

THE DISPARITY OF CRIMINAL IMPLEMENTATION IN CASE OF CHILD INTERCOURSE AND MOLESTATION AS SEEN FROM THE PERSPECTIVE OF DECIDENDIC RATIO THEORY

Fahmy Asyhari

Faculty of Law, IAIN Salatiga, Indonesia
Email: fahmy_asyhari@yahoo.com

Abstract

This study aimed at examining the factors that cause the disparity of punishment in cases of sexual intercourse and molestation of minors, especially in Salatiga City, the impact of the occurrence of criminal disparities, and how the policy model for criminal acts of sexual intercourse and obscenity should be seen from the decidendi theory. The results of the study showed that the disparity in criminal penalties in criminal cases with children as victims is the existence of internal and external factors. Internal factors is in the form of a judge's own personality. While external factor is the legal factor or the legislation itself and the situation factor in the person who is in the perpetrator or defendant. The judge must be careful in seeing, digging, and observing the facts in the trial. Judges must pay attention to the attitude of prudence, avoiding carelessness, both formal and material to technical skills. The judge needs to give reasons or considerations following the values of truth and justice (ratio decidendi). The judge must also use common sense or rational thinking by paying attention to the previous judge's decisions to avoid striking disparity in sentencing. Currently, the judiciary in Indonesia, especially in the Salatiga District Court, still uses the method of imposing sentences based on trial examinations only. This causes court decisions issued by judges to have differences between one decision and another, which is called criminal disparity. The research method used by the researcher was a juridical-normative research method equipped with an in-depth case approach using the ratio decidendi theory. The technique of collecting legal materials used was a literature study. The legal material analysis technique used was deductive data analysis.

Keywords: *Disparity in Punishment, Sexual Intercourse and Molestation, Ratio Decidendi Theory*

Introduction

The crime rate is increasing every year, the majority of crimes are crimes against property, decency, and crimes of persecution (Schlagdenhauffen, 2022). The crime of sexual intercourse and molestation against children is increasingly widespread (Joleby, Lunde, Landström, & Jonsson, 2021). The rapid development of society and the increase in crime in social life have an impact on a tendency of members of the community themselves to interact with one another (Rutter, 2021). This interaction often occurs when an act violates the law or the rules that have been determined in society (Utama, 2021), to create a sense of security, peace, and order in society (Anwar, 2021). In this case, not all community members want to obey it (Gagnon & Fox, 2021) and there are still those who deviate from the predetermined rules (Nonnenmacher & Marx Gómez, 2021), in general this behavior is not liked by the community (Soekanto & Sulistyowati, 2013).

Article 1 point 3 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System states that children in conflict with the law are children who are 12

The Disparity of Criminal Implementation in Case of Child Intercourse and Molestation As Seen From The Perspective of Decidendic Ratio Theory

(twelve) years old, but not yet 18 (eighteen) years old. Especially for children in conflict with the law, based on Article 64 Paragraph (2) of the Child Protection Act, protection for children in conflict with the law is carried out through: (1) humane treatment of children in accordance with the child's dignity and rights; (2) provision of special facilities and infrastructure; (3) provision of special assistant officers for children from an early age; (4) continuous monitoring and recording of the development of children in conflict with the law; (5) providing guarantees to maintain relationships with parents or family; and (6) protection from identity reporting through mass media and to avoid labeling.

Many crimes in which children are victims have been recorded in court. One of them is the Salatiga District Court. The decision that can be seen in the criminal imposition of the case of the crime of sexual intercourse is decided by the judge at the Salatiga District Court. As for the decision, there are differences between one judge and another judge. Differences in decisions can be seen in the imposition of criminal cases of sexual intercourse.

There are differences in the sentencing of criminals against the perpetrators of sexual intercourse because of the domain factor of the case that is in the hands of the judge, causing disparities in case decisions even in similar cases. This can be seen from the sharp differences between judges who decide cases, even though they refer to the same regulations and almost the same legal events.

Judges as law enforcers have the obligation to be free and independent from impartial or impartial judges. This is in order to enforce the judicial function which guarantees the fulfilment of treatment according to human rights. This judicial function is the duty of the judge in realizing equality before the law for every citizen (equally before the law).

Law Number 48 of 2009 concerning Judicial Power states that the freedom of judges in exercising their judicial authority is not absolute. Justice enforced by judges must remain based in the corridor of values contained in Pancasila. However, it is not uncommon for controversial decisions to be born in reality. Not infrequently, there is a severe criminal verdict against a perpetrator of a crime, while another convict is given a light sentence or even released, even though the article violated is the same. This difference is known as Disparity. Criminal disparity is the application of unequal punishment to the same offense (same offense) in practice in court. The disparity of judges' decisions in cases of sexual intercourse at the Salatiga District Court against adult perpetrators against children who were decided was different in similar cases.

There are various factors underlying the emergence of the disparity in the decision. Court decisions basically refer to legal facts submitted by the Public Prosecutor in the form of indictments and examination of witnesses before the trial. But basically, the occurrence of disparity is also determined by the judge's attitude, values, and personality. In fact, the inner atmosphere influences the judge in taking legal interpretations, as an effort to give a decision on the case being handled, in this case, adultery (Suseno & Putri, 2013).

Criminal disparity basically creates problems in law enforcement. On the one hand is the freedom of judges in deciding a case to seek justice, which is guaranteed by law. But on the other hand, this creates legal uncertainty, especially the dissatisfaction of the community or the litigants, especially the victims, is very likely to occur. The author wants to discuss what policies can be used as guidelines by judges in imposing criminal penalties so that the emergence of criminal disparities can be minimized in terms of the decidendi theory.

There are two questions answered by this paper, namely: What are the factors that lead to disparity in sentencing and the impact of disparity in punishment? How should the model for the punishment of the crime of sexual intercourse and obscenity be seen from the Ratio Decidendi Theory?

Research Methodology

According to MacKenzie, there are several theories that discuss the factors considered by judges in imposing a criminal decision (Rifai, 2010), one of them is the theory of the ratio decidendi besides that there is also the theory of balance, the theory of intuition and art, the theory of the scientific approach, and the theory of the experiential approach. Ratio Decidendi or also known as judge's consideration are the reasons or arguments used by judges as legal considerations that form the basis before making a decision. According to Peter Mahmud Marzuki, finding the ratio decidendi in a decision can generally be found in certain sections. To be able to reach a decision, a judge must write down the reasons called the ratio decidendi. The ratio decidendi in Indonesian law, which adheres to the civil law legal system, can be found in the "Considering" the "Main Case". The ratio is found by paying attention to material facts and decisions based on those facts. So that from a material fact there can be 2 (two) possible decisions that are opposite in nature.

The ratio decidendi theory explains that when a judge is about to make a decision, the judge must have a basic philosophical foundation and relate to the basis of the applicable laws and regulations and in accordance with the subject matter and motivation of the judge who is clear as an effort to enforce the law and provide justice. for the parties. This theory also requires judges to pay attention to the factors of education (education), humanity, expediency, law enforcement, and legal certainty in giving a decision (Faisal & Rustamaji, 2020). This theory also requires judges to pay attention to the factors of education (education), humanity, expediency, law enforcement, and legal certainty in giving a decision.

Result and Discussion

Factors of Disparity in Criminal Imposition

The factor of disparity in judicial decisions gives judges a special position. He is in charge of presiding over the course of the trial. In giving a decision, the judge must collect and collect information from all parties. However, an important position is balanced with a heavy task. The judge's responsibility is not limited to the law alone, but also concerns the people, even to God Almighty. This heavy task, not only reflects the duty of judges as skilled officers in the field of justice, but judges are representatives of God in the world in resolving all the disputes they face (Muhammad, 2013).

The position of the judge as the leader of the trial is an attempt to seek justice. The task of the judge is not only to oversee the entire course of the judiciary, until the decision is issued, but also to ensure that the decisions he makes are realized for justice based on the One Godhead. It is this responsibility to God Almighty that must be the realization of his responsibility. Bismar Siregar said that the task of judges as law enforcers is in the

The Disparity of Criminal Implementation in Case of Child Intercourse and Molestation As Seen From The Perspective of Decidendic Ratio Theory

context of law as a tool of engineering in Indonesia's development era. This role requires formulating the legal values that live in the community which are considered by the community to be disturbing the balance and should be punished, but in the provisions of the written law there are no rules.

The duties and behavior of judges are one of the benchmarks in law enforcement. This role makes judges as central figures in law enforcement in the courts. Therefore, in the process judges must be able to set an example in carrying out law enforcement, this is the task of the judiciary as law enforcement and justice seeking institutions. Including in adjudicating criminal acts committed by adults. One of the cases of sexual intercourse, where the victim is a child, is a matter that must be handled wisely and wisely. This is because sexual intercourse is a crime of decency that has the potential to have a psychological effect on the victim, it can even interfere with the growth and development of a child until he grows up. The handling of this type of crime must be taken seriously. As recorded in the Salatiga District Court in the case of sexual intercourse with the convict Trianto Alias Pete who was sentenced to 7 years in prison. Then in December 2020, the convict Triyanto aka Pete who got parole but the convict Triyanto aka Pete repeated the crime in the same clump, namely the crime of obscenity with a prison sentence of only 5 years. In fact, there are different decisions for the convict TRIYANTO which the convict is a recidivist.

According to the Criminal Code, recidivist or repetition of a crime is included in the category that can be aggravating the crime and can get additional penalties, based on Articles 486,487 and 488. Recidivists comes from French which is taken 2 (two) Latin words, namely re and co, re means again and cado means fall. Recidivists means a tendency to repeat the law because of repeated crimes and about Recidivists is to talk about the law repeatedly as a result of the same or similar or cognate acts. In the sense of the general public, recidivists are defined as repeat offenders. The perpetrator is considered a recidivist if he commits a crime again after he has finished serving his prison sentence. Even the convict Triyanto alias Pete is still undergoing parole and the convict Triyanto has committed a similar crime in the form of obscenity. Actually, to call a recidivist, it doesn't have to be based on whether the repetition of the crime is the same as the previous (similar) crime or the next criminal act is classified as thinking whether the crime is a "similar group" and also thinking whether the next crime still exists in a certain period of time. so it can be categorized as a resident. Because if a prisoner commits another crime after the prisoner is released from the State Detention Center (Rutan) or Correctional Institution (Lapas), then the prisoner is categorized as a recidivist.

One of the factors that caused the difference in the decision was the different conditions of the case brought before the judge. There is also a point of view between one judge and another, which leads to different decisions even in the same case. Thus, there is a difference in the assessment of the legal facts that affect the decision. The factors that influence the occurrence of this disparity are classified into 2 (two) things, namely First, the internal factor is a factor that comes from the judge's personality which is autonomous and cannot be separated, it is integrated with the attributes of someone who is called a

judicial person (human equation). . Second, external factors, namely factors that influence the judge's decision that comes from outside the judge. Internal factors, law enforcement is an important pillar in the criminal justice system as an effort to uphold the rule of law. Judges as law enforcers are required to be really professional and prioritize the values of justice.

Even though in reality there are many mistakes made by law enforcers, starting from the police, prosecutors, advocates, and even the judges themselves. Following Lord Acton's assumption that 'power tends to corrupt', this can happen to a judge. Judges have enormous power in the Judiciary, so there is also the possibility of abuse of authority, both when presiding over the judiciary, and in making decisions. Although not a single factor. There are also other variables, such as the lack of human resources in the judiciary itself. The desire to create independence in the administration of judicial power, the Supreme Court in its instruction No.KMA/015/INST/VI/1998 dated June 1, 1998 instructed judges to increase professionalism to create a judiciary capable of producing quality decisions, which contain pathos values (juridical considerations main), ethos (integrity) sociological (according to the values prevailing in society), philosophical (core sense of justice and truth), and has a logos nature (acceptable by common sense), for the creation of independence of judicial administrators. Internal factors are closely related to the moral quality of the judges themselves. If having incompetence can be ascertained, there will be a lot of disparity in decisions.

This can be traced from the recruitment process, lack of moral integrity, including the level of education or expertise. As part of reducing criminal disparities, what needs to be improved is the moral quality of law enforcers themselves. Normative improvement alone is felt to be lacking, because without integrity support in the form of improving the quality of a judge, it is certain that good legislation is difficult to enforce. External factors are factors that determine the personality of a judge in giving a decision. These external factors can be divided into several things: First, the legal factor or the legislation itself. The rules governing children as perpetrators of criminal acts are Law Number 23 of 2002 concerning Child Protection and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Both do not explicitly regulate the threat of punishment for perpetrators of child crimes. The absence of a maximum and minimum limit gives the judge the flexibility to impose a sentence on the defendant. This opportunity can be used by judges whose quality is lacking, so that it affects the decision. Second, the situation factor in the perpetrator/defendant. A crime cannot be separated from the motive of the perpetrator. The factors for the formation of these motifs are also divided into 2 (two) namely internal factors and external factors. Internal factors come within the perpetrator, for example, the perpetrator is used to committing crimes, and can make himself satisfied. On the one hand, the motive for crime in a person may be formed by external factors, such as environmental and social conditions.

2. The Model of Criminal Policy that Should Be in the Crime of Sexual Intercourse and Obscenity Seen from the Decidendi Theory

The Disparity of Criminal Implementation in Case of Child Intercourse and Molestation As Seen From The Perspective of Decidendic Ratio Theory

The occurrence of disparities in the imposition of crimes against children as victims of crime is basically casuistic in nature. This is based on: (1) the background or motive of the defendant committing the crime (2) the track record of the defendant in committing the crime (3) the defendant's role in the crime (4) the level of understanding of the defendant (5) the method of committing a crime between one perpetrator and another. the other actors are different; and (6) Amount of evidence. Regarding the occurrence of a decision disparity, the research of Siegfried L. Sporer and Jane Goodman – Delahunty which found that legal factors, especially evidence, were a determining factor in every judge's decision, while factors outside that reached less than 10%. Most of the differences arise because the random time variability cannot be used as a comparison to the attitude of violence or leniency towards judges. Some differences in sentencing decisions cannot be separated from human factors. Sometimes some decisions are still related to the subconscious influence on punishment related to the characteristics of judges, perpetrators, and victims.

The judge's policy through his decision should be in the best interests of the child. As for the government's policy on children's problems, basically it has been realized since the issuance of Law Number 4 of 1979 concerning Child Welfare. Then came Law Number 23 of 2002 concerning Child Protection and Law Number 11 of 2012 concerning the Child Criminal Justice System. Law Number 23 of 2002 concerning Child Protection only explains in general that as an effort to protect children, it needs to be carried out as early as possible, namely from the age in the fetus to the general age of 18 years.

The spirit in this law basically wants to provide protection to children based on the principles of non-discrimination, survival, right to life, best interests for children, and development and respect for children's opinions. Meanwhile, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is the embodiment of the legal rules of the Convention on the Rights of the Child concerning special justice for children who are victims and children who are in conflict with the law. Basically, the purpose of the crime is not only to provide punishment, but also to improve conditions, and protect and care for children, as well as prevent the occurrence of repeated crimes. In this case, the punishment given by the judge where the child is the victim should be for the good of the child in the future. A fair judge's decision will affect the public's trust in the judiciary. The facts revealed in the trial, that judges who have a progressive attitude will be different from conservative judges in giving decisions. This is evidenced by the judge's initial commitment to uphold the essential truth to the community. The judge's psychological condition basically moves from his conscience, which is rooted in the values he holds. The most significant impact of progressive decisions is the growing return of public confidence in the judiciary. Especially in dealing with juvenile crimes. This can be proven in handling cases of sexual intercourse and obscenity against children who have permanent legal force at the Salatiga District Court in the last 5 years. Every judge's decision in juvenile crime can be ascertained that there is a criminal disparity. This disparity shows a negative trend towards public trust in the judiciary. Trust in the functioning of the judiciary is necessary to avoid anarchy and create a legal order. For the

judiciary itself, this trust is important as a form of community appreciation for the function of the judiciary in law enforcement. In relation to the disparity of decisions on juvenile crimes, the disparity will create a sense of suspicion towards the function of the judiciary that decides on different cases, even with the same articles and actions. What is feared is the feeling of dissatisfaction and distrust of the community towards the function of the judiciary, which creates a domino effect of 'acting of vigilantism' as a form of angry public aspirations. Nowadays, a concept has developed to prioritize non-penal efforts against criminal acts committed by children. However, this non-penal effort still does not go out of the corridor of law enforcement, while still paying attention to the child's interests. This could be considered a compromise effort to save children's future as an important national asset. There are 2 (two) important reasons children must be protected: first, children are the next generation and the nation's future. Second, children are a group of people who are vulnerable to crime. The state has a function to protect every citizen, including children. One of the efforts that must be made is to create a legal umbrella oriented towards upholding children's rights, without forgetting law enforcement. This rule is important, for children who conflict with the law, both as victims and as perpetrators, their rights must be protected and as much as possible, be avoided from discrimination (Muchsin, 2011).

In the case of criminal acts with children as victims, the judge's decision is the culmination of an ongoing case. In this case, the judge must be careful in seeing and observing the facts in the trial. Starting from the attitude of prudence, avoiding carelessness, both formal and material to the existence of technical skills. Basically, the judge's decision is difficult for both parties to accept, but the judge at least tries to make the person who will receive the decision feel relieved and satisfied. What needs to be done is to provide reasons or considerations that follow the values of truth and justice. And judges must also use common sense or their ratios by paying attention to previous judges' decisions to avoid glaring disparities.

In making a decision, the judge may not be intervened by any party. Law Number 48 of 2009 concerning Judicial Power states that judges are obliged to explore, follow, and understand legal values and a sense of justice that live in society. Judges are also obliged to consider the nature of good and evil in the defendant. In relation to the disparity of punishment, disparity is a manifestation of the independence of judges. Variables that cause disparity in decisions are not only single, but the judge is the most influential factor. Because it feels worrying, if there is arbitrariness. Future efforts made are to make standard guidelines in sentencing, and which minimize the interpretation of judges. This is also in line with the results of research conducted by Mark Osler that in the 1980s, there was a disparity in decisions by federal judges, which made the difference between one judge and another. This prompted a legislative effort to develop uniform guidelines. Through the manual for the decision of the Supreme Court in 2005, which made punishment guidelines that are technical in nature and merely a guide, it is not a mandatory order, but this is actually suspected to be the cause of limited discretion, which makes judges unable to be creative (Osler, 2012).

The Disparity of Criminal Implementation in Case of Child Intercourse and Molestation As Seen From The Perspective of Decidendic Ratio Theory

Basically, judges are not unaware of this disparity issue. Although the severity of the sentence is under the authority of judges of first instance and appeal, in several decisions, the Supreme Court judge at the cassation level tried to correct the verdict on the grounds that the sentence was disproportionate. Proportionate punishment is the imposition of punishment based on the seriousness of the crime committed. According to Eva Achjani Zulfa, the idea of proportional punishment then developed into an attempt to reduce the subjectivity of judges in deciding cases. Judge's discretion is very likely to be misused, so the compromise step that needs to be taken is to make sentencing guidelines (Zulfa, 2011).

Conclusion

There are two conclusions found in this research: First, the factors that cause criminal disparities in criminal cases with children as perpetrators and victims are internal and external factors. Internal factors is in the form of a judge's personality. Therefore, judges are required to act professionally. While external factors are legal factors or the legislation itself and the situation factor in the person who is in the perpetrator/defendant.

Second, judges in making decisions in cases of sexual intercourse or abuse with children as perpetrators or as victims must be careful in seeing and observing the facts in the trial. Starting from the attitude of prudence, avoiding carelessness, both formal and material to the existence of technical skills. Basically, the judge's decision is difficult for both parties to accept, but the judge at least tries to make the person who will receive the decision feel relieved and satisfied with the judge's decision. The judge needs to give reasons or considerations that follow the values of truth and justice and pay attention to victims' rights, especially child victims. And judges must also use common sense or rational thinking by paying attention to previous judges' decisions so that there are no glaring disparities.

Based on the conclusions above, some suggestions are made: Future punishment policies to reduce the occurrence of criminal disparities in the decisions of criminal cases with children as victims can be carried out by making sentencing guidelines. In addition, judges who handle sexual intercourse and obscenity cases in the Child Protection Act must pay attention to the decisions of previous judges (jurisprudence) so that there are no glaring disparities.

Bibliografi

- Anwar, Khoirul. (2021). Pancasila Village, Multicultural Education and Moderation of Diversity in Indonesia. *Nazhruna: Jurnal Pendidikan Islam*, 4(2), 221–234.
- Faisal, S. H., & Rustamaji, Muhhammad. (2020). *Hukum Pidana Umum*. Thafa Media.
- Gagnon, Analisa, & Fox, Kathleen A. (2021). Community satisfaction and police officer understanding of community expectations: a quantitative and observational analysis. *Criminology, Crim. Just. L & Soc'y*, 22, 1.
- Joleby, Malin, Lunde, Carolina, Landström, Sara, & Jonsson, Linda S. (2021). Offender strategies for engaging children in online sexual activity. *Child Abuse & Neglect*, 120, 105214.
- Muchsin, H. (2011). Perlindungan Anak Dalam Perspektif Hukum Positif (Tinjauan Hukum Administrasi Negara, Hukum Perdata, dan Hukum Pidana). *Varia Peradilan–Majalah Hukum Tahun XXVI No*, 308.
- Muhammad, Rusli. (2013). *Lembaga pengadilan Indonesia beserta putusan kontroversial*. UII Press.
- Nonnenmacher, Jakob, & Marx Gómez, Jorge. (2021). *Unsupervised anomaly detection for internal auditing: Literature review and research agenda*.
- Osler, Mark. (2012). The promise of trailing-edge sentencing guidelines to resolve the conflict between uniformity and judicial discretion. *NCJL & Tech.*, 14, 203.
- Rifai, Achmad. (2010). *Penemuan hukum oleh hakim: dalam perspektif hukum progresif*. Sinar Grafika.
- Rutter, Natalie. (2021). Social media: A challenge to identity and relational desistance. *Probation Journal*, 68(2), 243–260.
- Schlagdenhauffen, Régis. (2022). *Condemning obscenity in the name of public modesty (France, 1831-1981)*.
- Soekanto, Soerjono, & Sulistyowati, B. (2013). *Sosiologi Suatu Pengantar: Rajawali Pers*. Jakarta.
- Suseno, Sigid, & Putri, Nella Sumika. (2013). *Hukum pidana Indonesia: perkembangan dan pembaharuan*. PT Remaja Rosdakarya.
- Utama, Andrew Shandy. (2021). Law and Social Dynamics of Society. *International Journal of Law and Public Policy*, 3(2), 107–112.
- Zulfa, Eva Achjani. (2011). *Pergeseran paradigma pemidanaan*. Lubuk Agung.