SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN

(Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)

THESIS

By:

NISRINA SULISTYA HASTUTI

Student Number: 18410693

Major: Law (International Program)

LEGAL STUDY PROGRAM UNDERGRADUATE PROGRAM

FACULTY OF LAW

ISLAMIC UNIVERSITY OF INDONESIA

YOGYAKARTA

2022

SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN

(Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)

THESIS

Presented as the Partial Fulfillment of The Requirements to Obtain a Bachelor's Degree at The Faculty of Law
Islamic University of Indonesia
Yogyakarta

By:
NISRINA SULISTYA HASTUTI
Student Number: 18410693
Major: Law (International Program)

LEGAL STUDY PROGRAM UNDERGRADUATE PROGRAM
FACULTY OF LAW
ISLAMIC UNIVERSITY OF INDONESIA
YOGYAKARTA
2022

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN

(Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)

Has Been Examined and Approved by Thesis Advisor and submitted before the Board of Examiners in Final Thesis Examination on the date 5th December 2022

Yogyakarta, 5th December 2022

Thesis Study Advisor

(Ayu Izza Elvany, S.H., M.H)

NIK. 184100104

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN

(Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)

This bachelor's degree thesis has been approved by Thesis Language Advisor to be examined by the Board of Examiners at the Thesis Examination on

03 December 2022

Yogyakarta, 03 December 2022

Language Advisor,

Rina Desitarahmi, S.Pd., M.Hum.

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN

(Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)

Defended Before the Board Examiners on
And Declared Acceptable on
Yogyakarta, 16th December, 2022

Board Examiners	**Signature**
1. **Ayu Izza Elvany, S.H., M.H**	
2. **Dr. Aroma Elmina Martha, S.H., M.H**	
3. **Dr. Mahrus Ali, S.H., M.H**	

Islamic University of Indonesia
Faculty of Law
Dean,

Prof.Dr.Budi Agus Riswandi, SH., M.Hum
NIP: 014100109

SURAT PERNYATAAN

ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR

MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahirrahmanirrahim

Yang bertanda tangan di bawah ini, Saya:

Nama : **NISRINA SULISTYA HASTUTI**

NIM : **18410693**

Adalah benar-benar Mahasiswa Fakultas Hukum Universitas Islam Indonesia yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi dengan judul :

SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN (Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk**)**

Karya Ilmiah ini saya ajukan keapda Tim Penguji dalam Ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

Sehubungan dengan hal tersebut dengan ini saya menyatakan:

1. Bahwa karya tulis ilmiah ini adalah benar-benar hasil karya saya sendiri yang dalam penyusunan tunduk dan patuh terhadap kaidah, etika dan norma-norma penulisan sebuah karya tulis ilmiah sesuai dengan ketentuan yang berlaku;
2. Bahwa saya menjamin hasil yang dapat dikategorikan sebagai melakukan perbuatan karya ilmiah ini benar-benar asli (orisinil), bebas dari unsur-unsur *"penjiplakan karya ilmiah (plagiarism)"*;
3. Bahwa meskipun secara prinsip hak milik atas karya ilmiah ini ada pada saya, namun demi kepentingan-kepentingan yang bersifat akademik dan pengembangannya, saya memberikan wewenang kepada Perpustakaan Fakultas Hukum Universitas Islam Indonesia untuk mempergunakan karya tulis ini.

Selanjutnya berkaitan dengan hal di atas (terutama pernyataan butir nomor 1 dan nomor 2), saya sanggup menerima sanksi baik administratif, akademik, bahkan sanksi pidana, jika saya terbukti secara kuat dan meyakinkan telah melakukan perbuatan yang menyimpang dari pernyataan tersebut. Saya juga akan bersikap kooperatif untuk hadir, menjawab, membuktikan, melakukan terhadap pembelaan hak-hak dan kewajiban saya, di depan ''Majelis'' atau ''Tim'' Fakultas Hukum Universitas Islam Indonesia yang ditunjuk oleh pimpinan fakultas, apabila tanda-tanda plagiat disinyalisir/terjadi pada karya ilmiah saya ini oleh pihak Fakultas Hukum Universitas Islam Indonesia.

Demikian surat pernyataan ini saya buat dengan sebenar-benarnya, dalam kondisi sehat jasmani dan rohani, dengan sadar dan tidak ada tekanan dalam bentuk apapun dan oleh siapapun.

Yogyakarta, 27th November 2022
Yang Membuat Pernyataan

NISRINA SULISTYA HASTUTI
NIM : 18410693

CURRICULUM VITAE

1. Name : Nisrina Sulistya Hastuti
2. Place of Birth : Kalianda
3. Date of Birth : April 19th, 2000
4. Gender : Female
5. Address : Komplek Jati Indah B. 23, RT/RW 003/001 Kel. Way Urang, Kec. Kalianda, Lampung Selatan, Lampung
6. Parents Identity
   a. Father : Drs. Slamet Haryono
   b. Mother : Ir. Sri Wahyuti
7. Education
   a. Elementary School : SD Negeri 1 Way Urang
   b. Junior High School : SMP Negeri 2 Pati
   c. Senior High School : SMA Negeri 1 Kalianda
   d. College : Universitas Islam Indonesia
8. Organization Experiences
   a. Member of Division of HRD of Juridical Council of International Program (JCI) FH UII (2018-2019)
   b. Member of Division of IT of Juridical Council of International Program (JCI) FH UII (2020-2021)
   c. Member of Division of KADIS of TAKMIR Masjid Al-Azhar FH UII (2020-2021)
   d. Member of Division Design & Photo of Lembaga Pers Mahasiswa Keadilan FH UII (2020-2022)
9. Internship
   a. Internship at Sleman State Attorney Office (29th July 2021-20th September 2021)
   b. Internship at Pati District Court (13th October 2021-17th December 2021)
   c. Work experience as Law Administration Staff at Advocate & Legal Consultant Office "Utuh NTA & Partners" (1st March 2022-1st June 2022)

MOTTO

"*There is not a single struggle that is not exhausting.*

And give good tidings to those who are patient,

i.e. the one that when inflicted with calamity they uttered:

indeed, we all belong to God and truly

to him we return".

(QS. Al-Baqarah: 155-156)

"*To be yourself in a world that is constantly trying to make you something else*

is the greatest accomplishment"

-Ralph Waldo Emerson-

"*A life built on assumptions and expectations contains*

*its own seeds of disappointment.***"**

-Author-

DEDICATION

This Thesis dedicated

To:

Both beloved deceased parents and sisters who have educated, provided love, sacrifice, struggle, motivation, and provided role models in the author's life.

Budhe, who I have considered as a mother, Mrs. Subekti,

Pakde, who I also consider as a father, Pak Sudiharto,

Readers and seekers of knowledge in the way of Allah SWT.

I also offer this simple thought of thesis

To:

Almamater, Islamic University of Indonesia

ACKNOWLEDGMENT

Assalamualaikum Wr. Wb

Alhamdulillahirabbil'alamin, there are no words that are appropriate for the author to say other than gratitude to Allah SWT, the Lord of the Universe, who has bestowed His grace and guidance so that the author can complete this thesis, which entitled, **SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN** (Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)**.** *Shalawat* and *Salam* shall be granted to Prophet Muhammad SAW, for bringing all humankind to a brighter era with the full of knowledge.

This thesis is arranged to fulfill one of the most important requirements to achieve the bachelor's degree in the International Undergraduate Program in Law at Islamic University of Indonesia. The author realizes all the shortcomings and imperfections in writing this thesis, so that constructive criticism and suggestions will be accepted by the author for the future progress of the writer's learning process. This thesis will never be finished without any contribution, assistance, guidance and support from various parties. All gratitude shall be honored to:

1. Mr. **Prof. Fathul Wahid, S.T., M.Sc., Ph.D.**, as the Rector of Universitas Islam Indonesia
2. Mr. **Prof. Dr. Budi Agus Riswandi, SH., M.Hum.,** as the Dean of Faculty of Law Universitas Islam Indonesia;

3. Ms. **Ayu Izza Elvany, S.H., M.H.**, as my thesis advisor, who has helped me in writing my thesis, because of her guidance, advice, kindness and support *Alhamdullillah* finally, I can finish my thesis;
4. Mr. **Dodik Setiawan Nur Heriyanto, S.H., M.H., LL.M., Ph.D.** as my academic supervisor who guides me in planning subject every semester.
5. Mrs. **Dr. Aroma Elmina Martha, S.H., M.H.** as the secretary of the International Undergraduate Program in Law at the Faculty of Law Universitas Islam Indonesia.
6. Ms. **Rina Desitarahmi, S.Pd., M.Hum.** as Language Advisor who directs about the use of English very well and thoroughly.
7. My beloved parents, **Drs. Slamet Haryono (alm)** and **Ir. Sri Wahyuti (almh)** as my two guardian angels who always watch me from the sky being my first support system who always motivated and support me from the very beginning.
8. My two lovely sisters, big sis **Yasmine,** who always support me on my hardest time and always been there whenever I need her, and my mid sis **Catleya** who always cheers, hear my story, motivate, and advised for me. Without them, I will not be made to this point.
9. My extraordinary *Budhe* **Tien and** *Pakde* **Sudi,** who I have considered as parents, guardians, my home, the closest people who always care for, guide, teach, they are surrogate parents who I really love.
10. My brother in law, **Zul Sofyan**, who also gave direction, encouragement and assistance, without whom I would not have been able to complete my studies.

11. My nephew, **Darren**, who always decorates my day with his cuteness, behavior, and makes my energy charged just by looking at him.
12. My closest relatives, **Aunt Endah, Uncle Sus, Grandma Tun, Miss Sari, Mas Roni, Mas Bayu, Mas Dhoni, Salma, Nofal, Aulia, Bella, Syafira, Barra**, who are supportive and are my healing place.
13. The person, **Geary**, who supports, accompanies, and encourages me, thank you for all good memories, I've been learning so many lessons.
14. My best friends **agin, dian, hani, vivi, ulfa, caroline, pina**, as backstreet people who always support me no matter what, thank you so much.
15. My thesis comrade friends **Jiho** and **Aan**, who encourage, help and support each other, and achieving the same goals to complete this thesis.
16. My **best IP friends** rere, eca, lisa, ganis, uzma, ame, usy, rahma, sabil, icul, and **my classmates (IP Batch 2018)** that I could not mention one by one. Thank you for the unforgettable memories for the past four year of togetherness in class. See you on top.
17. The Skylark members, **kak rora, kak icil, kak chocho, kak maya, rara, shafa, ames, kak prad, kak imel, kak sasa**, until the newest member **elsya, mila, nicky, dyah, maida** who have given me memories that I can never forget, fighting and working hard together accompanying my leisure during college.

Finally, the author realized that there are still a lot of things that need to be improved. Hopefully, this thesis can be useful for anyone who reads this.

Wassalamu'alaikum Wr. Wb

Yogyakarta, November 27th 2022

Author

Nisrina Sulistya Hastuti

TABLE OF CONTENT

ABSTRACT

Sexual violence against children is the most dominant case that happens to children. But several decisions create injustice because of imposing light penalties. The sentencing theory seems able to influence the penalties. Therefore, deciding penalties must be based on sentencing proportionality. This writing is essential to determine the sentencing theory regarding the crime of sexual violence against children in decision Number 28/Pid.Sus/2021/PN.Bbs and decision Number 869/Pid.Sus/2021/PN.Ptk, and to find out how decision Number 28/Pid.Sus/2021/PN.Bbs and decision Number 869/Pid.Sus/2021/PN.Ptk from the perspective of sentencing proportionality. The research method used is normative legal research, carried out by researching library materials or secondary data as the basis for research by researching regulations related to the issues discussed. Absolute theory tends to be appropriate in deciding the relatively heavy criminal act such as crime of sexual violence against children because the priority purpose of punishment is solely for retaliation as main goal, adjusted to the fault of the perpetrator with receiving appropriate retribution. Meanwhile, this research found the sentencing proportionality between decisions No.28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk. With a comparison based on cardinal proportionality, which is seen from the highest level of crime and the seriousness of the crime.

Keywords: *Children Protection, Sentencing Proportionality, Sexual Violence.*

CHAPTER 1

INTRODUCTION

A. Background

Child term according to Article 1 number 1 of Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection, which has been amended several times, the last of which was amended by Law of the Republic of Indonesia No. 17 of 2016 concerning Child Protection, is a person who is not yet 18 (eighteen) years old, including children who are still in the womb. Law Number 4 on Child Welfare firmly formulates that every child has the right to be protected from the womb to after birth. But in reality, children become vulnerable group to several forms of violence, including sexual violence.

Violence, often referred to as sexual violence, is an act of forcing sexual relations or sexual relations with other people for commercial purposes and/or certain purposes.[1] Sexual violence is one of the criminal acts that can also be called rape. Rape is sexual violence that results in trauma to its victims, both physical and mental suffering. According to Bagong Suyanto, victims will likely suffer trauma that looms over their lives.[2] Article 285 of Indonesia Criminal Code states, "*whoever by force or threats to force a woman to have sex with him outside of marriage is threatened with rape with a maximum of twelve years of imprisonment*."

[1] Thathit Manon, et.al., "Identifikasi Kejadian Kekerasan Pada Anak di Kota Malang", Jurnal Perempuan dan Anak (JPA), Vol. 2, No. 1, 2019, page. 17

[2] Abdul Wahid dan Muhammad Irfan, "*Perlindungan Terhadap Korban Kekerasan Seksual*", Bandung: PT Refika Aditama, 2001, page. 78

Sexual violence against children is a gross violation of human rights. It must be considered an extraordinary crime because the damage it causes has threatened the future of the nation's generations.[3] Sexual violence against children is an extraordinary crime that is mostly committed against children who do not have the power to resist.

Types of violence against children are:

1) Physical (in the form of kicks, punches, pluck, fists, slaps, throwing objects, spitting, pinching, damaging, sabotaging, ganging, stripping, excessive push-ups, drying, cleaning the toilet, running around the field excessively / not knowing the condition of the students, heading cigarettes, etc.);
2) Verbal (berating, mocking, labeling/ nicknames ugly, denouncing, calling by the father's name, swearing, scolding, teasing, threatening, etc.);
3) Psychic (sexual harassment, slander, exclusion, ostracism, silence, sneering, insult, spread gossip).[4]

In a legal issue, the purpose of the sentencing is restitution, which is based on Article 71D paragraph (1) states that "Every Child who is a victim as referred to in Article 59 paragraph (2) letter b, letter d, letter f, letter h,

[3] Trini Handayani, *"Perlindungan dan Penegakan Hukum Terhadap Kasus Kekerasan Seksual Pada Anak"*, Jurnal Mimbar Justitia, Vol. II, No. 02, 2016, page. 828

[4] *Ibid*, page. 831

letter i, and letter j has the right to apply to the court in the form of the right to restitution which is the responsibility of the perpetrator of the crime".

In the case of criminal acts, the judge's decision greatly affects the victim. On this occasion, the author took a criminal case of sexual violence against children. This crime is one of the crimes that have the highest crime rate in Indonesia. In sentencing the verdict by the judge, it is necessary to question the victim and what the victim wants for the perpetrator.

On May 25, 2016, the government issued a Government Regulation in Lieu of Law No. 1 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning Child Protection. There were 6 (six) additional paragraphs to Article 81 and Article 82 of Law No. 23 of 2002 concerning Child Protection as amended by Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection (Law No. 35 of 2014) as well as the addition of Law No. 35 of 2014) as well as the addition of new articles, namely Article 81A and Article 82A. The additional paragraphs are in the form of a delict which is qualified as a basic penalty in the form of imprisonment from the previous maximum of 15 years to a maximum imprisonment of 20 years, life and death as well as a maximum fine of five billion rupiahs. In PERPPU No. 1 of 2016, a new additional form of criminal was also introduced by announcing the perpetrator's identity and actions in the form of chemical castration and chip installation to the perpetrator.

The prohibition of sexual violence in copulation or rape is contained in Article 76D. Article 76D says, "*everyone is prohibited from committing violence or threats of violence forcing a child to have intercourse with him or another person*." Meanwhile, sanctions against perpetrators of the crime of sexual violence against children are regulated in Article 81 of Law Number 17 of 2016 concerning Child Protection.

Based on Article 81, paragraph (1) states that sanctions are in the form of imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp.5,000,000,000 - (five billion rupiah).

There are also provisions if the sexual violence against children is carried out by parents, guardians, family, child caregivers, educators, education staff, officials who handle child protection, or is carried out by more than one person together, the punishment is increased by 1/3 (one third).

In addition, based on Article 81 paragraph (6), the perpetrator may also be subject to additional criminal penalties by announcing the perpetrator's identity.

Children are a vulnerable group to become victims of sexual violence crimes. Those children who has experienced the crime of sexual violence as victim, will certainly experience trauma due to sexual violence. Treatment for trauma and protection in the future requires sensitivity from

law enforcement officials so they don't feel cornered.[5] An urgency that should be included in the judge's considerations and decisions given the mandate for special treatment and protection of children.

One example of sexual violence against children occurs in decision Number 28/Pid.Sus/2021/PN.Bbs and the decision Number 869/Pid.Sus/2021/PN.Ptk. In this study, the author wants to examine sentencing theory for fulfilling the rights of children who experienced sexual violence taken from two different decisions.

This research is a study comparison between two verdicts. The decision from Brebes district court taken as a basic comparison because the sentence was 11 years imprisonment with the reference that the sentences handed down are on average in accordance with the sentences for other verdict of sexual violence against children. Taking into account that the maximum sanction under article 81 paragraph (1) is 15 years imprisonment. Thus, the decision from the Brebes District Court was used with the consideration that a 11-year imprisonment sentence was considered close to the maximum sentence provisions and a significant difference from the sentence imposed by the Pontianak District Court which is mentioned in this research.

[5] Firgie Lumingkewas, "TINDAK PIDANA KESUSILAAN DALAM KUHP DAN RUU KUHP SERTA PERSOALAN KEBERPIHAKAN TERHADAP PEREMPUAN", Lex Crimen Vol. V/No. 1/Jan/2016, p. 23

In both decisions, Number 28/Pid.sus/2021/PN.Bbs and decision Number 869/Pid.sus/2021/PN.Ptk, what two defendants did had fulfilled and violated Article 81 Paragraph (1) Jo. Article 76D of the Law of the Republic of Indonesia No. 35 of 2014 concerning Child Protection, the last being amended by Law no. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law Number 23 of 2002 concerning Child Protection for committing sexual violence against children.

Between decision No. 28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk, comparison has been obtained, which can be seen in the following table:

No	Comparison	Decision Number 28/Pid.Sus/2021/PN.Bbs	Decision Number 869/Pid.Sus/2021/PN.Ptk
1.	Defendant identity	Acep Narto Bin Maman (45 years old)	DEFENDANT (52 years old)
2.	Indictment	First: Article 81 Paragraph (1) Jo. 76D Law No. 35 of 2014 Second:	First: Article 81 Paragraph (1) Jo. 76D of the Law No. 35 of 2014 Second:

		Article 81 Paragraph (2) of the Law No. 35 of 2014 <u>Third:</u> Article 82 Paragraph (1) Jo. 76E of the Law No. 35 of 2014	Article 82 Paragraph (1) Jo. 76E of the Law No. 35 of 2014
3.	Demands	<u>Imprisonment:</u> 13 years <u>Fine:</u> Rp.200.000.000, - <u>Subsidiary Confinement:</u> If the fine is not paid, it will be replaced with imprisonment for 6 months	<u>Imprisonment:</u> 7 years 6 months <u>Fine:</u> Rp.500.000.000, - <u>Subsidiary Confinement:</u> If the fine is not paid, it will be replaced with imprisonment for 3 months.
4.	Child victim	13 years old	3 years and 9 months
5.	***Visum Et Repertum***	A tear in the hymen, the coitus hole of a woman who has often had sex but has not had children.	New tearing of the hymen (at 3, 6, and 11 o'clock, due to blunt force trauma, which resulted from the violence, resulted in lifelong disability and

			could heal but would hinder the victim's activities for several days.
6.	Family relations	The defendant has no family relationship with the victim	The defendant still has a family relationship with the victim
7.	Aggravating Things	The defendant's actions disturbed the public. As a result of the defendant's actions, the child victim experienced trauma and fear.	The defendant's actions have damaged the future of the child victim.
8.	Relieve Things	-The defendant behaved politely during the trial -The defendant regrets his actions -The defendant has never been convicted	-The defendant has never been convicted -The defendant confessed his actions frankly -The defendant regrets his actions -The defendant promised not to repeat his actions again

9.	Verdict	**Legally proven Article 81 Paragraph (1) Jo. 76D** Imprisonment: **11 years** Fine: **Rp.200,000,000, -** Subsidiary confinement: If the fine is not paid, it will be replaced with imprisonment for **6 months**	**Legally proven Article 81 Paragraph (1) Jo. 76D** Imprisonment: **7 years** Fine: **Rp.500,000,000, -** Subsidiary confinement: If the fine is not paid, it will be replaced with imprisonment for **3 months**
10.	Additional Criminal Sanction	Announcement of the identity of the perpetrator for 1 calendar month	No additional criminal sanctions

The decision Number 28/Pid.Sus/2021/PN.Bbs and the decision Number 869/Pid.Sus/2021/PN.Ptk prove that the impact and the sentence between decision No. 28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk are different.

The two decisions above have differences in terms of sentencing by the judges even though the panel of judges at the Brebes District Court and the Pontianak District Court agreed and strengthened the application of the

first alternative indictment, namely Article 81 Paragraph (1) Jo. Article 76D of the Law No. 35 of 2014 concerning Child Protection. The difference between the two panels of judges in considering sentencing is based on their respective judgments which affect the proportionality of sentencing. Therefore, it is interesting to examine the proportionality of the different punishments in the two decisions by raising the title, "**SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN (Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)**"

B. Problem Formulations

1. How is the sentencing theory regarding the crime of sexual violence against children in decision number 28/Pid.Sus/2021/PN.Bbs and decision number 869/Pid.Sus/2021/PN.Ptk?
2. How is the decision number 28/Pid.Sus/2021/PN.Bbs and decision number 869/Pid.Sus/2021/PN.Ptk from the perspective of sentencing proportionality?

C. Research Objectives

This research aims to determine the sentencing theory regarding the crime of sexual violence against children in decision Number 28/Pid.Sus/2021/PN.Bbs and decision Number 869/Pid.Sus/2021/PN.Ptk, and to find out how both decision from the perspective of sentencing proportionality.

D. Research Originality

The research carried out by the author is original. Previous authors have studied the research of crime of sexual violence against children. However, this research is more specific to sentencing proportionality, resulting in a disparity between two decisions: decision Number 28/Pid.Sus/2021/PN.Bbs and decision Number 869/Pid.Sus/2021/PN.Ptk.

No.	Name and Year of The Research	Title	Similarity	Difference
1.	Anyzah Oktaviyani, 2019	Sanksi Tindak Pidana Pelaku Pelecehan Seksual Terhadap Anak (Analisis Putusan No.12/JN/2016/ MS.ACEH)	This research discusses the decision analysis in deciding cases of sexual violence against children.	This research is seen from the perspective of Islamic criminal law and positive criminal law.
2.	A. Dinda Ayu Dinanti, 2016	Tinjauan Yuridis Terhadap Tindak Pidana Persetubuhan	This study discusses the minimum penalty based on Article 81	The defendant in this research committed a

		Dengan Kekerasan Terhadap Anak (Studi Kasus Putusan Nomor:110/Pid.Sus/ 2015/PN.Skg)	Paragraph (1) of Law no. 35 of 2014.	criminal act continuously.
3.	Muhammad Rizal Kurniawan, 2020	Pemidanaan Bagi Pelaku Tindak Pidana Pelecehan Seksual Dalam KUHP dan Hukum Islam	This research discusses the sentencing of sexual violence.	The object of this research is the victim of sexual violence in general according to positive and Islamic law.

E. Literature Review

1. Overview of Sexual Violence Against Children

A child (plural: children) is a boy or girl who is not yet an adult or has not yet experienced puberty. Children are also second descendants, where the word "child" refers to the opposite of parents, adults are children of their parents, even though they have grown up. Meanwhile, according to psychology, children are in a period of

development that spans from infancy to the age of five or six years. This period is usually called the preschool period, then develops equivalent to the elementary school year.[6]

Every child needs protection, Law No. 35 of 2014 Article 1 verse (2) explains the definition of child protection is all activities to guarantee and protect children and their rights so they can live, grow, develop and participate optimally in accordance with human dignity and protection from violence and discrimination. The implementation of child protection must be based on Pancasila and the 1945 Constitution of the Republic of Indonesia by upholding the principle of non-discrimination, the principle of the best interests of the child, the right to life, survival, and development as well as the principle of respect for the opinion of the child. The purpose of this child protection is to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally by human dignity, and receive protection from violence and discrimination for the realization of quality, noble, moral, and prosperous Indonesian children.[7]

Violence means persecution, torture, or mistreatment. According to WHO (in Bagong S et al., 2000), violence is the use of physical force and power, threats or actions against oneself, an individual or group of people, or society that results in or is most likely to result in

[6] https://kbbi.kemdikbud.go.id/entri/anak, accessed on 3 May 2022, 15:06
[7] Article 3 Law No. 35 Year 2014 concerning Child Protection

bruising/trauma, death, psychological harm, developmental abnormalities or deprivation of rights.[8] Here are some expert opinions on the meaning of violence:

a) Soekanto defines violence as a physical force that is forcibly applied to a person or object. Violence can occur when individuals or groups interact by ignoring social values that apply in society to achieve their respective goals.
b) According to Abdul Munir Mulkan, violence is a physical activity carried out by a person or group of people to injure, damage, or destroy other people or the value of objects and all life facilities that are part of the other person.
c) According to Colombijn, violence is behavior that involves physical violence intended to injure, hurt, damage or kill someone or something.[9]

Sexual violence includes forcing sexual intercourse against people who live within the scope of the household (such as wives, children, and domestic workers). Furthermore, it is explained that sexual violence is any act of forcing sexual relations, forcing sexual relations with other people for commercial purposes and or certain purposes. Sexual violence can be in the form of pre-sexual contact treatment between children and older people (through words, touch, visual images,

[8] Thathit Manon, et.al, *Op.Cit*, page. 15
[9] https://badrulmozila.com/pengertian-kekerasan-menurut-para-ahli/ accessed on 03 May 2022, 14:30

exhibitionism, or direct sexual contact treatment between children and adults (incest, rape, sexual exploitation).[10]

Based on Law Number 35 of 2014, types of sexual violence against children are divided into:

a) Sexual violence as regulated in the Criminal Code, article 64 verse (3), states, "special protection for children who are victims of **criminal acts**..." In this provision, the criminal acts, as referred to in the course, include the crime of sexual violence against children.
b) Sexual violence against children in the form of sexual exploitation as regulated in Article 66 of Law 35 of 2014.
c) Sexual violence against children preceded by kidnapping, selling, and trafficking of children as regulated in Article 68 of Law no. 35 of 2014.
d) Sexual violence against children as regulated in Article 69 of Law no. 35 of 2014.

2. Overview of Sentencing Theory

In Indonesian law, a sentence or other words of punishment is a way or process to impose sanctions or penalties for someone who has committed a crime or violation.[11] In this sense, it sets the law not only for a criminal law event but also for civil law. A sentence is an act against

[10] Thathit Manon, et.al., *Op.cit*, page. 19
[11] Muladi dan Barda Nawawi A, *Teori – Teori dan Kebijakan Pidana*, Alumni, Bandung, 1984, page 1.

a criminal, where punishment is intended not because someone has done a crime but so that the perpetrators of crimes no longer do evil and other people are afraid to commit similar crimes.

Sentencing theory can be classified into three primary groups, they are:

a. Absolute Theory or Retribution (*vergeldingstheorieen)*

This theory states that criminals do not aim for the practical, such as improving the attitudes of criminals. The crime contains elements for the criminal conviction to be imposed. Where there is a crime, the criminal must exist absolutely. Don't have to think about the benefits of penalizing itself. Every crime that occurs must result in a criminal offense being imposed on the offender. Criminal is said to be absolute prosecution, not just something that needs to be brought down but becomes a necessity. In essence, the criminal is retaliation.

The indicator of absolute/retributive theory are:[12]

1) if the punishment is a reward that the perpetrator deserves,
2) punishment primarily functions as a payment of compensation. That is, the suffering that the

[12] Salman Luthan, 2007, "Kebijakan Penal Mengenai Kriminalisasi di Bidang Keuangan, Studi Terhadap Pengaturan Tindak Pidana dan Sanksi Pidana Dalam Undang-Undang Perbankan, Perpajakan, Pasar Modal dan Pencucian Uang", Disertasi, Program Pascasarjana Universitas Indonesia, Jakarta, p. 153.

perpetrator receives through punishment is the price that must be paid for the suffering caused to others through a crime,

3) determination of the severity of the criminal sanction is based on the principle of proportionality, meaning that the gradation of the severity of the criminal sanction is positively correlated with the gradation of the seriousness of the crime.

b. Relative Theory or Purpose (*doeltheorieen*)

This theory seeks the basis of criminal law in carrying out public order and its consequences, namely, to prevent crime. The form of this crime is different, namely to frighten, repair, or destroy. The purpose of prevention generally requires that people, in general, do not commit offenses. While special prevention aims to prevent the perpetrator's bad intentions (*dader*), prevent the violator from repeating his actions, or prevent potential violators from carrying out their planned evil deeds.

c. Combined theory (*virenigingstheorieen*)

The combined theory is a theory that focuses on retaliation, and there are also those who want the elements of retaliation and prevention to be balanced. This theory equally emphasizes the elements of retaliation and the defense of

social order. This theory not only considers the past, as contained in the theory of retaliation but also considers the future simultaneously, as is intended in the theory of goals. Thus, the imposition of a crime must provide a sense of satisfaction, both for the judge and the perpetrators of the crime itself and the community.[13]

3. Overview of Sentencing Proportionality

In a sociological view, the existence of disproportionately resulting in disparity is understood as a phenomenon of legal injustice that will disrupt the sense of societal justice.[14] Beccaria, in the adage he formulated as "let punishment fit the crime," admits that every criminal case has its characteristics caused by the condition of the perpetrator, victim, or the situation that existed at the time the crime occurred. Therefore, the judge who saw this case certainly could not close their eye in considering these various factors.

It should be noted that judges who hold judicial power have the authority to examine and decide on criminal cases they handle freely from the intervention of any party. However, the freedom of judges to impose criminal sanctions is not without limits. There is the principle of *Nulla Poena Sine Lege*, where judges can only decide criminal sanctions

[13] Wirjono Prodjodikoro, *Asas-Asas Hukum Pidana di Indonesia*, Refika Aditama, Bandung, 2003, page. 25-27.

[14] *Ibid.*

based on the type and severity of sanctions must be by law. The imposition of sentencing proportionality is an idea that developed into a thought to create a sentencing guide that can reduce judges' subjectivity in deciding cases.

The theory of sentencing proportionality is rooted in the view of the classical scholar Beccaria, which says about the need for a balance between punishment and offense.[15] Based on Beccaria's view, there are two basic principles of criminal imposition, namely:[16]

a) Adage "let punishment fit the crime," which directs the view that punishment must be able to prevent crime.
b) Eliminating discretionary power from judges in deciding cases because judges lean only toward the law.

However, Beccaria's abovementioned theory is challenged because it is considered to limit judges in imposing a sentence. There is another view by Verri, which states that the calculation to decide a sentence is seen from the factors of the physical condition, psychological, environmental, and social background is a value that can add or reduce the number of penalties that can be imposed on him. The next theory that describes the idea of sentencing proportionality is the "desert" theory. Desert theory is translated as "the rational dessert rest

[15] Beccaria, "Of Crime and Punishment". Translated by Jane Grigson, (New York: Marsilio Publisher, 1996), without page.
[16] *Ibid.*

on the idea that penal sanctions should fairly reflect the degree of reprehensible ness (that is, the harmfulness and culpability) of the actor's conduct."[17]

The imposition of a criminal offense must also be measured based on the size of the offense committed by a criminal offender. The size for declaring a criminal act to be in the heavy or light category depends on two things, namely:

a) The value of the material loss incurred as a result of the crime that occurred.
b) Society's view or assessment of an action at a certain time.

The theory of sentencing proportionality aims to minimize injustice caused by differences in the type or amount of criminal sanctions.

F. Operational Definition

An operational definition is a definition based on the observable characteristics of what is being defined:[18]

1. Child

[17] Andrew Von Hirsch and Andrew Asworth, *Proportionate Sentencing: Exp/orale Principle*, (New York: Oxford University PressInc, 2005), page. 4.

[18] Jonathan Sarwono, *Quantitative & Qualitative Research Methods*, Graha Ilmu, Yogyakarta, 2006, p. 67.

A child is a person who is not yet an adult and has not reached the legal legitimacy limit age as a legal subject or as a subject of national law as determined by civil legislation.

2. Sentencing Proportionality

Sentencing Proportionality aims to minimize injustice caused by differences in the type or amount of criminal sanctions.

3. Sexual Violence

Sexual violence is words or actions by a person to control or manipulate another person and make them engage in unwanted sexual activity.

G. Research Methods

1. Types of Research

The type of research used to examine this problem is normative or doctrinal legal research, carried out by researching library materials or secondary data as the basis for research by searching for regulations related to the issues discussed.

2. Research Approach

a. Research Approach Method

This study discusses the crime of sexual violence against children, therefore with this legal problem, the type of research is legal research that uses a legal approach:

a. Statutory Approach

A statutory approach is an approach using legislation and regulation.[19] This approach prioritizes legal material in the form of legislation as a basic reference material in conducting research. In this case, the legislation is the Law of the Republic of Indonesia No. 35 of 2014 concerning Child Protection, which has been amended several times, the last being amended by Law of the Republic of Indonesia No. 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law Number 23 of 2002 concerning Child Protection.

b. Case Approach

This approach examines cases related to the issues at hand that have become court decisions with permanent legal force and how the law works in the community. The case approach in this research is coming from the case of the decision no. 28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk

[19] Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Cetakan Kesembilan, Kencana, Jakarta, 2014, page., 137.

b. Research Object

According to Supranto (2000: 21), the object of research is a set of elements that can be in the form of people, organizations, or goods to be studied. Therefore, the objectives of this research are:

1. Sentencing theory regarding the crime of sexual violence against children in decision number 28/Pid.Sus/2021/PN.Bbs and decision number 869/Pid.Sus/2021/PN.Ptk.
2. The decision Number 28/Pid.Sus/2021/PN.Bbs and decision Number 869/Pid.Sus /2021/PN.Ptk from the perspective of sentencing proportionality.

3. Research Data Source

a. Legal Materials

The materials collected and used as a place to find the law consist of 3 (three) materials:

a. Primary Legal Materials, this primary legal material consists of legislation, official records or minutes in making legislation, and judges' decisions. In this study, the primary legal material is the Law of the Republic of Indonesia No. 35 of 2014 concerning Child Protection, which has been amended several times, the last being amended by Law of the Republic of Indonesia No. 17 of 2016 concerning Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law Number

23 of 2002 concerning Child Protection, District Court Decisions Number 28/Pid.Sus/2021/PN Bbs and District Court Decision Number 869/Pid.Sus/2021/PN.Ptk.

b. Secondary Legal Materials, are legal materials that explain primary legal materials, such as literature studies, documentation studies, archives, official government data, legal books, journals, and published magazines. This includes theses, and legal dissertations.

c. Tertiary Legal Materials are related to legal materials as instructions or explanations for primary and secondary legal materials such as Legal Dictionaries, Encyclopedias, and so on.

b. Data Collecting Technique

The technique used in this study was secondary data collection techniques through library research and document or archive studies.

4. Data Analysis

Data analysis in this study was carried out qualitatively, namely describing data in sentence descriptions, classifying data, editing, presenting analysis results in narrative form, and drawing conclusions. The data description is then compared with the provisions of laws and regulations and with the opinions of legal experts.

H. Thesis Framework

The systematics of this writing aims to provide a clear picture of the contents of the presentation that the author conveys. So, the author divides this writing into four chapters. The first is CHAPTER I, Introduction. This chapter describes the background of the problem, problem formulation, research objectives, literature review, research methods, and thesis writing framework. CHAPTER II contains the definition of sexual violence against children, sentencing theory, and sentencing proportionality. CHAPTER III contains a discussion and analysis. In this chapter, the author or researcher describes several concepts related to research and explain the research and analysis results to answer the formulation of the problem. Furthermore, Chapter IV is the closing section which contains conclusions about the overall discussion and suggestions for the case study by the author.

CHAPTER II

GENERAL OVERVIEW ABOUT SEXUAL VIOLENCE AGAINST CHILDREN, SENTENCING THEORY AND SENTENCING PROPORTIONALITY

A. SEXUAL VIOLENCE AGAINST CHILDREN

Child (plural: children) is a boy or girl who is not yet an adult or has not yet experienced puberty. Marsaid quoted from Soedjono Dirjisisworo who stated that according to customary law, minors are those who have not yet determined concrete physical signs that they have matured.[20] According to Law Number 13 of 2003 concerning Manpower, child is every person under the age of 18 (eighteen) years.[21] If we look at Law No. 17 of 2016 concerning the Second Amendment to Law No. 23 of 2002 concerning Child Protection, said that child is someone who is not yet 18 (eighteen) years old, including children who are in the womb.[22] In the Convention on the Rights of the Child, the definition of a child is:

> "For the purpose of the present Convention, a child means every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier."

[20] Marsaid, *Perlindungan Hukum Anak Pidana Dalam Perspektif Hukum Islam* (Maqasid Asy-Syari'ah), (Palembang: NoerFikri, 2015) page. 56-58.

[21] Law No. 13 of 2003 concerning Manpower, page. 6

[22] Law of the Republic of Indonesia No. 17 of 2016 concerning Establishment of Government Regulation in Substitute of Law No. 1 of 2016 concerning Second Amendment to Law No. 23 year 2002 concerning Child Protection into Law, page 4.

Every child needs to be protected, that's why there is a law regulate about child protection. Article 1 paragraph (2) of Law Number 35 of 2014 concerning Child Protection stipulates that child protection is all activities to guarantee and protect children and their rights so that they can live, grow, and develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination. Child protection can also be interpreted as all efforts aimed at preventing, rehabilitating, and empowering children who experience child abuse, exploitation, and neglect, in order to ensure the survival and growth and development of children fairly physically, mentally and socially.[23]

Here are some expert opinions about the definition of child protection:

a) According to Santy Dellyana, "Child protection is an effort to make oneself to provide protection for children so that they can carry out their rights and obligations in the future."[24]

b) J.E. Doek and H.M.A Drewes classify child protection into two parts, namely:[25] In a broad sense, "Child protection law is all the rules of life that provide protection for individuals who have not yet reached adulthood and provide an obligation for them to be able to grow and develop." In a narrow sense, "Child protection

[23] Maidin Gultom, *Perlindungan Hukum Terhadap Anak Dan Perempuan*, Bandung: Refika Aditama, 2014, page 4.

[24] Santy Dellyana, *Wanita dan Anak di Mata Hukum*, Yogyakarta: Liberty, 1998, page.6.

[25] Maulana Hasan Wadong, *Advokasi dan Hukum Perlindungan Anak*, Jakarta: Grasindo, 2000, page.41.

law includes the law contained in the provisions of civil law, criminal law and procedural law."

Regarding what legal protections are given to children by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, it can be seen in the article listed below:

1. Article 59 paragraphs (1) and (2) of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection states:
   (1) The Government, Regional Government, and other state institutions are obliged and responsible to provide Special Protection to Children.
   (2) Special Protection for Children as referred to in paragraph (1) is given to:
      a. Children in emergency situations;
      b. children in conflict with the law;
      c. children from minority groups and isolated;
      d. economically and/or sexually exploited children;
      e. children who are victims of abuse of narcotics, alcohol, psychotropic, and other addictive substances;
      f. children who are victims of pornography;
      g. children with HIV/AIDS;
      h. child victims of kidnapping, sale, and/or trafficking;
      i. child victims of physical and/or psychological violence;

j. child victims of sexual crimes;

k. child victims of terrorist networks;

l. children with disabilities;

m. child victims of abuse and neglect;

n. children with deviant social behavior; and

o. children who are victims of stigmatization from labeling related to the condition of their parents.[26]

2. Article 69A Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection states: "Special Protection for Child victims of sexual crimes as referred to in Article 59 paragraph (2) letter j is carried out through efforts:

a. education about reproductive health, religious values, and moral values;

b. social rehabilitation;

c. psychosocial assistance from treatment to recovery; and

d. providing protection and assistance at every level of examination, from investigation, prosecution, to examination in court." [27]

[26] Law of the Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection**,** page 24-25.

[27] *Ibid,* page 30.

Sexual violence includes forcing sexual intercourse against people who live within the scope of the household (such as wives, children, and domestic workers). Furthermore, it is explained that sexual violence is any act in the form of forcing sexual relations, forcing sexual relations with other people for commercial purposes and or certain purposes. Sexual violence can be in the form of pre-sexual contact treatment between children and older people (through words, touch, visual images, exhibitionism or direct sexual contact treatment between children and adults (incest, rape, sexual exploitation).[28]

In Indonesia, sexual violence against children have a broad meaning. Sexual harassment is a term in society to describe an act of sexual violence, while in law the term sexual harassment is rarely used because it prefers to use the term sexual violence except in Law Number 9 of 1999 concerning Human Rights which mentions the term sexual harassment. Sexual harassment of children is included in a row of decency offenses, while the offense itself is an act that is prohibited by law, while decency is about good customs in relationships between various members of the community but specifically regarding the gender (sexual) of a human being, morality is different from politeness because the term politeness generally refers to

[28] Thathit Manon, et.al., *Op.Cit*, page. 19.

good habits and is not limited to gender (sexual).[29] Decency offenses against children in the Criminal Code will be divided into 2, namely: [30]

a) Sexual Intercourse

This crime is contained in Book II Chapter XIV of the Criminal Code concerning Crimes Against Morals. This crime is defined as a criminal act related to sexuality that can be committed against men or women. Sexual intercourse is divided into several types, namely:

1) Sexual intercourse with coercion is regulated in Article 285 of the Criminal Code.
2) Sexual intercourse without coercion is regulated in 286 and 287 of the Criminal Code.
3) Sexual intercourse against children is regulated in Article 287 of the Criminal Code.

b) Obscenity Act

Obscenity is an act that leads to sexual acts or can be in the form of words and images that lead to sexual activity which is carried out to achieve self-satisfaction outside the marriage bond. Obscene acts on children can also be oriented to verbal and non-verbal sexual activities, such as holding someone's

[29] M. Sudrajat Bassar, *Tindak-Tindak Tertentu di dalam KUHP*, Bandung, Remaja Karya, 1986, page. 170.
[30] Indonesian Criminal Code.

genitals, invitations to have sex that the victim does not want and there is an element of coercion in it. Obscene acts on children are regulated in Articles 287, 288, 289, 290 and 291 of the Criminal Code.

Regarding the punishment for perpetrators of sexual violence against children according to Law Number 35 of 2014 concerning Child Protection is a minimum of 5 years and a maximum of 15 years in prison and a maximum fine of Rp.5,000,000,000.00 (five billion rupiah).[31] While other punishments according to the Criminal Code articles 287 and 292 state that the maximum sentence for perpetrators of obscenity act of children is 9 years (article 287) and a maximum of 5 years (article 292).[32] The law on child protection as *lex specialis* provides a greater threat than what is regulated in the Criminal Code.

According to Russel's view in Yohannes Fery's book there are 3 (three) categories of sexual violence against children, namely:[33]

a) Very serious sexual violence. There are anal, oral and oral genital sex.
b) Serious sexual violence, namely by showing scenes of sexual intercourse in front of children, showing pornographic sites or

[31] Articles 81 verse (1) and 82 verse (1), Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, page 44-45
[32] Indonesian Criminal Code.
[33] Yohannes Ferry, *Kekerasan Seksual Pada Anak Dan Remaja*, Jakarta, PT.Rajawali, 1997, page 2.

images to children, ordering children to hold the perpetrator's genitals with the aim of obtaining satisfaction, or other sexual activities but not yet reaching sexual relations such as very serious sexual violence.

c) Serious enough sexual violence, namely touching the child's sexuality (child privacy) or by forcibly removing the child's clothes.

Sexual violence against children itself is defined as an act of coercion to have sexual relations or other sexual activities, which are carried out by adults against children, with violence or not, which can occur in various places regardless of culture, race and strata of society. The victims can be boys or girls, but generally the victims are girls under 18 years old.[34]

B. SENTENCING THEORY

In Indonesian law, sentence or other words of a punishment is a way or process to impose sanctions or penalties for someone who has committed a crime or violation.[35] Sentence is an act against a criminal, where punishment is intended not because someone has done crime but so that the perpetrators of crimes no longer do evil and other people are afraid to commit similar crimes.

[34] N Katjasungkana, *Penyalahan Seksual Pada Anak*, Jakarta, Mitra Wacana, 2000, page 14.

[35] Muladi and Barda Nawawi A, *Op.Cit*, page 1.

Sentencing can be interpreted as the stage of determining sanctions and also the stage of imposing sanctions in criminal law. The word "criminal" is generally defined as law, while "sentencing" is defined as punishment. Sentencing as an act against a criminal, can be justified normally not primarily because the punishment has positive consequences for the convict, the victim and other people in society. Therefore, this theory is also called the theory of consequentialism. Criminals are imposed not because they have done evil but so that the perpetrators of the crime will no longer do evil and other people are afraid to commit similar crimes. Sentencing is not intended as an effort to take revenge but as an effort to foster a criminal as well as a preventive measure against the occurrence of similar crimes.

In sentencing theory, generally divided into 3 (three) major groups, namely absolute theory or vengeance theory or retributive theory (*vergeldings theory*), relative theory or purpose theory (*doel theory*), and combined theory (*verenigings theory*).[36]

1. **Absolute Theory** (*vergeldingstheorieen*)

   The absolute theory or commonly referred to as the theory of retaliation explains that punishment is imposed because people have committed crimes. The basis for justification lies in the existence of the crime itself. Johanes

[36] E. Utrecht, *Hukum Pidana I*, (Jakarta:Universitas Jakarta, 1958), page. 157

Andenaes argues that the primary purpose of punishment according to absolute theory is to satisfy the demands of justice. Meanwhile, the beneficial effect is secondary. According to Muladi, absolute theory views that sentencing is retaliation/revenge for mistakes that have been made so that it is oriented by its action and lies in the occurrence of the crime itself. This theory puts forward that sanctions in criminal law are imposed solely because people have committed a crime which is an absolute consequence that must exist as a revenge for people who commit crimes so that sanctions aim to satisfy the demands of justice.[37]

According to Andi Hamzah, regarding absolute theory, punishment is not for practical purposes, such as fixing criminals. It is the crime itself that contains the elements to be imposed, the punishment absolutely exists, because a crime is committed. There's no need to think about the benefits of criminal prosecution.[38]

The theory of retaliation or absolute theory is divided into subjective and objective retaliation.[39]

a. Subjective Retaliation Theory, oriented to the perpetrator. The retaliation is retaliation for the crime

[37] Zainal Abidin Farid, *Hukum Pidana 1*, Sinar Grafika, Jakarta, 2007, page. 11
[38] Andi Hamzah, *Sistem Pidana dan Pemidanaan Indonesia*, Jakarta: Pradnya Paramita, 1993, page. 26
[39] Andi Hamzah, *Asas-Asas Hukum Pidana*, Jakarta: Rinneka Cipta, 1994, page. 31.

done by the perpetrator. If the big loss or misery is caused by a minor mistake, then the perpetrator of the crime should be sentenced by light punishment.

b. Objective Retaliation Theory, is retaliation for what the perpetrator has created in the community. Oriented to the fulfillment of satisfaction from feelings of revenge from the community. In this case, the act of the perpetrator must be repaid with a punishment in the form of a disaster or loss that is balanced with the misery caused by the perpetrator.[40]

On the subject of retaliation, an expert J.E. Sahetapy stated: "Therefore, if the sentence is imposed with the sole purpose of retaliating and frightening, it is not certain that this goal will be achieved, because there is no guarantee that the defendant feels guilt or regret, maybe vice versa, even he holds a grudge. In my opinion, retaliating or frightening the perpetrator with a cruel crime violates the sense of justice."[41]

There are several characteristics of absolute theory as expressed by Karl O. Cristiansen, namely:[42]

a. the sentencing purpose is solely for retaliation;

[40] *Ibid.*

[41] J.E. Sahetapy, *Ancaman Pidana Mati Terhadap Pembunuhan Berencana*, Bandung: Alumni,1979, page. 149.

[42] Muladi and Arief, *Op. cit*, page. 17

b. retaliation is the main goal, without containing means for other purposes, such as the welfare of the people;
c. mistake is the only condition for the existence of sentencing;
d. the punishment must be adjusted to the fault of the maker;
e. punishment is a pure reproach and the aim is not to correct, educate or re-socialize the perpetrator.

In the context of the Indonesian criminal law system, the characteristics of the absolute theory as retaliation are clearly not in accordance (contradict) with the philosophy of sentencing/punishment based on the penal system adopted in Indonesia which is Law No. 12 of 1995. As well as, the concept developed in the Draft of Indonesia Criminal Code, which is expressly stated in terms of the purpose of sentencing, that "Sentencing is not intended to suffer and demean human dignity."[43]

2. Relative Theory (*doeltheorieen*)

Relative/utilitarian/preventive theory born as a reaction to the absolute theory. Basically, the purpose of punishment according to relative theory is not just revenge, but to create

[43] Article 54 verse (2) Draft of Indonesia Criminal Code.

order in society. Sentencing is not just to retaliate or reward people who have committed a crime, but has certain useful purposes. Therefore, this theory is often also called the theory of goals (utilitarian theory). So, the basis for justifying the existence of a crime according to this theory lies in its purpose. The punishment is not "*quia peccatum est*" (because people commit crimes) but "*nepeccetur*" (so that people don't commit crimes).[44]

Herbert L. Packer express that relative theory emphasizes aspects of benefits for society, with the following criteria:[45] emphasize the aspect of the perpetrator, forward looking, justifying punishment because punishment has a positive impact or good effect on the convict, the victim and the community, leads to prevention, and by being sentenced, the perpetrator will be good and no longer commit a crime.

As stated by Koeswadji that the main objectives of sentencing are:[46]

a) To maintain public order.
b) To repair the losses suffered by the community as a result of the crime.

[44] Muladi and Barda Nawawi Arief, *Teori dan Kebijakan Pidana*. *Op.Cit*, page. 16.
[45] Herbert L. Packer, "*The Dilemma of Punishment*", p. 4-7.
[46] Koeswadji, *Perkembangan Macam-macam Pidana Dalam Rangka Pembangunan Hukum Pidana*, Edition I, (Bandung: Citra Aditya Bhakti, 1995) page. 12.

c) To repair the perpetrator (*verbetering vande dader*).

d) To destroy the criminal (*onschadelijk maken van de misdadiger*).

e) To prevent crime (*tervoorkonning van de misdaad*).

Regarding this relative theory, Muladi and Barda Nawawi Arief explained that: [47] "Sentencing is not a retaliation for the perpetrator's mistakes but as a tool for achieving a better purpose to protect the community towards the welfare of society. Sanctions are emphasized on the purpose, which is to prevent people from committing crimes, so it is not aimed at the absolute satisfaction of justice."

The British philosopher Jeremy Bantham (1748-1832), a figure whose opinion can be used as the basis of this theory. According to Jeremy Bantham, humans are rational beings who will consciously choose pleasure and avoid difficulty. Therefore, a punishment must be assigned to each crime in such a way that the distress will be more severe than the pleasure caused by the crime. Regarding the objectives of the punishment are:[48]

1) prevent all violations;

2) prevent the worst offense;

3) suppress crime;

[47] Zainal Abidin Farid, *Op.Cit*, page. 11
[48] Muladi and Barda Nawawi Arief, *Teori dan Kebijakan Pidana*. *Op.Cit*, page. 30-31.

4) minimize losses/costs.

In criminal law, according to E. Utrecht, relative theory divided into two, namely:[49]

a) General Prevention, aims to prevent people in general from violating, maintain public order from the disturbance of criminals. As there is a punishment, it is hoped that other members of the community will not commit criminal acts.
b) Special Prevention, aims to prevent the maker (*dader*) from violating, not repeating the crime. In this case, punishment exist to educate and improve prisoners to become good and useful members of society.

From the description above, several characteristics of the relative theory can be stated, namely:

a) the purpose of the punishment is prevention;
b) prevention is not a final punishment, but is a means to achieve a higher goal, namely the welfare of society;

[49] E. Utrecht, *op.cit*, page. 157

c) only violations of the law that can be blamed on the perpetrator are eligible for the existence of punishment;

d) must be determined based on its purpose as a tool for crime prevention.

e) Forward-oriented, punishment can contain elements of reproach, but both elements of reproach and elements of retaliation cannot be accepted if they cannot help prevent crime for the benefit of the public welfare.[50]

The Indonesian criminal law system can be said to be close to the relative theory. This is evidenced by the development of correctional theory and the correctional system which was then implemented in Law no. 12 of 1995 concerning the Correctional System. From the formulation of the draft Criminal Code[51] also seen the closeness of the idea to the theory of relative.

[50] Muladi and Barda Nawawi Arief, *Op. cit*, page. 17

[51] Article 54 Draft of Indonesia Criminal Code Year 2005:

(1) Sentencing aim:
   a. prevent the commission of criminal acts by enforcing legal norms for the protection of society;
   b. socialize convicts by conducting coaching so that they become good and useful people;
   c. resolve conflicts caused by criminal acts;
   d. restore balance, and bring a sense of peace in society;
   e. acquit the convict of guilt; and forgive the convict.

(2) Sentencing is not meant to suffer and demean human dignity.

So, the purpose of sentencing according to relative theory is to prevent (*preventive*) so that order in society is not disturbed. In other words, the punishment imposed on the perpetrator is not to avenge his crime, but to maintain public order.

3. **Combined Theory** (*virenigingstheorieen*)

According to the combined theory, the purpose of punishment is not only to avenge the crimes done by the perpetrator, but also to protect society by creating order. This theory uses the two theories above (absolute theory and relative theory) as the basis for sentencing, with the consideration that both theories have weaknesses, namely:[52]

a) The weakness of the absolute theory is that it creates injustice because in sentencing it is necessary to consider the existing evidence and the intended retaliation does not have to be the state that carries out.
b) The weakness of the relative theory is that it can cause injustice because the perpetrators of minor crimes can be severely punished, community satisfaction is neglected if the goal is to repair

[52] Koeswadji, *op.cit*, page. 11-12.

society, and preventing crime by threaten others not to do it is hard to implement.

Combined theory was introduced by Prins, Van Hammel, Van List with the following views:[53]

a) The most important goal of sentencing is to eradicate crime as a social phenomenon.
b) The science of criminal law and criminal legislation must pay attention to the results of anthropological and sociological studies.
c) Sentencing is one of the most effective ways that governments can use to combat crime. Sentencing is not the only way, therefore it should not be used alone, but must be used in combination with social efforts.

In essence, punishment is a protection against society and retaliation for unlawful acts. In addition, Roeslan Saleh also stated that the punishment contains other things, namely that the punishment is expected to be something that will bring harmony and as an educational process to make people acceptable again in society.[54] In that context, Muladi proposes a combination of

[53] Djoko Prakoso, Surat Dakwaan, *Tuntutan Pidana dan Eksaminasi Perkara di Dalam Proses Pidana*, Liberty, Yogyakarta, page. 47.

[54] Muladi and Barda Nawawi Arief, 1992, *Op. cit*, page. 22. Furthermore Van Bemmelen stated sentencing aim is retaliate and protect society. Action intends to secure and maintain the

sentencing objectives that are considered suitable with sociological, ideological, and philosophical juridical approaches based on the basic assumption that a crime is a disturbance of balance, harmony and harmony in people's lives, which results in individual or community damage. Thus, the purpose of punishment is to repair individual and social damage caused by criminal acts. The purposes of the sentencing are:

a) prevention (general and specific),
b) community protection,
c) maintain community solidarity,
d) compensation/balancing.[55]

In the Draft Law of the 2005 Criminal Code, regarding the purpose of sentencing is regulated in Article 54, namely:

a. Sentencing aims to:
    1) Preventing the commission of criminal acts by enforcing legal norms for the protection of society.
    2) Socializing prisoners by conducting coaching so that they become good and useful people.

goal. So the crime and the action both aim to prepare the convict to return to public life, (translated from quote Oemarseno Adji), *Hukum Pidana*,(Jakarta: Erlangga, 1980), page. 14.

[55] Muladi, *Op.cit*, page. 61.

3) Resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of peace in society.
4) Release the guilt of the convict.
5) Forgiving the convict.

b. Sentencing is not intended to suffer and degrading human dignity.

Seeing the purpose of sentencing above, Sahetapy stated that the purpose of sentencing is very important, because judges must reflect on the aspects of punishment/sentencing within the framework of the purpose of sentencing by paying attention not only to the sense of justice in the society, but must be able to analyze the reciprocal relationship between the perpetrator and victim.[56]

In relation to the sentencing purposes, Andi Hamzah put forward three R's and one D's, namely: [57] Reformation, Restraint, Retribution, and Deterrence. Reformation means repairing or rehabilitating criminals into good people and useful to society. Restraint means alienating violators from society, as well as eliminating law violators from society, meaning that

[56] J. E. Sahetapy, *Tanggapan Terhadap Pembaharuan Hukum Pidana Nasional*, Pro Justitia, Law journal, Year VII, Number 3, July 1989, page. 22.
[57] Andi Hamzah, 1994, *Op. cit*, page. 28.

society will become safer. Retribution is retaliation against lawbreakers for having committed a crime. Deterrence means to deter or prevent so that both the defendant as an individual and other people who are potential being a criminal will be deterred or afraid to commit a crime because they see the sentence imposed on the defendant.

According to Sholehuddin, the purpose of sentencing is: [58]

1) Provide a deterrent effect. Deterrence means keeping the convict away from the possibility of repeating the same crime, while the purpose of deterrence means that sentencing serves as a warning and frightening example for potential criminals in society.
2) Second, sentencing as rehabilitation. Purpose theory considers punishment as a way to achieve reformation or rehabilitation of the convict. The characteristic of this view is that sentencing is a social and moral treatment process for a convict to re-integrate into society properly.
3) Third, sentencing as moral education place, or a process of reformation. Therefore, in the sentencing

[58] Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana, Ide Dasar Double Track System & Implementasinya*, (Jakarta: Raja Grafindo Persada, 2003), page. 45.

process, the convict is helped to realize and admit the guilt he has been accused of.

The combined theory tries to create a balance because the purpose of punishment and sentencing is not singular, not only for retaliation but also for prevention, but with the aim to fix perpetrator for not doing the same crime.

C. SENTENCING PROPORTIONALITY

In law, known a word of disparity, which is basically a negation of the concept of parity, which means the equality of amounts or values. In the context of parity of sentencing means the equality of punishment between similar crimes under similar conditions[59]. Thus, disparity is the unequal punishment between the same offense in similar circumstances (comparable circumstances)[60].

The concept of parity itself cannot be separated from the proportionality principle, the principle of punishment promoted by Beccaria where it is hoped that the punishment imposed on the perpetrator of a crime is proportional to the crime he committed[61]. If the concepts of parity and proportionality are seen as a single unit, then the disparity in sentencing can also occur in the event that the same sentence is imposed on perpetrators who commit crimes with different levels of crime.

---

[59] Allan Manson, *The Law of Sentencing*, Irwin Law: 2001 page. 92-93.

[60] Litbang Mahkamah Agung, *Kedudukan dan Relevansi Yurisprudensi untuk Mengurangi Disparitas Putusan Pengadilan,* Puslitbang Hukum dan Peradilan Mahkamah Agung RI: 2010 p. 6.

[61] Allan Manson. *Op.cit* page. 82

The idea of sentencing proportionality became an idea that developed into the idea of making sentencing guidelines that was able to reduce the subjectivity of judges in deciding cases. Sentencing guidelines are considered the best way to limit judges' freedom so that objectivity and consistency in deciding cases will be maintained.[62]

The history of the idea of sentencing guidelines has been applied in several countries. The basis of justification for making this idea is the theory of proportional sentencing which is rooted in the classical scholar Beccaria's view of the need for a balance between punishment and guilt.[63] Beccaria's classical teachings explain two basic principles of sentencing imposition, namely:[64]

a) That "let punishment fit the crime" which directs the view that sentencing must be able to prevent crime.
b) Eliminating discretionary power from judges in deciding cases because judges are mere mouthpieces of the law.

There are three strategies for imposing criminal sanctions that have been developed in various countries in the world, namely:[65]

a. Indeterminate sentence

A system for imposing criminal conviction which is not based on a definite unit of time, however, the imposition of this

[62] Eva Achjani, "Proporsionalitas Penjatuhan Pidana", Journal of Law and Development, Faculty of Law, University of Indonesia, 2011, page 305.
[63] Beccaria, *op.cit.*
[64] *Ibid.*
[65] Eva Achjani, *op.cit.*

sanction determines a certain "range" of time, for example being sentenced to a minimum of 3 years and a maximum of 6 years.[66] So, the convict must serve a sentence of between 3 to 6 years, where the length of this time will depend on the convict himself. The sentencing paradigm in the indeterminate sentence can be seen in two important points, namely:

1) Sentencing is not a means of frightening but is a means of enlightenment where it is hoped that the perpetrator will realize that there is good for himself that he can seek for himself;
2) There is repair effort that occurs automatically on the impulse that arises from the hope to be able to free himself from the rehabilitation mechanism attempted by the institution.

b. Determinate sentence

In the determinate sentence model, the judge's attachment in sentencing is based on the provision of a unit of time by law. The judge in this case must choose between the available options, for example the law determines the amount of the sanction, which is 3,4,5 years. Usually the judge will choose the middle one, which is 4 years, because if they choose 3 years,

[66] G.Larry Mays and L.Thomas Winfree Jr., "*Contemporary Corrections* ", Second Edition, (Belmont: WadsworthlThomson Learning, 2002), p. 75.

of course there must be a justification reason that reduces the sentence, or if they choose 5 years there must be aggravating things to justify his decision.[67]

c. Mandatory sentence

The mandatory sentence is a mechanism for imposing criminal sanctions determined by law based on a certain scale. Usually determined based on the minimum scale of the length of the sentence (imprisonment) that must be served by the perpetrator. The formulation of sentencing using this mechanism has an impact on reducing the "sentencing discretion" of judges.[68]

d. Sentencing guidelines

In the existing Draft Indonesian Criminal Code, sentencing guidelines are written as a checking point in considering sentencing which includes: [69]

Article 56

(1) In sentencing, it is obligatory to consider:

a) the criminal offender's fault;

[67] Eva Achjani, *Op. Cit.*
[68] *Ibid.*
[69] Draft of Indonesian Criminal Code.

b) the motive and purpose of committing criminal act;

c) the inner attitude of the criminal offender;

d) whether the crime was committed with a plan;

e) how to commit the crime;

f) the attitude and actions of the criminal offender after committing a crime;

g) curriculum vitae and social and economic conditions of the criminal offender;

h) the effect of the crime on the future of the criminal offender;

i) the effect of the crime on the victim or the victim's family;

j) forgiveness from the victim and his/her family; and/or

k) public view towards the crime committed.

(2) The light of action, the personal circumstances of the criminal offender, or the circumstances at the time the crime was committed or what happened later, can be used as a basis for consideration not to impose a sentence or impose an action with taking a consideration from justice and humanity.

In addition, the inequalities of punishment are more likely to occur when the judge is free to determine the severity of the punishment to be imposed, because the law only regulates the maximum and minimum punishment, not the appropriate punishment. Thus, according to modern schools, the occurrence of inequalities in punishment (criminal disparity) can indeed be justified as long as each such case has a clear and transparent basis of justification. However, disparities that do not have a strong basis will lead to legal uncertainty.

There are two variants of criminal proportionality, namely cardinal/nonrelative proportionality and ordinal/relative proportionality. Cardinal proportionality requires that it be necessary to maintain a rational proportion between the highest level of crime and the seriousness of the crime.[70] While the ordinal proportionality requires that the rating of the severity of the criminal threat must reflect the rating of the seriousness of the crime and the guilt of the violator. Punishment are arranged based on a scale so that the relative severity of the crime is related to the comparison of the offender's guilt.[71]

The impact of sentencing disparities will threaten law enforcement efforts itself. In a sociological view, this problem is understood as a

[70] Andrew von Hirsch, "Communsurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale", Journal of Criminal Law and Criminology, Vol. 74, 1983, p. 213.

[71] *Ibid,* page 214.

phenomenon of legal injustice that will disrupt the sense of community justice (societal justice).[72]

D. SEXUAL VIOLENCE AGAINST CHILDREN IN ISLAMIC PERSPECTIVE

Criminal acts in Islamic criminal law are known as *jarimah*, which are divided into three. First, *hudud jarimah*, namely jarimah whose punishment has been determined both in form and amount by syara', such as adultery, accusing of adultery, drinking, stealing, robbing, leaving Islam and rebelling. Second, *jarimah qisas*, namely *jarimah* whose punishment has been determined by *syara',* but there is terms of forgiveness, namely that the punishment can be transferred to *al-diyat* (fine) or even free from punishment, if the victim or the victim's guardian forgives the perpetrator. Third, *jarimah ta'zir*, namely *jarimah* whose punishment is not determined both in form and amount by *syara'*, but given to the state its authority to determine it in accordance with the demands of benefit or criminal acts that are not determined by sanctions by the Qur'an and hadith are referred to as *ta'zir* criminal acts. *Jarimah hudud* can be transferred to be *jarimah ta'zir* if there is s*yubhad* (something that is doubtful or unclear.), both *syubhat fi al-fi'li*, *fi al-fa'il*, and *fi almahal*, and if the *hudud jarimah* does not meet the requirements.[73]

---

[72] Harkristuti Harkrisnowo, *Rekonstruksi Konsep Pemidanaan: Sualu Gugatan Terhadap Proses Legis/asi dan Pemidanaan di Indonesia*, Orasi Pengukuhan Guru Besar di Universitas Indonesia, (Depok: 8 Maret 2003).

[73] Nur Sa'ada, "Tinjauan KUHP dan Fiqh Jinayah terhadap Zina dan Turunannya dalam Qa'nu", Al-Qānūn, Vol. 19, No. 1, Juni 2016, p. 100-101.

Islam has regulated about sexual violence, but it is included in the category of adultery and included in the category of sexual intercourse and in Islam when someone commits adultery the punishment is stoning or having half the body buried in the ground and stoned in front of people to death.

Adultery is included in the *jarimah* whose punishment is *hudud*. *Jarimah* itself means doing or leaving an act that has been authorized or has been declared unlawful and sanctioned by the *Shari'a*, while *hudud* is a punishment that has been determined by Allah in the Qur'an and is the right of God or the rights of the general public.[74]

Based on Islamic Law, the offense of adultery has the following elements:

a) Sexual intercourse;
b) Between men and women, between women and women, and between men and men;
c) Done voluntarily or by force;
d) By people who are bound in marriage or not bound in marriage.

The elements of the adultery offense in the Islamic concept above make a distinction between the adultery offense and its punishment, namely: *muhsan* adultery in which the adulterer already has a legal partner (bound

[74] Muhammad Ichsan, M. Endrio Susila, 2008, Hukum Pidana Islam Sebuah Alternatif, Yogyakarta, LabHukum Universitas Muhammadiyah Yogyakarta, p 68.

in marriage) and *ghairu muhsan* adultery in which the adulterer has never been married and does not have a legal partner.[75]

If adultery is committed by coercion, the perpetrator of adultery will be stoned and the victim of the act will be released. This is regulated in QS. An-Nisa verse (19) which is translated and reads:

> "*O believers! It is not permissible for you to inherit women against their will or mistreat them to make them return some of the dowry ˹as a ransom for divorce˺—unless they are found guilty of adultery. Treat them fairly. If you happen to dislike them, you may hate something which Allah turns into a great blessing.*"

Allah SWT has confirmed that humans do have lust, including sexual lust, which is stated in QS. Ali Imran verse (14) which reads:

> "*The lust (extreme desire) towards women and children, of hoarded treasures of gold and silver, of branded beautiful horses and cattle and well-tilled land, is made to seem beautiful to men;*"

These lusts must be controlled, especially in this case the lust for sexuality which will lead to the act of adultery which is very hated by Allah because adultery in Islam is a major sin, this is explained in the QS. Al Furqan verse (68), which states that acts which are major sins include disbelievers, killing without a reason justified by Allah and adultery.

[75] Umi Rozah, "DELIK ZINA: UNSUR SUBSTANSIAL DAN PENYELESAIANNYA DALAM MASYARAKAT ADAT MADURA", Masalah-Masalah Hukum, Jilid 48 No.4, Oktober, 2019, p. 370.

Sexual intercourse or adultery is different from obscenity acts, in Islam obscenity acts are called acts of someone approaching adultery and are regulated in the QS. Al Isra verse (32) which is translated and reads:

"*Do not go near adultery. It is truly a shameful deed and an evil way*".

Of the two verses above, there are two prohibitions, namely the prohibition of adultery and the prohibition of approaching it, if equated with the positive law that applies in Indonesia, it will not differ much what is meant by sexual violence which in Islam is known as adultery (*zina*) and with this verse we know what is meant by sexual violence is an act that is carried out by force and is hated by God for an act that leads to sexuality.

Sexual violence against children in Islam is something that is very hated by Allah, but there is a difference between sexual violence of children in Islam and positive Indonesian law, namely the age of maturity which according to Islam is pegged to the age of puberty (*baligh*) of a child, this age is obtained earlier than the adult age according to Indonesian positive law which on average stipulates 18-21 years old.

The difference between adultery in Islam and in Indonesian positive law is included in terms of sanctions on the perpetrators, if in Indonesian law the sanctions for adultery or sexual violence are in the form of imprisonment and fines, while in Islam the punishment for perpetrators is very different, namely recognizing the punishment of lashing and stoning for adulterer.

The punishment of lashing and stoning is a punishment that Allah has prescribed for adulterers and is clearly regulated in QS. An Nur verse (2) which is translated and reads:

> "*As for female and male fornicators, give each of them one hundred lashes, and do not let pity for them make you lenient in ˹enforcing˺ the law of Allah, if you ˹truly˺ believe in Allah and the Last Day. And let a number of believers witness their punishment.*"

The flogging in the verse is in the form of lashing and then stoning is done by planting the adulteress in the ground up to the chest, then stoned to death in front of many people with the aim of reminding Muslims so that no one violates the law of Allah SWT.

The punishment for lashing and stoning applies to married adulterers (*muhsan*), namely by being lashed 100 times and then stoning to death, but if the adulterer is an unmarried person (*ghairu muhsan*) then the punishment is being lashed 100 times and exiled for 1 year, the Prophet Muhammad SAW said:

> "*take it from me, take it from me, indeed Allah has given them another way, namely those who are unmarried (zina) with unmarried people, the punishment is 100 lashes and exile for a year, as for those who are married (adultery) with people who married, the punishment is 100 lashes and stoning*".

The punishment for adultery in Islam is very heavy when compared to the punishment from the law in force in Indonesia because in Islam

adultery is a big sin so the proof should not be arbitrary considering the punishment is also very heavy.

Proof of adultery is by way of 4 adult male witnesses who saw the act, namely seeing the female and male genitals during penetration. Another proof is done by admitting the person who commits adultery if he has committed adultery 3 times.[76] Adultery committed by both of them wanting to commit adultery, the punishment is also carried out on both of them because all are considered as perpetrators, but if it is carried out by force, only the perpetrator gets punished and the victim will be released from punishment.

[76] Haidar Abdullah, Kebebasan Seksual Dalam Islam, Jakarta, Pustaka Zahra, 2006, page. 126.

CHAPTER III

SENTENCING PROPORTIONALITY REGARDING THE CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN

A. Sentencing Theory Regarding Crime of Sexual Violence Against Children

Child is a person under the age of eighteen years old.[77] Their activities need to be protected to guarantee and protect children and their rights so that they can live, grow, and develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination.[78] According to Law No. 35 of 2014 article 59 paragraph (2) letter (j), one form of child protection is child victims of sexual violence.

Punishment as a form of suffering that is intentionally imposed on a person as a legal consequence (sanctions) for his actions that have violated the prohibition of criminal law. This prohibition in criminal law is referred to as a crime (*strafbaar feit*). Based on this opinion, it is stated that the punishment contains elements which are essentially the imposition of suffering or misery or other unpleasant consequences. The crime is given intentionally by a person or body who has the power (an authorized person or institution), and it is imposed on a person who is responsible for a criminal act according to the law.[79]

---

[77] Law No. 13 of 2003 concerning Manpower, page. 6.

[78] Article 1 paragraph (2) of Law No. 35 year 2014 concerning Child Protection.

[79] Muladi and Barda Nawawi Arief, *Criminal Theories and Policies*, (Bandung: Alumni, 2005), page 4.

Judges in imposing a punishment must be oriented towards the purpose of sentencing which cannot be separated from the prevention factor. So, crime and countermeasures factor can't occur. From philosophical aspect of the imposition on criminal law, there is a goal of punishment. In criminal law there are at least 3 (three) sentencing theories, namely absolute theory, relative theory and combined theory, and these theories were born based on the issue of why a crime must be subject to criminal sanctions.

In order to find out whether the judge has applied one of the sentencing theories in his decision, the indicators/parameters of the theory of punishment are presented as follows:[80]

1) The indicator of absolute sentencing theory is when:
   a) Punishment is a reward that should be received by the perpetrators of crimes who have harmed the interests of others;
   b) The punishment mainly functions as a compensation payment. Means, the suffering obtained by the perpetrator through sentencing is the price to be paid for the suffering he inflicted on others through a criminal act;
   c) The determination of the severity of criminal sanctions is based on the principle of proportionality, meaning that the gradation of the severity of criminal sanctions is positively

[80] Effendi Mukhtar, "Implementation of Sentencing Theory in Psychotropic Case Decisions by Judges at the Yogyakarta District Court" Master's Thesis of Law Faculty of Law, Indonesian Islamic University, Yogyakarta 2008.

correlated with the gradation of the seriousness of the crime. The punishment imposed for a criminal act is commensurate with the losses caused by the crime.

2) The indicator of retributive theory, is when:
   a) In the consideration of the panel of judges, it is said that every human being is a rational economic being who always uses the calculation of profit and loss in committing an act, including committing a crime;
   b) The purpose of punishment is to prevent a convicted person from committing a crime again and prevent the general public from doing the same;
   c) Determination of the severity of criminal sanctions is based on the principle that the gradation of punishment exceeds the seriousness of the crime. Means, the calculation of losses (punishment/suffering) obtained as a result of committing a crime is greater than the gain (property or pleasure) obtained from the crime.
3) The indicator of combined theory, is when:
   a) The purpose of sentencing is to rehabilitate or improve the perpetrator of the crime so that he returns to being a good member of society so that he does not commit crimes again in the future.

b) Sentencing is based on the principle that punishment must be in accordance with the conditions of the convict. Determination of the severity of criminal sanctions tends to the principle that the gradation of punishment is lighter than receiving a lighter sentence (suffering) than the harm it causes to others through a criminal act.

Based on what the author has described in the previous background, in this research discusses about the sentencing theory used by judges in deciding cases of sexual violence against children in Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk.

1. Sentencing Theory in Decision No. 28/Pid.Sus/2021/PN.Bbs

The Brebes District Court Decision Number 28/Pid.Sus/2021/PN.Bbs is a crime that is categorized as sexual violence experienced by the child victim, 13 years old student, live at Karangmalang Village, Ketanggungan District, Brebes Regency. Before discussing about the sentencing theory used by judges in deciding this criminal case, it is necessary to know about the case position.

Chronologically, it starts when Acep Narto Bin Maman on Wednesday, November 11, 2020 around 17.00 WIB sold *cilok* in Karangmalang Village, Ketanggungan District, Brebes Regency, and Acep offered *cilok* to the child victim, and other friends of the child victim, then the friends of the child victim bought *cilok* to Acep, while the child victim did not buy *cilok* and sat in front of a mosque. After

buying *cilok,* the friends of the child victim went to their home, while the child victim, and her two friends (hereinafter referred to child-witness named Aufa Yawafilla and child-witness Nur Fajar Imani) were still sitting in the mosque.[81]

Furthermore, Acep approached the child victim and the two child witnesses Aufa and Nur Fajjar. Then Acep gave the child victim one plastic of *cilok* containing 6 *cilok*. Then Acep told Nur Fajar to buy ice and Acep told the other Aufa to take rubber in her house, with the aim that no one else would know the deeds that he would do to the child victim. Then Acep took the child victim to the backyard of a house with the words "*nok yuk demenan*" interpreted in english "*little girl, let's date*", then the child victim simply kept quiet and followed Acep to the backyard of a house.[82]

Arriving at the empty yard, Acep kissed the forehead and right cheek of the child victim, then Acep revealed the robe clothes worn by the child victim and also removed the panties worn by the child victim. Then Acep unzipped his pants and opened his penis which is already in a state of tension, then he attaches his penis to the vagina of the child victim and inserts his penis into the vagina of the child victim. Then Acep moves his hips in a back and forth motion for 3 (three) minutes, until Acep released sperm outside the vagina of the child victim. After

[81] Decision of Brebes District Court Number 28/Pid.Sus/2021/PN.Bbs. page 3.
[82] *Ibid.* page 4.

committing the sexual assault, Acep threatened child victim by saying "*Watch out if you tell your parents I'll hit you*". The threat of violence committed by Acep, made the child victim afraid to tell about the actions committed by Acep to the child victim. Furthermore, Acep went to the prayer room (*mushola*) bathroom to clean his penis while the child victim was wearing her underwear, then Acep walked together with the child victim to the front, and Acep left the place to continue sell *cilok*.[83]

Acep's actions on the child victim, based on the results of the *Visum Et Repertum* issued by the Brebes Regional General Hospital No. RM/47/XI/2020 dated November 14, 2020 which was made and signed by dr. Arie Indriianto, Sp.OG as the doctor who carried out the examination against the child victim. Through the examination, it was concluded that the hymen had tears in many places, torn to the bottom, the coitus hole of a woman who had frequent sexual intercourse but had no children.[84]

According on the facts obtained during the judicial process, it is known that when the incident happened, the child victim was still 13 years old, based on the Quotation of Birth Certificate Number: 48507/G/2009 who was born on August 25, 2007. It indicates that the victim is still a child whose way of thinking is limited and easily deceived to follow the perpetrator who was previously already given

[83] *Loc. Cit.*
[84] *Ibid,* page 5.

something to lure the child victim. Therefore, without thinking, the child victim immediately obeyed the order of the perpetrator who invited her to a backyard of a house without feeling any threat.

Acep's actions as above are regulated and threatened to criminal sanctions in Article 81 paragraph (1) jo. Article 76D Law of the Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.[85]

The Public Prosecutor has indicted Acep with an alternative indictment, namely committing an act as regulated and threatened by a criminal offense, (1) Article 81 verse (1) Jo. Article 76D of the Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection, (2) Article 81 verse (2) Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection, (3) Article 82 verse (1) Jo. Article 76E Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.[86]

Meanwhile, the Public Prosecutor demanded Acep, basically stated, *firstly*, Acep was proven guilty of committing the crime of "COMPETING THREATS OF VIOLENCE FORCING A CHILDREN TO HAVE A SEXUAL INTERCOURSE WITH HIM" as regulated and threatened in the first indictment Article 81 Paragraph (1) Jo. Article 76D Law No. 35 of 2014. *Second*, imposed sentence against Acep with

[85] *Ibid.*
[86] *Ibid,* page 3-11.

13 (thirteen) years, minus the period of detention that has been served. *Third*, imposed Acep to pay a fine of Rp.200,000,000. -with the provision that if the fine is not paid it is replaced with a 6 (six) month imprisonment. *Fourth*, imposed a sentence in the form of announcing Acep's identity as a perpetrator of sexual violence against children for 1 (one) calendar month through bulletin boards, the prosecutor's official website and print media, electronic media, and/or social media. *Fifth*, determine the evidence in the form of 1 (one) piece of green robe with a color gray combination; 1 (one) piece of white underwear with a red dot motif to be returned to the mother of the child victim. *Sixth*, stipulates that Acep be charged with a court fee of Rp.5,000, -.[87]

In the verdict, the judge declared that Acep Narto Bin Maman was legally and convincingly proven guilty of committing a criminal act by intentionally forcing a child to have intercourse with him, and sentenced Acep to imprisonment for 11 (eleven) years and a fine of Rp.200,000,000,- if not paid, it will be replaced with imprisonment for 6 (six) months and the announcement of Acep's identity as a perpetrator of sexual violence against children for 1 (one) calendar month through bulletin boards, the prosecutor's official website and print media, electronic media, and /or social media, as referred to:

[87] *Ibid,* page 2-3.

Article 76D[88]

” Everyone is prohibited from committing violence or threats of violence to force the child to have intercourse with him or with other people.”

Article 81 verse (1)[89]

“Anyone who violates the provisions as referred to in Article 76D shall be sentenced to a minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).”

Based on the provision above, Acep was legally and convincingly proven guilty of committing a criminal act by intentionally committing violence forcing a child to have intercourse with him, as regulated in Article 81 paragraph (1) Jo . Article 76D Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection, then the sentence imposed on Acep is classified in a fairly moderate sentence for imposing a prison sentence of 11 (eleven) years and a fine of Rp. 200,000,000, - if not paid, it will be replaced with imprisonment for 6 (months).

[88] Look at Article 76D Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.

[89] Look at Article 81 verse (1) Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.

In the judge consideration, the panel of judges took into account the facts revealed in the trial and used the indicators of the sentencing theory as the basis for sentencing.

In detail, judges must use sentencing theory in their considerations to make decisions. The sentencing theory in decision No. 28/Pid.Sus/2021/PN.Bbs can be seen in the following sentence:

"*Considering that in the trial, the Panel of Judges did not find anything that could eliminate criminal liability, either as a justification or excuse for forgiving, then the Defendant must be held accountable for his actions*;"

"*Considering that because the Defendant is capable of being responsible, he must be declared guilty and sentenced*."[90]

With the considerations and the existence of the sentence above, it means that there are no things or reasons that can eliminate the criminal liability in Acep and he must be sentenced to a punishment commensurate with his actions.

Moreover, with the additional punishment of revealing the identity of the perpetrator for 1 (one) calendar month through the bulletin board, the official website of the Prosecutor's Office and print media, electronic media, and/or social media. This additional

[90] Decision of Brebes District Court, *op.cit,* Page 26.

punishment is clearly intended to satisfy feelings of revenge and in order to avoid feelings of revenge in the community considering that the perpetrator's work is a *cilok* trader whose daily life is always in contact with the community itself, especially children.

So, the sentencing theory used in this decision is the absolute theory / retribution / retaliation to the defendant because it has been deemed appropriate and fair in accordance with his actions.

With retaliation against the perpetrator of a crime, the victim will be freed from feelings of revenge. The use of absolute theory in decision no. 28/Pid.Sus/2021/PN.Bbs means that the judge pays attention to the interests of the victim (offender protection oriented) because absolute theory punishment is expected to satisfy the feeling of revenge of the victim, both himself, his friends and his family.[91]

In addition to paying attention to the interests of the victim, the implementation of absolute theory as the basis of sentencing can provide a warning to criminals and any other members of the community that every threat that harms others or gains unfair advantage from others will receive retaliation. Because punishment is a retaliation against the perpetrator for his actions, the punishment must show a balance between

[91] Romli Atmasasmita, *Kapita Selekta Hukum Pidana dan Kriminologi*, Mandar Maju, Bandung, 1995, page. 83.

the degree of seriousness of the act (the gravity of the offense) with the sentence imposed.[92]

As Van Bemmelen said that this retributive/absolute type is still important for today's criminal law. The fulfillment of the desire for retaliation (*tegemoetkoming aan de vergeldingsbehoeffte*) is very important in the application of criminal law so that there is no "self judgement".[93] Based on absolute theory, the benefits of imposing criminal penalties do not need to be considered, because the principle of this theory of retaliation is "punishment for crime". Ignoring human values, and the main target is only for revenge. In a sense, the theory of retaliation does not consider about how to develop the perpetrator of the crime.

From the opinion of Immanuel Kant in his book Philosophy of Law regarding the demands of absolute justice, that crime is never carried out solely as a means to promote other goals/goods, both for the perpetrator himself and for the community. However, in all cases it must be imposed only because the person concerned has committed a crime. Each person should receive the reward for his actions and the feeling of revenge should not remain with the members of society. Therefore, decision No. 28/Pid.Sus/2021/PN.Bbs uses the theory of absolute sentencing.

[92] *Ibid.,* page. 84.
[93] Muladi and Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana*, *op.cit*, page. 15.

2. Sentencing Theory in Decision No. 869/Pid.Sus/2021/PN.Ptk

The second crime of sexual violence against children in this research came from the Pontianak District Court Decision No. 869/Pid.Sus/2021/PN.Ptk with the identity of the perpetrator whose name was not written in the verdict, the verdict only stated that the identity only "DEFENDANT" was 52 years old, male.

The chronology of this case begins on Saturday, September 18, 2021 at around 07.00 WIB, when the mother of the child victim picks up the child victim who is her biological child to be cared for by MOINAH (Moinah is the person entrusted by the child victim mother to leave child victim to be take care of). The child victim mother, delivered at approximately 7:30 a.m. at Moinah's house. At around 08.00 WIB, MOINAH went to the market to buy vegetables and the child victim was entrusted to the DEFENDANT, who is the husband of MOINAH. When the child victim was playing in the living room, suddenly the DEFENDANT grabbed the child victim's hand and was brought into the room, after being in the room the DEFENDANT opened the child victim pants and laid her on the bed, then the DEFENDANT inserted his genitals into the child victim genitals which caused the child victim feel pain and cry. Hearing the child victim crying, the DEFENDANT removed his genitals from the child victim genitals and put the child victim pants back on.[94]

[94] Decision of Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk.

DEFENDANT actions on the child victim, based on the results of the *Visum Et Repertum* issued by Bhayangkara Anton Soedjarwo Hospital Pontianak – Biddokkes Polda West Kalimantan with Number: VER/421/IX/2021 dated September 21, made up and signed by Dr. Mathyas Thanama as the doctor who carried out the examination against the child victim with the results of the examination stating the following: From the facts found from the examination of the victim, the doctor conclude that the victim is a woman, three years and nine months old, brown skin color, impression of good nutrition. On external examination, the victim's body was found to have a new tear in the hymen (at 3,6 and 11 o'clock) due to blunt force trauma, which as a result of the violence resulted in lifelong disability and was able to heal but would hinder the victim's activities for several days.[95]

According on the facts obtained during the judicial process, it is known that when the incident happened, the child victim was still 3 (three) and 9 (nine) years old, based on a photocopy of the birth certificate Number 6171-LT-26092018-0001 dated November 5, 2018, which indicates that the victim is still a little child whose way of thinking is limited and not any single of being threatened because the child victim has been cared for and entrusted by Moinah and the DEFENDANT since the child victim is 9 (nine) months years old. Therefore, since the child victim know the DEFENDANT because he is a distant relative of his

[95] *Ibid.*

mother and child victim feel safe because the child victim is in a family environment that the child victim has known for a long time without feeling any threat.

The defendant was indicted with alternative indictment, namely committing an act regulated and threatened by a criminal offense in, *first*, Article 81 paragraph (1) jo Article 76 D of the Law of the Republic of Indonesia No. 35 of 2014 concerning Amendments to Law of the Republic of Indonesia No. 23 of 2002 concerning Child Protection. *Second*, Article 82 paragraph (1) jo Article 76 E of the Law of the Republic of Indonesia No. 35 of 2014 concerning Amendments to Law of the Republic of Indonesia No. 23 of 2002 concerning Child Protection.

Thus the Public Prosecutor demanded the defendant, basically stated, *firstly*, DEFENDANT was proven guilty of committing crime "COMPETING THREATS OF VIOLENCE FORCING A CHILDREN TO HAVE A SEXUAL INTERCOURSE WITH HIM" as regulated and threatened in the first indictment Article 81 verse (1) jo Article 76 D Law No. 35 of 2014 concerning Child Protection. *Secondly*, imposed the defendant a prison sentence of 7 (seven) years and 6 (six) months in prison reduced while the DEFENDANT was in detention and a fine of Rp.500,000,000, - Subsidy for 3 (three) months of confinement. *Thirdly*, stating evidence in the form of 1 (one) birth certificate of child victim with Number: 6171-LT 2609201800001; 1 (one) red and white short-

sleeved shirt; and 1 (one) blue jeans to be returned to the mother of child victim. *Fourthly*, stipulates that DEFENDANT pays court fees of Rp.5.000, -.

Based on this, the judge declared that the DEFENDANT was legally and convincingly proven guilty of committing a criminal act by intentionally committing violence forcing a child to have intercourse with him, and sentenced DEFENDANT to imprisonment for 7 (seven) years and a fine of Rp.500,000,000,- if not paid, it will be replaced with imprisonment for 3 (three) months, as stated below:

Article 76D[96]

" Everyone is prohibited from committing violence or threats of violence to force the child to have intercourse with him or with other people."

Article 81 verse (1)[97]

"Anyone who violates the provisions as referred to in Article 76D shall be sentenced to a minimum imprisonment of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah)."

Based on the decision Number 869/Pid.Sus/2021/PN.Bbs with the convict DEFENDANT, which stated that it was legally and convincingly proven guilty of committing a criminal act by intentionally

[96] Look at Article 76D Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.

[97] Look at Article 81 verse (1) Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.

committing violence forcing a child to have intercourse with him, as regulated in Article 81 paragraph (1) Jo . Article 76D Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection, then the sentence imposed on the DEFENDANT is classified in a rather light sentence because it is close to the minimum sanctions for imposing a prison sentence of 7 (seven) years and a fine of Rp.500,000,000, - if not paid, it will be replaced with imprisonment for 3 months.

In imposing a criminal sentence, it's not an easy way to decide the punishment towards the defendant. The judge must consider many things in deciding the crime of sexual violence against children. In detail, the sentencing theory uses in the decision on cases of sexual violence against children at the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk can be seen and indicated from the consideration of the decision which uses the sentence:

(1) "*Consider that during the examination in court on the defendant there is no exception for criminal liability, either as a reason for forgiveness or justification that can erase the guilt of the defendant, the defendant must be held accountable for his mistake and must be sentenced*;"[98].

When viewed from the sentence above, the judge in his consideration stated that according to the facts revealed in the trial, the

[98] Decision of Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk, page 16.

panel of judges have opinion that there were no things or reasons that could eliminate the nature of responsibility in the convict, so he must be punished according to his actions. Based on the considerations point number (1) above, it indicates that the purpose of sentencing is as retaliation because there are no justifications and things that can eliminate criminal liability, therefore the theory of punishment seen in point number (1) is an absolute theory. The absolute theory as retaliation against the perpetrator for committing a crime and the perpetrator must bear the consequences for his actions.

(2) "*Considering that the purpose of sentencing is not retaliation but rather is a form of guidance for defendants who have made mistakes so that it is hoped that later they can return to the community after being able to correct their mistakes*;".[99]

Based on the sentence above, the basis for consideration in the decision on the criminal act of sexual violence against children is Decision No. 869/Pid.Sus/2021/PN.Ptk with the consideration that the sentencing to the defendant is not a form of sorrow or revenge for his actions, but is intended to protect the defendant and provide an opportunity for the defendant to reflect and not repeat his actions. The sentence imposed on the defendant is not revenge, but focuses on a

[99] *Ibid*, page 17.

coaching. In addition to the nature of general prevention and special prevention, it is hoped that in the future, he will not repeat his action and not to commit acts that violate or are contrary to the laws and regulations.

On the consideration point number (2), we can clearly see that the purpose of the sentencing given to the convict is for guidance. It means that socializing convict by conducting coaching so that they become good and useful people. The purpose of sentencing the DEFENDANT is aimed at prevention, both special prevention (*speciale preventive*) aimed at the perpetrators and general prevention (*generale preventive*) aimed at the community for the actions that have been carried out in this case, namely the crime of Article 81 paragraph (1) Jo 76 D Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection. This also shows that the sentencing aim is not intended to suffer and degrading human dignity to the convict.

So, from the consideration above, relative theory used as it's sentencing theory. It also said that relative theory can be seen from the weighting of imprisonment for certain types of sexual violence, such as inclusion, repetition, and being carried out by closest people to the victim, so that the training for perpetrators in the Correctional Institution is longer so that they are more ready to be re-socialized and accepted back in the society. Whereas, this relative theory is aimed to the coming

day, namely with the intention of educating people who have done a criminal act, to become good people again.[100]

(3) "*Considering that based on the considerations above, the punishment to be imposed on the defendant as stated in this verdict is deemed to have been commensurate with the actions of the defendant*."[101]

In the judge consideration stated above, the judge opinion that the punishment given to the DEFENDANT must be punished according to his actions (punishment have been commensurate with the action). Because the crime that the DEFENDANT has committed is intentionally committing violence, forcing a child to have intercourse with him, so that the criminal sanctions imposed are real consequences that must be given to the perpetrators of the crime of sexual violence against the child as a form of guidance.

On the point number (3) above which have been stated in his decision, it is found that the purpose of the punishment imposed is solely to give deterrence. With the aim that the punishment imposed to the perpetrators are already commensurate with his criminal actions. It created a balance between the revenge and prevention.

[100] Samidjo, *Introduction to Indonesian Law*, *Armico*, Bandung, 1985, p.153
[101] *Ibid.*

In decision No. 869/Pid.Sus/2021/PN.Ptk implement one of the sentencing purpose which is punishment as rehabilitation. The visible characteristic is that sentencing is a moral treatment process for a convict to re-integrate into society properly. This punishment also aims to create a balance because the purpose of the sentencing is not singular, not only for revenge or retaliation for the perpetrators but also as a means of fostering the perpetrators.

The conclusion obtained from the considerations number (1), (2), and (3) above is that in addition to admitting the imposition of criminal sanctions, criminal sanctions are felt to be commensurate with their actions, it is also intended that the perpetrators can be corrected so that they can be returned and accepted into the community. The means of punishment is not as retaliation for the wrongdoing of the perpetrator but a means of achieving a useful goal to protect the community towards the welfare of society. Sentencing is emphasized on its purpose, namely to prevent people from committing crimes, so it is not aimed at the absolute satisfaction of justice. From what mentioned above, they clearly indicated that there's two theories implemented on decision No. 869/Pid.Sus/2021/PN.Ptk, they are absolute and relative theory. Because of two theories have been used to imposing the punishment, therefore, the sentencing theory used by judges in deciding the criminal case is combined/mixed theory.

Because the understanding of the combined/mixed theory itself is a combination of absolute theory and relative theory. This theory combines the point of retaliation and defense of the legal order of society. The elements of retaliation and defense of the legal order of society cannot be ignored from one another. It means sentencing as a protection against society and retaliation for unlawful acts.

From January to May 2022, there were 2,267 children in all regions in Indonesia who became victims of crime. The types of crimes are various, among others are physical violence, psychological violence, sexual violence, neglect, employing minors, until violations of children's human rights as human beings. Where sexual violence dominates, there are 2,071 cases.[102] Sexual violence against children is a very despicable act, an unlawful act including a form of violation of human rights which is classified as a serious crime. Because the impact that occurs is also serious where the victims are children who can cause trauma and destroyed the children future.

Based on three sentencing theories, namely absolute theory, relative theory and combined theory, it has been shown how is the sentencing theory been used in deciding a criminal case of sexual violence against children and its effect on the sentence in defendant life. Considering the seriousness

[102]https://pusiknas.polri.go.id/detail_artikel/kekerasan_seksual_mendominasi_kasus_kejahatan_pada_anak#:~:text=Sebanyak%2011.604%20orang%20menjadi%20korban,5%20persen%20dari%20data%20tersebut. Data source from eMP Robinopsal Bareskrim Polri accessed on Tuesday, October 18th 2022.

of the crime of sexual violence against children, the perpetrators must be given severe punishments. With the view that law enforcement must be victim-oriented, the sentence must be high because children are the nation's assets that must be protected. According to the author, the most fair sentencing theory used to decide the crime of sexual violence against children is the absolute theory. Because of the sorting in the use of the purpose in the sentencing theory, namely towards crimes that are relatively serious/heavy, then the priority of punishment towards violators must contain elements of retaliation.[103]

The absolute theory tends to be used in deciding the defendant with a relatively heavy criminal weight, "the crime caused injustice, must also be repaid with injustice" - Immanuel Kant. This research agrees with the idea of absolute theory where the crime is a revenge for injustice that has harmed the other party. Absolute theory tends to be appropriate to be used in deciding the crime of sexual violence against children. It considers the condition of children who are victims of criminal acts of violence as a reason for criminal offenses. It is also in accordance with the spirit of protecting children, that anyone who commits acts of sexual violence against children will damage the future of the children, deserve to be punished accordingly. Absolute theory gives the basis for justification in the existence of the crime itself, as Muladi said, the retaliation/revenge oriented by its action, the

[103] See Widodo, *Criminal System in Cyber Crime*, Laksbang Mediatama, Yogyakarta, 2009, p. 60.

beneficial effect is secondary. The purpose of absolute theory is not for fixing the criminals, there is no need to think about the benefits of criminal prosecution, only looking that a crime is committed and the punishment absolutely exist.[104] Even though the sentencing purpose is not intended to suffer and demean human dignity, but expert J.E. Sahetapy said that "there is no guarantee that the defendant feels guilt or regret, even holds a grudge", in this crime of sexual violence against children, that the aim of punishment is a pure reproach and the aim is not to correct, educate or re-socialize the perpetrator. In line with subjective retaliation theory which is oriented to the perpetrator (retaliation for the crime done by the perpetrator) in sexual violence against children is included in the heavy criminal act category and results in a big impact on the child victim, so the subjective retaliation theory is if the big loss or misery caused by a major mistake (in this research is sexual violence against children), then the perpetrator of the crime should be sentenced by heavy punishment.

So, the absolute theory characteristic which is saying that the sentencing purpose is solely for retaliation as the main goal, making the only condition as 'mistake' or 'the fault of the maker' as the existence of sentencing and punishment must be adjusted has been appropriate for use in resolving sexual violence against children case as expert Karl O, Cristiansen expressed.

[104] Andi Hamzah, *op.cit,* p. 26.

Although there is no obligation for judges to adhere to an absolute theory in sentencing, it is natural for a serious criminal act to be subject to an appropriate punishment and regarding the length of sentence it is left up to the judge to consider it himself.[105]

With the use of absolute theory, the interests of the victim (offender protection oriented) are the most important. In addition to paying attention to the interests of victims, the purpose of using this theory is to provide a warning to criminals and other members of the community that any threat that harms others or gains unfair advantage from others will receive appropriate retribution. The sanctions in criminal law are imposed solely because people have committed a crime which is an absolute consequence that must exist as a revenge for people who commit crimes so that sanctions aim to satisfy the demands of justice.[106]

B. Sentencing Proportionality In Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk

Judges in making decisions on criminal cases, especially decisions that contain punishment and sentencing, will be seen in two categories. The first category will be viewed in terms of juridical considerations and the second will be non-juridical considerations.[107]

1) Juridical Considerations

[105] Wahyu Afandi, 1978, Hakim dan Hukum Dalam Praktek, Penerbit Alumni, Bandung, p. 17

[106] Zainal Abidin Farid, *op. cit.*

[107] Rusli Muhammad, *Contemporary Criminal Procedure Code*, First Printing, PT Citra Aditya Bakti, Bandung, 2007, p. 212-213.

Juridical considerations are judges' considerations that are based on juridical facts revealed in the trial and by law have been determined as things that must be included in the decision. The things referred to are, the indictment of the public prosecutor, the statements of the defendant and witnesses, evidence, articles in the criminal law regulations, and so on.[108]

2) Non-juridical Considerations

The circumstances classified as non-juridical considerations are:[109]

a. The background of the Defendant's Actions

The background of the defendant's action when committing the crime is any situation that causes a strong desire and encouragement to arise in the defendant for committing a criminal act.

b. The Consequences as a Result of The Defendant's Actions

The crime committed by the defendant is certain to bring the victim or loss to the other party.

c. Defendant's Personal Condition

The defendant's personal condition is the defendant's physical or psychological condition before committing the crime, including the social status attached to him.

[108] *Ibid.*
[109] *Ibid.* p. 216.

d. The Condition of Socio-Economic and Defendant's Family

Although in the Criminal Code or the Criminal Procedure Code doesn't have a single rule that clearly orders that the socio-economic and family condition of the defendant must be considered in making a decision in the form of a sentence, the concept of a new Criminal Code provides provisions, regarding sentencing guidelines that must be considered by the judge.

e. Religious Factor

Every court decision always begins with the sentence "FOR JUSTICE BASED ON THE ALMIGHTY GOD". Beside belong the head of the decision, this sentence importantly is a pledge from the judge that what is expressed in his decision is solely for justice based on the almighty god. The word "almighty god" or can be said as divinity shows an understanding that has a religious dimension. Thus, if judges make decisions based on divinity, it also means that they must be bound by religious teachings.

The attachment of judges to religious teachings is not enough if they only put the word "almighty god" at the head of the decision, but must be a measure of the assessment of every action, both the actions of the judges themselves and especially the actions of the perpetrators of crime. If this is

the case, it is natural and appropriate, even religious teachings should be considered by the judge in making his decision.

In the case of sexual violence against children as reflected in Decision No. 28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk, the two decisions describe the pattern of sentencing as follows:

No.	Case Registration Number	Criminal Threats in Law	The Punishment Imposed
1.	28/Pid.Sus/ 2021/PN.Bbs	Imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).	Imprisonment for 11 (eleven) years and fine Rp. 200.000.000, - subsidiary 6 (six) months imprisonment. Announcement of the identity of the defendant for 1 calendar month
2.	869/Pid.Sus/ 2021/PN.Ptk		Imprisonment for 7 (seven) years and fine Rp. 500.000.000, - (five hundred million rupiah) subsidiary 3

			(three) months imprisonment.

The phenomenon that can be described from the two decisions towards crime of sexual violence against children above is the decision No. 28/Pid.Sus/2021/PN.Bbs imposes a sentence that is close to the maximum criminal provisions determined by law. Previously, Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection determines that the punishment for perpetrators of sexual violence against children is based on Article 81 paragraph (1) Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection which says that the maximum penalty is 15 years in prison.

Meanwhile, when compared with the decision No. 869/Pid.Sus/2021/PN.Ptk, the imprisonment imposed is close to the minimum criminal provisions as stated in Article 81 paragraph (1)) Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection where the minimum punishment is 5 (five) years in prison.

In this case, it is indicated that the decision no. 28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk which uses the same article, namely Article 81 Paragraph (1) Jo. 76D Law no. 35 of 2014, there is a criminal gap that differs quite a lot. Decision No.

28/Pid.Sus/2021/PN.Bbs is more severe than the decision no. 869/Pid.Sus/2021/PN.Ptk. Therefore, it should be investigated if it is seen from the punishment imposed with the use of the same article already feels disproportionate.

When viewed from the sentencing purpose, from the previous discussion it was found that the sentencing theory used in the decision of the Brebes District Court No. 28/Pid.Sus/2021/PN.Bbs is an absolute theory where the weight of the sentence is 11 (eleven) years imprisonment, approaching the maximum sentence of 15 (fifteen) years imprisonment. Where, the use of absolute theory is used in deciding the defendant with the weight of the punishment is relatively heavy, which is close to the maximum sentence. Circumstances that are burdensome for the perpetrators are considered by the judge to use this theory of punishment. While the combined theory is used in the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk as its sentencing theory with a criminal weight of 7 (seven) years imprisonment approaching the minimum sentence of 5 (five) years imprisonment. This reflects that the theory of punishment used by judges to decide a case affects the proportionality of a sentence.

The existence of a disproportion in sentencing will cause to sentencing disparity. Reflected in the verdict which imposed for the same violation of the law, in this case two perpetrators of sexual violence against children who both fulfill the elements in Article 81 paragraph (1) of Law no. 35 of 2014 but received a different sentence. Therefore, criminal

disparity can be understood as a situation relating to differences in criminal penalties for cases of similar or equivalent seriousness, without any clear justification.[110] The existence of differences in sentencing or disparity in sentencing is basically a natural thing, because it can be said that almost no cases are really the same.

Proportionality refers to the seriousness of a crime and the severity of the threat of criminal sanctions. The more serious the crime, the more severe the criminal sanctions imposed on the perpetrator.[111]

The seriousness of a crime is reflected in the decision No. 28/Pid.Sus/2021/PN.Bbs and decision No. 869/Pid.Sus/2021/PN.Ptk describe the different levels of seriousness, in the decision, the analysis of the seriousness level from the results of the author's analysis is obtained as follows:

- **The Seriousness of the Decision No. 28/Pid.Sus/2021/PN.Bbs**

  First, from the facts of the trial that were revealed, it was found that the Defendant's name was Acep Narto, who at the time of the incident was 45 years old. Seriousness can be seen in the element of coercion obtained from the statement of the child victim that when the defendant approached the child victim, the defendant looked into the child victim eyes and basically ordered the two friends of the child victim to leave with the aim that no one else would know what the

[110] Harkristuti Harkrisnowo, *op.cit,* page. 7.

[111] Joel Goh, 'Proportionality - An Unattainable Ideal in the Criminal Justice System', *Manchester Student Law Review*, Vol 2, 2013, p. 44.; Erik Luna, "Punishment Theory, Holism, and the Procedural Conception of Restorative Justice", *Utah Law Review*, 2003, p. 216.

defendant was going to do against child victim;[112] That then the child victim right hand was pulled by the defendant's two hands towards the back of the house.[113]

The elements of threats received by the child victim after the defendant finished sexually harassing him were indicated by the sentence "WATCH OUT IF YOU TALK TO YOUR PARENTS' I'LL HIT YOU."[114]

The child victim has fought back at the time of the crime of sexual violence against her with the facts revealed: The child victim did not fight but the child victim only tried to scream for help; Whereas at that time the child victim screamed but her voice was low so no one could hear.[115]

The defendant before carrying out his actions lured / invited the child victim by giving 6 (six) *cilok* which the defendant gave for free.[116] However, against the elements of coercion and threats mentioned above, based on the defendant's statement in the trial, the defendant denied with the following statements: Whereas the Defendant in having intercourse with the child victim, the Defendant did not use violence or threats of violence; Whereas as far as the Defendant knows, child victim does not feel pain and does not fight the Defendant; Whereas as far as

[112] Decision of Brebes District Court Number 28/Pid.Sus/2021/PN.Bbs, page 4.
[113] *Ibid*, page 13.
[114] *Ibid.*
[115] *Ibid.* page 14.
[116] *Ibid.* page 18.

the Defendant knows, the vagina of the child victim is not bleeding.[117] It can be seen that the defendant did not openly admit his actions in court and this should be the reason for the weighting of sentencing.

So in its seriousness, this crime case is relatively serious and rips the values and dignity of equality among human beings, such as what Acep did to child victim, it can be understood if the judge tends to choose the type of imprisonment, fine and additional punishment in the form of announcing Acep's identity as a perpetrator of sexual violence for 1 month calendar as long as the choice of punishment is oriented to bring out and give a sense of justice to the victim and the community. The tendency of imprisonment imposed by judges is because the case being handled is a relatively serious criminal case, such as the crime of committing sexual intercourse with a child by using violence or threats of violence or by using a series of tricks (violation of Article 81 paragraph (1) of Law of Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection). The decision also shows that there is a practice of imposing criminal penalties that accumulate between imprisonment and fines as a criminal offense because the crime is considered very serious.

From the explanation above, it can be concluded that the judge's decision to impose the type of imprisonment, fines and additional penalties against Acep is reasonable. It can be understood at least due

[117] *Ibid.* page 19.

to 2 factors, namely, first, because that stems from the criminal threat system in Indonesian legislation which is indeed conditions judges to tend to always choose imprisonment in every sentencing decision, and second, the reason stems from the nature of the criminal act being prosecuted (namely sexual violence against children) which is substantively a relatively serious crime.

Therefore, the seriousness of the decision of the Brebes District Court No. 28/Pid.Sus/2021/PN.Bbs is in the high serious category, even though the proportionality of sentencing is in line with the principle of 'a ranking of crimes in terms of their seriousness'. However, there are reasons for the aggravation of the crime that must be considered that Acep does not openly admit his actions even though he has been sworn in and this condition must be put in aggravating circumstances. So that proportionality can be more reflected.

- **The Seriousness of the Decision No. 869/Pid.Sus/2021/PN.Bbs**

Considering the facts of the trial that were revealed. The facts were obtained from the statements of the witnesses. The first fact was, that the Defendant was a distant relative of the child victim. It can be seen in the witness' statement that the child victim mother had entrusted the witness and the witness' husband (DEFENDANT) to take care of the child victim from 3 years ago. It can also be seen from the defendant statement himself who stated "*that the defendant knew the child victim*

and was a relative of the defendant".[118] This clearly indicates that the perpetrator is a close person to the child victim who is still within the scope of the family. If viewed from the policy of criminal aggravation, especially the principal criminal, regulated in Article 81 paragraph (3) is aimed at the following: sexual violence against children committed by parents, guardians, people who have family relationships, child caretakers, educators, education staff , or the apparatus that handles child protection, the punishment shall be increased by 1/3 (one third) of the criminal threat.[119] This criminal aggravation is motivated by the fact that these parties are the closest people to the child so that the potential for sexual violence against children is greater by taking advantage of the weaker physical and psychological conditions of children.

Second, considering the age of the child victim at the time of the crime happened, the child victim was still 3 (three) years 9 (nine) months old as evidenced in a photocopy of the birth certificate Number 6171-LT-26092018-0001 dated November 5, 2018 which states that the child victim was born in Pontianak on December 06 2017. Meanwhile, the perpetrator is an adult who is 52 years old. This indicates that it is clear that the physical condition of the perpetrator and the child victim who is still little is highly different. This big difference in physical

[118] Decision of Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk.

[119] Look at Article 81 verse (3) Law No. 35 of 2014 concerning the Amendment of Law No. 23 of 2002 concerning Child Protection.

condition can also be a criminal aggravation because it takes advantage of the weaker physical condition of the child.[120]

Third, although in the criminal act committed by the Defendant no one was persuaded or threatened, this is because the child victim already knows the Defendant because the defendant is a close person who the child victim knows, so there is no sense of threat or self-defense from the child victim. This indicates the psychological condition of the child victim whose mindset is still below average, immature and still underdeveloping, considering the age of the child victim at the time of the incident was only 3 years 9 months old and has never received basic education. This can also be the basis for the criminal aggravation against the DEFENDANT.[121]

Fourth, in sentencing, one of the important aspects that must be considered is the aggravating and mitigating circumstances for the defendant. In the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk will describe the two conditions, namely:

Aggravating Things:

The defendant's actions have damaged the future of the child victim.[122]

[120] Decision of Pontianak District Court *op.cit.*
[121] *Ibid.*
[122] *Ibid.*

When viewed from the aggravating things as mentioned above, it still lacking because not only the defendant's actions have damaged the future of the child victim but also the child victim feels traumatized. This is evidenced by the fact that was revealed at the trial that after the Defendant had sexual intercourse with the child victim, the child victim was afraid of the defendant because the perpetrator was a family of the child victim. The trauma of sexual violence experienced by the child victim will make the child victim fear and not trust the people around them anymore. Therefore, it must be included in matters that aggravating the defendant.

Furthermore, the second thing that needs to be analyzed is the conditions that mitigating the Defendant, as stated in the verdict:

Mitigating Things:

- The defendant has never been convicted.

- The defendant confessed frankly his actions.

- The defendant regretted his actions.

- The defendant will not repeat his actions again.[123]

One of the mitigating things mentioned above is the point "the defendant confessed frankly his actions". From what the author sees as stated in the decision of the Pontianak District Court No.

[123] *Ibid.*

869/Pid.Sus/2021/PN.Ptk, it is true that the defendant always confirmed and did not mind to the testimony of the witnesses during the trial. However, there is a discrepancy in the chronology of events between what is stated in the case of the position in the indictment, testimony of witnesses, statements of the defendant, statements of the child victim. Until the consideration of the elements of Article 81 paragraph (1) in conjunction with Article 76 D Law No. 35 of 2014 concerning Child Protection. The judge has proved about how the Defendant had sexual intercourse with the child victim. If described what the differences are, in essence they are as follows:

a) The chronology contained in the indictment of the public prosecutor and the statement of the child victim (in the decision called as witness 2). In essence, the Defendant suddenly pulled the child victim's hand while playing in the living room into the room, then the Defendant opened the child victim's pants and laid the child victim on the bed, then inserted his genitals into the child victim genitals so that the child victim was in pain and crying.[124]
b) Chronology from witness testimony. Witnesses 1 and 3 (the biological parents of the child victim), essentially said that the child victim had pain in his genitals when urinating, then witness 1 checked that there was a red line like a wound on the inside of the hole, and the child victim told him that his genitals were stabbed

[124] *Ibid.*

with wood. The person who stabs the child victim genitals with wood is the DEFENDANT. While Witness 4 (the Defendant's wife) did not know how the defendant do the crime to the child victim.[125]

c) Chronology from defendant's testimony. In essence, the Defendant saying had committed an obscene act by inserting his right index finger into the genitals of the child victim. That at the time of the crime, the Defendant was taking care of the child victim in the family room. Then, the child victim said to the DEFENDANT "AKI, IT'S ITCHY KI" (while opening the pants and pointing towards the genitals), then the Defendant pleaded by saying "WHERE IT IS, HERE, LET AKI SCRATCH" then the defendant put his right index finger into the child victim genitals 1 time, then the child victim put his pants back on and immediately went outside to play.[126]

d) The chronology from the legal facts revealed. Whereas the panel of judges has outlined only the proven indictment that are in accordance with the material actions carried out by the defendant based on the facts at trial, in essence, the chronology is that the Defendant tried to insert his genitals into the child victim genitals, and the child victim felt pain. Same as the chronology stated in the indictment of the public prosecutor.[127]

[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*

Based on the description above, there are differences in how the perpetrators carried out his actions, from the statements of witnesses 1 and 3, the witness only knew that the child victim was stabbed with a wood and was confirmed by the Defendant. The Defendant also said that he only inserted his right index finger into the child victim genitals once. However, the panel of judges stated that the DEFENDANT was proven guilty of having sexual intercourse with a child as stated in the first indictment of Article 81 paragraph (1) Jo 76 D Law No. 35 of 2014. This indicates that Defendant was dishonest in giving his statement. So that it cannot be said that the defendant admitted/confessed frankly his actions. The mitigating factors that the defendant confessed frankly about his actions were proven that the defendant was not being honest/frank. So, this was not a mitigating factor, instead it is classified as aggravating matters. In the description above, the conclusion obtained is that one of the things that relieve the Defendant is not proven and is a consideration of the weighting of the sentencing that must be considered.

The four things mentioned above that the author has analyzed can be concluded that there is a criminal weighting with a high level of seriousness which is reflected in the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk, namely the perpetrators of sexual violence against children in this decision are still within the scope of the family which can be categorized as guardians/caregivers of children

and has been regulated in the provisions of Article 81 paragraph (3) if the person who commits sexual violence against children one of them is the guardian/caregiver of the child, the penalty is added by 1/3 (one third) of the criminal threat as referred to in Article 81 paragraph (1).

The physical and psychological conditions of children who are only 3 years and 9 months old are very far from those of adult perpetrators aged 52 years, so that child victims are very vulnerable to sexual violence against them. There are two other things that must be included in the aggravating things, namely the actions of the perpetrators causing trauma to the child victim and the perpetrators didn't frankly confessed his action. The sentence imposed should be higher than the sentence imposed by the judge in the Pontianak District Court's decision No. 869/Pid.Sus/2021/PN.Ptk, namely imprisonment for 7 (seven) years and a fine of five hundred million rupiahs subsidiary 3 months confinement, should be higher because the level of seriousness is also relatively so high. So the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk does not reflect sentencing proportionality, especially in the principles of 'a ranking of crimes in terms of their seriousness' and 'a ranking of punishments in terms of their severity.'[128]

[128] Göran Duus-Otterström, "Retributivism and Public Opinion: On the Context Sensitivity of Desert", *Criminal Law and Philosophy*, 12, 2018, p. 128.

Meanwhile, if proportionality is seen from the severity of the threat of criminal sanctions, the decision of the Brebes District Court No. 28/Pid.Sus/2021/PN.Bbs and the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk apply the same threat of sanctions, as regulated in Article 81 paragraph (1) Jo. Article 76 D Law of the Republic of Indonesia No. 35 of 2014 concerning Amendment of Law No. 23 of 2002 concerning Child Protection which mentions a minimum prison sentence of 5 years, a maximum prison sentence of 15 years, and a maximum fine of one billion rupiah.

In both decisions of the Brebes District Court No. 28/Pid.Sus/2021/PN.Bbs and the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk both have been legally and convincingly proven guilty of committing the crime of "committing violence or threats of violence to force a child to have intercourse with him", as regulated and threatened in Article 81 paragraph (1) Jo. Article 76 D Law of the Republic of Indonesia No. 35 of 2014 concerning Amendment of Law No. 23 of 2002 concerning Child Protection, in accordance with the alternative indictment of the Public Prosecutor in the two decisions, namely the first indictment.

It is necessary to examine one by one the decision of the Brebes District Court No. 28/Pid.Sus/2021/PN.Bbs. It can be seen that the weight of the punishment imposed by the judge in this case is quite heavy. In this decision, the punishment is carried out cumulatively by imposing imprisonment and a fine at the same time as well as additional punishment

as a burden because the case is classified as a serious case, namely related to sexual offenses. The threat of violence, the sentence imposed by the judge is very high, namely 11 years in prison and a fine of Rp.200,000,000. - subsidiary 6 months confinement. The judge's decision is almost close to the maximum criminal charge filed by the Public Prosecutor, which is 13 years imprisonment. Plus there is an additional penalties in the decision No. 28/Pid.Sus/2021/PN.Bbs namely the announcement of Acep's identity as a perpetrator of sexual violence against children for 1 (one) calendar month through bulletin boards, the prosecutor's official website and print media, electronic media, and /or social media. The additional penalties included in this criminal weighting are as regulated in the provisions of Article 81 Paragraph (6) of Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection: stated that, "In addition to being subject to the punishment as referred to in paragraph (1), paragraph (3), paragraph (5), the perpetrator may be subject to additional punishment in the form of announcing the identity of the perpetrator."[129]

Based on the data exposure and explanation above, it can be concluded that the judge's decision in imposing a sentence on the perpetrator of the crime of violence against children is relatively heavy, especially if it is measured by the weight of the crime in the demands of the Public

[129] Look at Article 81 Paragraph (6) of Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

Prosecutor. This can be interpreted that law enforcement officers (especially in this case the Public Prosecutor and Judge) show partiality to the child victim as a victim of a criminal act of sexual violence.

While the criminal threat which is reflected in the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk does not reflect the idea of sentencing proportionality, especially the principle of 'a ranking of punishments in terms of their severity.' In the Pontianak District Court judge's decision, the cumulative punishment by imposing imprisonment and a fine was simultaneously chosen by the judge as a burden because the seriousness level of this case indeed so serious, namely related to sexual offenses. Meanwhile, the punishment imposed by the judge is low, only 7 years in prison and a fine of Rp. 500,000,000, - subsidiary of 6 months in prison. The judge's decision is almost close to the minimum criminal threat and the criminal charges filed by the Public Prosecutor are also only 7 years and 6 months in prison. Whereas the weighting of punishment in the facts revealed in the trial is quite a lot as the author has described previously and the criminal threat in this decision should be higher than the decision No. 28/Pid.Sus/2021/PN.Bbs so that the application of criminal threats is wrong and is not in line with sentencing proportionality. It can be interpreted that law enforcement officers (especially in this case the Public Prosecutor and Judge) show impartiality towards the child victims as victims of criminal acts of sexual violence.

In the matters described above, it can be obtained that the threat of criminal sanctions in the decision of the Brebes District Court no. 28/Pid.Sus/2021/PN.Bbs and the decision of the Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk is the same, but shows a different level of seriousness. When compared with decision No. 28/Pid.Sus/2021/PN.Bbs which, according to the author, has reflected sentencing proportionality by giving the appropriate punishment. While the decision no. 869/Pid.Sus/2021/PN.Ptk does not reflect sentencing proportionality because the punishment is not proportional and ignores the provisions on the weighting of the criminals already listed in the law, which should have a heavier penalty than the sentence imposed. Because the principle of proportionality promoted by Beccaria says that "it is hoped that the punishment imposed on the perpetrator of a crime is proportional to the crime he committed".[130] In this research which is clearly the same crime, the two decisions have a big gap in sentencing the perpetrator so it doesn't fit the principle of proportionality. If the concept of proportionality in both decision No. 28/Pid.Sus/2021/PN.Bbs and No. 869/Pid.Sus/2021/PN.Ptk was seen as a single unit, then the concept of parity in sentencing can also occur if the event that the same sentence is imposed on perpetrators who commit crimes with different levels of crime, but not that quite far because of the levels of crime from the decision No. 869/Pid.Sus/2021/PN.Ptk is higher than decision No. 869/Pid.Sus/2021/PN.Bbs, so the punishment of 7

[130] Allan Manson, *op.cit.*

years imprisonment intended is not proportional. The strategies for imposing criminal sanctions if connected with an indeterminate sentence theory, saying that the imposition of sanction determines a certain "range" of time[131], which in this research being sentenced to a minimum of 5 (five) years and a maximum of 15 (fifteen) years. So, the convict must serve a sentence between 5 to 15 years, where the length of this time will depend on the convict himself. If we look in this research and implement certain "range" of time, taking attention that sexual violence against children is a serious crime, it is appropriate that decision No. 28/Pid.Sus/2021/PN.Bbs stipulates a sentence of 11 years in prison, but not with decision No. 869/Pid.Sus/2021/PN.Ptk which stipulates a prison sanction of only 7 years even though there was an aggravating article that was carried out, a 7 years sentence was considered disproportionate, especially in the case where it was said that the perpetrator was a relative of the family who should have had a heavier sentence. Looking at the circumstances of this comparison research, it is not compatible with Andrew Von Hirsch's theory which says "punishment are arranged based on a scale so that the relative severity of the crime is related to the comparison of the offender's guilt."

According to modern schools, the occurrence of punishment inequalities can be justified as long as each case has a clear and transparent basis of justification. However, the disparities found in decision No. 869/Pid.Sus/2021/PN.Ptk and decision No. 869/Pid.Sus/2021/PN.Bbs

[131] Eva Achjani, *op.cit.*

which have disproportionate sentencing do not have a strong basis and will lead to legal uncertainty. The disparities of sentencing proportionality in this research will threaten law enforcement efforts itself based on sociological view that this problem understood as phenomenon of legal injustice that will disrupt the sense of societal justice.[132]

[132] Harkristuti Harkrisnowo, *op.cit.*

CHAPTER IV
CLOSING

A. CONCLUSION

From the discussion in the previous chapter it can be concluded:

1. The sentencing theory used in decisions No. 28/Pid.Sus/2021/PN.Bbs is absolute theory. Which oriented to offender protection and the purpose of absolute theory is to be able to warn criminals and other members of the community that any threat that harms others or gains unfair advantage from others will receive appropriate retaliation. While the judge used the combined theory in decision No. 869/Pid.Sus/2021/PN.Ptk which considers that the punishment is imposed with the aim of punishing not only as retaliation but also as guidance for the perpetrators to be accepted back to the community after he serve the sentencing. Considering that anyone who commits acts of sexual violence against children as serious and unlawful act, then the priority of punishment for the perpetrator of this crime must contain elements of retaliation and deserve to be punished accordingly. Because the idea of absolute theory where the crime is a revenge for injustice that has harmed the other party and tends to be used in deciding penalties with a relatively heavy criminal weight. Therefore, absolute theory tends to be appropriate to be used as the sentencing theory in deciding the penalties regarding crime of sexual violence against children.

2. Decision No. 28/Pid.Sus/2021/PN.Bbs has reflected sentencing proportionality by giving the appropriate punishment. While the decision No. 869/Pid.Sus/2021/PN.Ptk does not reflect sentencing proportionality because the punishment should have a heavier penalty than the sentence imposed, and ignores the provisions on the weighting of the criminals which already listed in the law, so that violating the principle of fairness as the ultimate goal of the idea of proportionality in criminal law.

B. SUGGESTION

1. To fulfill a sense of justice in making every decision, judges should consider the theory of punishment to be applied with various aspects of the facts and evidence presented in court so that the application of the theory of punishment is truly appropriate and fulfills a sense of justice for the wider community.
2. In imposing punishment must be based on the sentencing proportionality so that there is no disproportionate decision, it is necessary to have sentencing guidelines as a basis to create balances to solve the crime and creating a fairness decision.

BIBLIOGRAPHY

Books

Abdullah, H. (2006). *Kebebasan Seksual Dalam Islam.* Jakarta: Pustaka Zahra.

Arief, B. N., & Muladi. (1884). *Teori – Teori dan Kebijakan Pidana.* Bandung: Alumni.

Arief, B. N., & Muladi. (1984). *Pidana dan Pemidanaan,.* Semarang: Badan Penyediaan Bahan Kuliah Fakultas Hukum UNDIP.

Arief, B. N., & Muladi. (2005). *Criminal Theories and* . Bandung: Alumni.

Atmasasmita, R. (1995). *Kapita Selekta Hukum Pidana dan Kriminologi.* Bandung: Mandar Maju.

Bassar, M. S. (1986). *Tindak-Tindak Tertentu di dalam KUHP.* Bandung: Remaja Karya.

Beccaria. (1996). *Crime and Punishment.* New York: Marsilio.

Dellyana, S. (1998). *Wanita dan Anak di Mata Hukum.* Yogyakarta: Liberty.

Farid, Z. A. (2007). *Hukum Pidana 1.* Jakarta: Sinar Grafika.

Ferry, Y. (1997). *Kekerasan Seksual Pada Anak Dan Remaja.* Jakarta: PT.Rajawali.

Gultom, B. M. (2012). *Pandangan Kritis Seorang Hakim dalam Penegakan Hukum di Indonesia.* Jakarta: PT Gramedia Pustaka Utama.

Gultom, M. (2014). *Perlindungan Hukum Terhadap Anak Dan Perempuan.* Bandung: Refika Aditama.

Hamzah, A. (1994). *Asas-Asas Hukum Pidana.* Jakarta: Rinneka Cipta.

Ichsan, M., & Susila, M. E. (2008). *Hukum Pidana Islam Sebuah Alternatif.* Yogyakarta: Faculty of Law, UMY.

Katjasungkana, N. (2000). *Penyalahan Seksual Pada Anak.* Jakarta: Mitra Wacana.

Koeswadji. (1995). *Perkembangan Macam-macam Pidana Dalam Rangka Pembangunan Hukum Pidana* (I ed.). Bandung: Citra Aditya Bhakti.

Lamintang, P. (1984). *Dasar-dasar Hukum Pidana Indonesia.* Bandung: Sinar Baru.

Marzuki, P. M. (2014). *Penelitian Hukum* (Revisi ed.). Jakarta: Kencana.

Mays, G. L., & Winfree Jr, L. T. (2002). *Contemporary* (2nd ed.). WadsworthlThomson Learning.

Moeljatno. (1985). *Azas-azas Hukum Pidana.* Jakarta: Bina Aksara.

Muhammad, R. (2007). *Contemporary Criminal Procedure Code* (First Printing ed.). Bandung: PT Citra Aditya Bakti.

Prodjodikoro, W. (2003). *Asas-Asas Hukum Pidana di Indonesia.* Bandung: Refika Aditama.

Sahetapy, J. (1979). *Ancaman Pidana Mati Terhadap Pembunuhan Berencana.* Bandung: Alumni.

Samidjo. (1985). *Introduction to Indonesian Law.* Bandung: Armico.

Sarwono, J. (Yogyakarta). *Quantitative & Qualitative Research Methods.* 2006: Graha Ilmu.

Sholehuddin. (2003). *Sistem Sanksi Dalam Hukum Pidana, Ide Dasar Double Track System & Implementasinya.* Jakarta: Raja Grafindo Persada.

Soemitro, e. (1996). *BPK Hukum Pidana.* Surakarta: UNS Press.

Utrecht, E. (1958). *Hukum Pidana I.* Jakarta: Universitas Jakarta.
Von Hirsch, A., & Ashworth, A. (2005). *Proportionate Sentencing: Explorate Principle.* New York: Oxford University Press Inc.
Wadong, M. H. (2000). *Advokasi dan Hukum Perlindungan Anak.* Jakarta: Grasindo.
Wahid, A., & Irfan, M. (2001). *Perlindungan Terhadap Korban Kekerasan Seksual.* Bandung: PT Refika Aditama.
Widodo. (2009). *Criminal System in Cyber Crime.* Yogyakarta: Laksbang Mediatama.
Yulia, R. (2010). *Viktimologi Perlindungan Hukum terhadap Korban Kejahatan.* Yogyakarta: Graha Ilmu.

Journals

Duus-Otterström, G. (2018). Retributivism and Public Opinion: On the Context Sensitivity of Desert. *Criminal Law and Philosophy, 12*.
Goh, J. (2013). Proportionality - An Unattainable Ideal in the Criminal Justice System. *Manchester Student Law Review, 2*(41), 41-70.
Handayani, T. (2016). Perlindungan dan Penegakan Hukum Terhadap Kasus Kekerasan Seksual Pada Anak. *Jurnal Mimbar Justitia, II, No. 02*.
Harkrisnowo, H. (2003, Maret 8). Rekonstruksi Konsep Pemidanaan: Suatu Gugatan Terhadap Proses Legislasi dan Pemidanaan di Indonesia. *Orasi Pengukuhan Guru Besar di Universitas Indonesia*.
Hirsch, A. v. (1983). Communsurability and Crime Prevention : Evaluating Formal Sentencing Structures and Their Rationale. *Journal of Criminal Law and Criminology, 74*(1), 209-248.
Kholiq, M. A., & Wibowo, A. (2016). Penerapan Teori Tujuan Pemidanaan dalam Perkara Kekerasan terhadap Perempuan: Studi Putusan Hakim. *Jurnal Hukum IUS QUIA IUSTUM NO. 2 VOL. 23 APRIL 2016*, 186-2015.
Lumingkewas, Firgie. (2016). Tindak Pidana Kesusilaan dalam KUHP dan RUU KUHP serta Persoalan Keberpihakan terhadap Perempuan. *Lex Crimen, No. 1*.
Luna, E. (2003). Punishment Theory, Holism, and the Procedural Conception of Restorative Justice. *Utah Law Review*.
Manson, A. (2001). *The Law of Sentencing.* Irwin Law.
Marsaid. (2015). Perlindungan Hukum Anak Pidana Dalam Perspektif Hukum Islam (Maqasid Asy-Syari'ah). *Jurnal Kajian Syari'ah dan Masyarakat, 12 No. 2*.
Mukhtar, E. (2008). Implementation of Sentencing Theory in Psychotropic Case Decisions by Judges at the Yogyakarta District Court. *Master's Thesis of Law Faculty of Law, Indonesian Islamic University*.
Packer, H. L. (1969). *The Dilemma of Punishment.*
Prakoso, D. (n.d.). *Surat Dakwaan, Tuntutan Pidana dan Eksaminasi Perkara di Dalam Proses Pidana.* Yogyakarta: Liberty.
Rozah, Umi. (2019, Oktober). Delik Zina: Unsur Substansial dan Penyelesaiannya dalam Masyarakat Adat Madura. *Masalah-masalah Hukum, Jilid 48, No. 4.*

Sa'ada, Nur. (2016, Juni). Tinjauan KUHP dan Fiqh Jinayah terhadap Zina dan Turunannya dalam Qa'nu. *Al.Qanun, Vol. 19, No. 1.*

Sahetapy, J. E. (1989, July). Tanggapan Terhadap Pembaharuan Hukum Pidana Nasional. *Pro Justitia, Law journal*(3).

Salman Luthan, (2007). Kebijakan Penal Mengenai Kriminalisasi di Bidang Keuangan, Studi Terhadap Pengaturan Tindak Pidana dan Sanksi Pidana Dalam Undang-Undang Perbankan, Perpajakan, Pasar Modal dan Pencucian Uang. Disertasi, Program Pascasarjana Universitas Indonesia, Jakarta.

Thathit Manon, e. (2019). Identifikasi Kejadian Kekerasan Pada Anak di Kota Malang. *Jurnal Perempuan dan Anak (JPA), II No. 1*.

Zulfa, E. A. (2011). Proporsionalitas Penjatuhan Pidana. *Journal of Law and Development, 41*.

Paper

Lubitz, R. 1., & Ross, T. W. (2001, June). Sentencing Guidelines:Reflection on the Future. *Papers From the Executive Sessions on Sentencing and Corrections*.

Law & Regulation

Law No. 23 Year 2002 concerning Child Protection.

Law No. 13 of 2003 concerning Manpower.

Law of the Republic of Indonesia No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 concerning Child Protection.

Law of the Republic of Indonesia No. 17 of 2016 concerning Establishment of Government Regulation in Substitute of Law No. 1 of 2016 concerning Second Amendment to Law No. 23 year 2002 concerning Child Protection into Law.

Indonesia Criminal Code.

Draft of Indonesian Criminal Code.

Court Decision

Decision of Brebes District Court No. 28/Pid.Sus/2021/PN.Bbs.

Decision of Pontianak District Court No. 869/Pid.Sus/2021/PN.Ptk.

Electronic Sources

(n.d.). Retrieved May 3, 2022, from https://badrulmozila.com/pengertian-kekerasan-menrut-para-ahli/.

(n.d.). Retrieved May 3, 2022, from https://kbbi.kemdikbud.go.id/entri/anak.

(n.d.). Retrieved October 18, 2022, from https://pusiknas.polri.go.id/detail_artikel/kekerasan_seksual_mendominasi_kasus_kejahatan_pada_anak#:~:text=Sebanyak%2011.604%20orang%20menjadi%20korban,5%20persen%20dari%20data%20tersebut.

ATTACHMENT

FAKULTAS
HUKUM
Gedung Fakultas Hukum
Universitas Islam Indonesia
Jl.Kaliurangkm 14,5 Yogyakarta55584
T. (0274)7070222
E. fh@uii.ac.id
W.law.uii.ac.id

SURAT KETERANGAN BEBAS PLAGIASI

No. : 415/Perpus/20/H/XII/2022

Bismillaahhirrahmaanirrahaim

Yang bertanda tangan di bawah ini:

Nama	: **Joko Santosa, A.Md.**
NIK	: **961002136**
Jabatan	: **Staf Perpustakaan Referensi Fakultas Hukum UII**

Dengan ini menerangkan bahwa :

Nama	: Nisrina Sulistya Hastuti
No Mahasiswa	: 18410693
Fakultas/Prodi	: Hukum
Judul karya ilmiah	: SENTENCING PROPORTIONALITY REGARDING CRIME OF SEXUAL VIOLENCE AGAINST CHILDREN (Study Between Decision No. 28/Pid.Sus/2021/PN.Bbs and Decision No. 869/Pid.Sus/2021/PN.Ptk)

Karya ilmiah yang bersangkutan di atas telah melalui proses uji deteksi plagiasi dengan hasil **10**.%

Demikian surat keterangan ini dibuat agar dapat dipergunakan sebagaimana mestinya.

Yogyakarta, 05 Desember 2022 M
11 Jumadil Awwal 1444 H

Perpustakaan Referensi FH UII

Joko Santosa, A.Md.