Reflection of Child Protection on the Settlement of Child Sexual Violence In Indonesia: An Analysis of Court Decisions in 2019-2020

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Abstract

Protection of children from sexual violence is a shared responsibility of all parties, including the judiciary. One of the efforts to protect children by the judiciary is manifested in court decisions on cases of sexual violence against children. As a form of law enforcement in concreto, the study of this court decision will provide a signal for criminal law reform related to the regulation of sexual violence against children in Indonesia. This article aims to examine the reflection of child protection in the resolution of cases of sexual violence against children in Indonesia in 2019-2020. As normative research, a single issue is studied using a statutory, conceptual, and case approach and then analyzed using the descriptive qualitative method. A comprehensive synthesis of statutory analysis, doctrinal interpretation, and systematic case examination was concluded. The discussion shows that the majority of settlements of sexual violence cases against children have reflected the protection of children. However, 3 three limitations signaled criminal law reform: the absence of criminal law guidelines, the lack of specifically formulated minimum fines, and the absence of sanctions for victim-oriented treatment.

Keywords: Child Protection; Children Sexual Violence; Adjudication.

Introduction

Violence is a type of crime that is synonymous with children from the past until now. Some experts, such as David Filkelhor and Abu Hurairah, even firmly stated that the essence of various child protection efforts is actually to free children from all forms of violence that occur in all situations. At the international level, the existence of such efforts is universally recognized as a child's human right under Article 19 of the Convention on the Rights of the Child, The 1945 Constitution of the Republic of Indonesia, and also in Article 58 paragraph (2) of Law Number 39

of 1999 concerning Human Rights.

In research entitled "Children's Exposure to Violence", Finkelhor et al. (2009), as cited by Morlat, stated that in everyday life, children are at risk of experiencing more than one type of violence. Among the many spectrums of violence that can happen to children, sexual violence is the dominant type of violence experienced by children,[1] especially in the last ten years. The World Health Organization, in September 2016, noted that 1 in 5 women and 1 in 13 men had experienced sexual violence when they were children or adolescents. Furthermore, 12 percent of children worldwide are found to have experienced sexual violence.[2] Meanwhile, referring to data on Evidence Strengthening Child Protection System Violence Against Children in East Asia and The Pacific: A Regional Review and Synthesis of Findings in 2014, it was stated that Indonesia, together with several countries including the Philippines, Fiji, Vietnam, Laos, Papua New Guinea, and the Solomon Islands, are the countries with the highest rates of sexual violence against children, with 34.95 percent of boys and 17.45 percent of girls.[3]

The data above is reinforced by national data on the quantity of sexual violence against children in the last five years. Data from the Witness and Victim Protection Agency (LPSK) show that a significant increase in cases of sexual violence against children in Indonesia occurred from 2016 to 2019. In 2016, 25 cases were reported. In 2017, there were 81 cases; in 2018, 201; and in 2019, cases increased by 70 percent, to 350.[4] Meanwhile, until July 2020, data from the Online Information System for the Protection of Women and Children (Simfoni PP-PA) recorded 4116 cases of violence against children in Indonesia, of which 2,556 children had become victims of sexual violence.[5] In recent years, from 2021 to 2022, there was an

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[1] Pantxika Victoire Morlat and Laurence Alison, Understanding "Childhood Poly-Victimization" to help uncover abuse during child investigative interviewing: a systematic review, *Frontiers Psychology, Section Forensic and Legal Psychology*,15, 16 September 2024, p. 01-10, DOI: https://doi.org/10.3389/fpsyg.2024.1395940.

[2] https://pusdatin.kemkes.go.id/resources/download/pusdatin/infodatin/Kekerasan-terhadap-anak.pdf, p.3, accessed on 9 Maret 2021, at 20.56 WIB

[3] www.pusdatin.kemkes.go.id....., p.4

[4] https://lokadata.id/data/kasus-kekerasan-seksual-terhadap-anak-2016-2019-1578639190, accessed on March 9 2021, at 21.15 WIB.

[5] https://nasional.kompas.com/read/2020/08/24/11125231/kementerian-pppa-sejak-januari-hingga-juli-2020-ada-2556-anak-korban, accessed on March 9 2021, at 21.16 WIB.

escalation in cases, from 4162 in 2021 to 9588 in 2022.[6]

The increase in the number of cases of sexual violence against children certainly requires a legal response as well as an appropriate social response to overcome it. This child protection effort is, of course, not the work of individuals or only the responsibility of several state institutions such as the State Ministry of Women's Empowerment and Child Protection (Kemeneg PP-PA), the Ministry of Social Affairs, and the Indonesian Child Protection Committee (KPAI), but the work and responsibilities jointly responsible for all parties, both directly and indirectly involved. C. Joynes (2018) implied in his article that the success of child protection in a country depends heavily on shared perceptions among all parties regarding its nature and purpose.[7] Furthermore, Von Jhering argues that modern law can reflect efforts to protect the rights of each individual while encouraging individual and social welfare.[8] Efforts to protect the rights and welfare of individuals, as referred to by Jhering, include children, who are recognized as having inherent human rights from birth.

Guarantees to protect children from all forms of violence (including sexual violence) are actually dimensional in nature and involve all areas of national and state life. This is evident in Article 19, paragraph 1, of the Convention on the Rights of the Child, which explicitly states that this child protection effort must be properly implemented and reflected in all legislative, administrative, social, educational, and judicial measures.[9] Look at Article 19 paragraph 1 of the Convention on the Rights of the Child, which states: "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment,

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[6] www.cnnindonesia.com/nasional/20230127173509-20-905780/kemenpppari-darurat-kekerasan-seksual-anak-9588-kasus-selama 2022, diakses pada tanggal 05 Mei 2023

[7] C. Joynes, *Evidence of effective child protection systems in practice,* K4D Research, The UK Department for International Development, 2018.

[8] Jed Meers, etc., Expanding The Boundaries of Social Welfare Law, Journal of Social Welfare and Family Law, 2023: 45 (2), p. 196 - 208

[9] Look at Article 19 paragraph 1 of the Convention on the Rights of the Child, which states: "*States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*".

maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

In the judicial field, one effort to protect children can be seen in the decisions of the judiciary, including the courts of first instance, appeals, and cassation, in child protection cases. In this case, whether the decisions issued have reflected efforts to protect children or vice versa. In resolving cases of sexual violence against children, for example, judges in this judicial institution are expected not only to be able to meet the demands of legal certainty and justice. Still, they are also required to be able to provide a sense of protection to children, both children who are victims and those who become perpetrators of sexual violence. In the context of current law enforcement, which tends to prioritize legalism, achieving legal certainty is undoubtedly easier than achieving justice. The meaning of justice plus here is justice, which includes guarantees for child protection, especially when the case of sexual violence resolved through litigation involves children as perpetrators and children as victims. In the perspective of Law Number 35 of 2014 concerning Child Protection and Law Number 11 of 2012 concerning the Juvenile Justice System, both have the prestigious right to receive special protection and be explicitly treated, including in the context of their punishment.

In all law enforcement, the role of judges is not simple. The implementation of the rule of law and the fair resolution of legal conflicts between the parties are only a small part of the judges' role. In Aharon Barak's view, a judge is required to bridge the gap between society and the law itself, to signal legal reform, to formulate rules, and to protect the rights of individuals and communities recognized in the constitution.[10] Thus, conducting a child protection study against cases of sexual violence against children is not only to see the practice of implementing the Child Protection Law in judges' decisions, but also to be part of the re-evaluation, re-orientation, and reformulation efforts of child protection regulations in the future.

Referring to Barda Nawawi Arief's opinion, the success of law enforcement

[10] Rivka Weill, The Strategic Common Law Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding, *Law and Ethics of Human Rights Journal*, 2020: 14 (2), p. 227 – 272.

in concreto actually depends on law enforcement in abstracto, as formulated in the laws and regulations enacted by legislators. On the other hand, law enforcement in concreto will provide a signal and a significant input for future legal improvement. The legal issue studied in this article is whether the guarantee of child protection has been reflected in the judge's decision as a form of resolving cases of sexual violence against children in Indonesia.

Research Method

This article was based on normative research using several approaches, including the legal, case, and conceptual approaches. The legal materials used include Law Number 23 of 2002, Law Number 35 of 2014, and Law Number 17 of 2016, as well as 26 Supreme Court rulings on cases of sexual violence against children issued throughout the years 2019 to 2020. The chosen cases represent legal challenges faced by the Supreme Courts in dealing with various cases of sexual violence against children. By integrating the child protection approach into their court rulings, they also show the pattern of sanctions for sexual violence against children imposed by Supreme Court judges. The case analysis technique involves a systematic examination of 26 selected court cases, beginning with the identification of relevant facts, legal issues, and applicable norms, followed by an in-depth evaluation of the court's reasoning and final judgment. To integrate findings on how child protection norms are applied, identify recurring judicial patterns of sanction in the settlement of sexual violence against children, and eventually formulate a well-grounded evaluation of the effectiveness and responsiveness of Indonesia's legal framework in safeguarding child victims, the conclusion was drawn by a comprehensive synthesis of statutory analysis, doctrinal interpretation, and systematic case examination of court rulings from 2019–2020.

Result and Discussion

Trends in Settlement of Sexual Violence Cases against Children Based on the Decision of the Supreme Court in 2019-2020

Observing 26 cases of sexual violence against children that occurred between 2017 and 2019, and an appeal was requested from 2019 to 2020, it is known that 60

percent of appeals for cassation were submitted by the Public Prosecutor, and the rest by defendants, both adult and child defendants. The average reasons put forward in the appeal are related to [a] the severity of the sentence; [b] assessment of the reality of the results of evidence that is appreciative of a fact; [c] imprecise application of the law; and [d] consideration of mitigating and aggravating circumstances for the accused which will later have implications for the accuracy of sentencing.

Regarding the entire appeal for the case of sexual violence against children, the Supreme Judges who tried the case refused with several considerations, both legal, sociological, and the benefits borne by the defendant [in this case the child] and the child victim after the sentence was handed down. The refusal of the cassation taken by the judge includes two: refusal to strengthen the previous decision or refusal to improve the editorial qualifications of the crime stipulated in the judex facti decision, as well as related to the weight of the sentence. The details of the settlement of cases in 26 cases of sexual violence against children that were filed for cassation from 2019 to 2020 are set out in the following table:

Table 1. Settlement of Sexual Violence Cases against Children in Supreme Court Decisions 2019-2020

Decision No.	Supreme Court Decision (Judex Juris)	Decision No.	Supreme Court Decision (Judex Juris)
2143/K/Pid.Sus/2019 [Juvenile]	The Juvenile's Cassation Application was rejected, and the Judge upheld the judex facti decision	135/K/Pid.Sus/2019 [Adult Defendant]	The defendant's request for cassation was rejected with the improvement of criminal sanctions: 10 years in prison and a fine of 60 million
3461/K/Pid.Sus/2019 [Juvenile]	The Public Prosecutor's Cassation Application was rejected, and the Judge upheld the judex facti decision	1368/K/Pid.Sus/2019 [Adult Defendant]	The Prosecutor's Cassation Application is rejected, the Supreme Court upholds the judex factii [PT] decision
1508/K/Pid.Sus/2019 [Adult defendant]	The defendant's appeal was rejected and the judge upheld the judex facti decision	1223/K/Pid.Sus/2019 [Adult Defendant (educator)]	The Prosecutor's Cassation Application is rejected, the Supreme Court upholds the judex facti [PT] decision
281/K/Pid.Sus/2019	The Public	1995/K/Pid.Sus/2019	The Prosecutor's

[Adult Defendant]	Prosecutor's Cassation Application was rejected, and the Judge upheld the judex factii decision, with legal as well as sociological considerations.	[Adult Defendant]	Cassation Application is rejected, the Supreme Court upholds the judex facti decision
985/K/Pid.Sus/2019 [Juvenile]	The Child's Cassation Application was rejected with the improvement of criminal sanctions in the form of imprisonment for 2 years and 6 months and Job Training for 3 months at LPKA.	603/K/Pid.Sus/2019 [Adult Defendant]	The Prosecutor's and the Defendant's Cassation Application was rejected, the Supreme Court upheld the judex facti decision
261/K/Pid.Sus/2019 Juvenile]	The Public Prosecutor's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision	618/K/Pid.Sus/2019 [Juvenile]	The Public Prosecutor's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision
440/K/Pid.Sus/2019 [Juvenile]	The Child's Cassation Application was rejected, and the Supreme Court upheld the judex factii decision	657/K/Pid.Sus/2019 [Adult Defendant]	The defendant's and the prosecutor's cassation request was rejected, and the Supreme Court upheld the judex factii decision
680/K/Pid.Sus/2019 Juvenile]	The Child's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision	63/K/Pid.Sus/2020 [Adult Defendant]	The defendant's request for cassation was rejected with the improvement of criminal sanctions in the form of 5 years imprisonment and a fine of 60 million if not paid, replaced with 6 months imprisonment.
		929K/Pid.Sus/2020 [Adult Defendant]	The defendant's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision
36/K/Pid.Sus/2020 Adult Defendant]	The defendant's Cassation Application was rejected and the Supreme Court upheld the judex facti decision	694/K/Pid.Sus/2020 [Adult Defendant]	The defendant's request for cassation was rejected with the improvement of criminal sanctions in the form of 6 years

			imprisonment and a fine of 100 million if not paid, replaced with 3 months imprisonment
)13/K/Pid.Sus/2020 ،dult Defendant]	The Public Prosecutor's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision	:79/K/Pid.Sus/2020 [Juvenile]	The Child's Cassation Application was rejected with an amendment to the editorial qualification of the crime in the judex facti decision, to "Intentionally with the threat of violence forcing the child to commit obscene acts."
)41/K/Pid.Sus/2020 ،dult Defendant]	The Public Prosecutor's Cassation Application was rejected, and the Supreme Court upheld the judex factii decision	:89/K/Pid.Sus/2020 [Adult Defendant]	The defendant's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision
)67/K/Pid.Sus/2020 ،dult Defendant]	The Public Prosecutor's Cassation Application was rejected and the Supreme Court upheld the judex factii decision	:16/K/Pid.Sus/2020 [Juvenile]	The Public Prosecutor's Cassation Application was rejected, and the Supreme Court upheld the judex facti decision

Source: Supreme Court Decision on 26 Cases of Sexual Violence against Children 2019-2020

From the table above, it can be seen that judges take a different legal stance in resolving cases of sexual violence against children committed by adults than in cases committed by children. This distinction, of course, refers to Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which stipulates children in conflict are subject to different and lighter punishment rules, ranging from the type of sanctions (strafsort), the weight of the sanctions (strafmaat), to the mode of sanctions (strafmodus), compared to the rules for punishing adult offenders.

By considering the quality of sexual violence against children as a serious crime, the average sentence imposed by judges on adult perpetrators is heavy. In contrast, judges take a more lenient stance toward children. Of the 18 cases of sexual violence against children with adult defendants, 78 percent of cases (14 cases) were resolved by imposing a criminal sentence in the form of imprisonment

and heavy fines, ranging from 5 to 15 years in prison. A fine of between 60 million and 2 billion IDR, a total of 5 percent of cases (1 case) are subject to a moderate sentence of imprisonment for 2 years. A fine of 60 million IDR, 12 percent (2 cases) are subject to a sentence of less than 1 year: 1) imprisonment for 10 months and a fine of 10 million IDR (see Decision No. 1013/K/Pid.Sus/2020; and 2) imprisonment for 4 months and a fine of 50 million IDR (see Decision No. 281/K/Pid.Sus/2019, and 5 percent (1 case) acquitted because the legal facts presented before the trial were not proven (see Decision No. 1923/K/Pid.Sus/2019).

Meanwhile, the settlement of 8 (eight) cases of child sexual violence committed by children includes 4 (four) settlement models, in the form of the imposition of two cumulative criminal sanctions, conditional punishment, action sanctions, or a combination of criminal sanctions and actions. The following are the details of sanctions imposed by judges on children who commit sexual violence against children:

a) Imprisonment for 4 (four) years and job training for 30 (thirty) days at the Social Service;
b) Imprisonment for 2 (two) years and 6 (six) months and Job Training for 3 (three) months;
c) Imprisonment for 1 (one) year and 4 (four) months and job training at the Child Special Guidance Institute (LPKA) for 3 (three) months;
d) Imprisonment for 3 (three) years and 6 (six) months and job training for 3 (three) months;
e) Conditional punishment in the form of supervision for 2 (two) years by the Public Prosecutor;
f) The act of returning to the parents; and
g) On-the-job training for 2 hours a day for a period of 10 months.

The selection of the type and weight of sanctions imposed by judges on children who commit sexual violence, as stated in the eight decisions above, is based on several considerations, including: (1) the age of the child; (2) the weight of the act committed; (3) the impact of losses suffered by child victims; (4) implications for the future of children and child victims; (5) the best interests of the child; (6) reaching an agreement between the victim's family and the child's family in conflict with the law; (7) whether there is a recommendation from the Correctional Center; and (8) parental commitment.

Judging from the case settlement mechanism, the majority of sexual violence against children is resolved by applying a retributive justice approach. Still, there are several cases in which the perpetrators were both child defendants and adults whose resolutions under the judge's consideration presumably used a restorative justice approach, as seen in the case with Decision Number 281/K/ Pid.Sus/2019 with adult defendants, and Decision Number 3818/K/Pid.Sus/2019 with child defendants.

The use of a restorative justice approach in these two cases shows that in adjudicating cases of sexual violence against children, judges do not only prioritize the realization of legal certainty but also want to realize other legal goals, they are justice, expediency, and protection by accommodating sociological and humanistic considerations attached to the two cases, such as (1) the existence of an admission of guilt, apology, and willingness of the defendant to be responsible for the immoral behavior he had committed; (2) reaching a peace agreement between the victim and the family and the defendant; (3) the victim's request has been fulfilled as a form of agreement between the two parties, such as giving a gold necklace and a commitment to marry the victim; (4) the commitment of each parent to increase their concern of educating their children; and (5) the desire of children, both victims, and perpetrators, to continue their education.

Especially for the case with Decision No. 281/K/Pid.Sus/2019, the Judge's Decision at the Appeal level is strengthened by the Judge's decision at the Cassation level, dropping a sentencing decision which not only tends to relieve the defendant, but the weight of the criminal sanction imposed is below the minimum sanction limit of criminal acts that the Child Protection Act threatens for these crimes. The breakthrough made by the judex factie was based on the future interests of the child victim who had been married by the defendant as part of the peace agreement with the victim and his family that was made earlier. In this context, the judge is of the view that the imposition of heavy criminal sanctions has the potential to damage their relationship, interfere with the defendant's provision of spiritual support, and become a factor in family neglect that will lead to divorce.

In addition, there are 3 (three) other interesting things that appear in the

settlement of cases of sexual violence against children: (1) the weight of the fine imposed for violating Article 81 paragraph (2) of Law no. 35 of 2014 jo. Article 64 paragraph (1) of the Criminal Code, as shown in Decision Number 1508/K/Pid.Sus/2019 is much heavier than the weight of the criminal fine imposed on defendants in cases of sexual violence that resulted in mental disorders in the victim's child, as seen in the case with Decision Number 4457/K/Pid.Sus/2019, in which the defendant was declared to have violated Article 82 paragraph (4) of Law Number 17 of 2016, even though both norms regulate the same pattern of punishment; (2) The imposition of a criminal fine on a child defendant in a case with Decision Number 1879/K/Pid.Sus/2020: if the fine is not paid, it will be replaced with a substitute term of imprisonment. Whereas in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, fines are unknown and Article 71 paragraph (3) stipulates that if children are subject to cumulative imprisonment and fines, the fines are replaced with job training within a specific period; and (3) The fact that there is a forced confession of sexual violence against children by children at the level of investigation by the police as seen in the case with Decision Number 2516/K/Pid.Sus/2020.

Reflection on Child Protection in the Resolution of Child Sexual Violence Cases: An Evaluation

Compared to settlements in other legal cases, settlements involving children as both perpetrators and victims require a different paradigm. The paradigm of law enforcement in resolving children's cases is not only oriented to the realization of legal certainty but also to achieving justice, benefits, and guarantees of child protection. In fact, Rebecca Jaremko Bromwich explicitly stated that, for children in conflict with the law, the settlement of the child's case must emphasize child protection and rehabilitation.[11] The protection aspect can be understood that children have the right to have their rights protected, including receiving punishment or actions that respect their dignity. In contrast, the rehabilitation aspect

[11] Rebecca J. Bromwich, Cross-Over Youth and Youth Criminal Justice Act Evidence Law: Discourse Analysis and Reasons for Law Reform, *Manitoba Law Journal*, 42 (4), 2020, p. 265 - 290.

emphasizes that punishment and/or all legal consequences imposed on children must remain educative and rehabilitative to accelerate their reintegration into society.

According to Article 1, point 1 of Law Number 35 of 2014, child protection is all activities carried out to guarantee and protect children's rights, so that they can live, grow, develop, and participate optimally, in accordance with human dignity and respect, and in a manner that is free from violence and discrimination. This normative definition is not much different from the international definition issued by UNICEF. Still, in its definition, UNICEF emphasizes child protection as all prevention and response efforts taken to ensure that children are free from all forms of violence, exploitation, and abuse against children in all contexts.[12] In line with UNICEF, Kathryn Maguire-Jack, et.al (2022) resonate with Waldfogel's prevention-oriented view that the meaning of child protection has always been nothing but efforts to prevent all forms of violence and mistreatment of children and promote children's welfare, especially for those who are victims of violence, arbitrary acts, or neglect.[13]

There are two reasons for placing "prevention of violence" as the central element in the definition of child protection above. First, freedom from violence is a child's human right that has been recognized in various international instruments. Second, child abuse is a significant crime that is identical to and commonly experienced by children in the past. The latest global data shows that there are around 1 billion children aged 2 to 17 years who have experienced various forms of violence, including sexual violence Third, violence is a cyclical crime. This means that children who experience various forms of violence have a greater potential to do the same thing as adults if they do not get proper handling and rehabilitation. Thus, efforts to protect children from violence today are actually oriented towards protecting children in the future.

Child protection is the work and responsibility of all parties. As a continuous,

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[12] https://data.unicef.org/topic/child-protection/overview/ , accessed on March 27, 2021, at 09.17 WIB.

[13] Kathryn Maguire-Jack, et.al, Early Childhood Education and Care Policies and Their Impact on Family Violence, *Children and Youth Services Review*, Elsevier, 142 (C), 2022.

integral, and systemic effort, child protection will not succeed if carried out by a single government institution. Each of us, both individuals and groups of people, and every institution in government, is an agent of child protection either directly or indirectly. Afrooz Kaviani Johnson & Julia Sloth-Nielsen (2020) supported Beckett Argument, which stated that several core elements that organize child protection: (1) all parties directly involved in the implementation of child protection, such as individuals, families, schools, religious communities, and law enforcement officers from the police to judges; (2) the Central Government that formulates policies, legislative products, and strategic steps to protect children; (3) local governments that formulate policies, legislative products, and strategic steps to protect children in the regions; (4) Social Welfare and Child Protection Organizations; and (5) Mass Media.[14] Meanwhile, UNICEF has determined that five actors play an essential role in child protection: (1) Family; (2) School; (3) School; (4) Community Groups; (5) NGOs and other similar organizations; and (6) the government, both regional and central.

In Beckett's opinion above, it appears that law enforcement officers, whether police, prosecutors, or judges, are the core agents of direct child protection. In carrying out its primary law enforcement function in cases involving children as perpetrators or victims, law enforcers also have the task of ensuring the fulfillment and implementation of child protection. The principles of child protection must be reflected at every stage of law enforcement, and the welfare of children must always be taken into account in the pursuit of law enforcement's ultimate goal. Tasmo and Bowo Suharto (2019), in this case, argue that in every legal activity carried out against children, whether police, prosecutors, judges, or other officials, the aim must be aimed at the welfare of the child or for the benefit of the child, without having to reduce attention to the interests of the community.[15] In other words, the

[14] Afrooz Kaviani Johnson & Julia Sloth-Nielsen, Safeguarding Children in the Developing World — Beyond Intra-Organisational Policy and Self-Regulation, *Social Science Journal*, 9 (6), 2020, p. 2-19.

[15] Tasmo and Bowo Suharto, The Legal Consequence Of The Judge Decision In The Case Of Children Criminal Justice Which Do Not Based On Society Research From Society Supervisor (Studies on Settlement Case of Children Crime In State Court of Cirebon*), Journal of Daulat Hukum*, 2 (4), 2019, p. 565-570.

welfare of these children must be taken into consideration and reflected in the resolution of cases involving children as victims and perpetrators.

In the context of resolving cases of sexual violence against children, to see whether the decisions handed down by judges have succeeded in reflecting child protection or not, it is measured using 2 (two) perspectives: (1) the perspective of the principles of child protection; and (2) the perspective of understanding several vital aspects in child protection according to Arif Gosita. The details are described in the description below:

1) Perspective on the General Principles of Child Protection

At its most basic, child protection aims to ensure that children's rights are not infringed. Simply said, child protection ensures that children have what they need to survive, flourish, and develop.[16] Every child protection activity, either directly or indirectly, must always refer to the fulfillment of the general principles of child protection. This general principle is seen as a foundation and a beacon for child protection across various countries. There are 4 (four) general principles of child protection stipulated in the Convention on the Rights of the Child and also regulated in Article 9 of Law Number 23 of 2002 concerning Child Protection: (1) the best interest of children; (2) the continuation of normal child growth and development (the right to survive and development); (3) non-discrimination; and (4) respect for view of children.

In evaluating the reflection of child protection within the case settlement of sexual violence against children, the fundamental indicators that are internationally used to assess the implementation of child protection in all fields of life are the 4 four general principles of child protection mentioned above. Such indicators serve as measurable benchmarks for systematically assessing the alignment between legal practice and child protection principles. Additionally, these indicators provide a structured framework for a more precise, evidence-based assessment of whether

[16] Trian Yuli Diarsa dan Sarwirini, Penjatuhan Pidana Peringatan dalam Rangka Mewujudkan Perlindungan Anak, *Journal Rechtidee*, 16 (2), 2021, p. 22-44

judicial decisions and settlement processes genuinely embody the principles of child protection. These indicators are as follows: First, the best interests of the child standard serves as a foundational principle, requiring that every judicial and procedural decision prioritize the child's safety, well-being, and developmental needs. Second, the continuation of normal child growth and development requires that every stage of the legal process consider the normal growth and development of child victims. Therefore, the extent of victim recovery must be reflected in the availability and enforcement of restitution, access to psychosocial support, and rehabilitation programs designed to restore the child's physical and emotional well-being.Third, the implementation of non-discrimination requires that both child perpetrators and child victims are given legal treatment that protects as well as prioritizes the fulfillment of their fundamental rights. The discrimination of treatment is justified under consideration of the special needs of children that must be differentiated from those of adult perpetrators. Lastly, the implementation of the principle of respect for children requires that every judicial and procedural decision consider and respect children's opinions, views, and current conditions.

The implementation of those four principles of child protection in the Supreme Court's rulings issued between 2019 and 2020 is further elaborated below.

First, the principle of the best interest of children is the main principle (primary consideration) in child protection. Article 3.1 of the Convention on the Rights of the Child stipulates that: "**In all actions concerning children** whether undertaken by public or private social welfare institutions, **courts of law**, administrative authorities or legislative bodies, the best interest of the child **shall be a primary consideration**" (bold by the author). The concept of the best interests of children, according to John Eekelaar, as cited by Lilla Garayová, can mean fulfilling children's basic interests, including ensuring they are physically and psychologically safe and healthy so they can grow and develop normally.[17]

In Article 3.1 above, it is explicitly stated that the best interests of the child must be the primary consideration in all activities related to children, including

[17] Lilla Garayová, The Best Interests of the Child Principle*, Central European Academy law Review*, 2 (1), 2024, p. 9 - 28

those carried out by the court. In the context of the settlement of 26 cases of sexual violence against children that were requested for Cassation in 2019 – 2020, the principle of the best interests of children is usually implied in cases of sexual violence against children with adult defendants, through the imposition of imprisonment and heavy fines on the defendant. Through this severe punishment, it is implied that there is a guarantee of physical and psychological safety of child victims from the possibility of repeating similar acts by the perpetrators (re-victimization). In addition, the severe punishment of the perpetrators also has meaning for the benefit of other children in general (within the framework of social defense and general prevention) so that they are also protected from acts of sexual violence by the perpetrators.[18]

The best interests of the child are also expressed explicitly in the settlement of cases of child sexual violence committed by children and 1 one case of child sexual violence committed by adults, which is evident in the case with Decision Number 281/K/Pid.Sus/2019. In consideration of the judge at the appellate level, which the judge later confirmed at the Cassation level, it was explicitly stated that the imposition of a lighter sentence than the minimum weight of the sanctions threatened by law was based on consideration of the interests of both the child who had married the perpetrator so as not to suffer any loss or other suffering such as neglect of the household. With a light sentence, the perpetrator is expected to fulfill his responsibilities as a husband and support his wife as much as possible.

Meanwhile, for the decision on cases of child sexual violence committed by children, the manifestation of the fulfillment of the principle of the good interests of the child is seen in the imposition of actions in the form of returning to parents and job training within a specific period, and conditional punishment in the form of supervision in several cases with the consideration that children can continue their education normally. Considering that the perpetrators and victims are both children, the balance of consideration of the best interests of the child is also seen in the imposition of imprisonment for a specific time, which refers to Law Number 11 of

[18] See Decision Number 281/K/Pid.Sus/2019.

2012 concerning the Juvenile Criminal Justice System, which is combined with job training actions that are expected to have educational and rehabilitative effects for children.

From the victim's point of view, the best interest of the child, which has not been a significant concern or has become an explicit part of the decision in 26 child sexual violence cases, is the fulfillment of assistance to restore the psychological, mental, and social conditions of the victim's child. However, psycho-social rehabilitation is essential for providing a guarantee for the safety of the psychological-social condition of children who are disturbed due to experiencing sexual violence, and even need to get the main attention and be prioritized. Rehabilitation of child victims is not included as part of the judge's decision on child sexual violence, because based on Article 59 A juncto Article 69 A of Law No. 35 of 2014, the fulfillment of the right to rehabilitation and assistance must automatically be given to child victims at every stage of the legal process, such as investigation, prosecution, and examination in court.

Second, the principle of child survival and development is found in Article 6.2 of the Convention on the Rights of the Child, which states: "State Parties shall ensure to the maximum extent possible the survival and development of the child." This principle implies that every action involving children must continue to prioritize the interests of survival, expected growth, and children's development, according to each child's needs, including physical, mental, spiritual, moral, psychological, and social growth and development.

In relation to the settlement of sexual violence against children cases, this principle is not explicitly seen in the decision on the settlement of sexual violence against children committed by adults cases, because as described previously, the recovery and rehabilitation of the psycho-social condition of child victims so that their normal growth and development returns is a special right of protection that must automatically be fulfilled by the institution that handles child protection for child victims at every stage of the legal process it goes through based on Article 59 A juncto Article 69 A of Law Number 35 of 2014, juncto Articles 90 and 91 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, juncto Article

6 of Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Witnesses and Victims. Especially for children who are perpetrators of sexual violence, this principle has been reflected in the selection of lighter types of action and criminal sanctions and adapted to the needs and characteristics of the child, as well as the peculiarities of the situation and conditions surrounding the child.

Third, the Non-Discrimination Principle is expressed in Article 2 of the Convention on the Rights of the Child: "States Parties shall respect and ensure the rights outlined in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's parents or legal guardian, race, color, sex, language, religion, political or other opinions, national, ethnic or social origin, poverty, disability, birth or another status". Simply put, this principle holds that all children, without exception, have the right to enjoy their rights, regardless of their intrinsic or extrinsic characteristics.

In the context of resolving 26 cases of sexual violence against children in Indonesia, both child perpetrators and child victims are generally given legal treatment that still upholds and pays attention to the fulfillment of their fundamental rights. The distinction between giving criminal sanctions and treatment against children as perpetrators is based on consideration of the conditions and special needs of each child, so that children can still enjoy their fundamental rights. Of the 26 cases, there is 1 (one) case of sexual violence, with Decision Number 2516/K/Pid.Sus/2020, which revealed facts at trial that the child of the perpetrator was forced to admit his actions, even though he did not do it at the investigation stage. However, given that there are no legal grounds supporting the charge against him, the appeal court's decision was affirmed because he was later released at the cassation level.

Fourth, the principle of respect for the views of children is regulated in Article 12.1 of the Convention on the Rights of the Child, that: "States Parties shall assure to the child who is capable of forming his or her own views the rights to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child." This principle

emphasizes that every child, by considering his age and level of maturity, is guaranteed and respected the right to express opinions and views.

In 26 decisions on cases of sexual violence against children in 2019-2020, it appears that the judges provide opportunities for children to express their opinions and views related to the acts of violence they have experienced (child victims), and acts of violence that they do or do not commit (child perpetrators). Of course, the delivery of these opinions is assisted while taking into account their age and psychological condition.

In several cases, the punishment was even reduced in light of the victim's children's statements. In the case of Decision Number: 281/K/Pid.Sus/2019 and Decision Number: 3818/K/Pid.Sus/2019, it appears from the considerations presented in the two decisions that the judge considers the child's (and his family's) opinion, which has forgiven the perpetrator's actions. Especially for the child perpetrator, the fulfillment of this principle can be seen in the judge's consideration, which takes into account the views and desires of the child perpetrator to be able to receive a regular education, and the statement of the child perpetrator regarding the forced confession he experienced at the investigation stage, as written in Decision Number 2516/K/Pid.Sus /2020.

2) The Perspective of Understanding Some Important Aspects in Child Protection

Whether or not the attitudes, actions, and decisions taken in resolving cases of sexual violence against children, especially those committed by children, are very dependent on the accuracy and common understanding of the parties (law enforcement officials) regarding various aspects of child protection, including (1) child protection; (2) child protection is a human problem; (3) justice in child protection; (4) the interrelation of various relevant phenomena; (5) child protection is a joint effort; (6) re-victimization prevention orientation; and (7) Consideration of juridical, philosophical, and sociological basis. In our opinion, the accuracy and shared understanding of these aspects would significantly impact the realization of child welfare as the ultimate goal of every child protection activity. On the other

hand, these inaccuracies and differences in understanding hinder the success of child protection efforts.

First, in understanding the nature of child protection, its essence is the legal protection of children, including efforts to uphold the law against various freedoms and human rights of children, as well as interests related to child welfare. Collins and Wright (2022) argue that protection should not be limited to preventing harm but should also enable children's participation, dignity, and development in accordance with their rights.[19] This is relevant to Immanuel Kant's view that the law protects the human rights and freedoms of its citizens. The state (government) is tasked with upholding these fundamental rights to create prosperity and happiness for the community, which is the state's goal. Thus, the reflection of child protection in every case involving children, both as victims and perpetrators, manifests in the extent to which the rights and interests of children are fulfilled and in the primary consideration of children's rights and interests in decision-making.

In addition, in the settlement of cases in court, Supreme Court Justice McLachlin in Canada said that the court is "the ultimate guardian of the rights of society", both human rights as individuals and their rights as a community.[20] Therefore, every judge in resolving cases before him must be able to protect the human rights of the parties in conflict with the law in a balanced way. From the resolution of 26 issues of sexual violence through litigation above, the judges generally seem to have the same understanding of the importance of fulfilling and protecting children's rights, especially child victims, except for Decision Number 1879/K/Pid.Sus/2020 with a child as a defendant, in which the rights of the child as the perpetrator appear to have not been sufficiently accommodated, seeing the punishment of a fine that can be replaced with imprisonment for a specific time, puts the child perpetrator at risk of continuing to carry out custodial sanctions in addition to imprisonment if fines cannot be paid.

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[19] Tara M. Collins and Laura H.V. Wright, The challenges for children's rights in international child protection: Opportunities for transformation*, World Development Journal*, Elsevier,159 (2022).
[20] Jamie Cameron, McLachlin's Law: In All Its Complex Majesty, *The Supreme Court Law Review*: Osgoode's Annual Constitutional Cases Conference 88. (2019), p. 308 - 337

Second, the understanding of child protection as a human problem. Arif Gosita said that child protection is a human problem that is a social reality.[21] Meanwhile, crime is not only a social problem but also a human problem. In light of this opinion, efforts to protect children from crime will undoubtedly be significantly influenced by the accuracy of the parties' understanding of humanity. Therefore, every solution to the problem of child protection needs to be approached in ways that still uphold the dignity of the child as a human being and still consider the humanitarian conditions inherent in the child, both as a perpetrator and a victim.

In the context of sentencing, this humanistic approach is not limited to the idea that the punishment imposed must be in accordance with civilized human values. Still, it must also raise the perpetrator's awareness of human values and the values of social life. In this case, Sudarto once stated, "If you talk about crime, you have to talk about the person who committed the crime."[22] The use of a humanistic approach in sentencing, also known as individualization, is the idea that, as Thomaidou and Berryessa found, providing scientific/clinical evidence (about mental health, trauma, etc.) significantly influences sentencing decisions. Defendants with no mental-health explanation tended to get harsher sentences compared to those whose behavior could be contextualized via "biological or trauma-related disorders. This aligns with Glueck's principle that punishment decisions should consider the psychiatric/psychological and sociological background of both perpetrators and victims.[23] In the context of the 26 cases above, judges have applied values and a humanitarian approach in their considerations when selecting and determining the type and weight of the crime, for example, in Decision No. 3818/K/Pid.Sus/2019.

Third, justice in child protection. In an effort to resolve the issue of child protection, the parties and the community should no longer need to argue over

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[21] Arif Gosita, *Masalah Perlindungan Anak,* Jakarta:Akademika Pressindo, 1989. p. 14

[22] A view of Sudarto, in an article of Pradika Andi Alvat, Individualisasi Pidana dalam KUHP Baru, Marinews, 26 Maret 2025, https://marinews.mahkamahagung.go.id/artikel/individualisasi-pidana-dalam-kuhp-baru-, accessed in November 20, 2025.

[23] Mia A. Thomaidou and Colleen M. Berryessa, Bio-behavioral scientific evidence alters judges' sentencing decision-making: A quantitative analysis, *International Journal of Law and Psychiatry*, 95, 2024, p.1-10

whether justice or child protection should be prioritized. Justice is the very essence of child protection. Arif Gosita said that where there is justice, there will be good child protection[24]. Thus, seeking child protection in the settlement of legal cases involving children does not mean ignoring the realization of justice for all parties. However, child protection must still be implemented rationally, fairly, and beneficially for both parties to the conflict and the wider community. Thus, the realization of children's interests must not reduce attention to the interests of the community (including other parties in the case). The interests of the child here are the interests of the child's development, not just the interests of the child, according to the judge. Therefore, the child must still be heard, and his opinions and needs must be considered to achieve justice and the child's welfare in this case.

Fourth, the interrelation of various relevant phenomena. A single factor does not cause a crime; instead, it involves multiple factors and is related to other phenomena before and after the crime. It also applies to child protection, as Arif Gosita believes that all child protection issues stem from the interplay of numerous other interconnected events.A proportional understanding of the relations and interactions among these various phenomena will influence the accuracy with which the correct and comprehensive attitude and action are chosen and determined in solving the problem. In relation to the issue of sexual violence against children, the judge's decision-making to resolve the issue needs to pay attention to various concrete facts that occurred before and after the occurrence of the violence against children, as well as to think about the possibility of other facts (impacts) that can occur after the decision is dropped or imposed. This is where judges play a role in measuring the costs and benefits of each sentencing decision in concrete cases. Do not let the burden of punishment imposed on the perpetrators result in greater losses for the victim. An example of this understanding is reflected in Decision No. 281/K/Pid.Sus/2019.

The above understanding departs from Jeremy Bentham's view that a crime should not be imposed if it is groundless, needless, unprofitable, and inefficacious,

[24] Arif Gosita, *Masalah Perlindungan.....,* p.15

and from Ted Honderich's view that crime and punishment must function as economic deterrents.[25] One of the functions of a crime is that the punishment does not cause other conditions that are more dangerous/harmful than what would have happened if the sentence had not been imposed. This economic deterrent consideration also applies to determining the length or severity of the punishment imposed.

Fifth, child protection is a joint effort of all parties in the neighborhood, country, and even the world (globally). In this matter, child protection efforts are a joint work carried out in a comprehensive, sustainable, and coordinated manner among various parties providing child protection, directly or indirectly. This means that judges, as law enforcement officers, whose role is to resolve legal cases in the realm of litigation, are the only party that participates in organizing child protection through their decisions. Thus, efforts to protect children in the criminal justice system are not only the task of judges and stop at the judge's decision but must be accompanied, supported, and followed up by the involvement of other relevant parties to perfect the child protection efforts, for example in the context of providing psycho-social rehabilitation assistance to child victims of sexual violence, or in filing for restitution in this case. Reflection on understanding this aspect can be seen in the coordination between law enforcement officers, LPSK, and child and social protection agencies in resolving the handling of child sexual violence in accordance with their respective responsibilities.

Sixth, orientation to re-victimization prevention. According to Arif Gosita, every child protection effort that is carried out must not then cause other conditions that cause children to become victims of other acts (re-victimization). In the context of children experiencing sexual violence, the judge's decision, as much as possible, does not cause other sufferings that the child can feel. Reflection on child protection in the judge's decision should be not only pragmatic but also futuristic, oriented towards preventing suffering or other losses felt by the victim's child as a result of the continuation of the judge's decision. In addition, especially for children as

[25] Roy Sanjaya, *Konstruksi Teori Efek Jera Sebagai Parameter Hakim dalam Menjatuhkan Putusan Pidana*, Pusat Analisa Kebijakan Hukum dan Ekonomi, 2024, p. 1-27

perpetrators, the judge's decision that must be carried out must not only cause suffering to the children, but also have no educational and rehabilitative value. The understanding of this aspect can be seen in the settlement of cases of sexual violence against children, which are also carried out by children, wherein, in some cases, judges choose to impose actions and the combination of custodial sanctions with non-custodial sanctions.

Seventh, Philosophical, ethical, and juridical considerations. According to Arif Gosita, good child protection is grounded in a transparent juridical, philosophical, and moral basis.[26] In this case, every effort to implement child protection must still be based on the philosophical values of Pancasila, the 1945 Constitution of the Republic of Indonesia, relevant laws, and the social and religious values prevailing in society. Understanding these basics will have implications for decision-making and actions regarding children, as well as for guidelines for evaluating positive rules related to child protection. In the context of the settlement of the 26 cases of sexual violence against children above, the child protection efforts carried out by judges have referred to the values of Pancasila, the 1945 Constitution of the Republic of Indonesia, several relevant laws, such as Law No. 23 of 2002, Law Number 35 of 2014, Law No. 17 of 2016, and Law No. 11 of 2012.

Justice versus Child Protection: Which Comes First?

Ideally, the settlement of cases in court can indeed satisfy the sense of justice of all parties: the defendant, the victim, and the wider community. But that may not always be the case. On the contrary, it is not uncommon to find judges' decisions that provoke both support and opposition from victims and perpetrators, fellow law enforcers, and even the community itself.[27] Usually, the fairness of the settlement

[26] Arif Gosita, *Masalah Perlindungan*., p. 21

[27] Anthony D'Amato, *On The Connection Between Law and Justice*, Faculty Working Papers. Paper 2. http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2, 2011, p. 18. D'Amato implicitly stated in his opinion "*often the Justice can simply join either with the majority opinion or the dissenting opinion. In those cases where the justice is assigned the task of writing the majority opinion, or for some other reason wishes to present a reasoned opinion....., Even if there are cases where the justice apparently has gone against one of his or her own prior opinions, the clerks can be relied upon to show how the new case differs from the old one and represents a further refinement of the justice's evolving jurisprudence"*.

in the case is questioned again. This condition is not uncommon. In fact, it is very natural, because each person is very likely to have a different perspective on what "justice" is. Besides being influenced by different case contexts, the meaning of justice also depends on each party's beliefs, knowledge, understanding, and experience.

In general, in Indonesia, justice is understood to be limited to the fulfillment of the norms in the written law and in itself. Whether we realize it or not, the teachings of legalism still color and serve as a reference for law enforcement in Indonesia, where law enforcement officers enforcing the law cannot be separated from the written law. Judges as case-breakers are expected to work only as mouthpieces of the law (spreekbuis van de wet), so that the judge's assessment of justice cannot be separated from how the judge literally implements the law. In fact, judges are often faced with the legal facts of a case that make them enforce the law contextually.

Justice, in the judge's view, is sometimes not the same as the law's text in the case. Thus, an assessment of judges' justice should be based on the application of the law in specific contexts. At the abstract level, justice is of equal value. However, this value of justice needs to be translated into contextual space, the meaning of which may differ from one case context to another. Anthony D'Amato simply states the concept of justice is "what law is for; what lawyers should do; and what judges should render", while the law is a set of tools--admittedly complex and intellectually engaging.[28] Like any other instrument, laws can facilitate the solution to a particular problem, but the law cannot be expected to tell how a case should be resolved appropriately. Therefore, in resolving cases, according to D'Amato, judges must decide based on justice. Meanwhile, the law is a fact relevant to other material facts, applied to determine justice in the context of the conditions that accompany it.[29]

The relationship between the above justice issues and several cases of sexual violence against children for which Cassation was requested in 2019-2020 is that there are several cases whose decisions by the Public Prosecutor (possibly by the

[28] Ritupriya Gurtoo*, D'amato Theory Of Logical Reasoning: Jurisprudential Perspective*, International Journal Of Research In Social Sciences, 8 (6), June 2018, P. 283-295
[29] Anthony D'Amato, in the article of Ritupriya Gurtoo....., p. 283-295

public) can be viewed as controversial decisions, so that an appeal is requested, with (1) Decision Number 281/K/Pid.Sus/2019, in which the judge makes a legal breakthrough in sentencing in the form of a criminal with a sanction weight below the minimum criminal sanction threatened by law; (2) Decision Number 3818/K/Pid.Sus/2019, in which the judge handed down the act of returning to the parents the child who committed sexual violence; (3) Decision Number 3261/K/Pid.Sus/2019, in which children are subject to training actions within a specific time; (4) Decision Number 1923/K/Pid.Sus/2019; and (5) Decision Number 2516/K/Pid.Sus/2020, in which the two defendants were acquitted. The five judex factie decisions were then strengthened by the Judge at the Cassation level, who rejected the Cassation application.

In addition, judges at the Cassation level also made improvements to the sentencing decisions handed down by the judex facti, as in Decision Number 1035/K/Pid.Sus/2019, with the weight of the criminal sanction being heavier than the punishment in the previous decision, Decision Number 2985/K/Pid. Sus/2019 (children), Decision Number 263/K/Pid.Sus/2020, and Decision Number 1394/K/Pid.Sus/2020, in which the three weights of criminal sanctions were decided to be lighter than those in the previous decision.

Referring to the decisions of several cases above, both the decisions handed down by the judex facti, which were later strengthened by the judex juris, as well as the judex facti decisions, which were later corrected more lightly by the judex juris, of course, can raise counter questions related to justice and child protection in these decisions. Judges may be seen as failing to uphold a sense of justice and to reflect on child protection in their choices. Or even if the judge's decision is considered fair, the judge is seen as prioritizing justice over child protection.

However, measuring the success of child protection is not that simple. Reflection on child protection is not measured solely by the imposition of severe criminal sanctions in all cases, without considering the facts or other conditions that accompany each case. Another thing is that the value of justice cannot be placed on a par with the value of child protection, as if pitting the power or dominance of the two objectives of the law. The success of child protection, according to Arif Gosita,

is primarily determined by the parties' understanding of its key aspects.[30] Among these aspects, understanding justice in child protection is a key determinant of its success. Simply put, there will never be child protection if justice does not manifest in the settlement of the case.

Signals for Criminal Law Reform from the Resolution of Child Sexual Violence Cases

Punishment is one of the subsystems of the criminal law system (the penal system), along with criminalization and criminal execution.[31] Punishment itself can be interpreted as the process of imposing a sentence by a judge, which is straightforward rather than complex. In imposing a sentence, a judge is not only required to think pragmatically but also to be idealistic, protecting individuals (perpetrators and victims) and society (social defense) in the future.[32]. In imposing a crime, a judge is required not only to realize the legal goal of legal certainty but also to achieve justice and benefit. A judge is also required always to be careful and not impose a crime so that the criminal remains in their function as the main guarantor (prime guarantor)[33]. The accuracy of judges in sentencing (also called law enforcement in concreto) is strongly influenced by the inaccuracy or weakness of the positive legal rules that serve as the judge's basis for imposing the crime. According to Barda Nawawi Arief, substantive criminal law has a strategic position and has a significant influence on the success of law enforcement in concreto.[34] Therefore, in the context of reforming substantive criminal law, it is essential to identify loopholes in the rules that can hinder the enforcement of the in concreto criminal law.

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[30] Arif Gosita, *Masalah Perlindungan……..,* p. 13-21

[31] Dian Alan Setiawan, The Implication of Pancasila Values on The Renewal of Criminal Law in Indonesia, *Unifikasi Jurnal Hukum*, 5 (2), 2018, p. 58 -67

[32] Faisal, et al, Progressive Consderation of Judges in Deciding Sentencing Under Indonesia New Criminal Code*, Jambe Law Journal*, 6 (1), 2023, p. 85 - 101

[33] Herbert L. Packer, in the article of Axl Maflew Situmorang, I Gede Agus Kurniawan, I Made Wirya Darma, Implementation ofthe Principle of Proportionality in Criminal Sentencing in Indonesia, *Pena Justitia*, 24 (1), 2025, p. 5112 -51125

[34] Barda Nawawi Arief, in the Article of Aris Hardinanto, entitled: Critical Analysis of Living Law Formulation in Law No. 1 of 2023 Concerning the Criminal Code: Towards Law Reform to Realize Justice with the Spirit of Pancasila, *Journal of Law and Legal Reform*, 5 (03), 2024, 1029 -1066.

Taking into account the positive criminal rules and the settlement of cases of sexual violence against children in the previous description, the following are some notes that can be said to be legal loopholes that can be used as a signal for criminal law reform, especially in terms of sentencing perpetrators of sexual violence against children.

1) Absence of Provisions on General Guidelines for Sentencing

One of the reasons the Public Prosecutor or the defendant filed an appeal and cassation for this case of sexual violence against children was related to the length or weight of the sentence (strafmaat) imposed by the judge, according to the views of both parties, which was relatively light. Although each judge is independent in deciding cases based on their beliefs and the facts presented at trial, determining the type and weight of the crime is not easy. Therefore, to minimize significant discrepancies in sentencing, setting punishment guidelines is urgent and essential.

The sentencing guidelines here are guidelines for judges in imposing criminal sanctions threatened in the law against perpetrators of criminal acts. Theoretically, this criminal guideline includes 3 (three) types: (1) general guidelines that provide direction for judges on matters that should be considered in imposing a sentence; (2) special guidelines that provide direction to judges in selecting or imposing certain types of crimes; and (3) guidelines for judges in implementing the system for formulating criminal threats in each formulation of offenses.[35]

So far, in the product of national criminal law, general guidelines for punishment have not been regulated either in the Criminal Code as general rules, as well as the main rule (umbrella act) in criminal law, as well as specific criminal rules (Laws outside the Criminal Code), except for Law No. 11 of 2012 concerning the Juvenile Criminal Justice System. In fact, according to Barda Nawawi Arief, the existence of general guidelines for punishment will make it easier for judges to determine the severity of the crime (strafmaat).[36]

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[35] Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Jakarta: Kencana Prenada Media Grup, 2008, p. 137

[36] Barda Nawawi Arief, *Bunga Rampai*....., p. 138

2) No Specific Minimum Criminal Fines are Formulated

The absence of a specific minimum formulation for fines in Article 81 and Article 82 of Law Number 35 of 2014 will undoubtedly have implications for significant differences in the imposition of penalties for cases of sexual intercourse or child molestation. This condition is certainly not beneficial for the victim, especially when the victim experiences sexual violence with a relatively severe quality of action, such as continuing acts, the impact of mental disorders on the victim, and participation in the case. Both Article 81 and Article 82 of Law Number 35 of 2014 regulate the threat of criminal weight and the same pattern of punishment, such as minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years in prison, and a maximum fine of 5 (five) billion. Likewise, regarding the weighting of the two criminal acts under Articles 81 and 82 of Law Number 17 of 2016, it does not at all address the specific minimum fine issue. The implications of the absence of a special minimum regulation for fines are evident in the case of Decision No. 1508/K/Pid.Sus/2019 and Decision No. 4457/K/Pid.Sus/2019.

3) Absence of Treatment Sanction: Focusing on Victim Repair and Recovery

It could be different from dealing with other types of crime; overcoming violence against children, especially sexual violence against children, can not only be approached by imposing serious crimes against the perpetrators, but also by imposing actions aimed at improving the perpetrators so that they do not repeat their actions in the future. So far, the manifestation of the settlement of cases of sexual violence against children has only been dominated by the punishment of perpetrators. Although Law Number 17 of 2016 also provides chemical castration for sexual violence of a certain quality, all of these means, both criminal and acts, remain focused on the perpetrator. Even though several studies show that sexual violence is a revolving cycle, child victims of sexual violence who are not handled properly will have the potential to become perpetrators in the future. In the context of overcoming sexual violence against children, the paradigm of severe punishment of perpetrators should be followed by a paradigm of proper improvement and

restoration of the victim's physical, psychological, and social conditions.

So far, several relevant laws have indeed regulated the issue of psycho-social rehabilitation assistance for children who have been victims of sexual violence. Still, this rehabilitation is the government's obligation and responsibility.[37] It is not one of the sanctions that can be imposed on the perpetrator. The cost of repairing and restoring the victim's condition has not been borne by the perpetrators of sexual violence but is borne by the government and by the victim's family. Article 7 A paragraph (1), letter (b) and (c) Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Sanctions and Victims indeed stipulates that victims of criminal acts are entitled to restitution.[38] In the form of (b) compensation for losses caused by suffering directly related to a crime; and/or (c) reimbursement of medical and/or psychological treatment costs. However, this restitution requires applying for restitution itself through the LPSK, which is carried out before or after a court decision has permanent force. While the crime for which restitution will be sought is determined by the LPSK, restitution is not automatic or selective; it applies only to criminal acts so determined.

The need for recovery and improvement of victims of child sexual violence is used as one of the actions based on the nature of treatment as educative and reparative sanctions, which have social goals, one of which is to protect victims and the community. If the law provides for action sanctions to restore the perpetrators, based on the principle of balance, the law should also accommodate sanctions for treatment-oriented recovery of victims from the consequences of criminal acts committed by the perpetrators.

[37] Article 82 paragraph (1) letter g of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System recognizes the types of sanctions for remedial actions due to criminal acts. However, in the explanation of the article, it is explained that the repair due to this crime is more about repairing the damage caused by the crime and restoring the situation in accordance with before the crime occurred. There is no further explanation whether the improvement due to this crime includes the psychological consequences caused by sexual violence on children, considering that for children in legal conflict, the law no longer imposes financial penalties such as fines.

[38] Article 1 number 11 of Law Number 31 of 2014, defines restitution as compensation given to the victim or her family by the perpetrator or a third party.

Conclusion

Of the 26 decisions in 2019-2020, the majority of cases of sexual violence against children in Indonesia reflect child protection, both from the perspective of child protection principles, as well as the perspective of understanding several vital aspects of child protection. Judges in deciding cases have placed children both as victims and perpetrators as the primary consideration in imposing a sentence. Although the majority of case settlements use retributive justice and impose criminal penalties on the perpetrators, some cases with unique accompanying conditions adopt a restorative justice approach. Specifically, perpetrators impose certain types of actions on children. In addition, there are 3 (three) signals for criminal law reform in substantive rules related to child protection: (1) the absence of general guidelines for punishment; (2) no specific minimum sanctions for fines on norms of sexual violence against children are formulated; and (3) the absence of action-oriented sanctions for the improvement and recovery of victims of sexual violence.

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