

CRIMINAL DISPARITY IN JUDGE'S DECISION ON CHILD CASES REVIEWED FROM THE PERSPECTIVE OF CHILD RIGHTS PROTECTION (CASE STUDY IN MATARAM DISTRICT COURT)

Farid Maulana,* Rodliyah, Any Suryani Hamzah****

**Postgraduate program Legal Study and Notaries, Mataram University, Indonesia*

***Lecture of Law Faculty Mataram University, Indonesia*

Email correspondence: farid.maulana1894@gmail.com

Abstract: *This study aims to determine and understand the occurrence of Criminal Disparity Judges Decisions in Child Crimes Viewed from the Perspective Protection of the rights of the child and to know and analyze the Criminal Disparity Settings Judge's Decision in the Case of Children. The research method used is empirical law research method, with approach of Legislation, Conceptual Approach, and Case Approach. The results showed that: First, the occurrence of Criminal Disparity In Judge's Decisions About Child Cases Viewed From Perspective Protection of the Rights of the Child caused by factors include: (a) Internal factors, i.e. factors Sourced from the judge itself because it is fixated as a person attribute referred to as judicial personnel; (b) External Factors are factors that affect the decision of a judge who comes from outside the judge. Second, the Criminal Disparity Arrangement in Judge's Decisions on Child Cases has not been regulated in the laws and regulations due to the absence of punishment guidance, especially in the crime of children, but the judges use discretion or their freedom to impose criminal punishment on children.*

Keywords: *criminal disparity, judge verdict*

I. INTRODUCTION

Children are a gift and a gift of God Almighty; even children are regarded as the most valuable treasure than the wealth of other property. Philosophically Children as God's mandate should always be guarded and protected because in the child attaches the dignity, dignity, and rights as human beings who must be upheld. Children have a very strategic position in the life of the nation and the state and child rights are part of human rights contained in the 1945 Constitution and the United Nations Convention on the Rights of the Child.

Child mischievousness every year is always increasing. The phenomenon of increased behavior of crime committed by children as if not directly proportional to the age of the

perpetrator.¹ Especially the crimes against property, murder, torture, fights and crime of decency. Increasing the growth of information technology today also greatly affect and shape the growth of the soul of children, so that children do all the actions that want to do or out of control.

Children need legal protection different from adults. Physical and mental children are not mature and mature underlying the need for different treatment of children. Children need to obtain a protection that is contained in legislation. The judge's immense authority in deciding cases leads to disparities in decisions in similar cases.² This is marked by a substantial sharp distinction between one judge's verdict and the other judges on the same case, whereas all refer to the same rules.³ The disparity of the judge's decision in the Criminal case occurs against a child actor who is one with another child actor or the punishment for a child offender is a lighter punishment than the other.

Criminal disparity brings its own problems in law enforcement. On the one hand, different punishments / criminal disparities are a form of judge discretion in judgment, but on the other hand different criminal/criminal disparities also bring discontent to convicts even the public at large. There is also social jealousy as well as a negative view by society on the judicial institution, which is then manifested in the form of indifference to law enforcement in society.

The existing criminal law legislation does not provide explicit criminal guidance guidelines which will serve as the basis for judges in imposing criminal sanction on the child Abuser so that a void of norms arises, this Code should be explicitly stated in Law Number 11 of 2012 on the System Child criminal justice, to avoid the arbitrariness that will be done by the judge in dropping his verdict. The need for a policy that can be used as guidance in the imposition of criminal so that the emergence of criminal disparity can be minimized its application by the judge. Differences of considerations used by judges who caused Disparity to the imposition of crime for children as perpetrators In the Court of Mataram became very interesting to investigate more deeply.

Based on the background of the problem as described above, then the problem in this research is formulated as follows: 1. Why Occurred Criminal Disparity Judge's Decision in Child Case Reviewed from Perspective Protection of the Rights of the Child 2. How Is The Criminal Disparity Setting Judge's Decision In The Case Of Children?

This type of research uses normative juridical research methods. As a supporter used unstructured interview techniques. as well as an interview with a child judge who has handled child cases concerning Criminal Disparity. Because the research method used is normative juridical, then one thing is certain is the use of statute approach, conceptual approach and case approach. Normative law research, generally using the type of data directed at secondary data research. In legal research, secondary data includes: a. Primary legal materials, secondary law materials, and tertiary legal Material. Analysis of legal materials in this study using the method of Legal Discovery (*Rechtsvinding*). The discovery of the law is the process of legal formation by judges or other legal officers who are given the task of enforcing the law or apply common

¹ Nandang Sambas, 2010. *Pembaharuan Sistem Pemidanaan Anak di Indonesia*, Yogyakarta: Graha Ilmu. p. 213

² The shift of criminal philosophy from retaliation to rehabilitation effort by considering a number of individual factors of perpetrators often creates problems of criminal disparity which has not been determined the standard or the size of criminal imposition in terms of the severity of the criminal. H. Eddy Djunaidi Karnasudirdja, 2013, *Beberapa Pedoman Pemidanaan dan Pengamatan Narapidana*, Jakarta, p.7-8.

³ Bambang Sutiyoso. 2012. *Metode Penemuan Hukum Upaya Mewujudkan Hukum yang Pasti dan Berkeadilan*, Yogyakarta: UII Press. p.38

law rules for concrete legal events⁴ As in the Decisions of the Mataram District Court on Child Cases, which became the object of this study

II. RESULT AND DISCUSSION

2.1 Criminal Disparity in Judge's Decision on Child Cases Reviewed From a Perspective on the Protection of the Rights of the Child

Judges in carrying out their duties in solving a case, especially a criminal case is not uncommon found that dropped the Decision There is a Criminal Disparity. Criminal disparity arises because of different penalties against similar crimes. This criminal detention is certainly a punishment imposed by the judge on the offender so that it can be said that the judge figure in the case of the emergence of the disparity of punishment is crucial. More specifically from that understanding, according to Harkristuti Harkrisnowo criminal disparity can occur in several categories:⁵

- a. Disparity between the same crime;
- b. Disparity between criminal acts that have the same degree of seriousness;
- c. Criminal disparity imposed by a panel of judges;
- d. Disparity between criminal sanctions imposed by different judges for the same offense.

Based on the opinion Harkristuti Harkrisnowo that can be found container where the growing disparity and historic in law enforcement in Indonesia. Disparity does not only occur in the same criminal acts, but also on the seriousness of a crime, as well as from the judge's verdict, either a panel of judges or by a different panel of judges for the same case.

A fair ruling can be achieved especially if the Judge constantly sharpens his or her conscience and is strongly grounded in his religious teachings and beliefs. It should be done in order to enforce the law and justice. The expected impact of any just judgment of Judges is not merely to obtain a positive image, but rather to re-establish public trust in the judiciary and its instruments, especially in handling cases with children as perpetrators of criminal acts. Public confidence in the judiciary can be seen from the number of cases of criminal offenses with children as perpetrators who have permanent legal force in the District Court of Mataram in the last 3 years as follows.

Table 1. Decisions on Criminal Cases of Children Year 2015 – 2017

No	Years	Total
1	2015	3
2	2016	32
3	2017	46

Source: Documentation of Criminal Registry Section of PN Mataram

⁴ Sudikno Mertokusumo, 2011. *Penemuan Hukum Sebuah Pengantar*, Yogyakarta: Liberty. p. 37

⁵ Harkristuti Harkrisnowo, 2013, *Rekonstruksi Konsep Pemidanaan: Suatu Gugatan terhadap Proses Legislasi dan Pemidanaan di Indonesia*, Jakarta: KHN, p. 28

The number of criminal cases with children as perpetrators in the District Court of Mataram from year to year has increased very Drastic, of course this can be a concern for all parties, especially the family environment. Family status Very fundamental and has a vital role in educating children, if education in the family fails, then children tend to do mischief in society and often lead to crime or criminal acts.⁶

Crime with children as the perpetrator, has many who decided by the court. Especially the Mataram District Court. The judges' judgment handed down in the criminal case consisted of theft, narcotics, intercourse, obscenity, embezzlement and other criminal cases. The judgment between judges with each other has its own assessment of the same criminal case. In every Judge's verdict it is certain that there is a criminal disparity in a criminal case with a child as the perpetrator. The increasing number of cases of criminal cases increased every year indicating that the criminal disparity in each judge's ruling tended to negatively affect public trust to the judiciary.

To explain the occurrence of different decisions in the imposition of crime in the General Court of Mataram which is especially for criminal disparity in Child Crime can be seen in the Table as follows:

Table 2. Judge's Decision in Narcotics Case Cases

No	No. Case	The Indictment	Decision
1	4/Pid.Sus-Anak/2016/PN.Mtr	Narcotics	Granting a Successful Diverse or Agreement
	13/Pid.Sus-Anak/2016/PN.Mtr		
	2/Pid.Sus-Anak/2017/PN.Mtr		
2	23/Pid.Sus-Anak/2017/PN.Mtr 27/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Prison Penalty for 9 Months
3	32/Pid.Sus-Anak/2017/PN.Mtr 33/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Institutional Coaching For 7 months
4	37/Pid.Sus-Anak/2017/PN.Mtr	Narcotics	Coaching outside the institution in the form of therapy for 6 months

Source: Register Criminal Case Child court Mataram District

Based on the above table, the decision of a judge in a narcotic criminal case committed by a child occurs Criminal Disparity through various criminal imprisonments such as prisons, institutional guidance, outside coaching, job training and diversion. When looking at the various impositions of criminal sanctions against children above the judge should be able to apply the diversion for children committing criminal acts of narcotics abuse in the best interests of the child so that children do not experience trauma to stage the trial and to avoid negative stigma in society.

⁶ Maidin Gultom, *Op.Cit.* p. 57

Table 3. Judge's Decision in Criminal Cases of Child Protection

No	No. Case	The Indictment	Decision
	2/Pid.Sus-Anak/2015/PN.Mtr	Intercourse	Coaching in a Social Institution For 2 years and a fine of Rp.500.000.000 (five hundred million Rupiah) subsidiary with a 3 month job training
1	1/Pid.Sus-Anak/2016/PN.Mtr	Intercourse	3 years imprisonment and a fine of Rp.500.000.000 (five hundred million Rupiah)
2	5/Pid.Sus-Anak/2017/PN.Mtr	Intercourse	Prison Penalty for 1 year 6 Months and Criminal training for 3 months
3	45/Pid.Sus-Anak/2017/PN.Mtr	Intercourse	Institutional Coaching for 6 months Criminal training for 3 months
4	2/Pid.Sus-Anak/2016/PN.Mtr	Fornication	Treatment Actions in LPSK
5	17/Pid.Sus-Anak/2016/PN.Mtr	Fornication	2 years imprisonment and a fine of Rp.500.000.000 (five hundred million Rupiah) replaced with a 3 month training in a social institution
	32/Pid.Sus-Anak/2016/PN.Mtr	Fornication	Criminal Prison For 2 years 6 Months

Source: Register Criminal Case Child court Mataram District

Based on the above table, the Crime of Child Protection, especially the sexual abuse and intercourse by the child in the Mataram District Court, shows the difference of the judge's decision. The verdict was even more striking for the same case. Criminal allegations in cases of sexual intercourse and child abuse do not have the same decision in one case, of course it is interesting to be observed because the crime of child protection is one of the criminal acts that the most severe punishment penalty, but the application occurs disparity either in the form of sanctions such as criminal in the form of imprisonment, coaching, vocational training and fines or in the form of acts such as care in LPSK or length of time to undergo crime such as criminal disparity in the provision of punishment in the form of imprisonment.

According to Muladi and Barda Nawawi, the cause of the criminal disparity (judge's verdict) starts from its own law. In Indonesia's positive criminal law, the judge has the greatest freedom to choose the desired type of crime (strafsoort), in connection with the use of alternative systems in criminal penalties within the law.⁷

The second causative factor of the existence of criminal disparity is sourced to the judge, both internal and external.⁸ According to Hood and Sparks which are also adapted by Muladi and Barda Nawawi, the internal and external nature of judges is sometimes difficult to separate,

⁷ Muladi dan Barda Nawawi Arief, 2012, *Pidana dan Pemidanaan*, Semarang: FH Unissula Semarang, p.143

⁸ In Indonesia many people are less or even less likely to pay attention to the inherent characteristics of the judge, such as his individual background, his education and the concrete circumstances he faces at the time of making a decision. See Satjipto Rahardjo, 2015, *Hukum dan Masyarakat*, Bandung: Angkasa, p. 57

because it is integrated as an attribute of someone called “human equation” or “personality of the judge” in the broad sense concerning the influences of social background, education, religion, experience, temperament and social behavior.⁹

The existence of the decision difference may be caused by the different actions that are presented to the judge. In addition, there is also a judge's inequality in assessing a similar or equivalent case. The difference in determining the criminal in practice is the result of the fact that the acts before the criminal judge indicate a difference. It also shows that among judges there is a different view of the assessment of data in the same or similar cases.

Thus, the factors that resulted in the disparity of the judge's decision in the criminal case with the child as the perpetrator are internal factors and external factors.

Internal Factors, Factors that come from within the judge itself that cannot be separated, because it is fixated as an attribute of a person who is called a human justice (human equation). External factors, namely factors that affect the decision of a judge who comes from outside the judge, among others: a. Factor law or legislation itself, b. Factor situation in the perpetrator / defendant.

2.2 *Arrangement of Criminal Disparity In Judge's Decisions on Child Cases*

The regulation on the disparity of the judge's decision on criminal cases has not been regulated in legislation. Criminal disparity occurs because there is no criminal guidance, but the criminal justice disparity is closely related to the freedom of judges contained in the provisions of Article 24 paragraph (1) of the 1945 Constitution which provides the legal basis for the judicial power of judicial power is an independent power to organize justice to enforce law and justice. The provision of Article 24 Paragraph (1) of the 1945 Constitution provides guarantees to the freedom of the judiciary as an independent institution, including the freedom of judges to impose criminal sanctions.

The freedom of the judge in the imposition of Criminal as stipulated in the constitution applies also in the imposition of criminal case against children through Act No. 3 of 1997 regarding the juvenile court replaced with Law number 11 of 2012 on the Child Criminal Court system regulates the overall process of Case Settlement Children who are dealing with the law begin the investigation stage until the stage of guidance after undergoing Criminal.

In the Criminal Justice System of the Child, there are several elements that constitute a unity, namely: Child Investigator, Public Prosecutor, Child Judge and Child Correctional Officer. A fair justice will provide protection for the rights of the child, either as a suspect, a defendant, or as a convicted / inmate. Therefore, in the regulations governing Juvenile Justice, the rights of the child are the foundation of the establishment of the regulation.

The judge has the freedom in choosing a criminal to be imposed on the defendant who has been proven to commit the deed charged to him. In the Law of the Criminal Justice System of the Child, the judge's decision that can be imposed on the Child is a form of criminal or acts. Criminal consists of:¹⁰

- a. The Basic Crime for Children consists of:
 1. Criminal warning;

⁹ Muladi and Arief, Barda Nawawi. 2010, *Teori-teori dan kebijakan pidana*, The fourth printing, Bandung: Alumni, p. 144

¹⁰ Wagiati soetedjo and melani, 2013, *Hukum Pidana Anak*, Refika Aditama, Bandung, p. 170.

2. Criminal with condition:
 - a) Criminalization outside the institution;
 - b) Community service; or
 - c) Monitoring.
 3. Work training;
 4. Coaching in institutions; and
 5. Jail.
- b. Additional criminal consists of:
1. Deprivation of profits derived from a crime; or
 2. Fulfillment of customary obligations.

Measures that may be imposed on the Child include:

- a. Return to parent / Guardian;
- b. Surrender to someone;
- c. Mental hospital care;
- d. Treatment at LPKS;
- e. The obligation to attend formal education and / or training conducted by the government or private entity;
- f. Revocation of driver's license; and / or
- g. Improvement due to crime.

Often said to be different from the criminal, then the action aims to protect the community, while the crime focused on the imposition of sanctions on the perpetrators who committed an act of crime. But theoretically, it is difficult to distinguish because criminal punishment is often called aimed at securing society and improving the convicted. So the criminal sanction puts the punishment on the punishment rather than education and counseling on the naughty child, whereas the sanction of the action is focused on education and coaching rather than punishment.

The criminal disparity itself does not automatically bring about an unjust disparity. Similarly, the equation in criminal prosecution does not automatically bring the right criminal.¹¹ So far there has been no formulation about the purpose of punishment and punishment guidelines in the positive law of Indonesia. As a result of the absence of this form of punishment, there have been numerous inconsistent and overlapping forms and types of criminal sanctions.¹²

In the absence of punishment guidelines, the judge does not have a definite measure as a consideration in determining the severity of the criminal to be imposed. Therefore, the provision of the Penal Code is very important for the judge in deciding a case and has a fairly rational consideration, especially in considering the dosage or the severity of the criminal sanction to be imposed.¹³

¹¹ M. Sholehuddin, 2013, *Sistem Sanksi dalam Hukum Pidana: Ide Dasar Double Track System dan Implementasinya*, Jakarta. PT Raja Grafindo Persada, p. 116

¹² *Ibid*, p. 131

¹³ Dwidja Priyatno, 2016, *Sistem Pelaksanaan Pidana Penjara di Indonesia*, PT Bandung: Refika Aditama, p. 39

The Criminal Code actually contains a number of guidelines, such as Article 14a, Articles 63- 71, and Article 30. In addition, the draft of the Criminal Code already has guidelines which the judge must consider in deciding the decision: penalty guideline is regulated in Article 55 paragraph (1) Year 2005 stated that in the crime shall consider: a. the criminal offense of the offender; b. motive and purpose of committing a crime; c. the inner attitude of the offender; d. whether a crime is committed by a plan; e. how to commit a crime; f. attitudes and actions of the producer after committing a crime; g. curriculum vitae and socioeconomic circumstances of the offender; h. the criminal influence on the future of the offender; i. the effect of a crime on the victim or the victim's family; j. forgiveness from victims and / or their families; and / or k. public view of the crime committed.

Specifically, the interests of Child Players to minimize Disparity in the child's case, the judge shall consider the Rights of Child Protection in its Decision Letter. Law Number 23 Year 2002 regarding Child Protection laid down the obligation to provide protection to children based on the principles that are:

- a. Non Discrimination
- b. Best interests for children
- c. Right to life, survival and development; and
- d. Appreciation of children's opinions

In considering criminal sanctions as well as action sanctions against children conducting criminal acts need special attention, because the judge's decision on juvenile justice should prioritize the provision of educational guidance and moral coaching of the child, in addition to punitive actions. Because even though the defendant is sentenced to imprisonment, he/she still has the right to receive education and guidance in Child Correctional Institution.

III. CONCLUSION

Based on the above discussion, it can be concluded as follows:

1. The occurrence of Criminal Disparity in Judge's Decisions on Child Cases Reviewed From the Perspective on the Protection of the Rights of the Child caused by factors such as: (a) Internal factor, that is factor derived from judge itself because it has been fixed as an attribute of someone called human equation or personality of judge in the broad sense which concerns influence of social background, religious education, experience and social behavior; (b) External Factors are factors that affect the judge's decision that comes from outside the judge, among others: 1) legal factors or rules of the legislation itself and 2) State factors on self-perpetrators/defendants.
2. The Regulation of Criminal Disparity In Judge's Decisions on Child Cases has not been regulated in the laws and regulations due to the absence of punishment guidance especially in the crime of children, but the judges use their discretion or freedom in imposing criminal sanction against the children as regulated in Law Number 48 2009 on Judicial Power and Law No. 11 of 2012 on the Criminal Justice System of Children.

REFERENCES

- Harkrsnowo, Harkristuti. 2013. *Rekonstruksi Konsep Pidana: Suatu Gugatan terhadap Proses Legislasi dan Pidana di Indonesia*. Jakarta: KHN.
- Mertokusumo, Sudikno. 2013. *Bab-bab Tentang Penemuan Hukum*. Print VI. Yogyakarta: PT Citra Aditya Bakti..
- M. Sholehuddin. 2013. *Sistem Sanksi dalam Hukum Pidana: Ide Dasar Double Track System dan Implementasinya*. Jakarta: PT Raja Grafindo Persada.
- Muladi and Arief, Barda Nawawi. 2010. *Teori-teori dan kebijakan pidana*. The fourth printing. Bandung: Alumni.
- _____, 2012. *Pidana dan Pidanaan*. Semarang: FH Unissula Semarang.
- Priyatno, Dwidja. 2016. *Sistem Pelaksanaan Pidana Penjara di Indonesia*. PT Bandung: Refika Aditama.
- Rahardjo Satdjipto. 2015. *Hukum dan Masyarakat*. Bandung: Angkasa.
- Sambas, Nandang. 2010. *Pembaharuan Sistem Pidana Anak di Indonesia*. Yogyakarta: Graha Ilmu.
- Soetedjo, Wagianti and Melani. 2013. *Hukum Pidana Anak*. Refika Aditama, Bandung.