



Basis for Judges' Considerations in Criminal Sending Article 81 Paragraph 2 Act on the Protection of Children That Childs Do Collection on the Basis of Like-Free

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Abstract

The recent rise in cases of consensual sexual intercourse between children is very concerning considering that children are the future generation of the nation. In addition, children as subjects that must be protected either by the family or the government make it a benchmark that children are the heirs of the baton for the leadership of the Indonesian nation. So that the level of crimes committed by child perpetrators and child victims can be minimized as little as possible so that children can develop with dignity in accordance with cultural principles and laws and regulations in community life as they should. Based on the description of the background mentioned above, there is a void in the norms governing sexual intercourse with children in such circumstances, while children under any circumstances must receive protection from such acts according to the Child Protection Act, when viewed from the elements, it only regulates the crime of sexual intercourse is committed with an element of coercion and an element of lying or persuasion, however, the crime is not regulated if the sexual intercourse is carried out on the basis of mutual liking without any element of violence or inducement from the perpetrator to the victim.

Keywords: *Judge; Child Protection Laws; Intercourse*

Introduction

Children are an inseparable part of human survival, children are the next generation of a family as the smallest scope and in a wider scope are the successors to the continuity of a nation. Children are a national asset because children are one of the human resources that have a strategic role as successors to the ideals of the nation's struggle. Therefore, coaching and protection is very important to ensure the quality of growth and physical, mental and social development of children. Maidin Gultom said that "childhood is a period of sowing seeds, erecting stakes, making foundations, which can also be called a period of forming the character, personality and character of a human being, so that they will later have strength and ability and stand strong in pursuing life."¹

Children have rights that are specifically different from adult human rights, because children have physical and mental conditions that are still unstable, and in all circumstances these rights must take precedence over other interests. With these unstable physical and mental conditions, in many cases children must receive special treatment and protection, especially against actions that could be

¹ Gultom Maidin, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak di Indonesia*, Refika Aditama, Bandung, 2008, hlm. 1.

detrimental to the child's own development and that of society. Children need conditions in the family and society that enable them to grow and develop normally and optimally in accordance with their dignity as children until they become adult human beings.² The surrounding environment also influences children's growth in daily life, this is because the formation of morals, behavior and thoughts is a reflection of our daily lives which can be seen from the developments in the everyday environment.

In addition, children are the hope of parents, the hope of the nation and state that will continue the baton of development. Children have a strategic role in ensuring the existence of the nation and state because it is this generation that will build the nation and state in the future. Children's rights must be fulfilled to achieve optimal child growth and development, both in physical, mental and social development. Guidance for children must be done as early as possible, especially since childhood is a period of forming character, personality and self-character of a human being.

Human experiences in childhood will carry over into adulthood. Trauma, both physical and psychological, will greatly affect children's development, because not only do parents have regulations to protect and provide education for children, but the government also has an obligation to provide protection for children. Protection of Indonesian children means protecting the potential of human resources and building Indonesian people as a whole, towards a just and prosperous society, spiritual material based on the state foundation, namely Pancasila and the 1945 Constitution.³ Thus, child protection is part of national development and the development of the Indonesian human being as a whole and also of course protects children from crimes that are increasingly prevalent in this globalization era.

Crime is not something that can be predicted beforehand, crime can happen anywhere and anytime. Crime is an act that is prohibited by the state because the occurrence of a crime will cause disruption to life in a country, therefore the state has the authority to impose sanctions on the perpetrators of crimes.⁴ The crime of sexual intercourse with minors is a type of crime that often occurs today, and is often carried out by perpetrators and victims of fellow children.

In general, the form of protection for children has been regulated in Book II of the Criminal Code (KUHP), but according to the *Lex Specialis Derogat Legi Generalis* principle, in this case related to child protection, it has been regulated more specifically in Law Number 23 of 2002 concerning Child Protection as amended twice, most recently by Law Number 17 of 2016 concerning 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 to become Law (hereinafter called the Child Protection Act). Historically, the urgency of establishing a Child Protection Law is to provide a complete, comprehensive and comprehensive concept of protection for children by taking into account the principle of non-discrimination; the best interests of the child; the right to life, survival, development and respect for the opinion of the child.⁵ The number of new offenses regulated in the Child Protection Act is a reflection of the Government's seriousness in protecting and upholding the dignity and worth of children through the policies of the drafters of the law.

The development and acceleration of science and technology, cultural infiltration and development development have an influence on human behavior as members of a society or even a state, so that existing crimes will also be increasingly unique with various modes of implementation. Currently, there are developments in laws and regulations such as Law Number 12 of 2022 concerning Crimes of Sexual Violence (hereinafter referred to as the TPKS Law). The main substances in the TPKS Law are regulated in Article 3, namely preventing all forms of sexual violence; handle, protect, and recover victims; carry out law enforcement and rehabilitate perpetrators; creating an environment without sexual violence and ensuring the non-repetition of sexual violence.

² Bambang Waluyo, *Pidana dan Pembinaan*, Sinar Grafika, Jakarta, 2004, hlm. 245

³ Nashriana, *Perlindungan Hukum Pidana Bagi Anak di Indonesia*, Rajawali Pers, Jakarta, 2011, hlm. 1

⁴ Topo Santoso dan Ava Achjani, *Kriminologi*, Raja Grafindo Persada, Jakarta, 2001, hlm. 14

⁵ Penjelasan Undang-Undang Republik Indonesia Nomor 23 Tahun 2002 tentang Perlindungan Anak

The regulation of offenses in the Child Protection Act, when viewed from the elements, only regulates the crime of intercourse which is carried out with elements of violence or threats of violence and elements of deception, a series of lies or persuasion, however, the crime is not regulated if the intercourse is carried out on the basis of mutual consent. like without any elements of violence or threats of violence and deception or persuasion from the perpetrator to the victim. The large number of consensual sexual intercourse is the result of promiscuity and special relationships, or in general terms the child recognizes relationships that go beyond the boundaries that are not in accordance with existing norms. The existence of these action factors is certainly influenced by several aspects that exist and develop in children's lives every day.

Children as in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law) are qualified into 3 (three) meanings, namely Children in conflict with the law, namely where the child is suspected of committing a crime, children who are against with the law, namely a child who is in conflict with the law either being a witness and/or victim of a crime and a child who is a victim of a crime, hereinafter referred to as a Child Victim where he experiences physical, mental and/or economic losses caused by criminal act.

Article 3 of the SPPA Law, among other things, explains that every child in a criminal justice process has the right to obtain legal aid and other assistance effectively and is separated from other general courts. This is of course limitative for the subject of Children who are in the SPPA Law, including for Child Actors and Child Victims. As in Article 4 it is also explained that children who are serving a crime, among others, have the right to obtain parole, a reduction in their criminal past, which shows that the treatment of children must be different from the criminal justice process as stipulated in the Criminal Procedure Code.

The SPPA Law also recognizes Diversion, namely the transfer of settlement of child cases from the criminal justice process to processes outside of criminal justice by using a restorative justice approach, which means settling cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing the return or restoration of the situation before the crime was committed. However, the arrangements and procedures for diversion are regulated in a limited manner in Article 7 paragraph (2) of the SPPA Law. Seeing from Article 81 paragraph (2) Jo Article 76D as is usually the application of the article applied by law enforcement officials in suspecting the crime of intercourse committed by a child on the basis of consensual punishment with a sentence of more than 7 years, Diversion cannot be applied to this situation.

The principle of the *Ultimum Remidium* principle in which criminal law is the last resort in solving a problem, of course, is the basis for law enforcement officials to uphold justice properly.⁶ However, when looking at the construction of the preparation of the Minutes of Examination, questions are often found which justify that the intercourse was solely carried out by the perpetrator's child with the presence of deception and/or a series of lies.

Intercourse committed by children who are in conflict with the law cannot be seen as ordinary delinquency. In-depth studies must be carried out using various approaches. There are many causal factors that lead to sexual intercourse with children, both by adult and child perpetrators, which are carried out without coercion, seduction, or even because of the will of the perpetrator or victim, including the child's curious behavior, imitating factors, an unfavorable social environment. health, the circulation of pornographic videos that can be accessed easily and the fading of cultural and religious values.

Against the crime of sexual intercourse committed by the perpetrator's child against the victim's child, not only the victim's child is harmed but the parents are also harmed. This is often evidenced by the many reporters of alleged sexual intercourse, namely the parents of the victim's child, who often find that

⁶ R.Soesilo, **Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal**, Politea, Bogor, 1995, hlm 114.

there is a sense of suspicion towards the victim who often goes out without permission or doesn't even come home for several days. These motives are often found in the Investigation Documents by police investigators. Even though parents, based on the SPPA Law, also have a role to protect children both from inner education and mental formation and the nature of children.⁷

However, the child victim should also have to get punishment or action for the actions he has committed as indirectly he has also committed acts which should not have been carried out by minors. Bearing in mind that in the Child Protection Act there are no elements that can convict child victims in consensual intercourse, with this in mind the purpose of establishing the Child Protection Act, which among other things, is to keep children away from negative stigma. does not materialize in the absence of a deterrent effect given to child victims.

The polemic that arises from the crime of sexual intercourse with children, one of which gets attention is the problem of proof, where in Article 184 paragraph (1) of the Criminal Procedure Code (KUHAP) states that valid evidence is witness statements, expert statements, letters, evidence and testimony of the accused. Furthermore, to determine whether a person can be sentenced to a crime, it is required that there are at least 2 (two) valid pieces of evidence (Article 183 of the Criminal Procedure Code). The obstacle faced by the Public Prosecutor and the Judge in proving at trial was that most of the perpetrators did not admit their actions, coupled with the victims who also did not want to provide information, even though sometimes only the victims knew that the crime of sexual intercourse had occurred against the child. Apart from that, it's delict than.

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So the author is interested in conducting research with the title "**BASIS FOR JUDGMENT CONDITIONS IN CRIMINAL DROPIING ARTICLE 81 PARAGRAPH 2 OF THE ACT FOR THE PROTECTION OF CHILDREN TOWARDS CHILDREN WHO DO COLLECTION ON THE BASIS OF LIKE-FRIENDLY**".

Research Method

The approach used in writing this thesis uses a normative juridical approach which is based on a statute approach and a relevant conceptual approach.

⁷ Gultom Maidin, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak di Indonesia*, Refika Aditama, Bandung, 2008, hlm. 43.

Results and Discussion

a. Evidence Provisions in Action Cases Performed by Children on a Like-Free Basis

Children as victims of crime are victims who do not have the capacity to fight against perpetrators because child victims are in a weak position. In this act of intercourse, in essence, the victim is a woman who belongs to the weak in protecting herself. Meanwhile, the perpetrators of sexual intercourse are boys who by nature are physically stronger than women. The crime of sexual intercourse committed by children against children is a problem that has been happening lately, where the perpetrators and victims are children. On this basis, children need to be protected from actions that are detrimental, so that children as the next generation of the nation are maintained for the future of the nation and state.

Proof is a legal effort made to provide clarity regarding the legal position of the parties based on the legal arguments stated by the parties, so that the judge has a clear picture to make the correct conclusions and decisions in court. Proof has the purpose of providing a picture related to the truth of an event. Proof is provisions that contain guidelines on ways that are justified by law to prove the guilt of the accused against the accused. Evidence also regulates evidence that is justified by law and may be used by judges to prove the guilt of the accused. Consensus is voluntary sexual relations without coercion, or in the Big Indonesian Dictionary it is called "fornication". The Child Protection Act does not recognize the term consensual because the position of the child is seen as a victim. Even though for example the child is asking for sexual intercourse, and it is done on a consensual basis.

As for several procedural law arrangements based on the Law and Guidelines for the implementation of case handling related to proving cases involving children both as perpetrators and/or as victims **Forms of Legal Protection**

According to R. La Porta in the Journal of Financial Economics, the form of legal protection provided by a country has two characteristics, namely preventive and punishment. The most obvious form of legal protection is the existence of law enforcement institutions such as courts, prosecutors, police, and other non-litigation dispute resolution institutions.⁸ This is in line with the understanding of law according to Soedjono Dirdjosisworo which states that law has various meanings in society and one of the most obvious of the notions of law is the existence of law enforcement institutions. Legal protection is closely related to the aspect of justice. According to Sudirman Kartohadiprodjo, essentially the purpose of law is to achieve justice. Therefore, the existence of legal protection is one medium to uphold justice.⁹

Law enforcement in the form of legal protection in economic activities, especially investment, cannot be separated from the legal aspects of the company, especially regarding limited liability companies because legal protection in investment involves several business actors, including investors, directors, commissioners, permit givers and power holders, and parties supporting the occurrence of investment activities such as notaries where the parties are dominated by legal subjects in the form of legal entities in the form of limited liability companies.

There are two legal subjects in civil law, namely individual legal subjects and legal subjects in the form of legal entities. The legal subject of an individual or *natuurlijkpersoon* is a person or human who has been deemed competent according to law. People as legal subjects are supporters or bearers of rights from the time they are born alive until they die.

⁸ Soedjono Dirdjosisworo, 2010. Op, Cit, hlm 31.

⁹ Ahmad Miru, 2014. Prinsip-priip Perlindungan Hukum bagi Konsumen Indonesia, Raja Grafindo Persada, Jakarta, hlm 63.

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Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak sebagaimana diperbarui dengan 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 Perlindungan Anak;.

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