Gender Discrimination Against Minor Children Who Complete Criminal Acts of Inclusion and Law Based on Child Protection Law

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Abstract: In a state of law, equality before the law is a principle. In reality, it turns out that there is a process of discrimination in the crime of sexual intercourse and obscenity based on the Child Protection Act. The justification for the perpetrators of sexual intercourse and obscenity is confirmed to be a boy. In fact, it is possible that the occurrence is based on a consensual agreement. The act which is known as experimental sexual intercourse cannot be construed as a crime. This study examines how the issue of the crime of sexual intercourse and obscenity is based on the Child Protection Act. Studies was conducted on the three cases of the perpetrators. The research method used is normative juridical research. The theory which is implemented to these cases are the theory of Rule of Law, Legality and Critical Theory. Based on the analytical framework of the rule of law, legality and critical theory, it is found that the law develops. It should be responsive to cultural transformation that occur. Consensual relationships between boys and girls cannot make boys convicted. The protection of boys against consensual sexual relations or experimental sexual relations needs to be covered in the laws.

1 INTRODUCTION

Rape is a very serious problem, but few of victims and their families report the cases to the authorities. In addition, the mass media discloses only a small number of cases reported to the police. The most detrimental and disturbing rape to the community is the rape of children.

Rape is coercion. If there is no coercion, it cannot be categorized as rape. This statement appears in the provisions of Article 5 of Permendikbud, Research and Technology Number 30/2021. If the victim does not give consent, then an act can be categorized as sexual violence. This Permendikbud drew criticism from many circles, because the moral impression was ignored. In Indonesia the sexual relations that were not through the marriage were not accepted by society.

The provision seems to contradict the meaning of rape. Agus Purwadianto in his dissertation stated that empirically rape is a phenomenon of violence and/or sexual coercion or threats of sexual intercourse from male perpetrators, which can be one or more individuals against female victims (which can be one or more). It can be called as rape because there is the penetration of the penis (perpetrator) – vagina (victim) or extended as a form of insertion of any object into any part of the body orifice of the victim, regardless of the age of the victim, without prior or at the time of the incident the male perpetrators get the victim's consent. In rape, the perpetrator and the victim are bound by marriage or not, which takes place at a certain place, time and law (Purwadianto, 2003: 97).

Rape as a gender based violence has been included in the United Nations Declaration on the Elimination of Violence against Women. Mely G. Tan cites a number of articles related to sexual violence against women in the declaration, including:

> Article 1. For the purposes of this Declaration, the term 'violence against women' means any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or deprivation of liberty arbitrarily, which occurs in public or private life.

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> Article 2. Violence against women includes, but is not limited to, the following: (a) physical, sexual and psychological violence occurring in the family, including beatings, sexual abuse of girls in the family, violence related to dowry , wife rape, female genital mutilation, and traditional practices that harm women, violence by non-husbands, and violence related to exploitation; (b) Physical, sexual and psychological violence in the general population, including rape, sexual assault, sexual harassment and intimidation in the workplace, educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or permitted by the Government, which occurs anywhere (Tan, 2003: 47).

Mely G. Tan noted that the rate of rape is included in the category of ultimate violence in Indonesia. In 2001 there were 3.167 cases of violence against women reported. Of the 3.167 cases, there were 1.023 cases of rape (32.3%) and 228 cases of sexual assault/harassment (7.2%). In Jakarta there were 500 rape cases, followed by East Java and Yogyakarta, each of which recorded 356 cases, but from very different groups (Tan, 2003: 48).

Indonesia as a state of law has formulated laws and regulations against the perpetrators of rape. Initially, the Criminal Code (KUHP) stipulates the provisions for crimes against crimes related to morals. Article 281 to Article 303 regulate it. The legal threat to the crime of rape is stated in Article 285 with a maximum sentence of 12 years in prison. This is in accordance with Article (285) which stipulates that anyone by force or by threat of forcing a woman who is not his wife to have intercourse with him, is punished for committing rape with a maximum imprisonment of twelve years (Hamzah, 2011: 15).

The causes of rape include family environmental factors. The freedom feeling and the neglect of parents can be the cause of this crime. Lack of parental supervision for their children is very much needed. Environmental factors can also make a person commit a crime. Because of wrong association a person can commit a crime.

Another cause of rape is sexual factors. The details of this factor are a person's desire and lust for sexual intercourse. For example, the perpetrator who already has a wife, this happens because there is no sexual satisfaction that is channeled when dealing with his wife.

Factors of advances in science and technology telecommunications factors can be a factor in the occurrence of sexual crimes. The existence of pornographic sites is one of the main factors. With the rapid development of telecommunications, it is easy to access porn sites through cyberspace or the internet. The sophistication of telecommunication tools and the ease of accessing pornographic sites that are so easy can lead to crime. Because you don't have a partner, someone will vent with other people, even people they don't know. As a result of the sophistication of this communication tool, it is easy for criminals to vent their desires and make it easier for them to commit their crimes.

In Indonesia there is the protection to the rape victims, but there is also legal protection for children who commit that crimes. UU no. 11 of 2012 concerning the Juvenile Justice System aims to protect children who are in trouble with the law. This law states that the Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law. The juvenile justice system process starts from the investigation stage to the guidance stage after serving a crime. The juvenile justice system calls children in conflict with the law with three characteristics. They are children in conflict with the law, children who are victims of criminal acts, and children who are witnesses of criminal acts (Article 1 paragraph 1 and paragraph 2 of Law no. 11 of 2012 concerning the Juvenile Justice System).

The Juvenile Justice System Law recognizes the concept of diversion. With this concept, children can be transferred to the settlement of children's cases from the criminal justice process to processes outside of criminal justice (Article 1 paragraph 7 of Law no. 11 of 2012 concerning the Juvenile Justice System). In every criminal justice process, whether from the Police, the Prosecutor's Office and the Judiciary, the diversion process is prioritized. The purpose of diversion is to; achieve peace between victims and children; resolve cases of children outside the judicial process; prevent children from deprivation of liberty; encourage people to participate; and instill a sense of responsibility in children. (Article 6 of Law no. 11 of 2012 concerning the Juvenile Justice System)

The goal of the research paper is to find out whether the diversion carried out by law enforcement officers in the Juvenile Justice System against children who are in conflict with the law because of alleged abuse and sexual abuse has reflected the absence of gender discrimination. The object of the research is related to the crime of

sexual intercourse and sexual abuse of minors. The object of this research specifically are 3 decisions of the district court related to the crime of sexual intercourse and obscenity committed by SH bin S. The perpetrators were SH bin S, SM bin IS and CA. All three are underage boys who were sentenced to prison terms that have permanent legal force on charges of sexual intercourse and obscenity. The legal area for the 3 cases is the North Jakarta Police area.

2 LITERATURE REVIEW

Hershkowitz and Katz interviewed 426 children aged 4 to 13 who were victims of sexual violence in the family. Interviews used the Standard Investigative Interview Protocol (SP) of the National Institute of Child and Human Health (NICHD) found evidence that many victims were reluctant to make reports, despite evidence and documentation of allegations of abuse taking place. This study was conducted using a forensic interview method to facilitate valid reports of child abuse (Herskowitz, I. Lamb, 2014).

Laura K. Noll et al conducted a study of children who were just growing up who consumed pornography on the internet. The results show that there is an increasing trend of consumption of pornography on the internet. It also encourages a culture of violence against women and minority groups, including the rape (Laura K. Noll, 2022).

Edward L. Rowan MD made a definition of sexual violence. He defines it broadly as the unwanted sexual act of contact with another person. Child sexual abuse, or child abuse, is more narrowly defined but definitions vary from one legal jurisdiction to another. The bottom line is that a child cannot knowingly or voluntarily consent to a sexual relationship with someone who is stronger and older. Depending on the jurisdiction, to be charged with harassment, the older one must be at least sixteen or eighteen years of age. This limit is at least three or five years older than the child (Rowan, 2006: 3)

By this definition Rowan MD admits that sexual experimentation between younger peers does exist, but that sexual contact between a child and an adult male or female is wrong. However, violating social norms is inevitably the same as endangering children (Rowan, 2006: 3).

Josie Spataro et al conducted a study on children who were victims of both boys and girls. The prospective study conducted looked at victims who were both children and post-adults. The result is the risk of experiencing mental stress psychological problems reached 12.4 % compared to 3.6% who did not. Psychological illnesses experienced include excessive anxiety and affective disorder. From the research, it is shown that many boys who become victims end up receiving treatment compared to girls with a ratio of 22.8 % and 10.2% (Spataro, 2004: 416).

Nathanael Sumampouw examines the handling of court files on child sexual abuse cases. His research explains that case disclosure is often not processed properly through the next stage. For example, it is not forwarded to the realm of investigation and prosecution by law enforcement agencies. Previous studies from various countries have shown that the rate of child sexual abuse is not continued as high as 40%. In Sweden, only 1 in 10 cases reported to the police end up being processed by the courts. In New South Wales, Australia, it was found that most cases of sexual assault do not progress beyond the stage of a police investigation. Of the 15% of cases of child sexual violence that underwent prosecution, only 8% were proven in court. The low level of prosecution of child sexual abuse cases is associated with a number of factors. The main factor is the insufficient availability of corroborating evidence to support the testimonies of child victims (Sumampouw, 2002: 984-985).

Sumampouw shows a number of solutions to overcome obstacles to legal settlement of child sexual violence. In Indonesia the confession of a suspect, the presence of a doctor's expert witness on a report of sexual violence and the duration of the investigation between 1 to 2 months help to complete the prosecution. Suspects and evidence of *visum et repertum along with the* testimony of expert witnesses from doctors are important (Sumampouw, 2002: 999).

I Dewa Gede Budhy Dharma Asmara, discusses restorative justice which is defined as the recovery of the condition of the victim and the community by the defendant as the fulfillment of his obligations because he is aware of his guilt. In judicial practice, the thesis reveals that people are often dissatisfied with the judge's decision which does not accommodate the concept of restorative justice. The results of the study, in the case of Orli Masudara Alias Oling and Asman Husin Alias Asman, the concept of restorative justice could be applied. Considering the various factors that influence the judge's judgment and the obstacles he experiences, it is recommended to regulate the concept of restorative justice in the Criminal Code in the form

of expanding the meaning of excuses. As a criminal policy, the defendants should be released from lawsuits/*onslag* (Asmara, 2013).

The research states that children are the next generation and development assets. The author states that children as the next generation, children must get guidance so they can carry out their obligations and get protection to get their needs and rights. Guidance and protection of children is the responsibility of parents, families, communities and the state. However, if the child commits a behavior deviation in terms of committing a crime of decency in the form of sexual intercourse with a child, then protection for the child must be given to both the perpetrator and the victim. The protection and handling of children who are perpetrators or victims in this crime of decency has a legal umbrella, namely the Juvenile Court Law and the Child Protection Act and the Child Criminal Justice System Act. The handling of child perpetrators and victims must receive special treatment from law enforcement officers from the beginning of the criminal justice process until the judge's decision is made, both in the form of crime and the actions and implementation of the decision (Endah, 2014).

Moh Faruk Rozi's research describes legal protection, and the efforts of investigators in this case the North Jakarta Polrestro PPA Unit against the practices of sexual crimes against children. His study is related to obscene acts committed by Syanwani alias Iwan, a marbot who guards the Al-Barkah mosque in Kelapa Gading, North Jakarta. The treatment carried out by the suspect against 26 boys was carried out in the room in the prayer room. In addition, this research describes and explains what obstacles are experienced by investigators in handling cases of sexual harassment and violence in the jurisdiction of the North Jakarta Police (Rozi, 2017).

The research has a different method with the research of Hershkowitz and Katz, Laura K. Noll et.all., Josie Spataro and Nathanael Sumampouw. The different is on the method. Others used the quantitative method and mine used the case study on the discrimination to the child.

The differences between the I Dewa Gede Budhy Dharma Asmara research dissertations and the thesis can be seen that the theme is almost the same as the study conducted by the researcher, namely the study of the crime of sexual intercourse. The difference is that the analysis and discussion of the writer of this thesis still uses the old Law Article 81 of Law Number 23 of 2002 concerning Child Protection. Meanwhile, the researchers used the reference of Law no. 35 of 2014 which is a revision of the Child Protection Law Number 23 of 2002. Another difference is that researchers review from the perspective of gender discrimination.

Another difference is on the perspective of gender discrimination. In the Naning Marini Sarwo Endah's thesis concerned on restorative justice. The difference between the Moh Faruk Rozi's research is on the perspective. The writer reviews from the perspective of gender discrimination, but Rozi emphasizes legal protection for male victims.

3 METHODS

Methods the research conducted in this study is a normative juridical legal research method. Legal research is conducted on statutory regulations. Legal research raises the issue of policy and the implementation of the rules that apply *in abstracto* at a certain time and area that is published as an explicit product as a national law that has become an explicit and positive rule or norm that is clearly formulated (Waluyo, 2002: 50). The objectives of this legal research are to: interesting legal principles Studying systematics, conducting an evaluation of the synchronization of existing laws and regulations, identify the basic understanding of the legal system (Soekanto, 1981: 204).

The data collection carried out in this study used primary data and the next is secondary data. Primary data was obtained from the first source in the form of court decisions related to cases of child sexual violence. Secondary data collection comes from documents related to research on child sexual violence. The tertiary data sources are the Legal Dictionary and the Indonesian Dictionary. An explorative analysis was carried out on the research results. The place and time of the research is the library. The search will be carried out during doctoral studies at the University of 17 August 1945. The agenda for this semester is making research proposals for Legal Research Methods.

The approach used in this research is a case study related to the legal issues faced. The cases studied are cases that have obtained court decisions with permanent legal force. The main thing that is studied in each of these decisions is the judge's consideration to arrive at a decision so that it can be used as an argument in solving the legal issues faced.

The primary data source of the research is the basic data of this study. The object of the research is related to the crime of sexual intercourse and sexual

abuse of minors. The object of this research specifically are 3 decisions of the district court related to the crime of sexual intercourse and obscenity committed by SH bin S. The perpetrators were SH bin S, SM bin IS and CA. All three are underage boys who were sentenced to prison terms that have permanent legal force on charges of sexual intercourse and obscenity. The legal area for the 3 cases is the North Jakarta Police area.

Secondary sources of research are books and laws related to the issue of sexual intercourse and obscenity. These books serve as material for analyzing the facts revealed in court decisions which are the primary sources of research.

The third source of research is legal dictionary books that provide explanations related to phrases, norms, legal concepts that are the research discussion. This third source helps a lot to clarify issues or discussions that are not yet clear.

4 RESULTS AND DISCUSSION

4.1 The Legal Aspect of Rape Punishment

The principle of legality has a general meaning that every act must be based on the applicable laws and regulations. This legal principle in Latin reads, "*nullum delictum nulla puna sine preavia lege poenali"* which means, "criminal events will not exist if the provisions of the law in the law do not exist first. This principle is contained in Article 1 paragraph 1 of the Criminal Code (Hamzah: 20). The purpose of this principle is the existence of legal certainty so that human rights can be protected.

This principle of legality also includes criminal events that can be justified by law, based on statutory provisions. It is based on justifying reasons (*rectsvaardigingsrood*) which are outside the law. The form of this reasoning in the container of jurisprudence (Adji, 1980: 194).

The principle of legality is related to the teachings of the nature of being against the law. Ruslan Saleh stated that the nature of being against the law is divided into two, namely the nature of being against the formal law and the nature of being against the material law. Ruslan Saleh's explanation regarding the nature of being against the formal law is, *"an act is against the law if it has fulfilled all the elements mentioned in the formulation of the offense. If you have fulfilled all the elements stated explicitly, then there is no need to investigate whether the act according to the community is truly deemed appropriate* (Saleh, 1962: 11).

Ruslan Saleh also mentioned the nature of being against material law. He said that "*this unlawful nature as an act that is clearly included in the formulation of the offense, it can be based on statutory provisions and also based on unwritten rules. So, the nature of teaching against material law is the same as being contrary to written law, including morals (ethics) and so on.* (Pious, 11)*"*

Hans Kelsen's theory of the hierarchy of legal norms was inspired by Adolf Merkl. He uses the theory of *das doppelte rech stanilitz*, namely legal norms have two faces. The first face of the legal norm is that it originates and is based on the norms above it. The face of the two legal norms down is that it also becomes the basis and becomes the source for the norms below it. So that if the legal norms above are revoked or deleted, then the legal norms below are revoked or erased as well (Maria Farida, 1998: 25).

Hans Kelsen places legislation in a hierarchical form. Besides the hierarchy of law formation is also considered dynamic by Kelsen. Kelsen considers the rule of law as a stufenbau of several ladders where a lower norm applies, originates and rests on an even higher norm. The highest norms are norms that cannot be traced again. There are no more stairs to reach than a standard Kelsen ladder. He describes it as follows, *"a norm the validity of which cannot be derived from a superior norm we call a 'basic' norm, all norms whose validity may be traced back to one and the same basic norm a system of norms, or an order* (Kelsen, 111). "

There are 3 decisions of the district court related to the crime of sexual intercourse and obscenity committed by SH bin S. The perpetrators were SH bin S, SM bin IS and CA. All three are underage boys who were sentenced to prison terms that have permanent legal force on charges of sexual intercourse and obscenity. The legal aspect of law is advance than the mediation. The formal law is used to sentence them. No room for the dialogue with the victim relatives. There is a proof that the diversion did not carried out by law enforcement officers in the Juvenile Justice System against children.

4.2 The Hierarchy of the Legal Norms

The hierarchical theory of legal norms proposed by Hans Kelsen is tiered and multi-layered in a hierarchy. In a hierarchical arrangement where a lower norm originates and is based on a higher norm. The basic norm, which is the highest norm in the norm system, is no longer formed by a higher

norm, but the norm is determined in advance by the community as the basic norm which is the hanger for the norms below it.

The Child Protection Law has followed the rules mandated in Law no. 15 of 2019 concerning Amendments to Law no. 12 of 2011 concerning the Establishment of Legislation. The following are the statutory provisions referred to by the Child Protection Act:

1. Article 20, Article 20A paragraph (1), Article 21, Article 28B paragraph (2), and Article 34 of the 1945 Constitution of the Republic of Indonesia ;
2. Law Number 4 of 1979 concerning Child Welfare (State Gazette of 1979 Number 32, Supplement to State Gazette Number 3143);
3. Law Number 7 of 1984 concerning the Elimination of All Forms of Discrimination Against Women (State Gazette of 1984 Number 29, Supplement to the State Gazette Number 3277);
4. Law Number 3 Year 1997 concerning Juvenile Court (State Gazette Year 1997 Number 3, Supplement to State Gazette Number 3668);
5. Law Number 4 of 1997 concerning Persons with Disabilities (State Gazette of 1997 Number 9, Supplement to the State Gazette Number 3670);
6. Law No. 20/1999 concerning Ratification of ILO Convention No. 138 Concerning Minimum Age for Admission to Employment (ILO Convention on Minimum Age to be Admitted to Work) (State Gazette of 1999 Number 56, Supplement to State Gazette Number 3835);
7. Law Number 39 of 1999 concerning Human Rights (State Gazette of 1999 Number 165, Supplement to the State Gazette Number 3886);
8. Law No. 1 of 2000 concerning Ratification of the ILO Convention No. 182 Concerning The Prohibition and Immediate Action for The Elimination of The Worst Forms of Child Labor (ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor) (State Gazette Year 2000 Number 30, Supplement to the State Gazette Number 3941) (UU no. 35 of 2014 concerning Amendments to Law no. 23 year 2002);

Provisions for child protection, apart from coming from the 1945 Constitution of the Republic of Indonesia, the Criminal Code, the Child Protection Act are also contained in several laws and regulations such as.

1. Indonesia's National Medium-Term Development Plan (RPJMN) 2015–2019.
2. National Strategy for the Elimination of Violence Against Children (Stranas PKTA) 2016–2020;
3. Child Friendly City Guidelines;
4. National Action Plan for Child Protection (RAN-PA) 2015–2019; and
5. Presidential Instruction No. 5 of 2014, concerning the National Movement for Anti-Sexual Crimes Against Children (GN-AKSA) (Wismayanti, 2019:9)

There are some regulations to protect the children, but the decisions to SH bin S, SM bin IS and CA never pay attention on the protection of the children. On the top of the hierarchy there are so many regulation saying the protection to the children who commit crime. But it is only on the paper. The delinquency trial was used, but the environment of the court as usual as non- delinquency trial.

4.3 The Feminist Perspective

Feminists pay attention to the gender issue and reject discrimination between men and women. There is no automatic preference where men are superior to women. Feminists challenge a wide range of laws that demonstrate direct and indirect discrimination against women (Fellmeth, 2020: 662).

Discussions about gender cannot be separated from sex and nature, because sex, nature and gender are closely related, but have different meanings. In relation to the roles of men and women in society, the meaning of the three concepts is often misunderstood. To avoid this and to sharpen the understanding of the concept of gender, the notion of sex and nature needs to be explained first. The term sex can be interpreted biologically, namely the male genitalia (penis) and female genitalia (vagina). From birth to death, men will remain male and women will remain female. Gender cannot be exchanged between men and women.

From this definition of gender and discrimination, a statement will emerge that nature is a biological innate trait as a gift from God Almighty, which cannot change over time and cannot be exchanged that is inherent in men and women. Here gender is more defined as sex. However, gender here is not biological sex, but socio-cultural and

psychological. If a person has a biological attribute, such as a penis in a man or a vagina in a woman, then it is also an attribute of the gender concerned and will then determine his social role in society.

In principle, the concept of gender focuses on the differences in roles between men and women, which are formed by society in accordance with social norms and socio-cultural values of the community concerned. Gender roles are social roles that are not determined by gender differences as well as natural roles. Therefore, the division of roles between men and women can differ from one society to another according to the environment. Gender roles can also change from time to time, due to the influence of progress: education, technology, economy.

The juvenile delinquency system sentenced to SH bin S, SM bin IS and CA because the actor should be a male. There is an imagination that there is the sexual consent among the others. The confession of the female about the experimental activity with the male never be followed as the clue of the sexual consent. Because the three of them are male, so they are blamed. The judges sentenced them to the jail, because the gender bias.

Actually crime acts can be committed by men or women, children or adults, rich or poor. The perpetrators who have the awareness to commit a criminal act are held accountable regardless of background or status. Crime of sexual intercourse and sexual abuse of minors Bad stereotypes against boys. This is likely to be discriminatory. Made Sadhi Astuti, who discussed juvenile justice, expressed his views.

> Boys have a greater tendency to commit criminal acts when compared to girls, because boys are braver and do not know danger, like to read with their friends through the streets in the city and outside the city. Girls, on the other hand, prefer to stay at home and feel more delicate than boys (Astuti, 2003: 152).

The definition of intercourse according to R. Soesilo, refers to Arrest Hooge Raad dated February 5, 1912, namely "a competition between male and female genitalia which is carried out to get children, so male members must enter into female members so that they secrete semen" or In other words, intercourse can be interpreted as the entry of the penis of the perpetrator of rape into the vagina of the woman who is the victim and ejaculation occurs in the vagina (Soesilo, 1981:209).

Developments related to physical violence in accordance with the Criminal Code have changed in the Child Protection Law. Articles 76D and 76E of Law no. 35 of 2014 concerning Child Protection stipulates that elements of violence or threats of violence are not required to prove the existence of rape or sexual abuse of children. This applies as long as there is evidence that an obscene act or sexual intercourse with the child occurred, the perpetrator can already be charged with a punishment.

The definition of the criminal act of obscenity is regulated in Article 289 of the Criminal Code as follows: "Whoever by force or threat of violence forces a person to commit or allow an obscene act to be carried out, is threatened for committing an act that attacks the honor of decency, with a maximum imprisonment of nine years."

Article 289 of the Criminal Code regarding obscenity does not specifically limit the perpetrators and victims of obscene acts. Victims can occur to both men and women. It does not include rape. From article 289 of the Criminal Code, gender discrimination occurs where men cannot be raped, but only as victims of sexual abuse.

Criminal acts are not only based on intentional acts, but also because of negligence. Thus, errors can arise from intentional and also negligence Roeslan (Saleh 1985: 49).

The Criminal Code places emphasis on individuals who have the awareness to take actions to be held accountable. Those who are unable to take responsibility are granted an exception. Article 44 of the Criminal Code confirms this. Criminal liability cannot be given to those who have mental disabilities or are mentally and mentally disturbed. Criminal acts also cannot be applied to those who commit out of compulsion. This is stated in Article 48 of the Criminal Code. If the judges are very careful to make a decision, they can see there are the sexual consent. The problem of the three cases are the interventions of the victim family. They only see the male as the actor, not as the sexual consent. It can be called as the bias gender.

4.4 The Critical Legal Perspective

Critical *Legal Studies* (CLS) is not a new phenomenon in legal science. Nor is it a postmodernity movement. The postmodern movement thinks things are not going well. In the legal context, this school assumes that justice has failed or the law has separated itself from ethics. *Critical Legal Studies* is a doctrine of critical legal studies that addresses the failure, injustice, discrimination and inequality of legal traditions and the examination of the future of law (Douzinas, 1994: 3-7).

CLS rejects the notion that law is separate from political, economic, social and cultural elements as conceptualized by Hans Kelsen with his theory *of the pure theory of law*, which craves the law to be free from non-legal elements such as politics, economics. , social and others. On the other hand, CLS assumes that the law is always intervened by interests outside the law so that the law is never neutral and objective. This means that law cannot be separated from politics because law is not formed in a value-free vacuum. In addition, CLS does not believe in the neutrality of the judge's decision. Judges who are echoed by the flow of legal realism have also not been able to provide justice because their decisions may not be objective because they are influenced by their background in life (Rahmatullah, 2021).

CLS challenges theories, doctrines or principles such as legal neutrality, legal autonomy, and the separation of law from politics. For example, CLS criticizes equality before the law (*equality before the law).* This principle is a principle that contains equality before the law from an ideal of a state of law. CLS adherents suspect this idiom because every law-making process is so elitist that it often only benefits the elite and harms the lower strata.

Sinoidh Douglas Scott explained that the study of law must use an interdisciplinary approach. He has idealism in learning law to be meaningful by fighting hegemony. The current legal approach, according to Scott, is more to strengthen the ratio, science and deduction. Laws with this approach began to fade. The study of the law should bring awareness of knowledge to the power that exploits and oppresses (Douglas, 2013: 8).

Scott thinks that law in the modern era needs to be identified and understood in certain attributes. Those attributes are; trust and legal autonomy, identification of law as state law and law systematized into the legal system. In the contemporary post-modern era, law is more difficult to identify, because the law is spread out with a more plural character. Meanwhile, the relationship between the state and the law has become less harmonious. The reason is that capitalism perpetuates itself and changes all ideologies that contradict it (Scott, 380).

This school considers that legal products in the form of laws and their derivatives must be criticized. This is a condition for the existence of the law itself. In addition to being a requirement for every formation of state legal products, CLS can also carry out its role as a means of control for the community over the state. Control of the *checks and balances mechanism* is the target of the CLS flow. This role is carried out by independent civil society institutions, NGOs, state institutions, both national and international to supervise, monitor, and evaluate state legal policies that are considered to deviate from the goals of the nation and state. The state must accept a different opinion, or a different view of what the state is doing. The goal is to help the country see from the outside if there are still deficiencies that need to be corrected.

The CLS stream also pays attention to discrimination. Discrimination occurs because of domination. The general dominance is male over female. With this dominance, the law does not provide protection for women's rights. The legal equation that is considered utopian by the CLS school can also occur, but quite the opposite. Discrimination can occur in boys. Different treatment occurs when there is a crime of sexual intercourse and obscenity. Boys are certainly wrong and their rights are not protected. The CLS stream can see this as discrimination. Court decisions can be criticized if there are acts of discrimination against boys.

The culture of violence against women in the form of rape is considered as an effort to maintain the symbol of male gender domination over women. Men dominate women. This becomes the ideology, structure and law of a society. Louise Newman calls this condition a *rape culture*. The female body becomes the object of male violence (Newman, 2021: 12). The term *rape culture*, according to Jan Jordan, has been around since the early 1970s. This term became a theoretical construction of the second wave of the 1970s feminist movement (Jordan, 2023: 17).

Does rape only happen to women, because of thoughts and violence in the name of patriarchy? The answer is no. There are a number of rapes committed by women against men. Shia LaBeouf, an artist and director in the United States, was raped by a woman. Inna Levi's survey of 505 comments about the incident showed that 55% thought it was the victim's fault, 35% supported that rape could happen to men and 10% were mixed (Levi, 2018). This study shows that there are still many people who think it is impossible to rape men. If that happens, then the blame is on the man as revealed by Inna Levi.

The contradictions of the three laws in defining children and the minimum age for sexual consent and marriage are problematic. The Criminal Code and the Marriage Law override the Child Protection Act in interpreting a case of sexual crimes against

children. The Criminal Code can override the Child Protection Law because it is the main source of law for criminal law that regulates criminal acts in Indonesia. The Marriage Law overrides the Child Protection Law because Indonesia adheres to the lex specialist principle. *Lex specialis legi derogat generali* is the principle of legal interpretation, which states that special law (lex specialist) overrides general law (lex generalis). In this case, the Marriage Law is a special law to legalize marriage, while the Child Protection Law is considered a general law. These conflicting laws show inconsistencies in the application of laws to end child marriage and protect children in Indonesia, and in particular to protect children from sexual abuse in the family.

The Child Protection Law also regulates the role of parents in preventing child marriage. Contradictions arise when the Criminal Code provides sexual consent according to the Criminal Code is the minimum age of 15 years for girls. The law only mentions sexual consent for girls and this can increase the vulnerability of girls under the age of 18. This law is intended for the protection of children. When children are minors, they are not considered capable of consenting to sex, thus eliminating any possible defense of consent. The Criminal Code only stipulates the age of consent for girls, it marks that only girls need protection. For example, if a girl is already married and is 15 years old and has sex with a boy, neither will be prosecuted. It is a crime if the incident is considered coercion or rape. If the girl was under 15 years old, it would be against the law. However, if the girl is irrespective of the age of marriage and the incident (even in the case of rape) only involves the husband, then it will be legal (article 287). The Criminal Code also fails to protect children from sexual abuse if the incident occurred in a legal marriage.

This contradiction is narrated by the Child Protection Act. In consideration of this law it is stated that:

> Even though the legal instruments have been owned, in the course of the Law Number 23 of 2002 concerning Child Protection has not been able to run effectively because there is still overlap between sectoral laws and regulations related to the definition of children. On the other hand, the rise of crimes against children in the community, one of which is sexual crimes, requires increased commitment from the Government, Regional Government, and the Community as well as all stakeholders related to the implementation of Child Protection (UU no. 35 of 2014 concerning Amendments to Law no. 23 year 2002).

Yanuar Farida Wismayanti et al examined the difficulty of handling sexual violence against children. Wismayanti et al. identified that social restrictions and economic vulnerability in Indonesia can contribute to the occurrence of child sexual violence. There is still a taboo in Indonesia to reveal this disaster to minimize case reporting. The sensitive nature of these crimes often results in victims and their families not disclosing or reporting due to fear and stigmatization. This case is considered a disgrace to the victim and her family. In Indonesia, most victims do not share or report their experiences until they are adults. In fact, some chose not to tell anyone (Wismayanti, 2019: 7-8).

Wismayanti also sees that poverty and economic vulnerability increase the possibility of children becoming victims of violence. In this situation, poverty contributes to poor child welfare, including poor health, lack of educational opportunities, and the risk of trafficking. The risk of violence and sexual violence against children increases when poverty takes root in the community (Wismayanti, 2019: 9).

Sexual violence against children is often defined as immoral acts by adults against children who are underage. Edward has stated that children (minors) sometimes experiment with their peers. They determine their own destiny sexually. They sometimes kiss each other between peers and the opposite sex. Edward said this act usually cannot be equated with immoral acts of adults towards children. This cannot be categorized as exploitation by adults (Rowan, 2006: 18).

Cultural relativism will lead to differences in sexual relations without sexual intercourse with children aged 12 to 18 years. Even in the West, peer -to-peer relationships and an agreement by both parties are not considered acts of child sexual abuse. The variety of definitions does not reduce the potential impact of this behavior on the victim, but the awareness to perform the act or sexual intercourse is consensual.

This cultural relativism must be respected and also when the opposite is true in the East. Consensual relationships before adulthood can be reported to the police. Legal proceedings will occur. Discrimination occurs when the victim is a girl, then the boy will be made the accused. Although sexual desire can come from both. The report to the police will be followed up by a prosecution by the prosecutor and then decided by the judge. This discrimination will cause boys to become

"perpetrators" as well as "victims" because of female parents' reports.

Sometimes feminist groups always consider boys as accused before the investigation begins. They advocate with the sentiment that women must be victims, because of the patriarchal system in Indonesia. Radical feminist groups do not pay attention to the existence of equality in the intercourse of minors. As a result, discrimination against children occurs.

Table 1: Application of Articles to Cases of Obscenity and Sexual Intercourse by Minors.

Perpetrator (Age)	Victim (Age)	Article applied	Verdict
CA (17 years)	DAB (14 years)	Article 81 paragraph (2)	10 years
SH (16 years)	FQBS (15 years)	Article 82 paragraph (1)	3 years 6 months
SM (14 years)	NA (14 years)	Article 81 paragraph (2) and Article 82 paragraph (1)	3 years 6 months

Reports by parents and NGOs affiliated with feminism consider that sometimes they pay attention to the context of the relationship, whether consensual or coercive. If it is an adult who commits it by persuading the victim to have sexual intercourse, then it is clearly a criminal act. However, the relationship carried out by minors on the basis of consensual, it is necessary to deepen the discussion. In addition, the treatment of children as suspects must be protected by law, so that their future is not disturbed. This protection is an obligation and not discrimination. Discrimination should not occur in providing protection for children who are suspected of being perpetrators and children as victims.

Radical feminist groups often attack the "patriarchal" state and its legal apparatus together as products and perpetrators of oppression by men. Feminists believe that legal history is written from a male perspective and does not reflect the role of women in making history and shaping society. Such laws have presented male characteristics as norms and female characteristics as deviations from the norm, therefore the applicable law will always strengthen and perpetuate patriarchal power. For feminists, the concept of gender is created socially, not biologically. For feminists, biological differences only create differences in physical appearance and reproductive capacity, not creating psychological, moral, or social constructions, so that it is not appropriate for the law to be enforced, placing biological differences as the basis for making distinctions between women and men in terms of their relationship. in state life (Natalis, 2020).

Amalia Fransiska Ilyas' study at the Batu Police, Malang shows that children as perpetrators of sexual intercourse do not receive procedures according to the Child Protection Act. He explained that overall the protection of children as perpetrators went quite well. He felt a shortage when the boy was in the process of being investigated at the Police, it turned out that there were still violations of children's rights (Ilyas, 2013).

Health problems, mental psychological, economic can be a direct or indirect impact of the crime of sexual abuse and sexual intercourse. However, there are a number of cases where these crimes were committed out of consensual behavior by underage boys. In today's era with technological advances and gadgets that children can carry around and display pornographic images or videos can increase the potential for acts of obscenity and sexual intercourse. Therefore, it is necessary to take a deeper look at how these actions are taken from the perspective of positive law and *critical legal justice*.

Researchers' observations of the three sentences against children in conflict with the law have not paid attention to the existence of the Juvenile Justice System. The existence of Law no. 11 of 2012 concerning the Juvenile Justice System that puts forward the principle of diversion, it turns out that there is no common ground. Whereas sexual intercourse and obscenity are more like experimentation with children or consensual. The perpetrator is confirmed to be a boy and does not pay attention to whether there is an element of invitation from a girl. The author assumes that there is gender discrimination against children in conflict with the law.

Law enforcement officers in the Juvenile Justice System are still not serious about diversion which is part of *restorative justice*. This lack of seriousness causes no common ground between the families of the perpetrators and victims. Article 8 of the Juvenile Justice System Law clearly states that the diversion process is carried out through deliberation involving the child and his/her parents/guardians, victims and/or their parents/guardians, community advisors, and professional social workers based on a Restorative Justice approach. Critical legal schools will certainly criticize and evaluate whether legal action against children in conflict with the law is in

accordance with this provision. If not, then injustice has occurred. The imposition of a sentence that does not pay attention to the rights of this child has violated the provisions of the law.

The cases raised above need to be viewed from a perspective other than positive law or the *Rule of Law*. Critical Law School can see the cases above from the perspective of this school. He can ask questions whether the application of law a has been carried out correctly by the juvenile justice system. Or, is there a correction, because it is not automatically a criminal law system is perfect. Interventions in law enforcement and law enforcement that run on political interests are not within the corridor of law and justice are the focus of this study. The need for efforts to correct law enforcement from deviant procedures and goals is the concern of adherents of this school. To carry out this mission, law enforcers such as judges and lawyers must understand the critical flow of law. Law enforcement officers must dare to convey evaluative criticism in order to realize justice for the community.

This legal perspective is inseparable from the political system of criminal law in Indonesia. Mahfud MD defines the legal political system as a *legal policy* or official line (policy) regarding the law that will be enforced, both in making new laws and by replacing old laws, in order to achieve state goals (Mahfud MD, 2009: 1). The study of legal politics covers, among others; *First,* the state's policy regarding the law that is enacted or not enforced. *Second,* the political, economic, social, cultural background for the birth of legal products. *Third,* law enforcement in reality on the ground (Mahfud MD, 2009: 1).

At the beginning, it was stated that the Permendikbud on Research and Technology that puts forward *sexual consent* or sexual agreement in adults encourages reviewing the existence of sexual acts between children. Is this experimentation a form of sexual violence perpetrated by boys. The act was not necessarily forced, but also got the consent of the daughter. Our legal politics still considers that there is no *sexual consent* for children. Therefore experimentation is not justified. However, the question is, is it fair to punish only boys with obscenity?

Sexual Consent does not violate the legislation regarding the crime of rape as regulated in Article 285 of the Criminal Code. In it there are no elements: his act forced intercourse; how: by force or threat of violence; and the female object is not his wife.

By this definition Rowan MD admits that sexual experimentation between younger peers does exist, but that sexual contact between a child and an adult male or female is wrong. However, violating social norms is inevitably the same as endangering children (Rowan, 2006*:* 4).

Rowan MD's definition of sexual experimentation between children's peers can be juxtaposed with Article 5 of Permendikbud, Research and Technology 30/2021. Article 5 states that if the victim does not give consent, then an act can be categorized as sexual violence. If the children's experimentation is known by the parents, the female parents will be ashamed and punish the boy as guilty, which is then reported to the police and punished.

5 CONCLUSION

The conclusion of the research on the three decisions of the district court related to the crime of sexual intercourse and obscenity committed by SH bin S, SM bin IS and CA that there are no the diversion carried out by law enforcement officers in the Juvenile Justice System against them.

The three cases showed that there were still violations of children's rights. The children as perpetrators of sexual intercourse do not receive procedures according to the Child Protection Act. There is a shortage when the three boys of the case were in the process of being investigated at the Police, the attorney and the judge.

The system only pays attention on the legal aspect of rape punishment. No room for the mediation among each other. Even though there are some the legal norms give the special attention to protect the children as the victims or the actors. The feminist perspective tends to blame the boy as the actor, even there is the sexual consent or the children sexual experiment. Permendikbud on Research and Technology that puts forward *sexual consent* or sexual agreement in adults encourages reviewing the existence of sexual acts between children. Is this experimentation a form of sexual violence perpetrated by boys?. The act was not necessarily forced, but also got the consent of the daughter. But the facts of three cases showed there were no the protection to the children on the delinquency justice system.

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