

**Revisiting Conditional Punishment Jurisdiction in Child Abuse Cases
(Study Decision Number X/Pid.Sus-Child/2021/PN.Pwt)**

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Abstract

The Criminal Code (KUHP) has regulated alternative sanctions for imprisonment in criminal practices, namely conditional sentences as regulated in Articles 14a to Article 14f of the Criminal Code. One of the sentences related to conditional criminal sentences is Decision Number X/Pid.Sus-Anak/2021/PN.Pwt. This research aims to find out the legal considerations of judges in imposing conditional criminal sanctions on defendants in the Purwokerto District Court Decision Number X/Pid.Sus-Anak/2021/PN Pwt. The approach method used in this research is normative juridical with prescriptive research specifications. The data source used is secondary data by collecting and using literature studies presented in narrative text, and the data analysis method used is normative qualitative. The results of research and discussion show that the judge in deciding Case Number X/Pid.Sus-Anak/2021/PN.Pwt did not consider the theory of retaliation. However, the conditional criminal sentence of 6 (six) months shows that the judge did not consider the fiscal theory, because the defendant has committed criminal acts against 2 (two) other victims.

Keywords: *abuse; conditional criminal; criminal act;*

Abstrak

Kitab Undang-Undang Hukum Pidana (KUHP) telah mengatur tentang alternatif dari sanksi pidana penjara dalam praktek peradilan pidana yaitu pemidanaan bersyarat sebagaimana diatur dalam Pasal 14a sampai dengan Pasal 14f KUHP. Salah satu putusan yang berkaitan dengan penjatuhan pidana bersyarat adalah Putusan Nomor X/Pid.Sus-Anak/2021/PN Pwt. Penelitian ini bertujuan mengetahui pertimbangan hukum hakim dalam menjatuhkan sanksi pidana bersyarat terhadap terdakwa dalam putusan Pengadilan Negeri Purwokerto Nomor X/Pid.Sus-Anak/2021/PN Pwt dan mengetahui penerapan pidana bersyarat terhadap terdakwa dalam putusan Pengadilan Negeri Purwokerto Nomor X/Pid.Sus- Anak/2021/PN Pwt. Metode pendekatan yang digunakan dalam penelitian ini adalah yuridis normatif dengan spesifikasi penelitian preskriptif.

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Sumber data yang digunakan adalah data sekunder dengan pengumpulan dan menggunakan studi kepustakaan yang disajikan dengan teks naratif, dan metode analisis data yang digunakan adalah normatif kualitatif. Berdasarkan hasil penelitian dan pembahasan, menunjukkan bahwa Hakim dalam memutus Perkara Nomor X/Pid.Sus-Anak/2021/PN.Pwt telah mempertimbangkan aspek perbuatan dan orangnya, pemenuhan alat bukti dan hal-hal yang memberatkan serta meringankan. Terdakwa. Namun demikian, dengan dijatuhkan pidana bersyarat selama 6 (enam) bulan menunjukkan bahwa Hakim tidak mempertimbangkan pada teori pembalasan, karena Terdakwa sudah melakukan tindak pidana pada 2 (dua) korban lainnya.

Kata kunci: *pencabulan; pidana bersyarat; tindak pidana*

1. INTRODUCTION

The problem of sexual abuse has broad and complex dimensions, both from a medical, psychiatric, mental health, and psychosocial perspective. Child sexual abuse can be devastating to the family, community, and school environment. Frequently reported long-term effects of sexual abuse include depression and self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, difficulty in trusting others, a tendency to revictimize, substance abuse, and sexual non-conformity.¹ Sexual abuse is also directly or indirectly a threat to the continuity of development and the future of children who are the next generation of the nation and state of Indonesia. According to I Gusti Ngurah Agung Sweca, sexual abuse has become a severe problem not only locally and nationally but also at the international level.²

Based on positive law in Indonesia, legal protection of children's rights can be found in various rules and regulations as stipulated in Article 28D paragraph (1) of the 1945 Constitution, Article 28B paragraph (2) of the 1945 Constitution, Presidential Decree No. 36 of 1990 concerning the Convention on the Rights of the Child (Keppres No. 36 of

¹ Angela & Finkelhor David Browne, "Impact of Child Sexual Abuse: A Review of the Research," *Psychological Bulletin* 99, no. 1 (1986): 66–77, https://lazypsych.files.wordpress.com/2009/10/browne_1986_sabuse.pdf.

² I Gusti Ngurah Agung Sweca Brahmanta, "Tinjauan Yuridis Tindak Pidana Pencabulan Terhadap Anak," *Jurnal Analogi Hukum* 3, no. 3 (2021): 355–62, <https://doi.org/https://doi.org/10.22225/ah.3.3.2021.355-362>.

1990), Law No. 4 of 1979 concerning Child Welfare (Law No. 4 of 1979), and Law No. 35 of 2014 concerning Child Protection. Article 2, paragraphs (3) and (4) state, "Children have the right to care and protection both during the womb and after birth. The child is entitled to environmental protections that may harm or inhibit normal growth and development". These two paragraphs explain that child protection strives for correct and fair treatment to achieve child welfare.³

As in the Purwokerto District Court Decision Number X/Pid.Sus-Anak/2021/PN.Pwt regarding the crime of child sexual abuse committed by defendant M, aged 15 (fifteen) years 8 (eight) months, against a girl named K, aged 17 (seventeen) years 4 (four) months. The public prosecutor stated that defendant M was guilty of committing the crime of 'Cabul' as regulated and punishable under Article 82 paragraph (1) of Law No. 35 of 2014 Jo Law No. 17 of 2016 on Government Stipulation instead of Law No. 1 of 2016 on the Second Amendment to Law No. 23 of 2002 on Child Protection (Law No. 17 of 2016).

The sexual abuse of victim K committed by defendant M occurred when defendant M was at the home of victim K together with victim K in Karangklesem Village, South Purwokerto Sub-District, Banyumas Regency. Defendant M found Victim K in the room, unconscious on the bed. Defendant M approached Victim K and tried to wake Victim K up by applying eucalyptus oil in front of Victim K's nose, but Victim K did not wake up. Then, defendant M committed sexual abuse by groping the victim's vital area 3 (three) times so that Victim K was semi-conscious, but Victim K was only silent because she was too weak to resist. Knowing that Victim K woke up, defendant M immediately left Victim K's home.

Based on the above, the defendant was sentenced to a conditional sentence of 6 (six) months. The imposition of the conditional criminal sanction above caused a social reaction from the community, especially since the facts in the trial showed that defendant

³ Nashriana, *Perlindungan Hukum Pidana Bagi Anak Di Indonesia* (Jakarta: PT Raja Grafindo Persada, 2012).

M had committed the crime of sexual abuse against other victims. This encourages the author to research the legal considerations of judges in imposing conditional punishment and the application of conditional punishment in Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt seen from the Criminal Purpose.

Previous research was conducted by I Gusti Ngurah Yudha Prasetia with the results of research on the qualifications of acts of child abuse in the view of criminal law, namely contained in Articles 290-296 of the Criminal Code, Article 82 of Law No. 23 of 2002 concerning Child Protection, Article 76E and Article 82 of Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, Article 82 and Article 82A of Government Regulation instead of Law of the Republic of Indonesia No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning Child Protection. The application of the law against the perpetrators of the crime of sexual abuse of minors, namely by imposing sanctions by Law No. 23 of 2002 concerning Child Protection, including imprisonment and fines. The difference with previous research is that this research focuses on applying conditional criminal offenses committed against children by analyzing court decisions. In contrast, prior research only focuses on discussing the legal aspects.

2. RESEARCH METHODS

The research approach method used is normative juridical with prescriptive research specifications. According to Irwansyah, research analysis is understood as a response, response, attitude and stance of researchers in an effort to convert available legal materials into scientific information to be used to solve problems, especially solutions to problems related to research. This analysis is the basis for researchers in conducting a more detailed, complete, and thorough discussion of the formulation of the problem to the formulation of conclusions.⁴ The data source used is secondary data by

⁴ Irwansyah, *Penelitian Hukum, Pilihan Metode & Praktik Penulisan Artikel*, Edisi Revisi (Yogyakarta: Mirra Buana Media, 2022).

collecting and using literature studies which are processed by data reduction, data presentation, data categorisation and presented with narrative text, and the data analysis method used is normative qualitative.

3. RESULTS AND DISCUSSION

3.1. Judges Legal Consideration in Imposing Conditional Criminal Sanction against the Defendant in the Decision of Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt

Article 1 Paragraph (8) of the Criminal Procedure Code explains that judges are stated judicial officials authorized by law to adjudicate so that judges, as enforcers of law and justice, are obliged to explore, follow, and understand the legal values that live in society. The judge's consideration in deciding after the examination and trial process is complete is that the judge must make decisions with a sense of justice. Soedarto argues that the conditions for punishment must fulfill the elements of a criminal offense, which can be divided into two main elements, namely:

1. Element of Act

The element of this person's act must be formulated in the law, which is against the law, and there is no justification. The explanation is as follows:

a. Fulfilling the Formulation of the Law

The actions of the defendant in the case of sexual abuse have been proven to fulfill the formulation of Article 82 Paragraph 1 of Law Number 35 Year 2014 on Child Protection, which regulates child sexual abuse. The elements of the defendant's criminal offense are as follows:

1) Element 1: "Every person"

"every person" is equivalent to the word "whoever," which is usually listed in the formulation of the offense, which is a term that is not an element of a criminal offense but is an element of the article, which refers to anyone individually or a legal entity as a supporter of rights and

obligations who commits or has been charged with committing an act prohibited by statutory regulations.⁵

Based on the Purwokerto District Court Decision Number X/Pid.Sus-Anak/2021/PN.Pwt, the element of every person has been fulfilled because Tedakwa's identity is by the facts revealed in the trial obtained from the testimony of the defendant himself, who has confirmed his identity in the indictment of the Public Prosecutor, so that there is no error in persona or confusion of the person presented in this trial. Thus, the first element has been fulfilled.

- 2) Second element: "It is prohibited to commit violence or threat of violence, to force, to deceive, to commit a series of lies or to induce a child to have sexual intercourse with him or to allow obscene acts to be committed."

Based on the facts revealed from the testimony of the Witnesses and the defendant as well as the defendant's parents, it is revealed that on Tuesday 26 January 2021 at approximately 14.00 WIB, located in the room of the Victim's house situated in Karangklesem Village, South Purwokerto Subdistrict, Banyumas Regency, the defendant has molested the Victim who was unconscious using his right hand 3 (three) times each.

It was revealed that defendant desire drove the motive and purpose of the acts committed by defendant by seeing the opportunity that existed where the Victim Child was unconscious. No one was at home, so the defendant's lust arose to commit these acts. Defendant had watched pornographic films when he was in grade 6 (six) of primary school, and defendant had seen people committing immoral acts (having sex) before,

⁵ Eddy Rifai, "Perspektif Pertanggungjawaban Pidana Korporasi Sebagai Pelaku Tindak Pidana Korupsi," *Mimbar Hukum* 26, no. 1 (2014).

and defendant had even committed similar acts against other victims. The obscene act committed by the defendant after committing the act was that the defendant felt a sense of satisfaction.

About the case in the Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt, the legal facts show that the defendant has committed intentionally and has contained the intent of the element of intentionally committing obscene acts. Thus, the second element of the defendant has been fulfilled.

b. Unlawful

Bemmelen defines against the law in two senses: contrary to proper rigor in associating society with other people or goods and to the obligations stipulated by law.⁶ According to the doctrine of criminal law, there are two types of unlawfulness, namely, against formal law and material law. The act in the Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt is formally against the law. The actions of the defendant in Purwokerto District Court Decision Number X/Pid.Sus-Anak/2021/PN.Pwt is against the law because these actions have been threatened and have fulfilled the formulation in Article 82 paragraph (1) of Law No. 35 2014 concerning child protection.

c. There is no justification

Justification is a reason that removes the unlawful nature of the act.⁷ Based on Decision Number X/Pid.Sus-Anak/2021/PN.Pwt, the defendant, committed his actions not because of a forced defense nor because of carrying out a lawful order or official order. Based on this, the trial did not prove legal facts that could be used as justification.

2. Element of Person

⁶ Mahrus Ali, *Dasar-Dasar Hukum Pidana* (Jakarta: Sinar Grafika, 2011).

⁷ *Ibid.*

a. The existence of fault (Dolus or Culpa)

The defendant's actions must be found guilty. In the broadest sense, guilt can be equated with the notion of responsibility in criminal law, namely the inner relationship of the maker. This inner relationship can be in the form of intent (dolus) or negligence (culpa). According to Satochid Kartanegara, intentionality is someone who intends the act and must understand the consequences of the act. There is also another mental attitude in the form of negligence resulting from a person's less careful actions.

According to the Memorie of Explanation (Memorie van Toelichting), deliberation or dolus is a conscious intention to commit a particular crime.⁸ Intentionality is also defined as willing and knowing, whereas negligence or culpa lies between intentional and accidental. Culpa is viewed as less severe than intent. The Government's Memorandum of Position (MvA) says that committing a crime intentionally means using his ability, while negligently committing a crime means not using the ability that should be used.⁹

Based on the legal facts in the decision, according to the author, the defendant committed obscene acts against the Child Victim, which is a form of intent with intent (opzet als oogmerk). The defendant, in this case, already had the intention to commit obscene acts against the Victim Child, as for the intention of the defendant's actions to commit obscene acts against the Victim Child, namely, the defendant was driven by the defendant's desire by seeing the opportunity that existed where the Victim Child was unconscious so that the defendant's desire arose to commit immoral acts against the Victim Child. Based on this, the author believes that the element of intent in this case has been proven.

b. Capable of Responsibility

⁸ Sudarto, *Hukum Pidana I* (Semarang: Yayasan Fakultas Hukum Universitas Diponegoro, 1990).

⁹ Andi Hamzah, *Hukum Pidana Di Indonesia* (Jakarta: Sinar Grafika, 2019).

Regarding the definition of responsibility, Van Hamel has provided a measure of the ability to be responsible, which includes genuinely understanding the consequences of his actions, realizing that the actions are contrary to public order, and determining the will to act. The three abilities are cumulative. This means a person is only accountable if one of the capabilities is fulfilled.¹⁰

Article 44 of the Criminal Code stipulates that:

- (1) Any person who commits an act for which he cannot be held responsible due to a defect in his mental development (*brekkie ontwikkeling*) or an illness (*ziekelijke storing*) shall not be punished.
- (2) If it is evident that the act for which he is not responsible is due to a defect in the development of his mind or an illness, the judge may order that he be committed to a lunatic asylum for a maximum period of one year on probation.
- (3) The provision mentioned in Paragraph (2) shall only apply to the Supreme Court, the Court of Appeal, and the District Court.

Based on the facts in the trial, the Public Prosecutor has presented a person as the defendant named M, who has admitted his identity with all his identity is true, the same, and by the Indictment of the Public Prosecutor. The defendant was able to answer clearly during the trial. In this case, it appears that the defendant is not defective in growth and is not impaired due to illness, so the defendant is not a person who is exempted from criminal responsibility. This means that the defendant can take responsibility.

c. No excuse

According to Sudarto, the excuse concerns the perpetrator's heart because this person cannot be reproached according to the law. This means a person is not guilty or cannot be held accountable, even though his actions are against the law. This shows that there are reasons to eliminate the perpetrator's guilt so

¹⁰ Hiariej O.S, Eddy, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2016).

that no punishment is possible. The excuses contained in the Criminal Code are force (*overmacht*), forced defense, a forced defense that exceeds the limit (*noodler excess*), and the implementation of official orders without authority based on good faith.¹¹

According to the author, the element of no excuse can be seen in the judge's legal reasoning, who stated that there was no excuse for the defendant. Based on the decision, this element is fulfilled because there is no excuse for the defendant's actions.

Based on the analysis of the punishment conditions above, all have been fulfilled regarding the act and the defendant (person). This means that the defendant can be sentenced based on material criminal law. However, if it is related to formal criminal law after the punishment conditions are fulfilled, valid evidence must also support it. The valid evidence must also convince the judge of the guilt committed by the defendant. The judge in passing a verdict must be based on what is regulated in Article 183 of the Criminal Procedure Code, which stipulates that:

"The judge shall not impose a sentence on a person unless he is convinced by at least two valid pieces of evidence that a criminal offense has occurred and that the defendant is guilty of committing it."

Based on Article 183 of KUHAP, the meaning of at least 2 (two) valid evidences is that there are at least two out of five valid evidences according to Article 184 of KUHAP. Article 184 of KUHAP stipulates that:

(1) Valid means of evidence are:

- 1) Witness testimony;
- 2) Expert testimony;
- 3) Letters;
- 4) Clues; and

¹¹ Sudarto, *Hukum Pidana I*.

5) Statement of the accused.

(2) Things generally known do not need to be proven.

Based on Article 184 Paragraph (1) of the Criminal Procedure Code and the legal facts revealed at trial, the evidence presented by the Public Prosecutor in this case is witness testimony and the testimony of the defendant as follows:

1) Witness Statement

The Public Prosecutor in the decision of the Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt presented a total of 6 (six) witnesses (witness Child, witness Sumiati, witness Arista Nabila, witness Slamet Triyanto, witness Febio Defka Prasetyo, witness Suhono). The six witnesses gave testimony which stated that on Tuesday, 26 January 2021, at 2.00 p.m., WIB was in the room of the Victim's house, which is located in Karangklesem Village, South Purwokerto Subdistrict, Banyumas Regency, the defendant committed sexual abuse against the Victim 3 (three) times.

2) Letters

Based on the trial, there were three letters read out in the form:

- a) Photo of Birth Certificate Excerpt Number: 3302-LT-XXXXXXXXXX-XXXX issued by the Population and Civil Registration Office of Banyumas Regency on 12 June 2015, which stated that in Banyumas on XX X 2005, a child was born, the third son of the father and mother;
- b) Photocopy of Family Card Number 3302XXXXXXXXXXXXXXXXX in the name of the Head of Family Suwarni issued by the Population and Civil Registration Office of Banyumas Regency dated XX X 2019;
- c) Photocopy of Birth Certificate Excerpt Number: XXXX/2003 issued by the Population, Civil Registration Office of Manpower and Transmigration of Banyumas Regency in Purwokerto on 3 October 2003, which states that in Purwokerto Banyumas on XX X 2003, Child Witness was born, a daughter of husband and wife, Suhono and Sumiati.

3) Statement of the defendant

The legal facts show that the defendant admitted that he was legally and convincingly guilty of committing the crime of intentionally committing obscene acts. Defendant confirmed that on Tuesday, 26 January 2021, at 14.00 WIB in the room of Victim K's house, which is located in Karangklesem Village, South Purwokerto Subdistrict, Banyumas Regency. The defendant committed such acts because the defendant had watched pornographic films.

Noting the basis for the judge's consideration in deciding the case above, apart from the judge considering the aspects of the act, the person, and the evidence, the judge also considered the mitigating and aggravating circumstances. Referring to Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt, the judge's legal consideration of the decision is that the judge considers the mitigating and aggravating circumstances in the case of Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt.

The judge considers the mitigating and aggravating circumstances, namely:

a. Aggravating circumstances

- 1) The child's actions caused the victim to experience trauma and material and immaterial losses.
- 2) The actions of the child violated the norms of decency in the community.
- 3) The child has committed similar acts against two other witnesses.

b. Mitigating circumstances

- 1) The child behaved politely in court;
- 2) The child confessed frankly, regretted his actions, and promised not to repeat his actions;
- 3) The child has never been convicted;

- 4) The child is still in grade 3 of junior high school, and there is still hope to improve his attitude and behavior.

Based on the above description, the Panel of judges of Purwokerto District Court tried to declare that the defendant was legally and convincingly proven guilty of committing the crime of sexual abuse. The Panel of Judges of Purwokerto District Court conditionally sentenced the defendant to 6 (six) months imprisonment. The Panel of Judges of Purwokerto District Court ordered that the punishment does not need to be executed unless in the future there is another order in the judge's decision that before the probation period of 1 (one) year ends commits a criminal offense and does not carry out community service at the Assalam Mosque on Jalan Damri RT.01/03 Kelurahan Karangklesem Kecamatan Puwokerto Selatan Kabupaten Banyumas. This means that the conditional punishment becomes void, and the defendant must serve 6 (six) months imprisonment if, before the expiry of the 1 (one) year probation period, the defendant commits a criminal offense.

According to the author, in the Decision of Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt the imposition of conditional punishment against the convicted person is not by the Theory of Criminal Purpose, namely retaliation. Retaliation theory was born in the classical school of criminal law; according to this theory, retaliation is the legitimacy of punishment. Punishment is imposed on the perpetrators because of just deserts; they are punished because they deserve to be punished for their despicable behavior. This means that the concept of "just deserts" in retribution is defined concerning the specific reason and rationale behind the imposition of punishment, namely the ill-desert of the offender, and can be fulfilled through

a negative payment or revenge by a punishment.¹² The theory of retaliation is divided into two types, namely:

- a. Objective retaliation theory is oriented towards fulfilling the satisfaction of feelings of resentment from the community. The criminal's actions must be rewarded with a punishment in the form of a disaster or loss balanced with the misery caused by the criminal.
- b. Subjective retaliation theory, orientated towards the criminal. According to this theory, it is the wrongdoing of the criminal that must be rewarded. A significant loss or misery is caused by a minor mistake, so the criminal should be sentenced to a light punishment.¹³

The judge considered that the defendant had previously committed a similar offense against witnesses M and S. However, this consideration was not realized in the judge's decision itself. The judge instead imposed a conditional sentence on the defendant. Referring to the theory of retaliation, the defendant should be given a punishment or loss commensurate with what was done because the defendant's behavior had molested other people. However, the judge did not consider the defendant's behavior, and according to the theory of objective retaliation, the punishment and loss should be balanced with the misery caused by the criminal.

According to the author, based on the decision of the Purwokerto District Court Number X/Pid.Sus-Child/2021/PN. Apart from not complying with the theory of retaliation, the decision also does not comply with the purpose of punishment, namely rehabilitation. This means that the perpetrator of the crime must be corrected in a better direction so that when he returns to society, his community can accept him and no longer repeat terrible acts. The purpose of punishment as rehabilitation is not new. Thomas Aquinas, from a Catholic perspective, has separated *poenae ut poenae*

¹² O.S, Eddy, *Prinsip-Prinsip Hukum Pidana*.

¹³ Erdianto Efendi, *Hukum Pidana Indonesia* (Bandung: Refika Aditama, 2011).

(punishment as punishment) from poenae ut medicine (punishment as medicine).¹⁴ According to Aquinas, when the state punishes with medicinal power, it is necessary to pay attention to general and special prevention (poenae praesentis vitae magis sunt medicines quam retributive). The rehabilitation theory is also inseparable from the relative theory of prevention. Criminal punishment as a medicine proposed by Aquinas is to improve the convict so that when he/she returns to the community, he/she will no longer repeat his/her actions as the purpose of unique prevention.¹⁵

The judge has considered that the defendant has committed a case of sexual abuse; referring to the theory of rehabilitation, the defendant, who is a child who is proven to have committed a criminal offense, should be rehabilitated in designated institutions, namely LPKS. Children are believed to be easier to coach compared to adults based on mistakes that should not be made.

Based on the analysis of the theory of criminal objectives, the decision of the Panel of judges of the Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt is not appropriate when imposing a conditional sentence. According to the author, it feels unfair to the Victim and does not provide a deterrent effect for the defendant. This is because the defendant has committed the crime of sexual abuse 2 (two) times with different times and victims. The first and second crimes of sexual abuse were not punished because the defendant had not yet been caught, so he could still commit the crime of sexual abuse against the Child Victim. The judge should have considered this in sentencing the defendant.

3.2. Mechanism of Conditional Punishment Implementation Against The Defendant in the Decision of Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt

Conditional punishment is a system of imposing specific punishments (imprisonment, confinement, fine) stipulated in the verdict that the punishment

¹⁴ O.S, Eddy, *Prinsip-Prinsip Hukum Pidana*.

¹⁵ *Ibid*.

imposed is imposed with certain conditions. The institution of conditional punishment arises based on the understanding that the law does not place all criminals or prisoners in prison. Officers should not put specific actions in prison, such as first-time offenders. This aims to prevent detrimental influences in prison, so it is necessary to allow convicts to improve themselves outside prison.¹⁶ Concerning Decision Number X/Pid.Sus-Anak/2021/PN.Pwt, the defendant, was found guilty of child molestation. Conditional criminal punishment can be imposed and executed by the defendant under the terms and conditions outlined in the Criminal Code as the legal basis for imposing conditional criminal punishment.

The mechanism of imposition and implementation of conditional punishment is regulated in Article 14a to Article 14f of the Criminal Code. Article 14, letter a of the KUHP regulates the requirements for imposing conditional punishment. For conditional punishment to be imposed, the judge must impose imprisonment for a maximum of 1 (one) year. The meaning of imprisonment for a maximum of 1 (one) year in the formulation of the article means that the judge has intended to impose imprisonment for a maximum of 1 (one) year for the perpetrators of criminal offenses, so it does not refer to the maximum threat of imprisonment.¹⁷ Therefore, the provision in Article 14a Paragraph (1) becomes the benchmark for whether a conditional punishment can be imposed. The discussion in this research is on the decision of Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt, the judge imprisoned the convicted person for 6 (six) months. The judge determines that the sentence does not need to be served unless, in the future, there is another order in a judge's decision that has permanent legal force before the probation period of 1 (one)

¹⁶ Elvina Frederica et al., "Analysis of Conditional Criminal Decision in Domestic Violence Crime Case," *International Journal of Social Science and Human Research* 06, no. 02 (February 9, 2023), <https://doi.org/10.47191/ijsshr/v6-i2-24>.

¹⁷ Hamidah Abdurrachman, "A Culture of Neglect: A Study in Indonesian Court Judgements Regarding Victims of Domestic Violence," *International Annals of Criminology* 55, no. 1 (May 2, 2017): 26–39, <https://doi.org/10.1017/cri.2016.1>.

year has passed, the Child has committed an act that can be punished and does not carry out community service at the Assalam Mosque/Mushola on Damri Street, South Purwokerto, Banyumas Regency.

The second article that regulates conditional punishment in the KUHP is Article 14b, which regulates the length of the probation period that the judge can determine. The article states that for criminal offenses regulated in Articles 492, 504, 505, 506, and 536 of the Criminal Code, the maximum is 3 (three) years; for other offenses, the maximum is 2 (two) years. The crime of sexual abuse is not included in the criminal offenses set out in Articles 492, 504, 505, 506, and 536 of the Criminal Code. The Panel of Judges of the Purwokerto District Court in Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt decided 6 (six) months imprisonment, then ordered that the punishment does not need to be executed by the Child unless, in the future, there is another order in the judge's decision that the convicted person before the probation period of 1 (one) year ends has been guilty of committing a criminal offense. Based on the description above, the decision of the Purwokerto District Court is Number X/Pid.Sus-Child/2021/PN.Pwt is by the provisions of Article 14b Paragraphs (1) and (3) of the Criminal Code, which regulates the length of probation periods in implementing conditional punishment.

The third article that regulates conditional punishment in the Criminal Code is Article 14c, which explains the general and special conditions the judge sets when imposing conditional punishment. The general and special conditions in the implementation of conditional punishment can be described as follows:

a. General requirements

The convict will not commit criminal offenses during the probation period.

b. Special conditions

- 1) The judge may stipulate that the convicted person must compensate all or part of the loss caused by the criminal offense within a period that does not exceed the probation period.

- 2) The judge determines the behavior that the convicted person must obey if he/she commits one of the criminal offenses in Article 492 of the Criminal Code (public drunkenness), Article 504 of the Criminal Code (public begging), Article 505 of the Criminal Code (loitering without livelihood), Article 506 of the Criminal Code (taking advantage of indecent acts by women), and Article 536 of the Criminal Code (being drunk in public).

Based on the Decision of the Purwokerto District Court Number X/Pid.Sus-Anak/2021/PN.Pwt, the judge only found the defendant guilty and imposed a prison sentence of 6 (six) months. The judge stipulated that the sentence does not need to be served unless, in the future, there is another order in a judge's decision that has permanent legal force before the probation period of 1 (one) year has passed, the defendant has committed an act that can be punished and has not carried out community services at the Assalam Mosque on Damri Street Purwokerto, Banyumas Regency. The court decision handed down by the judge to the defendant has fulfilled the elements of Article 14c Paragraph (1) and Article 14c Paragraph (2) of the Criminal Code because the formulation of special conditions is not something the judge must decide.

Article 14d explains the institution authorized to supervise the convict during the probation period of conditional punishment. Conditional criminal punishment imposed by the judge on the Juvenile Convict can be proposed and requested for amendment. The amendment stipulated in Article 14e of the Criminal Code is the amendment regarding the particular condition and length of probation period that has been determined by the judge previously when imposing the conditional punishment. Based on the Decision of Purwokerto District Court Number X/Pid.Sus-Anak/2021/PN.Pwt, the judge has set the probation period for the juvenile convict for 6 (six) months. Referring to the provisions of Article 14e of the Criminal Code, the probation period for the convicted person can be extended for 1 (one) year.

Article 14f regulates the cancellation of conditional punishment. Conditional punishment may be canceled and become imprisonment if, during the probation period, the convict commits a criminal offense so that the punishment becomes permanent and unconditional. In addition, if one of the conditions is not fulfilled, the judge will give a warning that the imprisonment becomes effective. About the discussion in this research, if referring to Article 14f Paragraph (1), the judge in the Purwokerto District Court Decision Number X/Pid.Sus-Anak/2021/PN.Pwt can order the convicted Child to carry out the imprisonment; the Panel of Judges of the Purwokerto District Court warned and admonished the convicted person to carry out the criminal sentence. This occurs if, after the decision has permanent legal force, the convicted Child commits a criminal offense during probation. This caused the juvenile convict to serve 6 (six) months imprisonment.

Based on the explanation of the application of conditional punishment for the crime of sexual abuse which intentionally causes the victim to experience trauma and material and immaterial losses as regulated in Article 82 paragraph (1) of Law No. 35 of 2014 which was decided by the Panel of Judges of Purwokerto District Court with imprisonment for 6 (six) months, but the punishment does not need to be carried out during the probation period of 1 (one) year in the Decision of Purwokerto District Court Number X/Pid.Sus-Anak/2021/PN.Pwt. The author argues that conditional punishment can be applied in this case because the elements in Article 14a-14f of the Criminal Code have been fulfilled in Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt.

According to Gustav Radbruch, as quoted by Satjipto Raharjo, there are fundamental values of law consisting of legal certainty, legal benefits, and justice; the three fundamental values are as follows:¹⁸

- 1) Legal Justice

¹⁸ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: Citra Aditya Bakti, 2014).

Radbruch adds an idea that goes beyond what can be said of justice by interpreting it as "the form of what is right".¹⁹ Justice is also interpreted as justice means correctness as related primarily to the law and policy conformity with the law).²⁰ About the discussion in this study, the Panel of Judges of the Purwokerto District Court in the Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt believes it would be fairer if the convicted person is sentenced to a conditional criminal sentence than a prison sentence that must be carried out unconditionally. According to the author, the principle of justice (*gerechtigheit*) has not been fulfilled because imposing criminal judgments on victims is considered unfair. The Panel of Judges did not consider the perpetrator who had committed the crime of sexual abuse 2 (two) times to other victims. Therefore, this decision did not bring justice.

2) Legal Certainty

Gustav Radbruch explained that legal certainty is a product of law or, more precisely, of legislation. Based on his opinion, favorable laws that regulate human interests in society must always be obeyed even though the positive law is unfair.²¹ About the discussion in this study, the Panel of Judges of the Purwokerto District Court in Purwokerto District Court Decision Number X/Pid.Sus-Anak/2021/PN.Pwt did not base on the value of legal certainty in imposing a conditional criminal sentence on the convicted person. This is because the Panel of Judges of the Purwokerto District Court imposing a conditional sentence does not base the law on facts or reality. It can be seen that the convicted person has committed the crime of sexual abuse 2 (two) times

¹⁹ Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Kompas, 2006).

²⁰ Karimatul Khasanah, "Telaah Integratif Filsafat Hukum Publik Dan Teori Masalah Terhadap Kebijakan Amnesti Pajak Di Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 1 (June 11, 2021): 37–52, <https://doi.org/10.24090/mnh.v15i1.4041>.

²¹ Budi Astuti and Muhammad Rusdi Daud, "Kepastian Hukum Pengaturan Transportasi Online," *Al-Qisth Law Review* 6, no. 2 (February 14, 2023): 205, <https://doi.org/10.24853/al-qisth.6.2.205-244>.

to other victims, and the judge overrides these legal facts. As for this case, according to the researchers, both the prosecutor and the judge should apply *Concursus Realis*, even though *Concursus Realis* itself is not regulated in the indictment of the Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt. *Consensus Realis* commits multiple acts simultaneously.²²

3) Legal Benefit

Expediency is generally understood as an expression of the suitability of the means to realize a goal. About the discussion in this study, the Panel of Judges of the Purwokerto District Court in Purwokerto District Court Decision Number X/Pid.Sus-Child/2021/PN.Pwt has not been concerned with legal expediency because, according to the author, this decision does not provide a deterrent effect to perpetrators who have previously committed criminal acts; on the contrary, it causes unrest in the community, so it is hoped that the panel of judges can provide the most severe criminal sentence for the defendant. The judge should have given the maximum criminal sanction because sexual abuse is a serious crime, especially for a defendant who has committed sexual abuse against 3 (three) victims.

Based on the criminal and legal objectives analysis, the decision of the Panel of Judges of the Purwokerto District Court Number X/Pid.Sus-Child/2021/PN.Pwt is inappropriate when imposing a conditional sentence. According to the author, it feels unfair to the victim and does not provide a deterrent effect for the defendant. This is because the defendant has committed the crime of sexual abuse 2 (two) times with different times and victims. In the first and second crimes of sexual abuse, the defendant was not convicted because his actions had not yet been discovered, so he was still committing the

²² Raju Kana dan Nila Trisna Redha, "Analisa Putusan Perkara Perdagangan Orang Berdasarkan Ajaran *Concursus Realis* (Studi Kasus Putusan Nomor 69/Pid.Sus/2021/PN.SKM)," *Jurnal Cahaya Mandalika* 3, no. 2 (2023): 797–810, <https://doi.org/https://doi.org/10.36312/jcm.v3i2.1759>.

crime of sexual abuse against the Child Victim. This should be a legal consideration for the Public Prosecutor and the judge to apply *Concursus Realis* against the defendant.

CONCLUSION AND SUGGESTION

The judge in deciding Case Number X/Pid.Sus-Anak/2021/PN.Pwt has considered the aspects of the act and the person, the fulfillment of evidence, and the aggravating and mitigating circumstances of the defendant. However, the imposition of a conditional sentence of 6 (six) months shows that the judge did not consider the theory of retaliation because the defendant had committed criminal offenses against 2 (two) other victims. The implementation mechanism of conditional punishment for child abuse in Decision Number X/Pid.Sus-Child/2021/PN.Pwt, as threatened by Article 82 paragraph (1) of Law No. 35 of 2014, is considered appropriate because the elements of Article 14a-14f of the Criminal Code have been fulfilled. However, it is not by the purpose of the law because it does not bring justice to victims and benefits to the broader community. They are not bringing legal certainty because if the Public Prosecutor and the Panel of Judges refer to the evidence at trial, they should be able to apply *Concursus Realis*.

Based on the research results, judges in imposing criminal sanctions against perpetrators of criminal offenses must prioritize justice, benefit, and legal certainty. This aims to fulfill the purpose of the law itself, where the defendant gets a punishment equivalent to the actions committed.

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