

## Application of Law in Judges' Considerations for Passing Judgment in Criminal Cases Against Child Victims

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### ABSTRACT

*The crimes of sexual abuse against children often use social networks to fool their victims in various crimes. The average victim is a child under the age and the perpetrator is an adult, the crime of sexual abuse causes deep trauma for the victim and requires a long time to eliminate it to the children. With the absence of law, perpetrators of sexual abuse against children could be criminalized if they meet the elements as stated in the Criminal Code (KUHP) and the Child Protection Act. The method of approach in the research was used is the approach of the law of normative-empirical approach and legislation (statue approach), conceptual approach and the case approach. The results of this study stated that the panel of Judges aggravated the punishment against the Defendant by taking attention to the relationship between the Defendant and the victim as the students and teachers in educational institutions. In the verdict of the trial with the case of the crime of sexual abuse, the Defendant demanded punishment with Article 82 section (1) Jo Article 76E Law Number 35 of the year 2014 concerning amendment to Law Number 23 of the Year 2002 about Child Protection, Jo Article 82 section (4.5) and the article is additional regulation Number 01 of the year 2016 on the second amendment to Law Number 23 of the Year 2002 about Child Protection, jo Law Number 17 of the Year 2016 On the Determination of Government Regulation in Lieu of Law Number 01 of the year 2016 on amendment to Law Number 23 of the Year 2002 On Child Protection with the threat of criminal for 20 (twenty) years and a fine of Rp 1.000,000,000,- this is because the Defendant is an educator / educators, where should the defendant give teachings, or education and provide a safe and comfortable against children, especially the victims of the crime of sexual abuse.*

**Keywords :** Crime Of Sexual Abuse, The Victim Of The Child, The Decision Of The Judges, Weighted Penalty

## A. INTRODUCTION

### 1. Background

The Indonesian state is a sovereign state based on law and not a state based on power. In accordance with the 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3) which reads "The State of Indonesia is a State of Law". In a State of law, it actually has joints that are universal and even quite fundamental, such as recognition and protection of human rights, the existence of rules of law that regulate the actions of the state or government in the sense that the actions of the state apparatus can be legally accounted for. Therefore, every policy pursued by the government must be based on the law, in order to prevent arbitrary actions (*abuse of power*) from the state or government, and ensure policies that protect the human rights of every citizen.<sup>1</sup>

The rapid growth, development and progress of community life in the development, economic, social, political and cultural sectors have also brought negative impacts in the form of an increase in the quality and quantity of various kinds of crimes that are very detrimental and disturbing to society.<sup>2</sup>

The increase in various types of crime is an inevitable fact of the times, and crime is a problem that humans must face from time to time. Because in any place where there is an association or society there is also the potential for crime.<sup>3</sup>

In essence, the law aims to realize the creation of order and security in a harmonious, peaceful and prosperous society. All of this will be realized if all components in society, namely harmony, peace and tranquility, comply with the applicable laws. Law is also a manifestation of the command and will of the State carried out by the government in the context of trust and protection of the population within its territory. The protection guaranteed by a state to all levels of society is manifested in various policies, according to the behavior of each local community, because the law also comes from a community custom.<sup>4</sup>

The Criminal Code is a positive criminal law, a criminal law that applies in Indonesia and has been enforced since colonial times. Criminal law is part of the overall law that applies in a country and contains norms along with the sanctions and prohibitions contained therein. Criminal law functions like a double-edged sword, in one part regulates how the state regulates the behavior of the social order that applies to society, in the sense that the state protects every citizen, in the other

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<sup>1</sup> Barawati, *Legal Protection for Child Victims of Sexual Crimes Based on Law Number 35 of 2014*, Postgraduate Thesis Wijaya Putra University, Surabaya, 2021, p.1.

<sup>2</sup> Nur Aulia Sari, *Analysis of Judges' Consideration in Imposing Criminal Sanctions on Narcotics Crimes*, Makassar State Islamic University, 2017, p.10.

<sup>3</sup> I Made Darma Weda, *Criminology*, Jakarta: Raja Grafindo Persada, 1990, p.11.

<sup>4</sup> Arief Gosita, *Problems of Crime Victims*, Buana Ilmu, Jakarta, 2004, pp. 63.

part, namely this criminal law as the last remedy (*ultimum remedium*) due to crimes committed by some citizens. So, do not let the criminal law be used at the beginning of an act that injures the social order. Criminal law is like the last resort, because it is the last remedy, so it must be preceded by efforts or policies outside of criminal law.

However, what is happening now is a misconception in the practice of law enforcement in the community. The mistake concerning the existence of threats against acts that violate the system of decency has automatically become a criminal act. This should be an affirmation that criminal law is a tool that functions to provide the last remedy (*umltimum remedium*).

Criminal Law is a part of public law that contains provisions on the general rules of criminal law and which relate to the prohibition of active and positive as well as passive and negative actions that are accompanied by threats of sanctions in the form of punishment for those who violate the norms of these prohibitions.

The Criminal Code is one of the main sources of material criminal law applicable in Indonesia, which contains general principles of criminal law, provisions on punishment or penitentiary law. And most importantly, it is a legal regulation that contains prohibitory norms and command norms that must be obeyed by everyone who lives in the territorial area of the Unitary State of the Republic of Indonesia. Law enforcement of the provisions of criminal law aims to support the welfare of society, both morally and materially.

In today's times, it is necessary to change the law that continues to develop, this is because the level of crime is very diverse in form and nature. There needs to be special handling and legislation to deal with this problem. For example, such as child protection laws, where children are victims of crime, and the average punishment for perpetrators, namely based on the Criminal Code, is too low. Where the punishment imposed on the perpetrator only uses the Criminal Code. Whereas the child protection law has a higher threat.

Article 63 paragraph (2) of the Criminal Code (KUHP) regulates the principle of "*Lex Specialis Derogat Legi Generalis*". This article states that "If an act is included in a general criminal regulation, it is also regulated in a special criminal regulation, then only the special one is applied". This explains that if a criminal case where the victim is a child, it is regulated in Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 23 of 2002 which regulates Child Protection.

The impact of the application of sophisticated science and technology provides an opportunity for the potential of some people to commit crimes of higher incidence and improve their quality, including criminal offenses that increasingly vary in modus operandi. With the application of advanced technology today, the modus operandi of criminals also follows the use of scientific and technological

advances. Criminal offenses are generally committed by criminals because they are encouraged or motivated by efforts to meet the needs of life, both physical and spiritual, which are relatively difficult to fulfill.<sup>5</sup>

Criminal acts that are the case with criminal offenses, if the act is contrary to the principles of positive law that live in a sense of law among the community, regardless of whether these principles are included in the criminal law. For example, in a criminal act that always targets society and order are two things that are very closely related, it can even be said that there are two sides of one coin and it is difficult to say that there is a society without an order. In the Criminal Procedure Law, the final decision on a criminal case is left to the judge and the judge is obliged to decide the fairest punishment against the perpetrator of the crime.

In sentencing the judge is expected to give the fairest possible sentence and in accordance with the applicable laws and regulations included in Indonesian positive law. The judge will hand down his decision based on procedural law evidence coupled with his conviction. In ideal conditions, a judge's decision will provide justice for all parties, even while providing benefits and legal certainty for the community.<sup>6</sup>

Judges, Prosecutors, Police, and Advocates are organs that are directly or indirectly involved in the process of law enforcement (*criminal justice system*) in Indonesia. Law enforcement harmonizes between values, rules, and behavior, for example the values of legal certainty with legal equality, law enforcement ranges from cracking down and maintaining peace aimed at justice for the community.<sup>7</sup> Therefore, the law as a means of creating order and justice in people's lives must be further enhanced, because without legal order and certainty, an organized and harmonious community life is unlikely to be achieved.<sup>8</sup>

The good and bad situation of security and order in society in a country is at least influenced by 5 (five) conditions, namely:

- 1) What is the management system and organization of the police;
- 2) How the legal system is organized to uphold justice;
- 3) How judicial practice is organized;
- 4) How the bureaucratic system fosters security and order in society and its law enforcement;
- 5) How can the community participate in realizing security and order in society.<sup>9</sup>

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<sup>5</sup> Mulyana Kusuma, *Legal Perspectives and Policy*, Rajawali, Jakarta, 2001, p.29.

<sup>6</sup> Journal of Ike Setyarini, *Basic Considerations of Judges in Imposing Criminal Decisions in Cases of Counterfeit Money Distribution (Study at the Malang District Court)*, Brawijaya University Malang, 2014, p.5.

<sup>7</sup> Soerjono Soekanto, *Joints of Legal Science*, Bandung: Cipta Aditya Bhakti, 1993, p. 35.

<sup>8</sup> Satjipto Rahardjo, *Principles of Legal Sociology*, Jakarta: Raja Grafindo Persada, 1991, p. 23.

<sup>9</sup> Lili Tjahjadi, *Moral Law*, Jakarta: Kanisius, 1991, p. 52.

Although this concept of thought was put forward more than thirty years ago, it is still quite actual as an analysis correlated with the current legal justice system in Indonesia, especially in increasing sanctions for criminal offenders. Therefore, law enforcement is carried out firmly and straightforwardly, but still respects human values and is based on the principles of benefit, justice and legal certainty in order to realize legal objectives.<sup>10</sup>

Law as a means to protect the interests of society must be implemented strictly and consequently. In the event of a violation of law or dispute, the implementation or enforcement of the law is left to the authorized authorities, in this case the judicial power. This is as stipulated in Article 1 paragraph (1) of Law Number 48 of 2009 concerning the second amendment to Law Number 35 of 1999 which regulates the Principles of Judicial Power which basically emphasizes that judicial power is a free, independent and independent state power in order to administer justice in order to uphold law and justice based on Pancasila and the 1945 Constitution, for the implementation of the Republic of Indonesia Rule of Law.

Judicial power is essentially a power that is free from the mainstreaming of other state organs, both executive and legislative. The main task of the judicial power is to receive, examine, and try and resolve every case submitted by the people seeking justice (*justibelen*). In adjudicating and resolving each case, the judicial power must be free, free in order to adjudicate and free from the influence of what or whoever. It is the nature of judicial power that judicial power is free, both in America, England, the Netherlands and in Indonesia. judicial power is basically free, but freedom is not absolute. freedom is influenced by the system of government, politics, economics, and so on.<sup>11</sup>

The duty of judges is to uphold law and justice based on Pancasila by interpreting the law and looking for the basics and principles that form the basis of the law in the decisions made. Through the cases that are brought before them, the verdict must reflect the sense of justice of the community. Judges' decisions must not deviate from Pancasila or contradict the provisions contained in the 1945 Constitution which emphasizes that the Indonesian State is a State of Law.

If judges carry out their duties properly and correctly and are full of responsibility, dedication and creation, it means that judges participate in legal development. Full responsibility and dedication means that judges understand, explore and realize what their duties are and what is expected of them and carry them out. The judge's duties are not merely routine and mechanical, but the judge can see, understand and explore the development and spirit of society. For this

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<sup>10</sup> Nur Aulia Sari, *Analysis of Judges' Consideration in Imposing Criminal Sanctions on Narcotics Crimes*, Makassar State Islamic University, 2017, p.11.

<sup>11</sup> Nur Aulia Sari, *Analysis of Judges' Consideration in Imposing Criminal Sanctions on Narcotics Crimes*, Makassar State Islamic University, 2017, p.12.

reason, it is necessary to foster the creative ability of judges in providing justice for the community.<sup>12</sup>

The main task of the judge is to receive, examine and try and resolve every case submitted to him. It seems very simple the duties of judges as intended in article 2 paragraph (1) of Law Number 48 of 2009, but in reality it is not that easy and simple. In essence, the position of judge is expected to give consideration to whether a person is guilty or not and whether the disputed event is true or not and then apply or determine the law.

Judges as enforcers of law and justice are obliged to explore and understand the law that lives in society (*living law*). This is so that judges can provide decisions that are in accordance with the law and sense of justice. In considering the severity or lightness of the criminal sentence imposed, the judge must also pay attention to the good and bad characteristics that appear from the attitude and behavior of the defendant. This needs to be considered because a person's personal circumstances need to be taken into account in order to impose an appropriate and fair criminal sentence. The personal circumstances can be obtained from the testimony of witnesses or people from his environment, expert doctors and so on.<sup>13</sup>

The country is currently suffering from a sexual crime emergency. Deviant sexual orientation and child abuse are still prevalent in our society. Some findings in the community are even astonishing and not only occur in big cities, but have even entered the suburbs and penetrated into villages. Sexual orientation deviation and sexual abuse of minors are still high.

Sexual abuse of children by adults targets children between the ages of nine years old and teenagers. Ironically, even though the victims have been treated in various ways, sexual abuse of children committed by adults is very difficult to cure, because it causes deep trauma to the victims and requires a long time to eliminate this trauma to children. If it cannot be cured, it is likely that children who are victims of sexual abuse will feel ostracized by the people around them and even worse, they can also fall into a black hole or dark world. It can be said that the current findings are like an "iceberg", because only a few cases have been found, while the data in the field is increasing if investigated more deeply.<sup>14</sup>

The development of sexual abuse crimes against children with adult perpetrators is very concerning, in 2020 there have been 51 cases of sexual abuse in East Java, sadly, the victims are not only female children, but there are also victims who are boys.

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<sup>12</sup> G. Karta Saputra, *Introduction to Legal Science*, Jakarta: Raja Grafindo, 1982, p. 34.

<sup>13</sup> Satjipto Rahardjo, *Principles of Legal Sociology*, p. 38.

<sup>14</sup> *Ibid.* pp. 319.

Even more sadly, the perpetrator is a person and is a person known by the victim. For example, a case of molestation that occurred in the city of Kediri, a father had the heart to molest his child for seven years, when the child was still in elementary school until high school. This molestation was only revealed in September 2020 when the victim's mother caught it and screamed hysterically so that neighbors came. The perpetrator's sexual abuse crimes have been committed from 2013 to 2020. For his actions, the perpetrator is charged with Article 81 of Law Number 35 of 2014 amending Law 23 of 2002 concerning child protection with a maximum penalty of 20 years in prison.<sup>15</sup>

The same case also occurred in the Surabaya jurisdiction, where a cemetery guard in Krembangan, Surabaya had the heart to molest four minors, the motive of the perpetrator molested the victim because the perpetrator had a sexual orientation disorder. The motive is an alleged tendency towards pedophilia. In his confession, the suspect admitted that the molestation was carried out because he liked children to vent his lust. Even though the suspect himself still has a wife and has grandchildren. As a result of these actions, the suspect was sentenced to ten years imprisonment by the public prosecutor.<sup>16</sup>

The same thing happened in Tuban City, precisely in Montong Sekar Village, Montong Subdistrict, Tuban Regency, where there was a crime of child molestation with thirteen children aged 9 years to 16 years. The perpetrator of the crime was a known person in the village and an education worker at one of the Montong Sekar primary schools. As a result of the crime of child molestation, the perpetrator was sentenced by the Tuban District Court to 20 (twenty) years imprisonment.

## **2. Problem Formulation**

Based on the background description above, in this study the author takes the formulation of the problem as follows: Whether after adding laws and regulations that are not charged by the Public Prosecutor to reach a verdict in a criminal case against a child victim, the judge can aggravate the punishment to the Defendant based on the added laws and regulations?

## **3. Research Methods**

The type of research of this proposal writing is using normative juridical which refers to the comparison of expert theories and doctrines of experts. The Criminal Code (KUHP), the 1945 Constitution (after amendment), Human Rights and Law Number 35 of 2014 concerning Child Protection as the legal basis and coupled

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<sup>15</sup> *A series of cases of sexual abuse in orphanages that make you sad during 2020.*  
<https://news.detik.com/berita-jawa-timur/d-5313021/sederet-kasus-pencabulan-di-jatim-yang-bikin-miris-selama-2020/5> accessed on December 12, 2021 at 01.54 WIB.

<sup>16</sup> *Ibid.*

with Perpu aggravation Number 01 of 2016 which regulates Child Protection. The approach taken in this research is a statutory approach, case approach, conceptual approach includes a set of legal principles, legal norms and legal rules both written and unwritten in addition to the approach of the Act also used historical and comparative approaches that use the legal system in force in Indonesia referring to the Criminal Code (KUHP), the 1945 Constitution (after the amendment), Human Rights and Law Number 35 of 2014 and Perpu aggravation Number 01 of 2016, namely an approach that looks at legal norms regarding the implementation of child protection and sanctions in order to provide a deterrent effect.

## **B. DISCUSSION**

### **1. Consideration of Judges in Aggravating Punishment to Impose Decisions in Criminal Cases Against Child Victims in the Perspective of Legal Certainty Theory**

The Unitary State of the Republic of Indonesia is a state that adheres to the principle of the rule of law, where this is reflected in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which explicitly states that "the State of Indonesia is a state of law". The meaning of the explanation above explains that the Unitary State of the Republic of Indonesia where both aspects in the fields of nationality, society, and statehood including the government must be organized based on law (*legality*). While the concept of law that we follow is the concept of law sourced in 5 (five) precepts that are packaged in Pancasila.

Certainty is a matter (state) that is certain. The law must essentially be certain and fair. Legal certainty is a question that can only be answered normatively, not sociologically. Normative legal certainty is when a regulation is made and promulgated with certainty, because it regulates clearly and logically, it will not cause doubts due to multiple interpretations so that it does not clash or cause norm conflicts.<sup>17</sup>

Conflict of norms arising from norm ambiguity in legislation may take the form of norm contestation, norm reduction, or norm distortion. Norms that are clear in the sense that they do not cause doubts (multi-interpretation) and logical in the sense that they become another norm so that they do not clash or cause norm conflicts. Legal certainty refers to clear, precise, consistent and consequent law enforcement whose implementation cannot be influenced by subjective circumstances. Law is a collection of rules or rules in a common life, the overall rules

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<sup>17</sup> *Analysis of the Concepts of Justice, Certainty, and Benefit in Mining Law Enforcement*, Available at <https://www.kejari-bone.go.id/artikel/detail/1/analisa-konsep-keadilan-kepastian-dan-kemanfaatan-dalam-penegakan-hukum-tindak-pidana-pertambangan.html#ftn4> accessed on January 19, 2022 at 14.14 WIB.



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of behavior that apply in a common life that can be enforced with a sanction. Legal certainty is an inseparable characteristic of law, especially for written legal norms.<sup>18</sup>

Law is a System of Norms. Norms are statements that emphasize the "should" or *das sollen* aspect, by including some rules regarding things to do or things that are forbidden to do. Norms are the product of deliberative human action. Laws that contain general rules become guidelines for individuals to behave in society, both in relations with fellow individuals and in relation to society. These rules serve as limits for society in burdening or taking action against individuals. The existence of these rules and the implementation of these rules give rise to legal certainty.<sup>19</sup>

In the criminal case of sexual abuse committed by the Defendant PS, where the victims reached as many as 12 children in Montong Sekar Village, Montong Subdistrict, Tuban Regency, where the average age of the victims was between 11-16 years old and the victims knew the Defendant. This made the Defendant free to carry out his actions, in addition to trusting the victim, it turns out that the Defendant also recorded and spread it to the internet via twitter.

In legal certainty, the Defendant's actions have clearly violated the law, namely committing sexual abuse of children, namely in Article 82 paragraph (1) Jo Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 which regulates child protection, violating pornography, namely in Article 29 jo Article 4 paragraph (1) of Law Number 44 of 2008 which regulates pornography and violating the ITE Law, namely Article 45 paragraph (1) jo Article 27 paragraph (1) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 which regulates Information and Electronic Transactions.

In the prosecution of the Public Prosecutor, it has been proven that the actions of the Defendant have been proven to have committed the acts as in the first alternative charge, namely violating Article 82 paragraph (1) Jo Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 which regulates child protection, and in the decision, the judge agreed with the evidence of the Public Prosecutor that the Defendant had been proven as in the first alternative charge primair. However, in handing down the decision, the judge must consider the aggravating and mitigating circumstances of the Defendant's actions.

Considerations regarding the aggravating and mitigating circumstances of the Defendant are regulated in Articles 197 letter d and 197 letter f of the Criminal Procedure Code in Article 197 letter d reads "Considerations that are concisely compiled regarding the facts and circumstances along with the evidence obtained from the examination in court which is the basis for determining the guilt of the

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<sup>18</sup> *Understanding Certainty in Law*, found in <https://ngobrolinhukum.wordpress.com> accessed on February 08, 2022 at 13.27 WIB.

<sup>19</sup> Peter Mahmud Marzuki, *Introduction to Legal Science*, Kencana, Jakarta, 2008, p.158.

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Defendant". Meanwhile, Article 197 letter f reads "The article of legislation that is the legal basis for the decision, accompanied by the aggravating and mitigating circumstances of the Defendant".

The addition of legislation that was not carried out by the Public Prosecutor in the case of the crime of sexual abuse committed by the Defendant PS because there were more than 1 (one) victim, namely 12 (twelve) child victims, as a result of the Defendant's sodomy of the victims, including 8 (eight) child victims suffered damage to their vital organs in the form of damage to their rectum / anus, and the Defendant's actions caused psychological trauma to the victims, and the Defendant's actions were very disturbing to the community. Therefore, the Judge decided to give an additional sentence by aggravating the punishment for the Defendant PS, namely imposing a prison sentence of 20 (twenty) years and a fine of Rp. 1,000,000,000.00 (one billion rupiah), provided that if the fine is not paid, it will be replaced with confinement for 6 (six) months and imposing additional punishment on the Defendant in the form of Announcement of the Identity of the Perpetrator. The addition of legal aggravation against the Defendant is the Criminal Code (KUHP), the 1945 Constitution (after amendment) and Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 23 of 2002 which regulates Child Protection for child victims and Perpu Number 01 of 2016 which regulates Child Protection.

So in the addition of legislation in the perspective of the theory of legal certainty in the criminal case of sexual abuse with the defendant PS, a conclusion is drawn:

- 1) That the actions of the Defendant have been proven to have committed the acts as charged in the first alternative charge, namely violating Article 82 paragraph (1) Jo Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 which regulates child protection, and in the decision, the judge agreed with the evidence of the Public Prosecutor that the Defendant had been proven as charged in the first alternative charge.
- 2) In addition to the aggravation of punishment against the Defendant, the Judge applied Perpu Number 01 of 2016 which regulates Child Protection and Law Number 17 of 2016, namely the addition of a sentence of 1/3 (one third) of the maximum criminal penalty.
- 3) Providing legal certainty against the Defendant PS for his actions, namely committing sexual abuse against victims as many as 12 (twelve) children with a prison sentence of 20 (twenty) years imprisonment and a fine of Rp. 1,000,000,000.00 (one billion rupiah) provided that if the fine is not paid it will be replaced with confinement for 6 (six) months.
- 4) Announcement of the identity of the perpetrator of the crime of sexual abuse of the defendant PS to the people of Tuban and surrounding areas.

## 2. Consideration of Judges in Aggravating Punishment to Impose Sentences in Criminal Cases Against Child Victims in the Perspective of Justice Theory

"Ubi societas ibi ius" is a sentence said by Cicero, a famous philosopher, jurist and politician in the 1600s. The sentence has a meaning that is still valid today, namely where there is society there is law. This theory expresses Cicero's philosophical concept that law cannot be separated from society. The peace and justice of society can only be achieved if the legal order has been proven to bring justice and can function effectively.<sup>20</sup>

Justice in English is called "justice" which has similarities with the Latin "justitia", and in Spanish it is defined as "*gerechtigheit*". According to Noah Webster, *justice* is part of a value or value, because it is abstract so it has many meanings and connotations.<sup>21</sup> In relation to the concept of justice, the word justice is defined as follows:

- 1) The quality of being *righteous; honesty;*
- 2) *Impartiality; fair* representation of the facts.
- 3) Quality of being *correct (correct, right)*
- 4) Retribution as *vindictive; reward or punishment* according to merit or fault.
- 5) *Sound reason; rightfulness; validity*
- 6) The use of power in order to maintain what is *right, just or lawful*.

The word "justice" is in some ways different from the word "equity", but in many ways they mean the same thing, namely justice. *Equity* is defined as follows:

- 1) *Justice, impartial, giving everyone his due;*
- 2) Everything is fair, or *equitable;*
- 3) The general principles of *fairness and justice* apply where the law is *inadequate*.

Justice according to law or what is often referred to as *legal justice* is justice that has been formulated by law in the form of rights and obligations, where violations of this justice will be confirmed through legal processes. This means that if someone violates this justice, they will be punished through the legal process (punishment or retributive). Justice is often associated with *fairness, right, deservingness* and others that are widely used to decide the distribution of rewards or resources. The term *justice* does not have a single meaning.

According to Aristotle, the state must be founded on laws that guarantee justice to its citizens. Justice is a condition for the achievement of happiness for its citizens, and as a basis for justice it is necessary to teach a sense of morality to every

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<sup>20</sup> Ramadhan Adi, *Ubi Societas Ibi Ius: There is Society, There is Law* (<https://ramadhanadi.wordpress.com/2013/11/29/ubi-societas-ibi-ius-adamasyarakat-ada-hukum/>).

<sup>21</sup> Fuady, Munir, *Dynamics of Legal Theory*, Bogor: Ghalia Indonesia, 2007, p. 90.

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human being so that he becomes a good citizen. In a state where the ruler is not really a human being, but a just mind, the ruler is only the holder of law and balance.

Meanwhile, according to Thomas Aquinas where he is one of the experts who developed the concept of justice which emphasizes equality of status and proportional equality of rights and obligations. Thomas Aquinas emphasized justice as "*Iustitia est habitus secundum quem aliquis constanti et perpetua voluntate ius suum unicuique tribuit*" (justice is a habit where a person with a constant and fixed will gives everyone what is his right).<sup>22</sup>

This can be interpreted that everyone who does good, will be rewarded with good too, but conversely if someone does evil, or harm to others, then that person will also get a reply (punishment) according to his actions.

Constitutionally, as stated in Article 28D of the 1945 Constitution; "everyone has the right to recognition, guarantees, protection of a fair law and equal treatment before the law". This constitutional basis is very clear, every citizen has the same rights and treatment in the eyes of the law. There is no discrimination in the law enforcement process. The state, in this case law enforcement officials have an obligation to provide non-discriminatory legal justice. Both for the benefit of the victims and the defendant.

Equal rights before the law are also affirmed by Human Rights Law Number 39 of 1999 article 2; "Every person is entitled to recognition, guarantees, protection and fair legal treatment as well as legal certainty and equal treatment before the law". In short, legal justice is the right of every citizen that must be guaranteed and protected by the state.

Legal justice for the community, especially for people like today, is very much needed, not only justice to claim rights and obligations, but justice in protecting ourselves against things that are considered to be harmful and detrimental to ourselves and have an impact on the wider community. Such is the case in the criminal case of sexual abuse committed by the Defendant PS, where the Defendant's crime was initially not detected by the surrounding community, this is because the victims, who were on average 11 years old to 16 years old, were threatened by the Defendant PS. However, in the end the Defendant's crime was uncovered by a report from the community to the police, and finally the Defendant was arrested by the police and then processed according to the applicable law.

The Defendant's crime was very disturbing to the community in the surrounding area, especially in Montong Sekar Village, Montong Sub-District, Tuban District. Because the victims of the Defendant PS's crime of sexual abuse of children

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<sup>22</sup> Arum, G. A. *The Concept of Justice (Iustitia) Perspective of St. Thomas Aquinas and Its Relevance For the Meaning of Precept V of Pancasila*, Lumen Veritatis: Journal of Philosophy and Theology, 10(1), 2019, p. 25.

have been victimized by 12 (twelve) children aged between 11 years and 16 years. The victims and the community demanded justice from the authorities by punishing the Defendant PS with the severest punishment because the Defendant had damaged the children of this nation's young generation.

According to Aristotle as stated by Theo Huijbers, Justice is arithmetic equality in the private and public spheres. If a person steals, then he must be punished, regardless of the position of the person concerned. Now if someone in society legally commits a crime, then that person must be punished no matter if he is someone who is respected, respected, or respected in his community.<sup>23</sup>

This is also the case with the criminal case of sexual abuse committed by the Defendant Parsialan, where the Defendant is an education worker (scoutmaster) and also doubles as a night watchman at SDN 1 Montong Sekar 1, Montong Subdistrict, Tuban Regency, in addition the Defendant is one of the martial arts teachers at the hermitage in Sendang Kalangan, Montong Village. Whereas a teacher is supposed to provide lessons and educational provision to the next generation of the nation's children, the Defendant instead damaged this generation of children by committing the crime of sexual abuse, where the average victim already knew the Defendant.

Because the Defendant PS committed the crime of sexual abuse of a child, the Defendant was prosecuted by the Public Prosecutor, where the Public Prosecutor had proven that the Defendant's actions had been proven to have committed acts as in the first alternative charge, namely violating Article 82 paragraph (1) Jo Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 which regulates child protection, and in the decision, the judge agreed with the Public Prosecutor's evidence that the Defendant had been proven as in the first primair alternative charge. Therefore, the judge decided to give an additional sentence by aggravating the punishment for the Defendant PS, namely imposing a prison sentence of 20 (twenty) years and a fine of Rp 1,000,000,000, - (one billion rupiah) provided that if the fine is not paid it will be replaced by confinement for 6 (six) months and imposing additional punishment on the Defendant in the form of Publicizing the Identity of the Perpetrator. The addition of legal aggravation against the Defendant is the Criminal Code (KUHP), the 1945 Constitution (after amendment) and Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 23 of 2002 which regulates Child Protection for child victims and Perpu Number 01 of 2016 which regulates Child Protection.

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<sup>23</sup> Hyronimus Rhiti, *Philosophy of Law Complete Edition (From Classics to Postmodernism)*, Ctk. Fifth, Atma Jaya University, Yogyakarta, 2015, pp. 242.

One of the reasons why the Defendant PS was sentenced to a heavier punishment than the public prosecutor's charges is because the Defendant is a respected person and is a scout teacher/coach and also a school guard at SDN Montong Sekar 1, Montong Subdistrict, Tuban Regency. Whereas the Defendant should have provided protection, security, and comfort to the school children, what the Defendant did was the opposite, namely destroying the future of these children, as well as the Defendant's actions causing psychological trauma to the victims.

Thus, the addition of legislative regulations in the perspective of justice theory has been carried out by the Tuban District Court, this can be proven by:

- 1) The imposition of additional aggravating punishment to the Defendant PS, which is imprisonment for 20 years and a fine of Rp 1,000,000,000.00, provided that if the fine is not paid, it is replaced by imprisonment for 6 (six) months and imposes additional punishment on the Defendant in the form of Publicizing the Identity of the Perpetrator.
- 2) To provide a sense of trust to the community, especially the victim and the community of Montong Sekar Village, Montong Sub-District, Tuban District, that the Defendant PS has been sentenced to imprisonment, and to provide a sense of security for the children in the village to start their normal activities.

In imposing the law on the defendant, the judge has absolute rights and is not interfered with by any party in considering the severity of the imprisonment sanction for the decision he handles. However, in making a decision in order to provide additional punishment against the defendant, either aggravating or mitigating the punishment, the judge needs to pay attention to several considerations, this is in order to ensure that the court's decision is truly objective. The judge's freedom in order to determine the severity of imprisonment must also be guided by the maximum and minimum limits and his freedom must be based on a sense of justice both for the defendant and the victim, the victim's family, the community and is responsible to God Almighty.<sup>24</sup>

Meanwhile, the evidence presented at the trial must be interrelated between one piece of evidence and another. The purpose is so that the judge can prove that the defendant is the one who committed the crime. 80 However, if the evidence presented at trial is different and not related to one piece of evidence to another, it can cause uncertainty in the judge.

Every court decision must be accompanied by considerations that form the legal basis and reasons for the decision. This is in Article 14 paragraph 2 of Law Number 48 of 2009 which reads: "In a deliberation session, each judge is obliged to

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<sup>24</sup> Kurnia Ramadhani, Suci, *Basic Considerations of Judges in Imposing Prison Witnesses Against Violent Theft Criminals*, p, 5 found in <https://media.neliti.com/media/publications/34712-ID-dasar-pertimbangan-hakim-dalam-enjatuhkan-sanksi-pidana-penjara-terhadap-pelaku.pdf> accessed on February 6, 2022 at 15.46 WIB.

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submit written considerations or opinions on the case being examined and become an integral part of the decision".

According to Article 11 of Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHP) states that a court decision is a judge's statement pronounced in an open court session, which can be in the form of transfer or acquittal or release from all charges in the terms and methods regulated by this law.

A defendant can be sentenced if the defendant if in the trial is proven legally and convincingly committed a criminal offense. Therefore, in the trial the judge must mention the actions of the Defendant which are in accordance with the facts revealed at trial and fulfill the formulation of certain articles of a legislation. In this study, the judge must formulate the actions of the Defendant which fulfill the formulation of Article 82 paragraph (1) Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 which regulates Child Protection which reads:

- 1) Stating that the Defendant PS is legally and convincingly proven guilty of committing the crime of "violating the provisions referred to in Article 76E, namely committing violence or threat of violence, forcing, deceiving, committing a series of lies, or inducing a child to commit or allow obscene acts to be committed", as regulated and punishable by Article 82 paragraph (1) Jo Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning child protection as in the First Primair Indictment of the Public Prosecutor.
- 2) Sentenced the Defendant PS to 13 (thirteen) years imprisonment to be deducted while the Defendant is in detention and with an order that the Defendant remain in detention and a fine of Rp. 1,000,000,000, - (One Billion Rupiah) in lieu of 6 (six) months imprisonment.

Judges in their consideration must also pay attention to aggravating and mitigating circumstances as stated in Article 8 paragraph (2) of Law Number 48 of 2009 which regulates judicial power which states that: "In considering the severity of the punishment, the judge shall also consider the good and evil character of the accused".

In the decision of the case of sexual abuse committed by the Defendant PS, after the Panel of Judges heard the testimony of witnesses and the testimony of the Defendant and took into account the evidence of letters and evidence that had been submitted by the Public Prosecutor in court, after the Panel of Judges heard the reading of the criminal charges filed by the Public Prosecutor, the Panel of Judges made a decision:

- 1) Stating that the Defendant PS is legally and convincingly proven guilty of committing the crime of "inducing more than 1 (one) child to commit obscene acts" as stated in the First Primair Indictment;

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- 2) Sentencing the Defendant PS therefore with imprisonment for 20 (twenty) years and a fine in the amount of Rp 1,000,000,000,- (one billion rupiah), provided that if the fine is not paid, it will be replaced with 6 (six) months of imprisonment;
- 3) Impose additional punishment to the Defendant in the form of Announcement of the Identity of the Perpetrator
- 4) Determine that the period of arrest and detention that the Defendant has served is deducted in full from the sentence imposed;
- 5) Determine that the Defendant remains in custody;
- 6) Determine the evidence in the form of: (as attached above)

In the court decision the judge added the aggravation of the law against the Defendant, namely the Criminal Code (KUHP), the 1945 Constitution (after amendment) and Law of the Republic of Indonesia Number 35 of 2014 concerning amendments to Law of the Republic of Indonesia Number 23 of 2002 which regulates Child Protection for child victims and Perpu Number 01 of 2016 which regulates Child Protection, with a prison sentence of 20 (twenty) years against the Defendant. This is based on the consideration of the judge and from the testimony and witnesses that the victims of the Defendant's crime were more than 1 (one) child, namely 12 (twelve) children; as a result of sodomy against 8 (eight) children the victims suffered damage to their vital organs in the form of damage to their anus; the Defendant's actions caused psychological trauma to the victims; plus the Defendant is an education worker and martial arts teacher in the victim's neighborhood, where an educator should nurture and protect his students, not damage them.

### **C. CONCLUSIONS**

Based on the description that has been stated above, it can be concluded that the judge's consideration to increase the sentence in sentencing criminal cases against child victims refers to two perspectives of legal certainty theory and justice theory perspective. Where in the theory of legal certainty, namely the actions of the Defendant have clearly violated the law, namely committing sexual abuse of children, namely in Article 82 paragraph (1) Jo Article 76E of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 which regulates child protection and in the demands of the Public Prosecutor, the judge has imposed additional penalties based on Perpu Number 01 of 2016 which regulates Child Protection. While in the theory of justice, namely giving punishment to the Defendant as fair as possible with a sentence of imprisonment for 20 years and a fine of Rp. 1,000,000,000, - provided that if the fine is not paid it is replaced by confinement for 6 (six) months and imposing additional punishment on the Defendant in the form of Publicizing the Identity of the Perpetrator. As well as providing a sense of trust to the victim and the community, especially the community of Montong Sekar Village, Montong Subdistrict, Tuban Regency, that the Defendant



PS has been sentenced to imprisonment, and providing a sense of security to children in the village in order to start activities as usual.

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