

Criminal Law Policy On Child Perpetrators Of Sexual Intercourse: A Child Protection Perspective

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ABSTRACT

Handling children as perpetrators of sexual intercourse offenses creates a normative antinomy between the specific minimum penalty under the Child Protection Law and diversion limits under the SPPA Law. This inconsistency blocks diversion, forcing child offenders into formal, retributive judicial proceedings. This study analyzes this legal conflict and formulates an ideal reconstruction of criminal law policy based on the principle of the best interests of the child and the New Criminal Code (Law No. 1 of 2023). Employing normative legal research with legislative, conceptual, and analytical approaches, the study shows that the Child Protection Law rigidly focuses on the act (*daatstrafrecht*). In contrast, the New Criminal Code shifts focus toward offender circumstances (*daderstrafrecht*) through sentencing guidelines, a double track system, and judicial pardon (*rechterlijk pardon*). An ideal policy requires reforming diversion criteria toward a qualitative approach, prioritizing rehabilitative sanctions over imprisonment, and adopting the Dual Protection Model. This model offers balanced protection between recovery and restitution for child victims, while ensuring rehabilitation, non-stigmatization, and continued education for child offenders. Ultimately, this reform aligns juvenile justice with human rights, ensuring that legal sanctions serve educational and restorative goals rather than purely punitive outcomes for all young individuals involved in legal disputes.

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1. INTRODUCTION

Children are both a trust and a gift from God Almighty, inherently possessing the dignity and worth of a fully-fledged human being. From the perspective of constitutional law and human rights, children occupy a strategic position as *the nation's future generation*, entitled to protection from all forms of

violence, discrimination, and crime.¹ The state has a constitutional obligation to guarantee the protection and fulfillment of children's rights as mandated in Article 28B, paragraph (2) of the 1945 Constitution of the Republic of Indonesia. However, in the functional sociological-legal reality, children are not only potential *victims* of crime but can also act as *juvenile offenders*²

One criminal phenomenon that triggers a crucial dogmatic and normative dilemma in the Indonesian criminal justice system is the crime of sexual intercourse committed by a child. Crimes against public decency or sexual offenses involving children as perpetrators place criminal law at the intersection of complex paradigms. On the one hand, there is an urgent normative need to provide maximum legal protection for children who are victims of sexual intercourse (*child victims*). On the other hand, when the perpetrator of the sexual intercourse offense is also a child who is psychologically immature, fundamental issues arise regarding the limits of *criminal responsibility* and the orientation of sentencing that aligns with the principle of *the best interests of the child*³

Normatively, the crime of sexual intercourse with a child is explicitly regulated in Article 76D *in conjunction with* Article 81 of Law No. 35 of 2014 Amending Law No. 23 of 2002 on Child Protection (hereinafter referred to as the Child Protection Law), as amended by Law No. 17 of 2016. These provisions impose a very severe prison sentence on perpetrators, namely a minimum of 5 (five) years and a maximum of 15 (fifteen) years. This legal framework is based on the doctrine of *statutory rape*, under which the law treats children as subjects who lack *the legal* capacity to give consent to sexual activity; consequently, sexual intercourse with a child whether committed through violence, threats, or consensually is still classified as a criminal offense.

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This regulation imposes a very severe criminal penalty on offenders, namely a minimum of 5 (five) years and a maximum of 15 (fifteen) years in prison. This policy is based on the doctrine of *statutory rape*, under which the law treats children as subjects who lack *the legal* capacity to give consent to sexual activity; consequently, sexual intercourse with a child whether committed through violence, threats, or consensually is still classified as a criminal offense.⁴

¹ Barda Nawawi Arief. (2018). Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru. Jakarta: Kencana, p.45

² Marlina. (2018). Peradilan Pidana Anak di Indonesia: Pengembangan Konsep Diversi dan Restorative Justice. Bandung: Refika Aditama, p.12

³ Dewi Sartika. (2022). "Prinsip Interest of the Child dalam Penanganan Anak Berhadapan dengan Hukum". Jurnal Hukum Media Hukum, 29(1): 48

⁴ Sudarto. (2016). Hukum dan Hukum Pidana. Bandung: Alumnus, p.89

However, a legal issue arises when the substantive criminal provisions of the Child Protection Act are applied to perpetrators who are themselves still classified as children. There is a philosophical conflict and a clash of norms between the principles of criminal punishment in the Child Protection Act which tend to be repressive and motivated by a *deterrent effect* and the fundamental principles of the Juvenile Criminal Justice System as stipulated in Law No. 11 of 2012 on the Juvenile Criminal Justice System (Juvenile Criminal Justice Act).⁵ The Juvenile Criminal Justice System Act (UU SPPA) emphasizes a paradigm shift in the justice system from a retributive approach (*retributive justice*) toward a *restorative justice* approach and diversion, positioning punishment as a last resort (*ultimum remedium*) and the deprivation of liberty as the very last option.⁶

Criminal policy in Indonesia regarding children who commit the crime of sexual intercourse faces substantive challenges at three main levels, as outlined by Marc Ancel and Barda Nawawi Arief: *formulative policy*, *applicative policy*, and *executive policy*.⁷ At the formulation stage, there is a lack of clarity regarding the legislative rationale for how criminal sanctions and *corrective* measures for child perpetrators of sexual intercourse should be rationally constructed without undermining the principle of legal protection for the child perpetrator while simultaneously ensuring legal certainty for the victim.⁸

This normative tension has the potential to create *legal uncertainty* and substantive injustice. If law enforcement officials rigidly apply only the specific minimum criminal penalties under the Child Protection Act without considering the juvenile offender's age, cognitive level, and psychosocial factors, the criminal justice system risks perpetuating discrimination and violating international conventions, particularly *the United Nations Convention on the Rights of the Child* (CRC 1989) and *the Beijing Rules (Standard Minimum Rules for the Administration of Juvenile Justice)*.⁹ Conversely, if the handling of child perpetrators of sexual intercourse is deemed too lenient in the name of child protection, there is concern that public dissatisfaction will arise and that the restoration of the rights of child victims will be neglected.

The enactment of the New Criminal Code (Law No. 1 of 2023 on the Criminal Code) brings a breath of fresh air and marks a new chapter in the overhaul of the national criminal justice system, particularly through the recognition of *the balance principle* and the modern sentencing paradigm. The New Criminal Code fundamentally shifts the orientation of sentencing from the traditional retributive (punitive) model toward an approach that emphasizes corrective, rehabilitative, and restorative justice.

⁵ Puji Retno Hardiningtyas. (2022). "Perlindungan Hukum Terhadap Anak Pelaku Tindak Pidana Seksual dalam Perspektif Keadilan Restoratif". Jurnal Hukum Lex Generalis, 3(5): 348

⁶ Ahmad Redi & Fahrul Rozi. (2022). "Rekonstruksi Kebijakan Pemidanaan Anak dalam Sistem Peradilan Pidana Indonesia". Jurnal Ius Constituendum, 7(1): 92

⁷ Muladi & Barda Nawawi Arief. (2015). Teori-Teori dan Kebijakan Hukum Pidana. Bandung: Alumni, p.27

⁸ Fikri Hadi. (2023). "Harmonisasi Sanksi Pidana Anak dalam KUHP Baru dan Undang-Undang Perlindungan Anak". Jurnal Riset Hukum Pidana, 3(2): 115

⁹ Shanty Dellyana. (2017). Wanita dan Anak di Mata Hukum. Yogyakarta: Liberty, p.64

This philosophical shift is tangibly focused on the reconceptualization of the *dual-track system* which places criminal sanctions and non-criminal sanctions on equal footing as well as the institutionalization of *sentencing* guidelines, as stipulated in Articles 51 through 54 of Law No. 1 of 2023.¹⁰ These guidelines require judges to carefully consider the degree of fault, motive, psychosocial background, and the future of the offender—including children so that the imposition of criminal penalties is no longer centered solely on the unlawful nature of the act (*daatstrafrecht*), but also on the individual characteristics of the offender (*daderstrafrecht*).¹¹

This shift in the substantive criminal law paradigm within the New Criminal Code creates both fundamental normative challenges and opportunities when it is pitted against the flexibility and specificity (*lex specialis*) of the Child Protection Act and the Act on the Handling of Juvenile Offenders (SPPA). The lack of consistency in interpretation and the failure to integrate the modern principles of criminal punishment under the New Criminal Code into policies for handling cases involving child perpetrators of sexual intercourse risk causing disparities in *sentencing* and legal fragmentation.¹²

Therefore, an in depth, rational, and structured review of the synchronization and reform of this *criminal policy* has become a crucial academic priority; not only to ensure *legal certainty* and substantive justice for child victims, but also to construct a comprehensive, humane, and future-oriented legal protection mechanism for children as perpetrators of criminal acts.

2. METHOD

This study employs a normative legal research method that focuses on a qualitative analysis of legal principles, legal systematics, the degree of synchronization of legislation, and the ratio legis of criminal law policy.¹³ The research approaches used encompass three main approaches, namely: the *statute based approach* to critically examine the consistency of legal norms between the Child Protection Act, the Juvenile Criminal Justice System Act, and the New Criminal Code (Law No. 1 of 2023); a *conceptual approach* to dissect the doctrine of *statutory rape*, the concept of *criminal responsibility*, and the doctrine of *the best interests of the child*; and an *analytical approach* to analyze the legal and effectiveness of norms regarding the criminal punishment of children.¹⁴

The legal materials used include primary legal sources derived from legislation and international conventions; secondary legal sources consisting of leading legal literature, academic papers, and accredited scientific legal journals

¹⁰ Barda Nawawi Arief. (2023). *Pembangunan Hukum Pidana Nasional*. Jakarta: Kencana, p.88

¹¹ Anugrah Adiasto. (2023). "Rekonstruksi Sistem Pemidanaan Anak Pasca Pengesahan UU No. 1 Tahun 2023 tentang KUHP". *Jurnal Hukum & Pembangunan*, 53(2): 305

¹² Muhammad Mustofa. (2023). "Harmonisasi Asas Legalisitas dan Pedoman Pemidanaan dalam Reformasi Hukum Pidana Indonesia". *Jurnal Lex Renaissance*, 8(3): 410

¹³ Peter Mahmud Marzuki. (2021). *Penelitian Hukum*. Jakarta: Kencana Prenada Media Group, p.35

¹⁴ Johnny Ibrahim. (2018). *Teori dan Metodologi Penelitian Hukum Normatif*. Malang: Bayumedia Publishing, p.295

and tertiary legal sources in the form of legal dictionaries and encyclopedias.¹⁵ All legal materials were collected through *library research* involving a comprehensive document search, which was subsequently analyzed using qualitative normative analysis techniques based on *deductive reasoning* to produce coherent, rational, and objective legal prescriptions and conclusions.

3. RESULTS AND DISCUSSION

3.1. Ratio Legis And The Construction of Criminal Liability for Minors ss Perpetrators of Sexual Intercourse Offenses in Indonesian Positive Law

The philosophical background and *ratio legis* of the criminalization of sexual intercourse with a child in the Indonesian criminal law system are rooted in the state's constitutional obligation to provide absolute protection for the growth, development, and physical and psychological integrity of children.

In substantive criminal law, the criminal offense of sexual intercourse with a child is specifically regulated in Article 76D *in conjunction with* Article 81 of Law No. 35 of 2014 Amending Law No. 23 of 2002 on Child Protection (Child Protection Law). These provisions adopt the doctrine of *statutory rape*, a legal construct that establishes that any form of sexual intercourse involving a minor is classified as a crime, regardless of whether the act was committed through coercion, the threat of violence, or consensually.¹⁶

The application of the doctrine of *statutory rape* is based on the legal fiction that a child is deemed to lack *legal capacity* and the psychological maturity to give legally *valid consent* in the realm of sexual activity.¹⁷ Therefore, in the context of criminal law doctrine, consent from a victim who is still a child is deemed *null and void* and does not negate the unlawfulness (*afwezigheid van alle materiële wederrechtelijkheid*) of the perpetrator's act.

However, dogmatic complexities arise when the perpetrator of the sexual intercourse is also a child (a child perpetrator). In such situations, a conflict arises between the principle of *statutory rape* which focuses on the absolute protection of the victim and the reality that the perpetrator is also a legal subject whose mental capacity is not yet fully developed.¹⁸

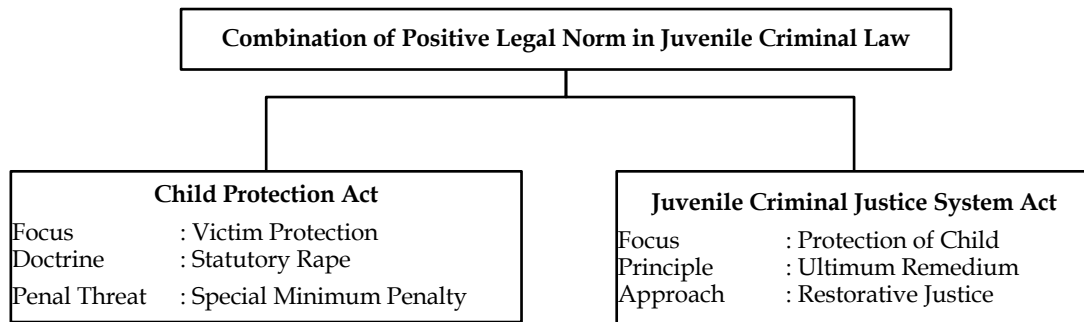
To provide a comprehensive conceptual overview of the philosophical conflict and normative antinomy arising from the intersection of these two national legal norms, the interrelationship of the norms can be mapped out using the following diagram:

¹⁵ Soerjono Soekanto & Sri Mamudji. (2019). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali Pers, p.14

¹⁶ Eddy O.S. Hiarij. (2016). *Prinsip-Prinsip Hukum Pidana*. Yogyakarta: Cahaya Atma Pustaka, p.154

¹⁷ Fitri Aulia & Dedi Rahmadi. (2022). "Dualisme Penegakan Hukum Pidana Terhadap Anak Pelaku Kejahatan Seksual dalam Sistem Hukum Indonesia". *Jurnal Pembangunan Hukum Indonesia*, 4(3): 388

¹⁸ Budi Hartono. (2022). "Implikasi Konsep Statutory Rape Terhadap Batas Usia Pertanggungjawaban Pidana Anak". *Jurnal Mimbar Hukum*, 34(1): 89



The diagram above illustrates the existence of an internal contradiction within Indonesia's juvenile criminal justice system. On the one hand, the Child Protection Law prioritizes a repressive approach based on specific minimum criminal penalties to ensure legal certainty and maximum protection for child victims. On the other hand, the SPPA Act mandates the protection of the rights of child offenders through out-of-court resolution mechanisms (diversion) grounded in the principles of ultimum remedium and restorative justice. The intersection of these two legal regimes creates a conflict of norms (antinomy of norms) that directly leads to disparities in law enforcement at the practical level, where law enforcement officials are often caught in a dilemma between upholding repressive criminal legal certainty or realizing substantive justice for child offenders.

3.1.1. The Concept of Criminal Responsibility and the Dilemma of Capacity to Consent

Doctrinally, criminal liability (*geestelijke vermogens*) requires the existence of an unlawful act (*actus reus*) and a criminal intent (*mens rea*), supported by the perpetrator's capacity for accountability (*toerekeningsvatbaarheid*).¹⁹ Pursuant to Article 1(3) in conjunction with Article 21 of Law No. 11 of 2012 on the Juvenile Criminal Justice System (the Juvenile Criminal Justice Law), the minimum age at which a child may be held criminally liable is 12 (twelve) years old, up to but not including 18 (eighteen) years of age. If a child who commits a criminal offense has not yet reached the age of 12, that child cannot be held criminally liable; instead, measures such as returning the child to their parents or participation in an educational/rehabilitation program will be taken.²⁰

Although the age limit for criminal liability has been normatively established in the SPPA Act, the assessment of a child's culpability as a perpetrator cannot be limited to the aspect of age alone. To understand the basis for culpability (*schuld*) more comprehensively, it is also necessary to analyze the criminological factors that influence a child's involvement in criminal acts.

¹⁹ Rizky Amalia & Tri Wahyu. (2022). "Analisis Normatif Batas Penjatuhannya Pidana Minimum Khusus dalam UU Perlindungan Anak Bagi Pelaku Anak". Jurnal Lex Renaissance, 7(2): 301

²⁰ Danang Wijaya. (2023). "Harmonisasi Ketentuan Diversi dalam UU SPPA Terhadap Tindak Pidana Seksual dengan Ancaman Pidana di Atas 7 Tahun". Jurnal Riset Hukum Pidana, 3(1): 55

From a criminological-theoretical perspective, a child's involvement as a perpetrator of a criminal act can be examined through two main contributing pathways, endogenous factors and exogenous factors. Endogenous factors originate from within the child and include biological and psychological limitations or impairments, as well as developmental delays in personality and intelligence that result in the child's inability to internalize prevailing social norms. Meanwhile, exogenous factors are external influences that include parental supervision, the social environment, the role of school education, and the inseparable impact of exposure to mass media and information technology.²¹

The relevance of these factors becomes increasingly significant when addressing criminal acts of sexual intercourse committed between children. In this context, the characteristics of a child's psychological development and environmental influences not only explain the background of the act but also have direct implications for the assessment of the presence of *mens rea* and the degree of culpability that can be held criminally accountable.

When a child between the ages of 12 and 18 engages in sexual intercourse with another child, the construction of *mens rea* becomes highly problematic. Determining whether the child perpetrator acted with an awareness of the unlawful nature of the act (*bewustzijn van de wederrechtelijkheid*) or was merely driven by emotional immaturity and the influence of their social environment, requires a careful legal analysis.²² The rigid restrictions in the Child Protection Act (UU PA), which exclude the relevance of the victim's consent, often automatically categorize the juvenile offender as a pure criminal. In reality, in many cases of *consensual statutory rape* among adolescents, the degree of culpability differs significantly from that of sexual crimes committed by adults.

3.1.2. Normative Antinomy Between the Special Minimum Penalties of the Child Protection Act and the Restorative Approach of the Juvenile Justice Act

One of the most fundamental legal issues in Indonesia's current positive law is the lack of harmony (*antinomy of norms*) between the substantive criminal norms of the Child Protection Act and the formal-substantive criminal norms in the Juvenile Justice Act:

- a. Article 81 of the Child Protection Act (UU PA) imposes a prison sentence of no less than 5 (five) years and no more than 15 (fifteen) years, as well as a fine of up to Rp5,000,000,000.00 (five billion rupiah), on perpetrators of sexual intercourse.
- b. Article 7(2) of the SPPA Act limits the application of diversion (the transfer of a child's case from the criminal justice process to a non-criminal justice process) solely to criminal offenses punishable by imprisonment of less than 7 (seven) years and that are not repeat offenses.

²¹ Salvadoris Pieter & Gusti Ayu Utami. (2024). "Anak Sebagai Pelaku Tindak Pidana Kesusilaan Dalam Perspektif Kriminologi". BACARITA Law Journal, 5(1): 149-150

²² Novia Anggraini. (2023). "Prinsip Best Interests of the Child dalam Dilema Penegakan Hukum Terhadap Child Sex Offenders". Jurnal Masalah-Masalah Hukum, 52(2): 180

The consequence of this legal contradiction is that the door to diversion is automatically closed for children accused of the crime of sexual intercourse under Article 81 of the Child Protection Act, given that the maximum penalty (15 years) exceeds the 7-year threshold. This situation forces the child offender to go through all stages of *the formal criminal justice process* which is stigmatizing and retributive in nature which is fundamentally at odds with the principle of *ultimum remedium* and the principle of protecting children's human rights.²³

3.1.3. Paradigm Shift in the Punishment of Children in the New Criminal Code (Law No. 1 of 2023)

The enactment of Law No. 1 of 2023 on the Criminal Code (New Criminal Code) provides a new philosophical foundation that has the potential to resolve this normative antinomy. The New Criminal Code explicitly adopts the principle of balance and relaxes the rigidity of the principle of formal legality through the institutionalization of *sentencing guidelines*.²⁴ In the context of criminal liability for children, Article 54(1) of Law No. 1 of 2023 stipulates that when imposing a sentence, the judge must consider:

- a. The nature of the offender's criminal conduct;
- b. The motive and purpose of committing the criminal act;
- c. The mental state of the perpetrator of the criminal act;
- d. Whether the criminal act was committed intentionally or unintentionally;
- e. The manner in which the criminal act was committed;
- f. The perpetrator's attitude and actions after committing the criminal act;
- g. The criminal's background, social circumstances, and economic circumstances;
- h. The impact of the criminal sentence on the future of the offender;
- i. The impact of the criminal act on the victim or the victim's family;
- j. Forgiveness from the Victim and/or the Victim's Family; and/or
- k. The values of law and justice that are alive in society.

This provision reaffirms a paradigm shift from *daatstrafrecht* (*criminal law focused solely on the act*) toward *daderstrafrecht* (*criminal law focused on the offender's personal circumstances*), thereby granting judges judicial discretion to adjudicate cases involving juvenile perpetrators of sexual intercourse in a more proportionate and just manner, rather than relying solely on the minimum prison sentence.

²³ Handoko Prasetyo. (2024). "Analisis Kritis Penjatuan Sanksi Tindakan Bagi Anak Pelaku Persetubuhan Ditinjau dari Asas Keseimbangan". Jurnal Pembaharuan Hukum, 11(2): 210

²⁴ Maya Indah. (2024). "Disparitas Putusan Hakim dalam Perkara Persetubuhan Anak Oleh Pelaku Anak: Suatu Analisis Normatif-Doktrinal". Jurnal Yustisia, 13(1): 45

3.2. Formulation of an Ideal Criminal Policy (*Penal Policy*) Based on the Principle of the Best Interests of the Child

3.2.1. Reconstructing Policy Formulations Between Criminal Sanctions and Correctional Measures

Criminal law policy is, in essence, an integral part of social policy, aimed at achieving public welfare and the protection of society.²⁵ In handling child offenders of sexual intercourse offenses, the policy formulation as the most strategic stage in the drafting of legislation must relax the rigidity of a single criminal norm that relies solely on imprisonment.

The imposition of a specific minimum prison sentence of 5 (five) years, as stipulated in Article 81 of the Child Protection Law for child perpetrators of sexual intercourse, often results in counterproductive effects (*destructive effects*), such as social stigmatization, psychological suffering that impairs the child's growth and development, and the spread of criminal behavior within correctional facilities.²⁶ Therefore, the reconstruction of an ideal policy framework must prioritize the consistent reconceptualization of the double track system,^l in which the imposition of non-criminal sanctions is given top priority over criminal penalties.²⁷

Non-custodial sanctions focused on medical care, psychosocial rehabilitation, sexual behavior counseling, and placement in social welfare institutions provide a more effective space for emotional recovery and moral education for juvenile offenders.²⁸ Imprisonment should only be imposed as a last resort (*ultimum remedium*) for the shortest possible period, specifically for cases of child sexual crimes involving extreme violence, organized exploitation, or committed by repeat offenders (*recidivists*).

3.2.2. Reconstructing the Policy Framework Between Criminal Sanctions and Non-Custodial Sanctions

The application of *restorative justice* through the diversion process, as mandated by the Child Protection Act (SPPA), faces formal legal obstacles when it conflicts with the criminal penalty under Article 81 of the Child Protection Act (PA), which carries a sentence exceeding 7 (seven) years. This inconsistency calls for a reformulation of criminal law policy through the revision of the diversion eligibility clause in Article 7(2) of the SPPA act..²⁹

²⁵ Barda Nawawi Arief. (2020). Politik Hukum Pidana. Jakarta: Kencana, p.72

²⁶ Romli Atmasasmita. (2018). Teori Hukum Integratif: Rekonstruksi Pembaharuan Hukum Pidana Indonesia. Yogyakarta: Genta Publishing, p.105

²⁷ Farida Ariani & M. Zaid. (2022). "Rekonstruksi Kebijakan Formulasi Sanksi Pidana Minimum Khusus Pada Anak Pelaku Tindak Pidana Seksual". Jurnal Pembangunan Hukum Indonesia, 4(1): 95

²⁸ Dian Rositawati. (2022). "Penerapan Prinsip The Best Interests of the Child dalam Kebijakan Pemidanaan Anak Pelaku Kejahatan Seksual". Jurnal Hukum Ius Quia Iustum, 29(3): 512

²⁹ Muhammad Amir. (2023). "Model Rekonsiliasi dan Restitusi Bagi Korban Kekerasan Seksual Anak dalam Bingkai Restorative Justice". Jurnal Masalah-Masalah Hukum, 52(3): 310

Ideally, the threshold for diversion should no longer be determined solely based on the formal criterion of a criminal penalty of less than 7 years,³⁰ but rather developed using a *qualitative-case* approach that considers:³⁰

- a. The category of the sexual offense (whether it involves *consensual statutory rape* between minors or sexual intercourse involving coercion or violence);
- b. The age and level of cognitive maturity of both the perpetrator and the victim;
- c. The existence of a settlement agreement and forgiveness from the child victim and their family; and
- d. The perpetrator's family's commitment to providing strict supervision and guidance.

Diversion mechanisms in cases of sexual intercourse with a minor should not be interpreted as an attempt at unconditional pardon. Restorative diversion is aimed at establishing a binding agreement, including the perpetrator's obligation to participate in a behavioral rehabilitation program, the restoration of the victim's physical or psychological harm through restitution or educational support, and participation in productive social activities.

3.2.3. Sinkronisasi Alignment of Criminal Law Policies in the New Criminal Code (Law No. 1 of 2023)

The integration of the principles of the New Criminal Code into the Juvenile Criminal Justice System marks a crucial turning point for transforming judicial practices from a retributive model toward a more just approach. The New Criminal Code provides a highly progressive legal instrument for juvenile judges through the institutionalization of *rechterlijk pardon* (judicial pardon) in Article 54(2) of Law No. 1 of 2023.³¹

This shift in criminal law policy demands a comprehensive analysis to clearly compare the paradigms between the current positive law and the future direction of national criminal law reform. This shift encompasses four fundamental parameters that distinguish the rigid traditional criminal approach from the modern criminal law approach oriented toward humanity and restorative justice. To provide a basic overview of this transformation in the criminal sentencing regime, a comparison of these parameters is presented in the following table:

³⁰ Aditya Setyawan. (2023). "Rechterlijk Pardon dalam KUHP Baru Sebagai Solusi Disparitas Pemidanaan Anak". Jurnal Lex Renaissance, 8(2): 275

³¹ Rian Saputra. (2024). "Konstruksi Dual-Track System dalam Pemidanaan Anak Berhadapan Dengan Hukum". Jurnal Yustisia, 13(2): 140

Tabel 1. Comparison of Sentencing Regimes for Juvenile Perpetrators of Sexual Intercourse

Evaluation Parameter	Current Positive Law Regime	New Criminal Code Regime
Primary Orientation	Retributive and formal legalistic (focus on the <i>act/daatstrafrecht</i>)	Corrective, restorative, And rehabilitative (<i>punishment for offenders</i>).
Priority of Sanctions	Specific minimum prison sentence (minimum 5 years in prison)	Measures (<i>maatregel</i>) and judicial discretion
Access to Diversion	Closed (due to a potential sentence of more than 7 years)	Open on a case-by case basis (<i>qualitativ case approach</i>)
Integration of rights	Asymmetrical (<i>often neglects the rehabilitation of perpetrators and victims</i>)	Dual protection model (<i>balance between the rights of victims and offenders</i>)

When analyzed normatively and dogmatically, the four parameters in the comparison table above are grounded in legal foundations and very tangible philosophical shifts:

a. Primary Orientation

The current positive regime (based on Article 81 of Law No. 35 of 2014) focuses rigidly on *Daatstrafrecht* (punishing the act without regard to the characteristics of the child as a subject). In contrast, the New Criminal Code regime adopts *Daderstrafrecht* based on Articles 51 and 52 of Law No. 1 of 2023, which prioritizes self-improvement, psychological background, and the child's future.

b. Primacy of Sanctions:

The previous regime established a specific minimum prison sentence of 5 years (Article 81(1) of Law No. 35 of 2014). In contrast, the New Criminal Code regime prioritizes corrective measures (*maatregel*) as stipulated in Article 67 in conjunction with Article 103 of Law No. 1 of 2023, and grants judges discretion to grant judicial pardon (*rechterlijk pardon*) under Article 54(2) of Law No. 1 of 2023.

c. Access to Diversion

The previous regime limited diversion solely to criminal offenses carrying a maximum sentence of less than 7 years (Article 7(2)(a) of Law No. 11 of 2012), thereby automatically excluding Article 81 of the Child Protection Act (carrying a maximum sentence of 15 years) from eligibility for diversion. The ideal regime constructs diversion based on a *qualitative-case approach* aligned with the sentencing guidelines of Article 53 of Law No. 1 of 2023.

d. Integrasi Integration of Rights

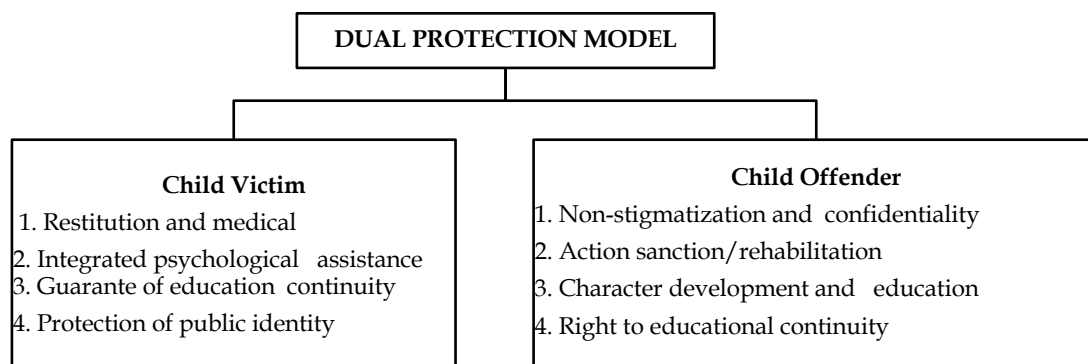
The old regime was asymmetrical because law enforcement often disregarded both the victim's right to restitution and the offender's right to rehabilitation. The ideal regime implements *the Dual Protection Model*, which aligns the state's protection obligations under Article 28B(2) of the 1945 Constitution, Article 3 of Law No. 11 of 2012, and Article 59A of Law No. 35 of 2014.

Through the instrument of *rechterlijk pardon*, a judge has the authority to refrain from imposing any criminal penalty or sanction whatsoever by declaring that is, finding the juvenile offender guilty but pardoning him or her provided that the following normative criteria are met: the minor nature of the offender's fault, the offender's cooperative attitude and sincere remorse, the existence of a complete

reconciliation between the offender's family and the victim's family, and the fact that the penalty sought is considered too severe, and disproportionate to the objectives of criminal punishment.³² The application of *rechterlijk pardon* and the *sentencing guidelines* of the New Criminal Code serves as a dogmatic bridge to avoid disparities in the imposition of sanctions by judges while preventing the destruction of the offender's future due to irrational imprisonment.

3.2.4. Sinkronisasi Synchronizing Criminal Law Policy in the New Criminal Code (Law No. 1 of 2023)

Criminal justice policies grounded in the principle of justice must not be trapped in a mutually exclusive dichotomy between the protection of child victims and the protection of child offenders. Handling cases of sexual intercourse involving children as both offenders and victims requires the simultaneous application of the *Dual Protection Model* (Dual Legal Protection Model).³³



To effectively operationalize this principle in law enforcement practice, a conceptual framework is needed that maps out the state's balanced responsibilities toward both parties. This model affirms that the protection of child victims and child perpetrators are not two conflicting matters, but rather two pillars that must be upheld on an equal footing.

The structure and distribution of fundamental rights within the Dual Protection Model framework are illustrated in the following diagram:

A detailed explanation of the main components in the Dual Protection Model diagram above is as follows:

a. Protection of Child Victims

1) Restitution & Medical Rehabilitation

Pursuant to Article 71D of Law No. 35 of 2014 as amended by Government Regulation No. 43 of 2017 on the Implementation of Restitution for Child Victims of Criminal Offenses, victims are entitled to compensation and guarantees for physical and reproductive health recovery, which are to be borne by the perpetrator or the parents, or facilitated by the state. Support

2) Integrated Psychological Support

³² Siska Elvy. (2024). "Sinergitas Perlindungan Hak Korban dan Hak Pelaku Anak dalam Kebijakan Pemidanaan". *Jurnal Hukum & Pembangunan*, 54(2): 198

³³ Denny Latumahina. (2024). "Implikasi Yuridis Dual Protection Model Terhadap Formulasi Sanksi Pidana Anak". *Jurnal Riset Hukum Pidana*, 4(1): 129

Article 59A in conjunction with Article 64(b) of Law No. 35 of 2014 mandates special protection in the form of ongoing psychological counseling until the victim's trauma has been resolved

3) Guarantee of Educational Continuity

Article 54 of Law No. 35 of 2014 in conjunction with Article 6 of Law No. 20 of 2003 on the National Education System prohibits educational institutions from expelling or discriminating against child victims in their access to education.

4) Protection of Public Identity

Article 64(i) of Law No. 35 of 2014 in conjunction with Article 19 of Law No. 11 of 2012 mandates the concealment of identity and the confidentiality of media publications to prevent revictimization through mass media coverage and to avoid negative societal stigma.

b. Protection of Child Offenders

1) Non-Stigmatization and Confidentiality

Pursuant to Article 19 of Law No. 11 of 2012 on the Protection of Children, the identity of a child offender must be kept confidential at every stage of the judicial process, with criminal penalties imposed on those who violate this provision.

2) Sanctions: Treatment / Rehabilitation

Article 82 of Law No. 11 of 2012 in conjunction with Article 103 of Law No. 1 of 2023 prioritizes corrective measures in the form of care at a Social Welfare Institution (LPKS) over the imposition of a prison sentence at a Special Juvenile Correctional Facility (LPKA).

3) Character Development & Education

Article 3(a) of Law No. 11 of 2012 guarantees humane treatment and moral and spiritual guidance for the social reintegration of children.

4) Right to Continue Education

Article 3(n) of Law No. 11 of 2012 in conjunction with Article 9 of Law No. 35 of 2014 guarantees that child offenders retain the right to receive both formal education and equivalent education during and after the judicial process.

By integrating the Dual Protection Model into juvenile criminal justice policy, the enforcement of criminal law is no longer used as an instrument of state retribution but rather as a means of restorative justice that guarantees the human rights and future of both parties in a balanced, just, and dignified manner.

4. CONCLUSION

Indonesia's current positive law policies regarding children as perpetrators of sexual intercourse offenses are plagued by a conflict of norms (antinomy of norms), leading to legal uncertainty. On one hand, the doctrine of statutory rape and the minimum five-year prison sentence stipulated in the Child Protection Act prioritize a punitive (retributive) approach to protect victims. On the other hand, however, this provision automatically precludes access to out-of-court resolution (diversion) under the Child Criminal Justice System Act, which limits diversion to criminal offenses carrying a sentence of less than 7 years. This inconsistency forces child offenders to undergo formal judicial proceedings and face the threat of a prison sentence of , even though their cognitive and emotional capacities are not yet fully developed, posing a risk of damaging their future.

As a solution to this problem, the reform of criminal law through the New Criminal Code (Law No. 1 of 2023) brings about a more humane paradigm shift one that focuses on the offender's personal circumstances (*daderstrafrecht*) and prioritizes restorative justice. An ideal legal policy should prioritize non-custodial sanctions such as rehabilitation and moral guidance over prison sentences, and provide judges with the flexibility to grant judicial pardon (*rechterlijk pardon*) if the offense was committed consensually between adolescents. This approach is realized through the Dual Protection Model a balanced protection model that ensures the restoration of rights and healing from trauma for child victims, while simultaneously safeguarding the rights to education, rehabilitation, and a future for child offenders without negative stigma.

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