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Sexual Violence That Occurs Between Children in the Perspective of the Juvenile Criminal Justice System in Indonesia (Case Study: District Court Decision No. 13/PID.SUS-ANAK/2019/PN SRG)

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13 STRACT

A child is a young human being below the age of puberty or below the legal age of majority. Children need to be taken seriously. However, as the most vulnerable and weak social beings, ironically, children are often placed in the most disadvantaged position, do not have the right to speak out, and they are often victims of violence and violations of their rights. We can also see from various mass media that almost every day various types of crimes occur, for example sexual violence. This crime can also be committed by anyone, whether children, elderly people, men or women. Sexual violence can be defined as an act or intimidation related to intimacy or sexual relations committed by the perpetrator against the victim by force, which results in the victim suffering physically, materially, mentally and psychologically. As a universal crime, this crime can be found all over the world, at every level of society, regardless of age and gender. The act of sexual violence by children that occurs is a problem that needs special attention by the government because it is related to the morality of the nation's generations. In this case the court which is the agency or institution that handles legal matters needs to pay attention to cases related to children, especially sexual crimes. Courts need to provide the most appropriate sanctions on children who commit criminal acts, especially sexual violence so that the perpetrators are deterred.

Keywords: Children, Sexual Violence, Universal Crime

1. INTRODUCTION

In this era, we can see from various mass media that almost every day there are various types of crime. This crime can also be committed by anyone, such as children, elderly people, men, or women. Despite the fact that the number of crimes committed by children is relatively small, it cannot be denied that crimes committed by children occur everywhere.

According to the General Indonesian Dictionary, etymologically, it means children with humans who are still small or humans who are not yet mature [1]. Meanwhile, according to Article 1 Paragraph (1) of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, defines child as anyone who is below 18 years of age [2].

Ironically, children as social beings who are weak and vulnerable are often in the most disadvantaged position, they do not have the right to voice their opinions, and often become victims of violence and violations of rights

that violate them [3]. Therefore, children need intensive attention.

Sexual violence is an act or threat related to intimacy or sexual relations by coercion by the perpetrator against the victim, this act can cause physical, material, mental and psychological suffering for the victim. As a common crime, this crime can be found all over the world, at every level of society, regardless of age and gender.

The majority of sexual violence against children is committed by people known to their victims, about 30% perpetrated by the child's family, such as a sibling, father, uncle, or cousin. 60% of perpetrators are other acquaintances such as family colleagues, caregivers, or neighbors. Then, about 10% of perpetrators of child sexual abuse are people who are not known to the victim [4]. This happens because children are still vulnerable, weak, and easily seduced, so legal action is needed to protect the rights of children who are victims of sexual violence.

As perpetrators of crimes of sexual violence, there are several factors that influence children to commit crimes of sexual violence. For example, because children lack or do

not get love and supervision from parents, environmental factors, or technological advances that make it easier for children to access content that can damage the child's soul. Sexual violence by children is a problem that requires special attention from the government because it is related to the morality of the nation's generations. In this case, the court as the agency or institution that handles legal issues pays attention to cases involving children, especially sexual crimes. Courts need to impose the most appropriate sanctions on children who commit crimes, especially sexual violence in order to create a sense of deterrent for the offenders.

Since the issuance of Law Number 23 of 2002 concerning Child Protection on October 17, 2014 it is used as a reference to capture perpetrators of criminal acts of sexual violence, it has been changed with the issuance of Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection. As a result, perpetrators of sexual violence are no longer prosecuted according to the provisions of the Criminal Code, but more specifically, Law Number 35 of 2014 concerning Child Protection is applied. This is in accordance with the principle of *lex specialis derogat legi generalis*. This essentially means that more specific rules will prevail over more general rules. In this case, Law no. 35 of 2014 overrides the Criminal Code.

Through Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA), the government has made efforts to prevent and overcome juvenile delinquency by organizing a Juvenile Criminal Justice System. According to this law, there are three categories of children involved in a crime, namely children who are perpetrators of criminal acts, children who are victims of criminal acts and children who are witnesses of criminal acts. Second, regarding the imposition of sanctions. In Article 69 paragraph (2) of the SPPA Law, it is stated that perpetrators of child crimes can be subject to two types of sanctions, namely actions for perpetrators of criminal acts under the age of 14 years and criminal sanctions for perpetrators of criminal acts aged 15 years and over [5].

This law also regulates diversion that must be carried out by law enforcement to prevent perpetrators from the formal justice system. The goals to be achieved from the diversion process are:

1. Achieving peace between victims and perpetrators;
2. Resolving child cases outside the judicial process;
3. Protecting children from deprivation of liberty;
4. Encouraging people to participate; and
5. Instill a sense of responsibility in children.

The diversion requirements are regulated in Article 7 paragraph (2) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU SPPA), namely:

1. Not a repeat action
2. The penalty is under 7 years.

The Indonesian government has given serious attention to children's rights with the existence of various laws and regulations that regulate children's welfare, and by having ratified and adopted the principles of the Convention on

the Rights of the Child, based on Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child, which states that, all children without exception have the rights stated in the declaration, without distinction or discrimination based on race, color, sex, language, religion, political understanding, and other beliefs, and themselves or their families [6].

Therefore, we can know that sexual violence can be committed between children. As in the District Court Decision No. 13/Pid.Sus-Anak/2019/ PN Srg. Broadly speaking, the chronology of the case is as follows: Yulianingsih is a woman who was 11 years old at the time of the incident. He was the victim of a criminal act of sexual violence committed by 17-year-old Aries Naziullah. Aries Naziullah had forced sexual intercourse on Yulianingsih 14 times, but he only remembers 7 times. Yulianingsih was treated this way until the last time on April 2, 2019. Aries also threatened to hit Yulianingsih when she refused. The evidence for Yulianingsih's 'visum et repertum' letter stating that there was a sexual relationship was also presented at the trial, then the victim's friends were also pressing the act. Aries is charged with Article 81 paragraph (1), Article 81 paragraph (2), and Article 82 paragraph (1) of the Law of the Republic of Indonesia No. 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 jo. Article 64 paragraph (1) of the Criminal Code. However, based on the judge's decision, Aries was declared free because he was still a minor.

According to articles 81 and 82 of Law No. 35 of 2014 concerning Child Protection, punishment for perpetrators of sexual crimes against children is imprisonment for a minimum of 5 years and a maximum of 15 years and a maximum fine of 5 billion rupiah.

Based on the background described above, the authors formulate the problem as follows: What is the appropriate criminal sanction to be given to defendants who commit acts of child sexual violence in court decision No. 13/Pid.Sus-Anak/2019/PnSrg?

2. RESEARCH METHOD

The type of research method used in this study is normative. The research specification used in this research is descriptive-analytical, descriptive because it wants to provide a comprehensive and systematic picture about the research focus. Meanwhile, analytical because it will analyze the data obtained. Types and sources of data include: primary law object such as The 1945 State Constitution of the Republic of Indonesia, law no. 8/1981 of The Republic Of Indonesia On The Code Of Criminal Procedure, Law No. 39/1999 Concerning Human Rights, Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child

Protection Act, Convention on the Rights of the Child, secondary law object such as literatures, legal expert opinion, law journals, and internet news that are related to the research. The analysis technique used by the researcher is qualitative, this analysis is used to find, provide existing data, and analyze existing problems then interpret it to get a conclusion from the problems of this research.

3. DISCUSSION

The appropriate criminal sanctions to be given to defendant who commit sexual violence against children in Court Decision No. 13/Pid.Susanak/2019/PnSrg

In general, sexual violence against children is the involvement of children in the form of sexual activity where the sexual activity occurs before the child reaches the age limit carried out by someone who is not yet and/or older than the child as stipulated by the law of the country concerned [7].

Currently, we can see from various mass media that children are often involved in criminal acts, including sexual violence. They are involved both as victims and as perpetrators. Despite the fact that the number of sexual violence perpetrated by children is relatively small, it cannot be denied that sexual violence perpetrated by children occurs everywhere.

The application of criminal sanctions against perpetrators of sexual violence against children is not only against adults, children who become perpetrators of sexual violence against children also have legal consequences. Perpetrators of sexual violence are no longer charged with the articles contained in the Criminal Code, but are charged with Law Number 35 of 2014 concerning Child Protection. This is in line with the principle of *lex specialis derogat legi generali*. In this case, Law no. 35 of 2014 set aside the Criminal Code, so Article 76D of Law no. 35 of 2014 concerning Child Protection is used to overcome this. In the article it is explained that everyone is prohibited from committing violence or threats of violence to force a child to have intercourse with them or with other people.

The government also seeks to prevent and overcome child delinquency by implementing the Juvenile Criminal Justice System (SPPA) through Law no. 11 of 2012 concerning the Juvenile Criminal Justice System with the aim of ensuring the protection of children in conflict with the law.

According to Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA), there are 3 (three) groups regarding children in conflict with the law, namely:

1. A child who is suspected of having committed a crime where the child is 12 years old but has not yet reached 18 years of age can be said to be a child in conflict with the law.
2. Children who are not yet 18 years old who have experienced suffering and caused physical and mental harm to the child, where this is also called a child who is a victim of a crime.

3. Children who are not yet 18 years old where the child can provide information for the benefit of the application of justice regarding a criminal case that he has heard, seen and experienced. Therefore, the child is categorized as a child who is a witness to a crime.

Considering the nature of the child and for the protection of the child, cases of children dealing with the law must be tried in the juvenile criminal court which is in the general court environment. This happens because the imposition of a crime on a child is an *ultimum remedium* or last resort. The litigation process in child cases must also be carried out by special officials who understand children's problems. However, before entering the court process, law enforcers are required to seek a settlement process outside the court, namely through a diversion route based on a restorative justice approach. In accordance with Article 96 of the SPPA Law, law enforcement officers who intentionally do not carry out their obligations, namely seeking diversion, will be subject to a maximum imprisonment of 2 (two) years or a maximum fine of Rp. 200,000,000.00 (two hundred million rupiah).

Restorative justice is the settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation.

Based on the United Nations Standard Minimum Rules for The Administration of Juvenile Justice (The Beijing Rules), diversion is the granting of authority to law enforcement officials to take policy actions in dealing with or resolving child offenders' problems by taking formal steps, including stopping or continuing or releasing from the criminal justice process or return or hand over to the community and other forms of social services. The application of diversion can be carried out at all levels of examination, intended to reduce the negative impact of children's involvement in the judicial process.

According to Article 8 paragraph (3) of the SPPA Law, the diversion process must pay attention to:

1. The interests of the victim;
2. Child welfare and responsibilities;
3. Avoidance of negative stigma;
4. Avoid retaliation;
5. Community harmony; and
6. Propriety, decency, and public order

The diversion requirements are regulated in Article 7 paragraph (2) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU SPPA), namely:

- a. Not a repeat action
- b. The penalty is under 7 years.

This requirement is cumulative or both must be met, if one of them is not met then diversion cannot be applied.

The concept of diversion and restorative justice in Indonesia is a new concept. The concept of diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside of criminal justice which aims to provide protection for children in

conflict with the law. Meanwhile, the concept of restorative justice is the process of resolving acts of law violations that occur by bringing the victim, and the suspect together sits in a meeting to talk, then there is a mediator who gives the suspect the opportunity to provide a clear picture of the actions he has taken [8].

The diversion process will result in a diversion agreement which must obtain the consent of the victim and/or the victim's child's family as well as the willingness of the child and his family. The results of the diversion agreement can be in the form of peace with or without loss, handover to parents/guardians, participation in education or training in educational institutions or LPKS for a maximum of 3 months or community service. The juvenile criminal justice process will continue if the diversion process does not result in an agreement or the diversion agreement is not implemented.

Sanctions are steps for imposing punishment by a certain state or group against a violation committed by a person or group that is coercive.

In criminal law there are two types of sanctions that have the same position, namely:

- a. Criminal sanctions
Is the type of sanction that is most widely used in sentencing someone who is found guilty of committing a criminal act.
- b. Action Sanction
It is a type of sanction outside the Criminal Code, such as hospitalization, and the return of the perpetrator to his parents or guardians for people who are unable to take responsibility and minors.

Then, according to the SPPA Law, children can be subject to two types of sanctions, namely:

- a. Sanctions for action (for children who commit crimes who are 14 years old)
 - 1) Return to parent/guardian;
 - 2) Submission to someone;
 - 3) Treatment in a mental hospital;
 - 4) Treatment in LPKS;
 - 5) Obligation to attend formal education and/or training held by the government or private bodies;
 - 6) Revocation of driving license; and/or
 - 7) Repairs due to criminal acts.

- b. Criminal sanctions (for children who commit crimes aged 15 years and over)
Child criminal sanctions are divided into 2 groups, namely:

- 1) The principal crimes consist of:
 - Criminal warning;
 - Criminal conditions with conditions, which consist of: coaching outside the institution, community service, or supervision;
 - Work training;
 - Coaching within the institution;
 - Jail.
- 2) Additional penalties consist of:
 - Deprivation of profits derived from criminal acts; or
 - Fulfilment of customary obligations.

In imposing criminal sanctions on children in conflict with the law, judges must pay attention to their rights as children. Article 28B paragraph (2) of the 1945 Constitution explains that every child has the right to survival, growth and development and the right to protection from violence and discrimination.

According to the researcher, the act of returning the child's parents to the defendant in Decision Number 13/Pid.Sus-Anak/2019/PN Srg is not appropriate because according to the diversion requirements as regulated in Article 7 paragraph (2) of the SPPA Law, this action does not fulfill one of the diversion requirements, which is the child is threatened with imprisonment under 7 (seven) years.

Due to the principle of *lex specialis derogate legi generali*, Article 76D of Law no. 35 of 2014 concerning Child Protection is used to overcome this. Anyone who is found to have violated Article 76D will be subject to a criminal offense as stated in Article 81 paragraph (1) of Law no. 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. It is explained in article 81 paragraph (2), for anyone who deliberately commits a trick, a series of lies, or persuades a child to have intercourse with him or with another person, will be sentenced to a minimum of 5 years in prison and a maximum of 15 years fine and a maximum fine of Rp 5,000,000,000.00 (five billion rupiah). Then, in accordance with Article 81 paragraph (2) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, the imprisonment that can be imposed on children is a maximum of 1/2 of the maximum prison sentence for adults. Therefore, the criminal act of sexual violence committed by the defendant can be sentenced to a maximum imprisonment of 7.5 years. This has gone beyond the limits of applying diversion to him.

So that the appropriate sanctions for sexual violence against children to be given to the defendant Aries Naziullah bin Syam'unbased on the Serang District Court Decision no. 13/pid.sus-anak/2019/PN srg, the perpetrator were charged with Law no. 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, namely the defendant had forced sexual intercourse to the victim Yulianingsih repeatedly, resulting in Yulianingsih's hymen being torn based on the results of *Visum et Repertum* so that the defendant can be sentenced to Article 81 paragraph (2) of Law no. 17 of 2016 with a maximum imprisonment of 7.5 years at the Special Child Development Institute (LPKA). If there is no LPKA in the area, the child can be placed in a correctional institution whose placement is separate from adults, such as the Social Welfare Organizing Institution (LPKS).

4. CONCLUSION

Based on the results of research³ and analysis of problems that have been carried out on the decision of the District Court with Court Decision Number 13/Pid.Sus-Anak/2019/PnSrg, diversion cannot be carried out on children of perpetrators who have violated Article 76D of Law no. 35 of 2014 concerning Child Protection, because it does not meet the first requirements listed in Article 7 paragraph (2) of the SPPA Law. Therefore, the sanctions that should be given by the Serang District Court judge in Decision No. 13/Pid.Sus-Anak/2019/PnSrg to the accused of sexual violence against children based on Law no. 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, as has been proven by the existence of Article 81 paragraph (2) namely the need for elements of every person, commits deception, a series of lies or induces a child to have intercourse with him or with another person with a maximum imprisonment of 7.5 years. Then, the defendant can be placed in a Child Special Guidance Institution (LPKA), and if there is no LPKA in the area, the child can be placed in a correctional institution whose placement is separate from adults, such as the Social Welfare Organizing Institution (LPKS).

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