

JUDGMENT CONSIDERATIONS IN DROPPING SPECIAL MINIMUM CRIMINALS AS DETERRENT EFFECT IN CASES OF CHILD MOLESTATION (Case Study at the Padang Panjang District Court)

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Abstract: *The increase in crime against children has been very worrying for all parties and lately it has caused a reaction in the midst of the community due to dissatisfaction of the community with the crime imposed on the perpetrators. To overcome this, judges, especially in issuing decisions in cases of sexual abuse against children, must pay attention to the provisions of special minimum criminal sanctions stipulated in the Child Protection Act. The forms of sentencing of judges in cases of Child Protection criminal acts are basically the same as the forms / types of judges' decisions in criminal cases in general, namely those that declare the defendant guilty and convict the defendant (conviction), acquittal and acquittal as they are which is regulated in the Criminal Procedure Code because in the Child Protection Law there is no stipulation regarding separate procedural law specially regarding the types / types of decisions. Judges' considerations in imposing special minimum crimes as a deterrent effect in the crime of sexual abuse of children are inseparable from various aspects including: the facts revealed before the trial based on valid evidence as stipulated in the Criminal Procedure Code, defendants, victims, the community, the state and the provisions in the law itself, bearing in mind that the judge's decision can also serve as a reference or guideline for the community, because the problem of crime against children especially the abuse of children has not been a deterrent effect that can be seen in the community, where from time to time the crime the child continues to increase.*

Key Words: *Judge Considerations, Special Minimum Crimes, Deterrent Effect, Child Abuse.*

1. INTRODUCTION:

Indonesia is a State of Law as outlined in the explanation of the 1945 Constitution, which states that, "The State of Indonesia is based on law (rechstaat), not based on mere power (machstaat)". The statement means that every action taken by the Indonesian people including government officials is based on and in accordance with applicable law.

Law enforcement, especially criminal law, functionally will involve a minimum of three interrelated factors, namely legal factors, law enforcement apparatus/institutions and legal awareness factors. Criminalization can be seen as a series of policy processes whose concrete deliberations are planned through the following three stages, namely the legislative stage (formulative policy), the judicative stage (applicative policy) and the executive stage (administrative policy).[1] The development of criminal law has lagged behind and is no longer in line with the development of society, so it is felt necessary to balance or align the rules of criminal law with the development of society by making special provisions governing acts or criminal acts outside the Criminal Code. One of them is the Law of the Republic of Indonesia Number 23 of 2002 concerning Protection of Children, to ensure the welfare of every citizen, including the protection of children who are human rights, where every child has the right to survival, growth and development, and is entitled to protection from violence and discrimination, and children as the shoots of the nation, the next generation of the ideals of the nation have an important role for the survival and progress of the nation so that it is obligatory to be protected from all forms of inhumane treatment.

Law Number 23 of 2002 concerning Child Protection in providing protection to children enforces special minimum criminal provisions which in Indonesia regarding the formulation of a minimum criminal have been regulated in the Criminal Code in Article 12 Paragraph (2) of the Criminal Code for imprisonment and Article 18 Paragraph (1) Criminal Code for imprisonment. The two Articles stipulate that the minimum crime is 1 (one) day and generally applies. Whereas for special minimum crimes, it is not regulated directly in the Criminal Code, only Article 103 of the Criminal Code states that laws outside the Criminal Code can regulate special matters, even in the Draft Criminal Code these minimum criminal provisions are also provisions that generally applies as stipulated in the Criminal Code, while for special minimum penalties there are separate exceptions. The Child Protection Law consists of 4 Articles which apply a minimum pattern specially, namely Article 81 concerning intercourse, Article 82 concerning obscene acts, Article 83 concerning child trafficking and Article 89 concerning involving children with narcotics.

The Child Protection Law has been amended several times until the last is Law Number 17 of 2016 concerning the Establishment of Government Regulations in lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning the Child Protection Act. The amendment is intended to be in accordance with the increasingly modern and advanced state of society because the old rules if they are still applied will not cause a deterrent effect for both the perpetrators themselves and the community, which in the end the goal of punishment will not be achieved. In practice, it is not uncommon for judges to also impose special minimum penalties by considering the objectives of punishment, the quality and principle of the benefits of such crimes and by taking into account the interests of the state, the interests of the perpetrators and the interests of the victims with the intention that the perpetrators of the criminal acts and the public become deterrent and afraid so do not commit crime again. However, this is often interpreted wrongly by perpetrators so that crimes against children continue to recur and even increase in number.

2. CONCEPTUAL FRAMEWORK:

a. Judges' considerations

Judges' considerations are matters which are the basis or are considered by judges in deciding / passing a decision on a case.

b. Special Minimum Criminal Punishments

Special Minimum Criminal Punishments are criminal sanctions with the lowest threat specially regulated in laws outside the Criminal Code.

c. Criminal Act

The term criminal act is derived from the term in the Dutch criminal law, *Strafbaar Feit*, which means an action for which the culprit may be subject to criminal penalties. Pompe states that a *Strafbaar Feit* is actually nothing but an "act which according to one formulation of the law has been declared as punitive action." [2]

d. Molestation

Molestation is derived from the word obscene meaning vile and dirty; indecent (breaking politeness, decency)

e. Child

Child is someone who is not yet 18 years old, including children who are still in the womb.

3. THEORITICAL FRAMEWORK:

a. Criminal Theory

Sudarto said: "Punishment comes from a legal basis, so that it can be interpreted as establishing the law or deciding on the law (*berechten*). [3]

b. Law Enforcement

Soerjono Soekanto stated that law enforcement is an activity to harmonize the relationships of values that are set out in solid rules and manifest attitudes as a series of translation of the final stage of values to create, maintain, and maintain peaceful social relations. [4]

4. LITERATURE REVIEW:

Judge's consideration is one of the most important aspects in determining the realization of the value of a judge's decision that contains justice (*ex aequo et bono*) and contains legal certainty, in addition it also contains benefits for the parties concerned for the sake of the enforcement of the law itself based on Pancasila and the 1945 Constitution so that the judge's consideration must be addressed carefully, well, and carefully. If the judge's judgment is not thorough, good, and careful, then the judge's decision derived from the judge's consideration will be overturned by the High Court/Supreme Court. [5]

Judges' considerations are divided into 2 categories namely, juridical considerations and non-juridical considerations. Juridical considerations are judges' considerations based on juridical facts revealed in court proceedings and stipulated by law as must be contained in decisions, for example prosecutors' indictments, defendant statements, witness statements, witness statements, evidence, and articles in criminal law regulations. Whereas non-juridical considerations can be seen from the defendant's background, the defendant's condition and the defendant's religion. [6] Judicial considerations in a non-juridical manner are also referred to as sociological. Judicial considerations are sociologically regulated in Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power which states that judges are obliged to explore, follow and understand the legal values and a sense of justice that lives in the community. Factors that must be considered sociologically by the judge in ruling a case, namely: [7]

- a. Unwritten legal sources and values that live in society.
- b. The good and bad nature of the defendant as well as the values that lighten up and the things that burden the defendant.
- c. The presence or absence of peace, error, the role of the victim.
- d. Community factors, namely the environment in which the law applies or is applied.
- e. Cultural factors, namely as the result of creative works and tastes that are based on human initiative in the association of life.

Special Criminal Minimum is a term known in criminal law consisting of three words namely criminal, minimum and special. The term criminal comes from the Dutch "*straf*". The term criminal generally means punishment, but punishment is a general meaning while the criminal constitutes a special meaning and in this case relating to criminal law that is as sanction or misery that tells. Special minimum penalties, according to Barda Nawawi Arief, are in principle an exception, namely for certain offenses which are very detrimental, endangering or unsettling to the public and offenses that are qualified or exacerbated by the consequences (*erfolgsqualifizierte delikte*).[8]

The opinions of Cesarre Beccaria and Jerome Bentham in their theory, *Deterrence* Theory, emphasize that in the aspect of punishment or in the aspect of the criminal justice system, which starts from the formulation of a criminal threat, the process of investigation, prosecution, law enforcement, to the process of imposing a sentence which is all directed towards the emergence or emergence of the criminal justice system. deterrence effect or deterrent as the main goal. The creation of *deterrence* effect or deterrent effect then it will prevent the same crime. Furthermore by Beccaria and Bentham, that aspects of punishment and the penal system can only be effective and cause a deterrent effect when in the threat and punishment there are elements which are as follows:[9]

- a. The threat of sanctions that are severe or severe.
- b. The threat of sanctions that is balanced with the evil deeds committed. That is not too heavy and not too light when compared with the deeds he did.
- c. Sanctions must be given immediately or swift, that is, given when after the evil deed was committed (*celerity*).
- d. There is an element of certainty in the implementation of the sentence (*certainty*).

5. METHOD:

This research uses normative legal research. Normative legal research is library law research. In this normative study, the approaches used are:

- a. Statutory Approach, is carried out by examining the statutory regulations from the highest norm to the lowest,
- b. Case Approach, is carried out by examining cases related to the legal issues at hand. The cases examined are cases that have obtained a court decision of permanent legal force.

6. DISCUSSION:

Judges in the court process must go through the process of presenting the truth and justice in the court decision process as a process of law enforcement. The court's decision is required to fulfill the theory of proof, that is interrelated between one evidence with another evidence, for example, between one election statement with other information or interrelated between information with other evidence (Article 184 Criminal Procedure Code).

Judges in assessing the truth of a witness's statement must seriously pay attention to the correspondence between one witness's testimony with another, the correspondence between the witness's testimony with other evidence, the reasons that the witness might use to give certain information, and the way of life and the attitude of the witness and all something which generally influences the reliability of the information.

Punishment decisions can be handed down if the objective and subjective conditions that are contained in Article 183 of the Criminal Procedure Code have been fulfilled. The special minimum criminal law in the Child Protection Law, the aim is to provide a minimum limit of criminal impose on perpetrators of crimes against children, so that deterrent actors repeat their actions and the community will be protected because people will think many times before committing crimes or in other words there will be many consideration for the community to commit a crime especially to children. Roscoe Pound states that the law can provide change to society through changes in the criminal law (law as a social engineering tool).

The Child Protection Law established by the government is Law Number 23 of 2002 concerning Child Protection. Where the special minimum criminal provisions in this law are contained in Article 81, Article 82, Article 83 and Article 89. In Article 81, Article 82 and Article 83 the minimum criminal provisions in particular are 3 years in prison while for Article 89 the minimum criminal provisions in particular is 5 years. Special minimum criminal provisions set by the state through its instruments are expected to protect children from crime and it is expected that the level of crime against children can be reduced, but over time and the effect of modernization, in fact, Law Number 23 Year 2002 is still unable to protect children from crime, so that the government and the legislature make changes to the law, which of these

changes gave birth to Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. Similar to Law Number 23 of 2002, Law Number 35 of 2014 also still maintains special minimum criminal provisions contained in Article 81, Article 82, Article 83 and Article 89. However, special minimum criminal provisions in Article 81 and 82 increased from 3 years to 5 years, while Article 83 the minimum criminal provisions in particular remain 3 years in prison and for Article 89 the minimum criminal provisions in particular remain 5 years.

Law Number 35 of 2014 which is the first amendment to Law Number 23 of 2002, apparently also has not been able to tackle crime against children, this was proven in 2016 one of which was the case of rape of a junior high school student named Yuyun in Bengkulu area committed by 14 people, which led to Yuyun's death, this made Indonesia at that time an "Sexual Crimes Emergency".[10] To overcome this situation, the government adopted a policy to issue Government Regulation in Lieu of Law Number 1 of 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection.

Government Regulation in Lieu of Law Number 1 of 2016, there are castration criminal provisions so that Government Regulation in Lieu of this Law is better known as "*Perpu Kebiri*", where this is a form of weighting in addition to the minimum criminal. Although this reaps the pros and cons, but this regulation is still enacted by the government with Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection into law.

The application of special minimum criminal provisions in the Child Protection Law is an embodiment of a sense of justice for the community, as according to the theory of special crimes relating to sanctions in criminal law, in essence the crime is a protection against society and retaliation against acts that violate the law, where the criminal is a the process of making a perpetrator of a crime acceptable in society and the criminal is expected to be something that will bring order and order in the community. Therefore, the government provides special minimum criminal provisions which are always raised the minimum criminal sanctions in any changes to the Child Protection Law is in line with the theory of Relative Punishment/purpose, which according to this theory the criminal imposed not only functions as retaliation but also functions as a protector of the community by frightening so that people do not commit or repeat the crime.

7. ANALYSIS:

The special minimum criminal provisions contained in the Child Protection Law are aimed at providing a deterrent effect to the perpetrators, as well as a means to frighten the public so as not to commit acts as prohibited by the law. Even though it has been raised to 5 years the minimum criminal limit in Law Number 35 of 2014, in reality sexual crimes against children remain unchanged, even increasing, so that in 2016 a second change was made to Law Number 23 of 2002, by including castration criminal law in Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 Year 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection Into Law.

The emphasis in this second amendment is the burden of punishment on perpetrators of sexual crimes against children in order to provide a deterrent effect and be able to comprehensively prevent the occurrence of sexual violence against children. Changes regulated in the second amendment to the Child Protection Law emphasized the imposition of criminal offenses against sexual violence against children, which is expected "that the penalties imposed for perpetrators of sexual violence against children have not provided a deterrent effect and have not been able to comprehensively prevent the occurrence of sexual violence against children". The preamble is seen that the weight of punishment aims to provide a deterrent effect on the perpetrators of sexual violence against children, as stated in the preamble c.[11]

The government's goal is to increase the penalties, especially the minimum criminal sanctions in the new Child Protection Act, to fulfill the sense of community justice (*ius constitutum*) and protect the community (*ius constituendum*). The promulgation of the Child Protection Law answers the question of justice seekers in cases of sexual violence that afflict children. All that remains is the seriousness and understanding of law enforcement officials to enforce this law, in the interests of victims and the protection of the community. In this case the principle of *lex specialist derogat lex generalist* has been applied.[12] As well as providing legal certainty for judges in each region in issuing their decisions in order to avoid disparities in convicting the same case. This will provide legal certainty to the community wherever they are.

The application of this special minimum criminal sanction contains two concepts, namely the concept of criminal purpose and the concept of law enforcement. Where the purpose of punishment is to protect the community through good law enforcement starting from the emergence of a special minimum criminal punishment pattern in the Child Protection Law (the formulation stage) to impose special minimum criminal sanctions on the perpetrators (the application stage).

Judges in deciding cases relating to crimes against children are free from any pressure from the power and judges in deciding cases based on facts in the trial sourced from legal evidence based on the provisions of Article 184 of the Criminal Procedure Code coupled with the judge's own conviction that decides with his conscience. Judges

'considerations in deciding cases of crimes against children are inseparable from the evidentiary efforts carried out before the trial, by revealing material facts of the perpetrators' actions, both those from witness statements, documentary evidence, expert testimony, instructions and recognition of the defendant, this will bring the judge to the point of conclusions about the actions of the defendant, where there is a match between the evidence so as to form a clue by the judge who finally concludes that the defendant really is the real culprit. So based on this, the defendant was handed down a criminal based on the severity of the crime committed. Judges in exploring the evidence can not be separated from the limitations among them are elements of offense charged with the defendant, where the public prosecutor will indict the provisions of the Child Protection Law, this is very closely related to the "formulation stage" carried out by the legislature in preparing the formulation of the offense, which will later be applied by the judge in his decision as a form of "stages of the Application". The two stages cannot be separated, because it would not be possible for a statutory regulation to be applied if not formulated in advance. And it will not be possible for a statute to be applied properly if the formula is not well formulated. Likewise, the Child Protection Law will not be possible to achieve the jerka effect if the minimum criminal provisions are not well-formulated, and the conviction is not in accordance with the provisions of the minimum criminal sanctions.

Judges' considerations in imposing criminal sanctions on defendants by taking into account the minimum criminal sanctions are inseparable from the purpose of punishment itself, namely, fulfilling a sense of justice for victims and the community and protecting the public from these crimes. As referred to in the Combined Theory which is a combination / combination between Absolute Theory and Relative Theory which bases the criminal on retaliation against the perpetrators and also maintains order in the community. Retaliation is intended to provide a reward in return to the offender and remind himself that the act he has committed against these children is a crime and therefore must be found guilty and convicted of a crime which according to the victim or the community must be considered fair. While protecting the public means by imposing a crime against the perpetrator of the crime against the child it can give fear to the community to commit the same act / crime, bearing in mind that the law to be carried out is very heavy, so therefore the number of crimes against children can be reduced and minimized, whichever this will have an impact on law order in the community and compliance with the law by the community which in itself will protect the community from the same crime.

The judge in considering the severity of the sentence is not enough just to pay attention to the individual attitudes of the defendant, such as: convoluted, not showing remorse or have repeatedly committed criminal acts. Judges are also required to consider the relation of such acts to the community, and the state, human values, even regional or international impacts, but the special concern is when judges consider mitigating matters, it must be interpreted as not going to impose maximum penalties unless it is very out of proportion with incriminating matters.[13]

Whether or not a judge decides below a specific minimum standard, in this case even though the judge's decision has been given the widest possible authority, as stipulated in the Judicial Power Law, but the special minimum standard has become a foothold for the judges, bearing in mind the aim of applying the minimum standard sanctions specially provide guidelines for judges to assess and consider legal limits imposed so that on the basis of these guidelines can help judges decide special criminal cases with decisions that are fair and meet legal certainty.

The juridical basis of the judge applies special minimum sanctions to special criminal cases, especially to cases of child protection, which still refer to each of the minimum threat of criminal offenses stated in each article.[14] As in Article 20 AB No. 14 of 1970, namely "judges must adjudicate according to the law unless stipulated in Article 11, the judge must not judge at all the meaning or fairness of the law".

The role of the Judge in the application of special minimum sanctions in the criminal justice process is very large, namely as the giver of the final decision, the judge is guided by the laws and regulations. In addition, the context of the minimum sanctions contained in the formulation of articles on special criminal offenses, clearly, there is a statement of criminal sanctions that contains the maximum provisions, so that it does not require further interpretation.[15]

The special minimum criminal sentence in a criminal case decision in the Padang Panjang District Court is as follows:

- Case Register Number 51/ Pid.B/2014/PN. Violating the provisions of Law Number 23 of 2002 concerning Child Protection and sentenced to imprisonment for 3 (three) years and a fine of Rp. 60,000,000.00 (sixty million rupiah), provided that the fine is not paid, replaced with imprisonment for 6 (six) months.
- Case Register Number 4/Pid.Sus/2017/PN. Pdp (Child Protection). Violating the provisions of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, and sentenced to imprisonment for 5 (five) years and a fine of Rp. 60,000,000.00 (sixty million rupiah), with the provisions if the fine is not paid, it is replaced with a sentence of imprisonment for 4 (four) months.
- Case Register Number 57/Pid.Sus/2017/PN. Pdp (Child Protection). Violating the provisions of Law Number 17 of 2016 concerning the Establishment of Government regulations in lieu of laws Number 1 of 2016 concerning Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law, and sentenced to imprisonment for 5 (five) years and a fine of Rp400. 000,000.00 (four hundred million rupiah), provided that the fine is not paid, replaced with imprisonment for 3 (three) months.

- d. Case Register Number 70/Pid.Sus/2017/PN. Pdp (Child Protection). Violating the provisions of Law Number 17 of 2016 concerning the Establishment of Government regulations in lieu of laws Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law, and sentenced to imprisonment for 5 (five) years and a fine of Rp800. 000,000.00 (eight hundred million rupiah), with the provision that if the fine is not paid, it will be replaced with imprisonment for 2 (two) months.

The defendant in the above case was found guilty of committing a crime "intentionally forcing a child to commit obscene acts" which violated the provisions of Article 82 of the Child Protection Law as in the Public Prosecutor's indictment and by the Panel of Judges, the defendant was convicted of a crime in accordance with the minimum criminal threat according to the provisions Article charged by the Public Prosecutor.

The consideration of the panel of judges handed down the sentence to the defendant with imprisonment for 3 (three) years for violations of the Child Protection Law Number 23 of 2002, and 5 (five) years for violations of the Child Protection Law Number 35 of 2014 and the Child Protection Law Number 17 The purpose of 2016 is to not only deter the defendant, protecting the public is also a form of application from the formulation formulated by the legislature so that it is expected that with good formulation, a good application will be created which will ultimately lead to the goal of punishment namely welfare and order in society

8. CONCLUSION:

From the discussion as explained earlier, several conclusions can be drawn, including:

- a. The forms / types of decisions of judges in criminal cases in the Child Protection Law are basically the same as the forms / types of judges' decisions in criminal cases in general as regulated in the Criminal Procedure Code because in the Child Protection Law it is not there is a set regarding the procedural law itself, especially regarding the forms of decisions. So regarding the forms of judges' decisions in child protection crime cases, it still refers to the Criminal Procedure Code, which is a decision that states the defendant is guilty and convicts the defendant (convicted verdict), acquittal and acquittal.
- b. Judges' considerations in imposing special minimum crimes as a deterrent effect in the crime of sexual abuse of children are inseparable from various aspects including: the facts revealed before the trial based on valid evidence as stipulated in the Criminal Procedure Code, defendants, victims, the community, the state and the provisions in the law itself, bearing in mind that the judge's decision can also serve as a reference or guideline for the community, because the problem of crime against children especially the abuse of children has not been a deterrent effect that can be seen in the community, where from time to time the crime the child continues to increase.

9. SUGGESTIONS:

The suggestions given by researchers are as follows:

- a. The government (executive) and legislature to keep abreast of developments in the community, especially the phenomenon of sexual crimes against children, given the rapid technology, so that they can immediately take policies to overcome them, so that the realization of children's welfare as the successor to the nation's generation
- b. Law enforcers, especially judges, should always prioritize a sense of justice based on the Almighty God, and be able to apply laws and regulations especially the Child Protection Law as formulated by legislators for the realization of all legal objectives, namely certainty, justice and benefit.

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