of this law also has an impact on legal certainty, legal benefits and justice for parties involved in a lawsuit.

Punishment can be understood as the stage where punishment is determined and sanctions are given to the perpetrator in the world of law. Provisions regarding the special minimum punishment system are regulated in special criminal laws and regulations outside the Criminal Code, because the punishment system in the Indonesian Criminal Code which is currently in force is oriented towards a general minimum and general maximum criminal system, then the special maximum is contained in the articles without regulating special minimum, while special criminal legislation outside the Criminal Code specifically regulates special maximum and minimum criminal limits, where this is clearly different from what is regulated by the Criminal Code.<sup>28</sup> In this case, the combined theory of punishment is more appropriate to apply as protection for the victim and retaliation for the defendant, so that in the future the same case is not found. The purpose of having special minimums and maximums is to limit judges who are too free to impose sentences between the general minimum and general maximum when handling a case, especially special criminal cases.

Article 253 paragraph (1) letter a of the Criminal Procedure Code states that "is it true that a legal regulation is not applied or is not applied as it should be". Applying the law is not as it should be with the intention that the judge has implemented the law but there are errors in several trial processes, such as preparing legal considerations and handing down verdicts against the defendant. Meanwhile, not applying the law means that the judge has departed from the path that should be carried out in several trial processes, one of which is the judge handing down a decision that is not guided by or is not based on the indictment that has been prepared by the public prosecutor.

Based on the perspective of legal certainty, a judge may not impose a crime outside the provisions of statutory regulations. This is also in line with judges who may not impose sentences below the minimum criminal threat limit stated in the laws and regulations in use. If the judge commits this act, it will create legal uncertainty regarding the legislation itself and create a sense of distrust among the public towards the law and APH in this country.

It is true that the minimum provisions limit a judge's freedom when imposing a sentence, this is in accordance with the principle of legality which states that no act can be punished without being preceded by criminal provisions contained in a law.<sup>29</sup> In parallel, a judge's freedom can be understood as freedom that is free from all obligations and attachments to anyone or anything (including lust) that could make the judge not free.<sup>30</sup> In the event that a judge has breached the provisions of a law and a sentence has been imposed

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<sup>28</sup> Edo Hendra Setyawan, Winarno Budyatmojo, dan Budi Setiyanto, "Implementasi Pemidanaan di Bawah Minimum Khusus dalam Tindak Pidana Narkotika", *Recidive*, Vol. 8, No. 3, (2019): 230.

<sup>29</sup> Dimas Varizal Putra Purnama et.al, "Analisis Yuridis Putusan Pemidanaan dalam Tindak Pidana Pencabulan dengan Korban Anak (Studi Putusan Nomor 149/Pid.Sus/2020/PN.Wng)", *Jurnal Penegakan Hukum Indonesia*, Vol. 4, No. 1, (2023): 103.

<sup>30</sup> Firman Floranta Adonara, "Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi", *Jurnal Konstitusi*, Vol. 12, No. 2, (2015): 226.

below the minimum limit, this is actually a manifestation of the judge's arbitrariness and harms legal certainty in terms of overcoming crime in a penal manner which is carried out in several stages, namely formulation, implementation, execution.<sup>31</sup>

Based on Article 81 paragraph (2) of the SPPA Law which states "the prison sentence that can be imposed on a child is a maximum of ½ (one-half) of the maximum penalty of imprisonment for an adult" and compared with the second charge which has been deemed proven by the judge handling it. In this case, the minimum and maximum provisions are 5 (five) years and 15 (fifteen) years, then the prison sentence of 10 (ten) months is not in accordance with the provisions in Article 81 paragraph (2) of the SPPA Law, which is ½ (one half) of 15 (fifteen) years as a special maximum provision of 7 (seven) years 6 (six) months. The decision handed down by the Bondowoso District Court can be said to be in conflict with the Child Protection Law and the SPPA Law and is not in accordance with the objectives of the sentence and has not achieved the specific minimum objectives. This decision is also considered inappropriate because imposing a sentence below the minimum is not in accordance with the principle of legality.

If reviewed based on Article 253 paragraph (1) letter a of the Criminal Procedure Code, the judge's decision was not completely wrong, but the judge's actions could be qualified as an act of "applying the law improperly". The judge has determined the appropriate article to impose a sentence on a child perpetrator, but the sentence imposed by the judge is very far from the provisions of the applicable laws and regulations. This is not in accordance with the principles of applying punishment, namely the principle of universal minimum special maximum or general minimum/special minimum principle, where judges are bound by the maximum and minimum limits determined by statutory provisions.<sup>32</sup>

Based on several legal facts and witness statements during the trial, the child perpetrator had sexual intercourse with the child victim 2 (two) times within a short period of time. The child perpetrator received little attention and supervision for the crime of sexual intercourse with the child victim without thinking about the consequences he would experience in the future. The judge should be able to impose a higher sentence on the child perpetrator so that the child perpetrator feels deterred and can minimize similar incidents in the future, even though imprisonment is the last resort in punishing children.

## Conclusion

The arrangement in the form of an alternative indictment submitted by the public prosecutor is not by the actions of the Child Offender, because this arrangement does not reflect the accuracy in the preparation of the articles in the indictment used. It would be best for the public prosecutor to apply more thoroughness and accuracy in drafting the articles that will be charged against the defendant with the aim that the defendant will not be separated from inaccurate articles of indictment. The actions of the judge who handled the case in this decision fell into the qualification of "applying the law improperly", because the imposition of a crime based on the article indicted was very far from the provisions of the applicable laws

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<sup>31</sup> Rusli Muhammad, *Sistem Peradilan Pidana Indonesia* (Yogyakarta: UII Press, 2011), 86.

<sup>32</sup> Dimas Varizal Putra Purnama et.al, op.cit, 106.

and regulations, namely Article 81 paragraph (2) of the SPPA Law. This creates uncertainty regarding the law and reduces the public's sense of trust in the law and APH.

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