

## **Basic Considerations of Judges in Imposing Criminal Code Article 81 Paragraph 2 of the Child Protection Law Against Children Who Have Sexual Intercourse on the Basis of Consent**

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### **Abstract**

*In this study, the author raises the issue of the basis of the judge's consideration in imposing punishment on children who commit Copulation on the basis of mutual consent. This is motivated because it is not clearly regulated in the Child Protection Law regarding the crime of sexual intercourse committed by a child if the sexual intercourse is carried out on the basis of mutual consent without any element of violence or persuasion from the perpetrator to the victim, causing a vacuum of norms. The formulation of this problem is How is the evidentiary arrangement of the case of sexual intercourse committed by a child on the basis of mutual consent in Indonesia and What is the basis for the judge's consideration in imposing a criminal decision based on Article 81 paragraph (2) of the Child Protection Law against children who have sexual intercourse on the basis of mutual consent. The objectives in this study are (1) To know and analyze the criminal proof of sexual intercourse committed by children on the basis of mutual consent in Indonesian criminal law enforcement. (2) To know and analyze the basis of the judge's consideration in handing down a verdict against minors who have consensual sexual intercourse. To analyze this problem, the theories that will be used as guidelines for analysis are the theory of evidence, the theory of justice, expediency and legal certainty. This type of research uses normative legal methods consisting of a statutory approach (statue approach), conceptual approach (conceptual approach) and case study approach (case law). The results of this study, the author concludes that the Child Protection Law does not recognize the term consensual because the position in child sexual intercourse against children who are consensual, children are seen in the position of victims. Although in the proof the act is done consensually or child fornication. The criminal regulation is regulated in Article 81 of Law Number 35 of 2014 concerning Child Protection.*

**Keywords: Evidence, Intercourse of Children, Judge's Consideration**

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## **INTRODUCTION**

Children are an inseparable part of human survival, children are the next generation of a family as the smallest scope and in a broader scope are the successor to the sustainability of a nation. Children are an asset to the nation because children are one of the human resources that have a strategic role as a successor to the ideals of the nation's struggle (Erdianti & Fatih, 2019). Therefore, guidance and protection are very important to ensure the quality of children's physical, mental and social growth and development. Maidin Gultom said that "childhood is a period of sowing seeds, erecting stakes, making foundations, which can also be referred to as a period of forming the character, personality and character of a human being, so that they will have the strength and ability and stand firm in life" (Iman, 2018).

Children have rights that are specifically different from adult human rights, because children have physical and mental conditions that are still unstable, and in all circumstances these rights must take precedence over other interests. With these unstable physical and mental conditions, in many cases children must receive special treatment and protection, especially against actions that can harm the development of the child himself and society (Al Faiq & Suryaningsi, 2021). Children need conditions in the family and society that allow them to grow and develop naturally and optimally in accordance with their dignity as children to become adult humans. The surrounding environment also affects children's growth in everyday life, this is

because the formation of morals, behavior and morals is a reflection of our daily lives which can be seen from developments in the daily environment (Carmela & Suryaningsi, 2021).

In addition, children are the hope of parents, the hope of the nation and the state that will continue the baton of development. Children have a strategic role in ensuring the existence of the nation and state because this generation will build the nation and state in the future (Pratama et al., 2023). Children's rights must be fulfilled to achieve optimal child development, both in physical, mental and social development. Coaching of children must be done as early as possible, especially that childhood is a period of character formation, personality and character of a human being (Ramadhani, 2022).

Human experiences in childhood will carry over into adulthood. Trauma both physical and psychological will greatly affect the development of children, because not only parents have the duty to protect and provide education for children, but the government also has an obligation to provide protection for children (Hamzah, 2020). Indonesian child protection means protecting the potential of human resources and building Indonesian human beings as a whole, towards a just and prosperous society, materially and spiritually based on the state foundation, namely Pancasila and the 1945 Constitution. Thus, child protection is part of national development and Indonesian human development as a whole and also of course protects children from crimes that are increasingly prevalent in this era of globalization (Lubis et al., 2022).

Crime is not something that can be predicted in advance, crime can occur anywhere and anytime. Crime is an act prohibited by the state because the occurrence of crime will cause disruption to life in a country, therefore the state has the authority to impose sanctions on criminals. The crime of intercourse against minors is one type of crime that often occurs today, often committed by perpetrators and victims of fellow children (Sunarso et al., 2022).

In general, the form of protection of children is regulated in Book II of the Criminal Code (KUHP), but according to the principle of *Lex Specialis Derogat Legi Generalis*, in this case related to child protection has been regulated more specifically in Law Number 23 of 2002 concerning Child Protection as amended twice, most recently by Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law (hereinafter referred to as the Child Protection Law). Historically, the urgency of the establishment of the Child Protection Law is to provide a complete, comprehensive and comprehensive conception of protection for children by considering the principles of non-discrimination; the best interests of the child; the right to life, survival, development and respect for children's opinions. The number of new offenses regulated in the Child Protection Law is the Government's seriousness in protecting and upholding the dignity of children through the policy of drafting the Law.

The development and acceleration of science and technology, cultural infiltration and development developments have an influence on human behavior as a member of a society or even a country, so that existing crimes will also be increasingly unique with various modes of implementation (Amin, 2020). Currently, there are developments in legislation such as Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence (hereinafter referred to as the TPKS Law). The main substance of the TPKS Law is regulated in Article 3, which includes preventing all forms of sexual violence; handling, protecting and restoring victims; carrying out law enforcement and rehabilitating perpetrators; realizing an environment without sexual violence and ensuring the non-repetition of sexual violence (Nurisman, 2022).

Children as in Law Number 11 of 2012 concerning the Child Criminal Justice System (hereinafter referred to as the SPPA Law) are qualified into 3 (three) definitions, namely Children in conflict with the law, where the child is suspected of committing a criminal offense, children who are in conflict with the law, namely children who are in conflict with the law either as

witnesses and / or victims of criminal acts and children who are victims of criminal acts, hereinafter referred to as Child Victims where they experience physical, mental, and / or economic losses caused by criminal acts (Aryaputra et al., 2019).

Article 3 of the SPPA Law, among others, explains that every child in the criminal justice process has the right to obtain legal aid and other assistance effectively and is separated from other public courts. This is certainly limiting to the subject of children in the SPPA Law, including Child Perpetrators and Child Victims. As in Article 4 it is also explained that children who are undergoing criminalization are entitled to parole, reduction of criminal period which shows that the needs of children must be different from the criminal justice process as regulated in the Criminal Procedure Code.

The SPPA Law also recognizes Diversion, which is the transfer of the settlement of children's cases from the criminal justice process to the process outside the criminal justice by using a restorative justice approach, which means case settlement by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair settlement by emphasizing the return or restoration of the situation before the crime was committed. However, the arrangements and procedures for Diversion are regulated limitatively in Article 7 paragraph (2) of the SPPA Law. Looking at Article 81 paragraph (2) Jo Article 76D as the usual application of the article applied by law enforcement officials in suspected criminal acts of sexual intercourse committed by children on a consensual basis with a criminal threat exceeding 7 years, Diversion cannot be applied in these circumstances (Hikmah, F., & Yanto, A. 2023)

## RESEARCH METHODS

This research uses normative legal research in the form of library research using 3 legal materials, namely primary legal materials, secondary legal materials and tertiary legal materials. Normative legal research is a process for finding legal rules, legal principles and legal doctrines in order to answer the legal issues at hand so that new arguments, theories or concepts are obtained as prescriptions in solving problems.

This study aims to examine what is the urgency of the Judge's consideration in imposing punishment on children who have sex on the basis of mutual consent. There is a vacuum of norms that regulate the sexual intercourse of children with the conditions of such cases, while children in any condition must get protection from such acts according to Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection as last updated by Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection, When viewed from the elements, it only regulates the crime of sexual intercourse committed with the element of coercion and the element of lies or persuasion from the perpetrator, but does not clearly regulate the elements related to the sexual intercourse carried out on the basis of mutual consent without the element of violence or persuasion from the perpetrator to the victim. The elements of what is regulated in the Child Protection Law include all criminal threats used to protect the rights of children from perpetrators of Pedophilia. However, it does not go into detail if the crime of sexual intercourse is committed by a child perpetrator and victim, so that many children's rights, especially the perpetrator, are protected.

The technique for analyzing in this research uses a systematic interpretation technique of the findings of the research results and Interpreting laws and regulations by connecting them with other laws or laws or with the entire legal system, so that they must not deviate or get out of the legislative system or legal system. The relationship between all regulations is not solely determined by the place of the regulations against each other, but by common goals or concurrent

principles that underlie the regulations.

## **RESULT AND DISCUSSION**

### **Evidentiary Arrangements for Sexual Intercourse Committed by a Child on the Basis of Consent**

Children who are victims of criminal acts are unable to resist the perpetrators due to the weakness of their position. In cases of sexual intercourse, victims are usually vulnerable girls. While the perpetrators are boys who are physically stronger. Child protection needs to be upheld for the future of the nation.

Evidence is a legal effort that provides clarification about the legal position of the parties in the trial. It is based on the legal basis expressed by the parties, helping the judge make the right decision. Evidence aims to find the truth of an event.

Consensual intercourse involves mutual desire without coercion. However, the Child Protection Act views children as victims, so underage copulation is considered an offense. The fundamental difference between sexual harassment and consensual sex is desire; harassment occurs when one party does not want to, while consensual sex occurs when both parties want to without coercion or threats. Examples of sexual harassment include:

1. Unwanted sexual advances, requests for sexual favors, verbal or other physical, explicit or implicit sexual behavior.
2. Verbal harassment of a sexual nature, including jokes directed at sexual acts or orientation.
3. Unwanted touching or physical contact.
4. Unwanted sexually explicit photos or text messages.

Consensual sex, on the other hand, is consent to participate in sexual activity. Before having sex with someone, one party should know the other party also wants to do it with the person who invited them. It is also important to be honest with your partner about what you want and don't want. In other words, a person consents to sexual activity if they :

1. Agree with the choice.
2. If someone says "no" to any kind of sexual activity, it means that they do not approve of it.

However, it should also be noted that if one does not say "no" then it does not mean that one is also consenting. It is important to understand that consent and asking for consent is about setting one's personal boundaries and respecting one's partner's boundaries. This includes checking or confirming if anything is unclear. Both parties must agree to have intercourse for the activity to be consensual sex.

Without the consent and enthusiasm of the partner, the sexual activity will become sexual harassment or violence. The attitude and feeling of enthusiasm is what must be underlined. Because if your partner says "yes" without feeling and enthusiasm, then "yes" does not mean consent. It is important to understand that consent must involve freedom and the capacity to consent. So saying "yes" is not enough to mean consent.

Being coerced, pressured, intimidated, manipulated, deceived, or feared, will take away one's freedom and capacity to make choices in many different situations. For example, if one is in a toxic or abusive relationship, they may say "yes" to something out of fear for their own or others' safety. So that "yes" does not mean that one actually wants it. Because there is a fear that takes away their freedom and capacity to make real choices. For example, spreading lies about someone's sexuality as a form of threat, or making someone feel worthless. There are several

procedural legal arrangements based on the Law and Guidelines for the implementation of case handling related to proving cases involving children either as perpetrators and / or as victims, namely as follows.

### **Evidentiary Arrangements in KUHAP**

In the Criminal Procedure Code, there are several proof systems that are often used, namely the proof system based on the judge's belief on rational grounds, the proof system based on positive law and the proof system based on negative law. In the context of evidence, Article 184 paragraph (1) of the Criminal Procedure Code (KUHAP) states that valid evidence is witness testimony, expert testimony, letters, instructions and testimony of the defendant. Furthermore, to determine a person can be sentenced to punishment, it is required that there are at least 2 (two) valid evidence (Article 183 KUHAP).

The proof of the crime of sexual intercourse committed by a child against a child often experiences various obstacles, one of which is that most of the perpetrators of the crime do not admit their actions, coupled with victims who also do not want to provide information, even though sometimes only the victim knows about the criminal act of sexual intercourse against the child. The type of evidence that can be used in the crime of sexual intercourse is to use negative evidence, which can be used as a basis for proving the case of sexual intercourse, this negative evidence says that the judge may impose a sentence, if the judge is convinced by valid evidence that an act committed by the defendant has occurred (Siagian & Sumarsih, 2020).

Regarding the age limit of minors, Article 330 of the Criminal Code determines that minors are those who have not reached the age of 21 (twenty-one) years and have not previously married. Furthermore, in article 47 of Law Number 1 of 1974 concerning Marriage that includes children who have not reached 18 years, Children according to Law Number 11 of 2012 concerning the Child Criminal Justice System. "Article 1 (3) a child is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years old who is suspected of committing a criminal offense. Meanwhile, according to Law Number 23 of 2022 as amended twice, most recently by Law Number 17 of 2016 concerning Child Protection. "Article 1 a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb."

However, linking the age limit of minors in Law Number 1 of 2023 concerning the Criminal Code explains in Article 150 that a child is someone who is not yet 18 (eighteen) years old, although the enactment of the Law has not yet been implemented but there is appropriate relevance regarding the regulation of children in Law Number 11 of 2012 concerning the Juvenile Justice System and Law Number 23 of 2002 as amended twice last time with Law Number 17 of 2016 concerning Child Protection.

### **Evidentiary Arrangements in Law No. 11/2012 on Juvenile Criminal Justice System (SPPA)**

The Child Protection Law provides special protection for children who are victims of the crime of sexual intercourse, which applies severe penalties for any perpetrator of the crime of sexual intercourse against children. The process of proving juvenile criminal offenses is not regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, in terms of evidence in proving juvenile criminal cases, it is not specifically regulated, therefore it still refers to KHUAP.

For the crime of sexual intercourse that is resolved through the court, in the provisions of Law number 11 of 2012 concerning the Juvenile Criminal Justice System that the juvenile trial process has legal protection for children. This is based on the provisions of Article 53 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which states: "(1) children are tried in a special room for children, (2) the waiting room for children is separated from the waiting room for adult trials, (3) the time for children's trials takes precedence over the time for adult trials." In the provision of protecting the confidentiality of children both as perpetrators of

criminal acts and as victims of criminal acts, the trial process for children is declared closed to the public. This is based on the provisions of Article 54 of Law Number 11 of 2012 concerning the Child Criminal Justice System, stating: judges examine children's cases in a hearing that is declared closed to the public, except for the reading of the decision.

The juvenile trial process which is declared closed to the public, then the parties who can attend the juvenile trial process based on the provisions of Article 55 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, states:

- 1) In a juvenile hearing, the judge shall order the parent/guardian or companion, advocate or other legal aid provider, and Community Counselor to accompany the juvenile;
- 2) In the event that the parent/guardian and/or companion is not present, the hearing shall continue with the presence of an advocate or other legal aid provider and/or Community Counselor;
- 3) In the event that the judge does not implement the provisions as stipulated in paragraph (2), the juvenile hearing shall be null and void.

In the crime of sexual intercourse committed by a child to a child, the legal protection of children is not only for the victim who is a child but legal protection must also be given to the child as the perpetrator of the crime of sexual intercourse. In the application of protection against children in sexual crimes, both victims and perpetrators are given legal protection based on the SPPA Law. The principle of legal protection of children must be in accordance with the Convention on the rights of the Child as ratified by the government of the republic of Indonesia by Presidential Decree No. 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child. Article 1 point 2 of the SPPA Law states that children in contact with the law are children in conflict with the law, children who are victims of criminal acts, and children who are witnesses to criminal acts. The Child Justice Law does not only protect children as victims or witnesses of criminal acts but also protects children as perpetrators of criminal acts who are considered children in conflict with the law (Ananda, 2018).

### **Evidentiary Arrangements of Law Number 12 Year 2022 on Sexual Violence Crime (TPKS)**

The presence of the TPKS Law is expected to provide more detailed and clear rules for criminal acts of sexual violence, especially the previous existing rules which have been deemed incomplete and less accommodating in resolving cases of sexual violence, which in the end is expected to prevent violence. In the settlement of criminal cases of sexual violence, the TPKS Law emphasizes that the settlement cannot be carried out outside the court, unless the perpetrator is a child, in addition to providing protection and the best interests of the victims, on the other hand this shows that the TPKS Law also prioritizes the rights of children.

In relation to evidence, the provisions of Article 1 paragraph (1) of the TPKS Law state that the crime of sexual violence is any act that fulfills the elements of a criminal offense as regulated in this Law and other acts of sexual violence as regulated in the law to the extent specified in this law. From the definition of Article 1 paragraph (1), it formulates two forms of proof that must be proven, namely proof of the elements of the article charged and proof of the elements of sexual violence in the form of a new definition, which in the TPKS Law is detailed and clearer, for example non-physical sexual abuse which is a new definition. With the enactment of the TPKS Law in terms of proving the crime of sexual violence is now expected to be easier, the TPKS Law related to proof is regulated in Article 24 and Article 25, valid evidence in proof does not only refer to proof that has only been in the form of a Visum.

## **Evidentiary Arrangements in Prosecutor's Guideline No. 1 of 2021 on Access to Justice for Women and Children in Criminal Case Handling**

The proof of the criminal case of rape or sexual violence against children in the Prosecutor's guideline Number 1 of 2021, the public prosecutor in qualifying the facts of the related actions must pay attention to the intersection between intercourse, sexual violence or rape in several laws and regulations through the pre-prosecution stage, namely where the Public Prosecutor has the authority to examine and conduct research on the completeness of a case file.

After receiving or receiving back the case file from the investigation which has been declared complete by the Public Prosecutor, then for the success of the prosecution and in order to determine whether the case is sufficiently feasible to be submitted to the Court, in this case the Public Prosecutor can conduct a preliminary meeting with the victim and / or witnesses in the case of a Child where the meeting can be held after the submission of the suspect and evidence from the Police investigator to the Public Prosecutor (Phase II).

The preliminary meeting conducted by the public prosecutor considers that in the case of a child there are several conceptions that must be considered by the Public Prosecutor as *Dominus Litis* or Controller of the Case, namely as follows:

- a. The course of the judicial process;
- b. Rights of witnesses/ or victims including the right to claim damages, restitution, and/or compensation, as well as the procedures for claiming them;
- c. Consequences of the Victim's/Witness's decision to attend or not attend the hearing to ensure the victim and/or witness can understand the situation;
- d. Carrying out the functions of the Law as a form of the government's seriousness in the field of prosecution in handling cases involving children.

As it was deemed sufficient by the Public Prosecutor in conducting the preliminary meeting, then the public prosecutor compiled an Indictment by describing the facts and actions related to the case to the extent possible to avoid descriptions that were too detailed, vulgar and excessive in the Indictment while still paying attention to the provisions of Article 143 of the Criminal Procedure Code, namely by continuing to pay attention to careful, clear and complete descriptions in the preparation of the Indictment. The avoidance of descriptions that are too detailed, vulgar and excessive as referred to above must be of particular concern to the Public Prosecutor as it is intended to respect the human rights, dignity and privacy of victims and/or child perpetrators and prevent revictimization arising. In addition, in the preparation of the Indictment, the Public Prosecutor must also pay attention to the Identity of the Child by keeping the identity, information and/or documents confidential as referred to in the laws and regulations.

## **CONCLUSION**

The Child Protection Law does not regulate and recognize the term consensual even though in the proof the act of copulation is carried out based on mutual consent. The position in child sexual intercourse with a child that is consensual, the child is seen in the position of a victim and based on the Criminal Code of 2023 Article 411 paragraph (2) parents can still make reports and complaints. The regulation of child sexual intercourse is regulated in Article 76D which then for the punishment is regulated in Article 81 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Based on Law Number 11 of 2012 concerning the Child Criminal Justice System, children who are over 12 (twelve) years old but not yet 18 (eighteen) years old are considered capable of taking responsibility for the criminal acts they commit. Judges in sentencing child sexual intercourse against children must consider the future of the child and prioritize the best interests of the

child and be based on the philosophy of restorative punishment by emphasizing recovery and not retaliation, based on the provisions of Law Number 11 of 2012 concerning the Child Criminal Justice System, children as perpetrators of criminal acts are still children who must be protected, assisted, fostered so that they can return to being good. The crime of sexual intercourse committed by a child against a child is a criminal offense that cannot be resolved through diversion, but restorative justice efforts must still be carried out to restore the good name of the child and parents.

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