

# Criminal Disparity In Judges' Decisions On The Crime Of Sexual Intercourse Against Minors

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# Criminal Disparity In Judges' Decisions On The Crime Of Sexual Intercourse Against Minors

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## Abstract

*The purpose of this research is to compare judges' decisions that give different sentences for the same criminal offense. Judges' decisions often provide different sentences for the same criminal offense because the positive criminal system in Indonesia uses an alternative system. This research raises the issue of why there is criminal disparity in the Supreme Court's decision related to the crime of sexual intercourse with a minor and how to reduce criminal disparity related to this crime. The urgency of this research is to find out and explain about the imposition of criminal law, compare judges' decisions on the imposition of criminal law and the impact of criminal disparity in cases of child sexual intercourse which has a serious impact on public confidence in the criminal justice system and the protection of children as a vulnerable group. This research is a normative juridical research using primary and secondary materials. The result of the research shows that: 1) There is a criminal disparity between Supreme Court Decision No. 2184K/Pid.Sus/2022 where the defendant was sentenced to 5 years imprisonment and a fine of Rp. 30,000,000.00 with Supreme Court Decision No. 2199K/Pid.Sus/2022 where the defendant was sentenced to 2 years imprisonment and a fine of Rp. 20,000,000.00. 2) The cause of criminal disparity is a legal factor that does not contain guidelines for the imposition of punishment for the defendant.*

**Keywords:** Crimes of Sexual Intercourse; Disparity in Criminal Decisions by Judges; Minors

## 1. INTRODUCTION

Judges' decisions in the Criminal Justice System can lead to different punishments for the same crime.<sup>1</sup> Judges are free to impose criminal sanctions due to the existence of a minimum criminal system and a general maximum and special maximum for criminal offenses. Sudarto explained that the freedom of judges to determine the law is not absolute freedom so that guidelines for sentencing for criminal disparity are needed.<sup>2</sup> In the application of a regulation that is implemented in the form of legislation, it must be based on the purpose of the law itself.<sup>3</sup> Judges are not just spokespersons or interpreters of the law; they are also implementers, lawfinders, and creators of good and reasonable law (judges made law). Therefore, judges must be held to a higher standard than the prevailing law, which refers to laws that are burdened with the dominance of the interests of the ruling minority group (the ruler).<sup>4</sup>

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<sup>1</sup> Ani Triwati dan Doddy Kridasaksana, "Pijakan Perlunya Diversi Bagi Anak Dalam Pengulangan Tindak Pidana," *Jurnal USM Law Review* 4, no. 2 (29 November 2021): 830, <https://doi.org/10.26623/julr.v4i2.3787>.

<sup>2</sup> Sudarto Sudarto, *Hukum dan Hukum Pidana* (Bandung: Alumni, 2017), 1.

<sup>3</sup> Muhamad Naufal Hibatullah, Elis Rusmiati, dan Agus Takariawan, "Akibat Hukum Penerapan Restorative Justice Oleh Kejaksaan Pada Perkara Tindak Pidana Penyalahgunaan Narkotika," *Yurispruden: Jurnal Fakultas Hukum Universitas Islam Malang* 7, no. 1 (19 Januari 2024): 132, <https://doi.org/10.33474/yur.v7i1.20965>.

<sup>4</sup> Andri Nurwandri dkk., "Faktor-Faktor Yang Mempengaruhi Independensi Hakim Di Pengadilan," *Journal of Educational Research and Humaniora (JERH)*, 11 Desember 2023, 4, <https://doi.org/10.51178/jerh.v1i4.1634>.

Another problem arises from the disparity in the imposition of punishment which does not seem to reward the Justice Collaborator for helping to reveal the crime of sexual intercourse, even though the court decision is an important pillar for the reflection of justice, because the court decision is the imposition of punishment and punishment. Philosophically, disparity in criminal decisions can cause harm to justice and victim protection. Criminal law policy is one of the important instruments in crime prevention efforts.<sup>5</sup> The existence of disparity in decisions can undermine public confidence in the justice system. Juridically, the existence of criminal disparity requires in-depth analysis of the factors that influence judges' decision making and the regulatory factors that govern it. Sociologically, criminal disparity reflects the complexity of social dynamics related to social perspectives such as stereotypes, the role of the media to inequality in access to justice which can be influenced by cultural values, social norms, and power structures which ultimately lead to disparity in criminal decisions.<sup>6</sup>

Sexual violence, harassment and exploitation not only affect adult women but also women who are minors (children). Child protection is an effort made to create conditions so that every child can exercise their rights and obligations for the reasonable development and growth of children both physically, mentally, and emotionally.<sup>7</sup> These sexual crimes do not only take place in corporate environments, offices or in certain places that provide opportunities for people of the opposite sex to communicate with each other, but can also occur in the family environment.<sup>8</sup>

Research related to the disparity in judges' decisions on the offense of sexual intercourse of minors is very important given the complexity and urgency of the issue. Criminal cases with minor victims, including sexual intercourse, are serious crimes that require firmness in legal handling.<sup>9</sup> Efforts to achieve justice will conflict with the existence of criminal disparities and can disrupt the effectiveness of law enforcement. The researcher will analyze Supreme Court Cassation Decisions No. 2184K/PID.SUS/2022 and No. 2199K/PID.SUS/2022 to identify patterns of inequality in the handling of the two cases, so as to answer the urgency of the research through suggestions and constructive criticism for the legal apparatus in order to create a more effective justice system.

There are several studies that have been conducted on the disparity of juvenile criminal offenses, namely *First*, written by Fathurroji with the title *Disparitas Pidana Terhadap Anak Pelaku Tindak Pidana Persetubuhan (Studi Kasus Putusan No.6/Pid.Sus-Anak/2019/PNBbs, No. 7/Pid.Sus-Anak/2019/PNBbs, dan No. 9/Pid.Sus-*

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<sup>5</sup> Naavi'u Emal Maaliki, "Kebijakan Hukum Pidana Sebagai Upaya Penanggulangan Tindak Pidana Penipuan Online," *Jurnal USM Law Review* 7, no. 3 (3 November 2024): 1409, <https://doi.org/10.26623/julr.v7i3.10023>.

<sup>6</sup> Harkristuti Harkrisnowo, *Rekonstruksi Konsep Pidana: Suatu Gugatan Terhadap Proses Legislasi dan Pemidanaan di Indonesia*, (Depok: Fakultas Hukum UI Press, 2013), 7.

<sup>7</sup> Meida Adita Rahma dan Surastini Fitriasih, "Selisik Tindak Pidana Kenakalan 'Perundungan Fisik' Anak Di Lingkungan Sekolah Berdasarkan Aspek Hukum Pidana," *Jurnal USM Law Review* 7, no. 3 (17 September 2024): 1098, <https://doi.org/10.26623/julr.v7i2.8976>.

<sup>8</sup> Eliza Anggoman, "Penegakan Hukum Pidana Bagi Pelaku Kekerasan/Pelecehan Seksual Terhadap Perempuan," *Lex Crimen* 8, no. 3 (15 Oktober 2019): 60.

<sup>9</sup> Achjani Zulfa Eva, *Pergeseran Paradigma Pemidanaan* (Depok: UI Press, 2015), 51.

Anak/2019/PNBbs di Pengadilan Negeri Brebes).<sup>10</sup> *First*, written by Fathuroji with the title Criminal Disparity Against Child Perpetrators of Copulation (Case Study of Decision No.6 /Pid.Sus-Anak/2019/PNBbs, No. 7/Pid.Sus-Anak/2019/PNBbs, and No. 9/Pid. Sus-Anak/2019/PNBbs in Brebes District Court). The previous research only focused on the regulation and legal consequences of the two decisions. If this research, focuses on the discussion of sanctions and comparative analysis of the law and the impact that occurs due to different decisions. This is a novelty in this research. *Second*, written by Reza Rahmawati, Dwi Endah, and Samuel Saut under the title of “Disparitas Pemidanaan Perkara Persetubuhan Oleh Terdakwa Anak Terhadap Korban Anak”.<sup>11</sup> Previous studies focused on regulations and policies governing disparities and no cases were analyzed. In this study there are cases that are analyzed, so in this case it makes the novelty of the research raised. *Third*, written by Oheo Kaimuddin, et al. under the title “Asas Proporsionalitas Tindak Pidana Persetubuhan Terhadap Anak”.<sup>12</sup> Previous research has not discussed the comparison of judges' decisions, only describing existing decisions. In addition, the novelty of this research focuses on the decisions of the judges appointed.

The rise of cases of sexual intercourse with minors and also the problems that arise due to criminal disparity make researchers focus on legal issues as they aim to conduct a comparative analysis of criminal disparity in Supreme Court Cassation Decisions No. 2184K/PID.SUS/2022 and No. 2199K/PID.SUS/2022 on the crime of sexual intercourse with minors, what factors cause criminal disparity in Supreme Court Cassation Decisions No. 2184K/Pid.Sus/2022 and No. 2199K/Pid.Sus/2022.

## 2. METHOD

This research uses normative juridical research, using statutory approach techniques, conceptual approaches and case approaches as a procedure for answering research problems through describing the state of the subject and object of research both individually, institutions and society. This research uses 2 legal materials, namely primary legal materials including the 1945 Constitution of the Republic of Indonesia, the Criminal Code, Law Number 17 of 2016 and secondary legal materials in the form of journals, scientific articles and several decisions, namely and Supreme Court cassation level decisions No. 2184 K/PID.SUS/2022 and No. 2199 K/Pid.Sus/2022. K/Pid.Sus/2022 The researcher will describe the criminal disparity of the perpetrators of the crime of sexual intercourse against minors in the Supreme Court Cassation level decisions No.2184K/PID.SUS/2022 and No.2199K/Pid.Sus/2022 and the analysis technique used is using descriptive analysis techniques .

## RESULTS AND DISCUSSION

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<sup>10</sup> Fathuroji Fathuroji, “Disparitas Pidana Terhadap Anak Pelaku Tindak Pidana Persetubuhan (Studi Kasus Putusan No.6/Pid.Sus-Anak/2019/PNBbs, No. 7/Pid.Sus-Anak/2019/PNBbs, Dan No. 9/Pid.Sus-Anak/2019/PNBbs Di Pengadilan Negeri Brebes),” *Jurnal Idea Hukum* 9, no. 1 (19 Agustus 2023): 65, <https://doi.org/10.20884/1.jih.2023.9.1.413>.

<sup>11</sup> Reza Rahmawati, Dwi Endah Nurhayati, dan Samuel Saut Martua Samosir, “Disparitas Pemidanaan Perkara Persetubuhan Oleh Terdakwa Anak Terhadap Korban Anak,” *Jurnal Ilmu Hukum: ALETHEA* 6, no. 1 (2022): 64–82, <https://doi.org/10.24246/alethea.vol6.no1.p64-82>.

<sup>12</sup> Oheo Kaimuddin Haris dkk., “Asas Proporsionalitas Tindak Pidana Persetubuhan Terhadap Anak,” *Halu Oleo Legal Research* 5, no. 2 (31 Agustus 2023): 576, <https://doi.org/10.33772/holresch.v5i2.264>.

<sup>1</sup> In Indonesian positive law, judges have very broad freedom to choose the type of punishment (strafsoort) they want in connection with the use of an alternative system in criminal threats in law. In connection with this freedom of judges, Sudarto said that:<sup>13</sup> The freedom of the judge in determining the punishment should not be such that it allows for a striking inequality, which will bring a feeling of dissatisfaction (onbehagelijk) to the community, then the guidelines for providing punishment in the Criminal Code are very necessary, because this will reduce the inequality even though it cannot eliminate it completely.<sup>14</sup>

The absence of general sentencing guidelines causes judges to have the freedom to determine the type of punishment<sup>15</sup>, the method of execution of the punishment and the level of punishment. It can happen that in the same offense or the same dangerous nature but the punishment is not the same. However, this freedom does not mean that the judge may impose the punishment at his own will without a certain measure.<sup>16</sup>

In the imposition of punishment, it is the obligation of the Panel of Judges to consider everything from various aspects, namely from theoretical juridical aspects, philosophical aspects, psychological aspects, sociological aspects, and pedagogical educational aspects. On the philosophical aspect, there is an effort to instill new views and attitudes for the Defendant in terms of ontology (existing reality), epistemology (correct knowledge), and axiology (good values) which radically and holistically provide understanding and enlightenment that the principle of doing good deeds and not doing bad deeds is a value, norm, and culture that must be maintained and applied in every activity and daily life from an early age so as not to be dragged into further difficulties.

The sociological aspect can be seen in the perspective of a society that continues to grow and develop, so that the community's desire for security and order must be captured as a spirit to actively build to achieve welfare and prosperity. The existence of security and order in all aspects gives birth to public safety and tranquility from crimes and violations that have implications for all life issues because early prevention of crimes and violations is able to protect the community from the recurrence of an act such as that committed by the Defendant which of course can disrupt community life.

The pedagogical educational aspect when viewed from the reality of daily social life, there are many negative problems that arise as a result of unlawful acts, but appropriate therapy must be included in every sentence imposed. In the sense that the Panel of Judges is of the opinion that the criminal offense committed by the Defendant must indeed be

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<sup>13</sup> Sudarto, *Hukum dan Hukum Pidana*, 61.

<sup>14</sup> Ardi Putra Dewa Agung, I. Made Sepud, dan A. A. Sg Laksmi Dewi, "Sanksi Pidana Terhadap Pelaku Penculikan Anak," *Jurnal Preferensi Hukum* 1, no. 2 (15 September 2020): 193, <https://doi.org/10.22225/jph.1.2.2388.195-195>.

<sup>15</sup> Sandy Doyoba Alexsander dan Yeni Widowaty, "Faktor Penyebab Timbulnya Disparitas Dalam M Putusan Hakim Terhadap Anak Pelaku Tindak Pidana Pencurian Dengan Pemberatan," *Indonesian Journal of Criminal Law and Criminology (IJCLC)* 1, no. 2 (29 Agustus 2020): 74, <https://doi.org/10.18196/ijclc.v1i2.9610>.

<sup>16</sup> Muammar, Kurniawan, dkk, "Analisa Peraturan Mahkamah Agung Nomor 1 Tahun 2020 tentang Pedoman Pemidanaan kaitanya dengan Asas Kebebasan Hukum dalam Tindak Pidana Korupsi", *Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum*, 3(2), (2021):75-97.

sentenced in accordance with the purpose of the punishment itself, which is not merely a retaliation/repressive but as a preventive effort and or more firmly educational, constructive and motivational for the life of the Defendant in the future. This is intended so that the Defendant does not repeat such acts and also for the community is a shock therapy.

### **3.1 Comparison Consideration of Judges in the Decision of the Supreme Court Judge Number.2184K/Pid.Sus/2022 between Consideration of Judges in the Decision of the Supreme Court Judge Number.2199K/Pid.Sus/2022**

The judge's consideration is one of the most important aspects in determining the realization of the values of a judge's decision that contains justice and contains legal certainty, and besides that it also contains benefits for the parties concerned so that this judge's consideration must be addressed carefully, well and carefully.<sup>17</sup>

Based on the Cassation Decision of the Supreme Court Judge with Case Number 2184K/Pid.Sus/2022, it can be seen that the defendant Mohammad Haris bin Mattari was charged by the Public Prosecutor of the Sumenep District Prosecutor as contained in the Sumenep District Court decision Number 207/Pid.Sus/2021/PN Smp with alternative charges, namely: 1) Violating Article 81 paragraph (1) of Law of the Republic of Indonesia 17 of 2016 concerning Amendments to Law of the Republic of Indonesia 35 of 2014 concerning child protection where the defendant's actions are "deliberately committing violence or threats of violence to force a child to have intercourse with him or with another person; 2) Violating Article 82 Paragraph (1) of Law of the Republic of Indonesia No. 17 of 2016 concerning Amendments to Law of the Republic of Indonesia 35 of 2014, concerning the protection of children where the defendant's actions are "intentionally committing violence or threats of violence, forcing, deceiving, a series of lies, or inducing a child to commit or allow obscene acts to be committed."<sup>18</sup>

Violating Article 81 paragraph (1) of Law of the Republic of Indonesia No. 17 of 2016 concerning Amendments to Law of the Republic of Indonesia No. 35 of 2014 concerning child protection where the defendant's actions are "intentionally committing violence or threats of violence to force a child to have sexual intercourse with him or with another person".

One of the acts committed by the defendant against the victim was to seduce the victim with the words "the defendant loves you and wants to have you completely because your parents do not approve of our relationship" so that the victim would have sexual intercourse with the defendant.<sup>19</sup> As a material consideration, the Panel of Judges of the Supreme Court read the decision of the Sumenep District Court Number 207/Pid.Sus/2021/PN Smp which stated that the Defendant Mohammad Haris Bin Mattari

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<sup>17</sup> Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama*. (Yogyakarta: Pustaka Pelajar, 2014), 140.

<sup>18</sup> Bianca Agnetha dan Irma Cahyaningtyas, "Perlindungan Hukum Bagi Anak Yang Lahir Di Penjara Dalam Perspektif Hak Asasi Manusia," *Jurnal USM Law Review* 5, no. 2 (31 Oktober 2022): 597, <https://doi.org/10.26623/julr.v5i2.5723>.

<sup>19</sup> Kompas Cyber Media, "Mengenal 5 Jenis Pelecehan Seksual, termasuk Komentar Cabul dan Penyuapan," *KOMPAS.com*, 5 Desember 2020, <https://www.kompas.com/sains/read/2020/12/05/200500323/mengenal-5-jenis-pelecehan-seksual-termasuk-komentar-cabul-dan-penyuapan>.

was arrested because he was proven legally and convincingly guilty of committing the crime of Intentionally inducing a child to have sexual intercourse with him and sentenced the Defendant to imprisonment for 1 (one) year and 3 (three) months and a fine of Rp30.000,000,- (thirty million rupiah) provided that if the fine is not paid, it shall be substituted with confinement for 2 (two) months and stipulates that the period of arrest and detention that the Defendant has served shall be deducted in full from the sentence imposed.

The consideration of the Panel of Judges of the Supreme Court on the grounds of cassation submitted by the Cassation Petitioner/Public Prosecutor in relation to the case of the defendant Mohammad Haris Bin Mattari who intentionally induced a child to have sexual intercourse with him, namely: 1) Not justifying the reason for the cassation of the Public Prosecutor which basically disagrees with the *judex facti* in terms of stating that the Defendant was proven guilty of committing a criminal offense in violation of Article 81 Paragraph (2) of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection as charged in the Second Alternative Indictment, where the Public Prosecutor argues that the Defendant should have been proven guilty of violating Article 81 Paragraph (1) of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection as charged in the First Alternative Indictment; 2) The *judex facti* did not err in applying the law and has properly considered the facts of the trial which show that the Defendant was found guilty of violating Article 81 Paragraph (2) of Law Number 17 of 2016 Concerning the Amendment to Law Number 35 of 2014 Concerning Child Protection as charged in the Second Alternative Indictment; 3) That the *judex facti* has given sufficient consideration regarding the imposition of punishment by considering the aggravating and mitigating circumstances, as stated in Article 197 Paragraph (1) letter f of the Criminal Procedure Code; 4) That based on the legal facts revealed at trial the Defendant had persuaded the 14 (fourteen) year old Victim Immilayatul Hasana to have intercourse with him by seducing her using words that the Defendant loved the Victim Immilayatul Hasana and wanted to have the Victim Immilayatul Hasana as a whole, so that intercourse occurred three times in one night and resulted in a tear in the hymen of the Victim Immilayatul Hasana at 03, 06 and 09 o'clock.

Based on these considerations, which are reinforced that the decision of the *judex facti* in the case of the defendant Mohammad Haris Bin Mattari is not contrary to the law and/or the law, the Panel of Judges of the Supreme Court rejected the Cassation Petitioner/Public Prosecutor.

The judiciary gives a special position to the judge. He or she is in charge of presiding over the trial. In giving a verdict, the judge must gather and collect information from all parties.<sup>20</sup> The position of the Judge as the leader of the trial is an effort to seek justice. The Judge's duty is not only to oversee the entire series of judicial proceedings, until the issuance of a decision, but also to ensure that the decision he makes is realized for justice based on the Almighty God.<sup>21</sup>

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<sup>20</sup> Tamrin Muchsin dkk., "Pejabat Pembuat Akta Tanah Dalam Hal Pendaftaran Tanah: Sebuah Tinjauan Kewenangan Dan Akibat Hukum," *Madani: Legal Review* 4, no. 1 (Juni 2020): 73.

<sup>21</sup> Bismar Siregar, *Hukum Hakim dan Keadilan Tuhan* (Jakarta: Gema Insani, 2015), 56.

Based on the Cassation Decision of the Supreme Court Judge with Case Number 2199K/Pid.Sus/2022, it can be seen that the defendant Hosaini alias Sai bin Hasanuddin was charged by the Public Prosecutor of the Sumenep District Prosecutor as contained in the Sumenep District Court decision Number 169/Pid.Sus/2021/PN Smp with alternative charges, namely: 1) Violating Article 81 paragraph (2) of Law of the Republic of Indonesia No. 17 of 2016 concerning Amendments to Law of the Republic of Indonesia No. 35 of 2014, concerning child protection where the defendant's actions are "deliberately deceiving, a series of lies or inducing a child to have sexual intercourse with him or with another person"; 2) Violating Article 82 Paragraph (1) of Law No. 17 of 2016 on the Amendment of Law No. 35 of 2014 on the Protection of Children, in which the defendant "intentionally commits violence or threat of violence, forces, deceives, lies or induces a child to commit or allow obscene acts to be committed."

Based on the theory of Guntoro Utamadi and Paramitha Utamadi which divides sexual harassment based on the Sexual Experience Questionnaire (SEQ), the actions of the defendant are part of Seductive behavior, namely seduction with demeaning connotations or sexual requests without threats and Sexual bribery, which is a type of bribery to be willing to perform sexual acts either through the provision of promises or certain rewards.<sup>22</sup> Verbal and non-verbal sexual harassment against women, making women have no bargaining in criminal law as victims.<sup>23</sup>

As material for consideration, the Panel of Judges of the Supreme Court read the decision of the Sumenep District Court Number 169/Pid.Sus/2021/PN which stated that the Defendant Hosaini alias Sai bin Hasanuddin was arrested because he was proven legally and convincingly guilty of committing the crime of Intentionally inducing a child to have sexual intercourse with him and sentenced the Defendant to imprisonment for 1 (one) year and 3 (three) months and a fine of Rp20.000,000.00 (twenty million rupiah) provided that if the fine is not paid, it shall be substituted with confinement for 2 (two) months and stipulates that the period of arrest and detention that the Defendant has served shall be deducted in full from the punishment imposed.

As a material consideration, the Panel of Judges of the Supreme Court has also read the decision of the Surabaya High Court Decision Number 1334/PID.SUS/2021/PT SBY dated December 10, 2021 which basically Accepts the appeal request from the Public Prosecutor and Affirms the Decision of the Sumenep District Court dated October 14, 2021 Number 169/Pid.Sus/2021/PN.Smp so that the Defendant Hosaini alias Sai bin Hasanuddin is still punished with imprisonment for 1 (one) year and 3 (three) months and a fine of IDR 20.000,000.00 (twenty million rupiah) provided that if the fine is not paid, it shall be replaced by imprisonment for 2 (two) months because it is proven legally and convincingly guilty of committing the crime of Intentionally inducing a child to have sexual intercourse

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<sup>22</sup> Rachael A. Spencer dkk., "Adapting and Validating the Sexual Experiences Questionnaire to Study Sexual Harassment Among University Women in Jordan," *Journal of Interpersonal Violence* 37, no. 1–20 (1 Oktober 2022): 4, <https://doi.org/10.1177/08862605211035880>.

<sup>23</sup> Rahmat, "Penyuluhan Hukum Di Desa Sampora Tentang Perlindungan Hukum Korban Pelecehan Seksual Terhadap Perempuan Di Indonesia." *Empowerment : Jurnal Pengabdian Masyarakat* 3 (1), 153.



with him and Stipulating <sup>1</sup> that the period of arrest and detention that the Defendant has served is fully deducted from the sentence imposed.

The consideration of the Panel of Judges of the Supreme Court on the grounds of cassation submitted by the Cassation Petitioner/Public Prosecutor in relation to the case of the defendant Hosaini alias Sai bin Hasanuddin who intentionally induced a child to have sexual intercourse with him, namely: 1) Not justifying the reason for the cassation of the Public Prosecutor who basically disagrees with the judex facti because the decision of the judex facti which states that the Defendant is proven to have committed the crime of "Intentionally inducing a child to have sexual intercourse with him", is correct and does not misapply the law because it has sufficiently considered the juridically relevant legal facts along with the means of proof which are the basis for determining the guilt of the Defendant; 1) Does not justify the reason for the cassation of the Public Prosecutor which basically disagrees with the judex facti because the decision of the judex facti which states that the Defendant is proven to have committed the crime of "Intentionally inducing a child to have sexual intercourse with him", is correct and does not misapply the law because it has sufficiently considered the juridically relevant legal facts along with the means of proof which are the basis for determining the guilt of the Defendant; 2) the trial, namely that the Defendant persuaded the victim Vanysa Nur Dainiyah, aged 16 (six) years old, to have sexual intercourse with him by seducing the victim using the words that the Defendant promised to marry the victim if the victim became pregnant, so that the victim agreed to have sexual intercourse with the Defendant 2 (two) times which resulted in the victim's hymen being torn at 04 and 07 o'clock, thus the material actions of the Defendant have fulfilled all the elements of the crime in Article 81 Paragraph (2) of Law Number 17 of 2016 concerning Amendments to Law Number 35 of 2014 concerning Child Protection as in the first alternative charge; 3) That however, the decision of the judex facti which imposed a prison sentence on the Defendant for 1 (one) year and 3 (three) months as well as a fine of Rp20,000.000.00 (twenty million rupiah) with the provision that if the fine is not paid, it will be replaced by imprisonment for 2 (two) months, is not appropriate considering that the substance of the peace between the Defendant's family and the victim's family is only limited to the victim's parents asking for leniency in sentencing the Defendant, which substance does not take into account the interests of the victim, then based on SEMA Number 7 of 2012 concerning Legal Formulation of the Results of the Plenary Meeting of the Supreme Court Chambers as Guidelines for the Implementation of the Duties of the Court Division, Section of the Results of the Criminal Chamber Meeting, Sub Section B General Crimes, number 13, it is stated that the judex juris can alleviate / aggravate the punishment imposed by the judex facti on the grounds of lack of legal consideration (onvoldoende gemotiveerd) with the ruling to reject the correction, so that it is considered fair and appropriate that the punishment imposed on the Defendant must be corrected.

Based on these considerations, which are reinforced that the decision of the judex facti in the case of the defendant Hosaini alias Sai bin Hasanuddin is not contrary to the law and/or the law, the Panel of Judges of the Supreme Court rejected the Cassation

Petitioner/Public Prosecutor by correcting the Decision of the Surabaya High Court Number 1334/PID.SUS/ 2021/PT. SBY, dated December 23, 2021, which upheld the Decision of the District Court of Sumenep Number 169/Pid.Sus/2021/PN.Smp, dated October 14, 2021, recognizing that the punishment imposed on the Defendant is imprisonment for 2 (two) years and a fine of IDR 20,000,000.00 (twenty million rupiah) provided that if the fine is not paid, it will be replaced by imprisonment for 2 (two) months.

*Table 1 Comparison of Supreme Court Judges' Decisions Number 2184K/Pid.Sus/2022 and Number 2199K/Pid.Sus/2022*

<b>Element</b>	<b>Supreme Court Judge Decision No.2184K/Pid.Sus/2022</b>	<b>Supreme Court Judge Decision No. 2199K /Pid.Sus/2022</b>
Perpetrator Identity	Mohammad Haris Bin Mattari, born in Sumenep on May 17, 2002 which when the verdict was issued was 19 years old, residing in Bujaan Hamlet, Lapa Laok Village, Dungkek Subdistrict, Sumenep District, is male and Muslim with a job as a shopkeeper.	Hosaini als. Sai Bin Hasanuddin, born in Sumenep December 14, 2001 which when the verdict was issued was 19 years old, residing in Karangnangka Hamlet, Karangnangka Village, Ra'as Subdistrict, Sumenep District, with male gender and Muslim religion.
Date of Arrest	17 May 2021	2 April 2021
Detention Date	29 May 2021	3 April 2021
Indictment	<ol style="list-style-type: none"> <li>1) Violating Article 81 paragraph (1) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection.</li> <li>2) Violating article 81 paragraph (2) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on the protection of children</li> <li>3) Violating article 82 paragraph (1) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection.</li> </ol>	<ol style="list-style-type: none"> <li>1) Violated Article 81 paragraph (2) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection.</li> <li>2) Violating article 82 paragraph (1) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection.</li> </ol>
Charges of the Public Prosecutor	1. To find the defendant guilty of committing the crime of "Threatening violence to force a child to have sexual intercourse" as charged in Article 81(1) of Law No. 17	1. To find the defendant guilty of committing the crime of "Intentionally inducing a child to have sexual intercourse with a child" as charged in Article 81

Evidence	<p>of 2016 on the Amendment of Law No. 35 of 2014 on the Protection of Children in the First Indictment.</p> <p>2. To sentence the defendant to 11 (eleven) years imprisonment minus the period during which the defendant is in detention and to pay a fine of Rp. 30,000,000 (thirty million rupiahs) Subsidiary to 3 (three) months imprisonment.</p> <p>1) 1) A red short-sleeved T-shirt, a brown leaf-patterned sarong, a torn piece of MOH. HARIS's black shirt with pink flowers motif and a necklace made of monel material with a ring hanger. (returned to the witness Immiliyatul Hasana)</p> <p>2) 2) A pink and black combination floral shirt with a tear on the left front (returned to the defendant;)</p>	<p>paragraph (2) of Law No. 17 of 2016 on the Amendment of Law No. 35 of 2014 on the Protection of Children in the First Indictment.</p> <p>2. To sentence the defendant to 9 (nine) years imprisonment minus the period of detention and a fine of Rp. 20,000,000 (twenty million rupees) Subsidiary to 3 (three) months imprisonment.</p> <p>A piece of blue long-sleeved shirt with a white combination, a piece of brown sarong with a white combination, a piece of purple underwear (returned to witness Vanysa Nur Dainiyah)</p>
Initial Decision	<p>Decision of the Sumenep District Court Number 207/Pid.Sus/2021/PN Smp which states</p> <p>1. The defendant Mohammad Haris Bin Mattari mentioned above, is legally and convincingly proven guilty of the crime of Intentionally inducing a child to have sexual intercourse with him as in the second alternative charge;</p> <p>2. Sentenced the Defendant to 1 (one) year and 3 (three) months imprisonment and a fine in the amount of Rp30,000,000.00 (thirty million rupiah) provided that if the fine is not paid, it shall be substituted with 2 (two) months imprisonment;</p>	<p>Decision of the Sumenep District Court Number 169/Pid.Sus/2021/PN Smp which states</p> <p>1. The defendant Hosaini Als. Sai Bin Hasanuddin mentioned above, is legally and convincingly proven guilty of the crime of Intentionally Inducing a Child to Have Sexual Intercourse with Him as in the first alternative charge;</p> <p>2. Sentencing the Defendant to 1 (one) year and 3 (three) months imprisonment and a fine in the amount of Rp20,000,000.00 (twenty million rupiah) provided that if the fine is not paid, it shall be substituted with 2 (two) months imprisonment;</p>
Appeal	Surabaya High Court Decision Number 1375/PID.SUS/ 2021/PT	Surabaya High Court Decision Number 1334/PID.SUS/ 2021/PT

Decision	SBY which in essence:	SBY which in essence:
	<p>1) Accept the appeal request from the Public Prosecutor and Amend the Decision of the Sumenep District Court Number 207/Pid.Sus/2021/PN Smp</p> <p>2) Stating that the Defendant Mohammad Haris Bin Mattari was arrested because he was proven legally and convincingly guilty of the crime of Intentionally inducing a child to have sexual intercourse with him</p> <p>3) Punish the Defendant with imprisonment for 5 (five) years and a fine of Rp30,000,000.00 (thirty million rupiah) provided that if the fine is not paid, it will be replaced by imprisonment for 2 (two) months.</p>	<p>1) Accept the appeal request from the Public Prosecutor and Affirm the Decision of the District Court of Sumenep Number 169/Pid.Sus/2021/PN.Smp</p> <p>2) Declare that the Defendant Hosaini is still sentenced to imprisonment for 1 (one) year and 3 (three) months as well as a fine in the amount of IDR 20,000,000.00 (twenty million rupiah) provided that if the fine is not paid, it will be replaced by imprisonment for 2 (two) months because he is legally and convincingly proven guilty of committing the crime of Intentionally inducing a child to have sexual intercourse with him and Determine that the period of arrest and detention that the Defendant has served is deducted in full from the sentence imposed.</p>
	Supreme Court Judge Decision No.2184K/Pid.Sus/2022	Supreme Court Judge Decision No. 2199K /Pid.Sus/2022
Judgment of Cassation	<p>The Supreme Court rejected the Cassation Petition from the Cassation Applicant / Public Prosecutor of the Sumenep District Prosecutor so that the defendant Haris Bin Mattari was sentenced to an appeal decision by the Surabaya High Court Judge No.1375/PID.SUS/2021/PTSBY to 5 (five) years imprisonment and a fine of Rp.30,000,000.00 (thirty million rupiah) with the provision that if the fine is not paid it will be replaced by a prison sentence of 2 (two) months.</p>	<p>The Supreme Court rejected the Cassation Petition of the Cassation Petitioner/Public Prosecutor of the Sumenep District Attorney by correcting the appeal decision of the Surabaya High Court No.1334/PID.SUS/2021/PTSBY which upheld the District Court of Sumenep Decision No.169/Pid.Sus/2021/PNSmp so that the defendant Hosaini alias Sai bin Hasanuddin was sentenced to 2 years imprisonment and a fine of Rp. 20,000,000, which if the fine is not paid is replaced by 2 months imprisonment.</p>

In 2 decisions of the Supreme Court Judges Number.2184K/Pid.Sus/2022 and Number.2199 K/Pid.Sus/2022 there has been a criminal disparity in the punishment given

by the perpetrator of the crime of sexual intercourse with a minor who violates Article 81 paragraph (2) of the Law of the Republic of Indonesia No. 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 concerning the second amendment to Law No. 23 of 2002 concerning Child Protection into Law as amended by Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection in Decisions No.2184K/Pid.Sus/2022 and No.2199K/Pid.Sus/2022. The details of the perpetrators' sentences in the studied decisions include imprisonment of 5 (five) years and a fine of Rp30,000,000.00 (thirty million rupiah) with the provision that if the fine is not paid it will be replaced by imprisonment for 2 (two) months in Decision No.2184K/Pid.Sus/2022 and imprisonment for 2 (two) years and a fine of Rp20,000,000.00 (twenty million rupiah) with the provision that if the fine is not paid it will be replaced by imprisonment for 2 (two) months in Decision No.2199K/Pid.Sus/2022.

With the difference in sentencing that is quite striking, it is the convicts who feel the impact of injustice the most. Because even though they violate the same article, the punishment imposed between one convict and another is not the same.<sup>24</sup> Based on the data exposure and research findings related to Supreme Court Judges' Decisions Number 2184K/Pid.Sus/2022 and Number 2199K/Pid.Sus/2022, the author makes a comparative table between the two sources of the decision.

Comparison of Supreme Court Judges' Decisions Number 2184K/Pid.Sus/2022 and Number 2199K/Pid.Sus/2022 in the aspect of the indictment, namely Supreme Court Judge Decision No.2184K/Pid.Sus/2022 Violating Article 81 paragraph (1) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection, Violating article 81 paragraph (2) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on the protection of children and Violating article 82 paragraph (1) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection, whereas in the Supreme Court Judge Decision Number 2184K/Pid.Sus/2022 stated violated Article 81 paragraph (2) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection, violating article 82 paragraph (1) of Law No. 17 of 2016 on the amendment of Law No. 35 of 2014 on child protection.

In the aspect of cassation decisions in Judge Decision No.2184K/Pid.Sus/2022 The Supreme Court rejected the Cassation Petition from the Cassation Applicant / Public Prosecutor of the Sumenep District Prosecutor so that the defendant Haris Bin Mattari was sentenced to an appeal decision by the Surabaya High Court Judge No.1375/PID.SUS/2021/PTSBY to 5 (five) years imprisonment and a fine of Rp.30,000,000.00 (thirty million rupiah) with the provision that if the fine is not paid it will be replaced by a prison sentence of 2 (two) months, while the Supreme Court Judge Decision No. 2199K /Pid.Sus/2022 The Supreme Court rejected the Cassation Petition of the Cassation Petitioner/Public Prosecutor of the Sumenep District Attorney by correcting

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<sup>24</sup> Ratna Herawati, Sekar Anggun Gading Pinilih, dan Ayu Savitri Nurcahyani, "Optimalisasi Pusat Pelayanan Terpadu Pemberdayaan Masyarakat dan Anak Dalam Menangani Kasus Kekerasan Dalam Rumah Tangga," *Masalah-Masalah Hukum* 50, no. 2 (30 April 2021): 134, <https://doi.org/10.14710/mmh.50.2.2021.131-142>.

the appeal decision of the Surabaya High Court No.1334/PID.SUS/2021/PTSBY<sup>4</sup> which upheld the District Court of Sumenep Decision No.169/Pid.Sus/2021/PNSmp so that the defendant Hosaini alias Sai bin Hasanuddin was sentenced to 2 years imprisonment and a fine of Rp. 20,000,000, which if the fine is not paid is replaced by 2 months imprisonment.

### **3.2 Factors Causing Criminal Disparity in Supreme Court Judges' Decisions Number.2184K/Pid.Sus/2022 and Number.2199K/Pid.Sus/2022**

There are several factors that cause criminal disparity in Supreme Court Judges' Decisions Number 2184K/Pid.Sus/2022 and Number 2199K/Pid.Sus/2022. The legal factor is that in positive criminal law in Indonesia, judges have very broad freedom to choose the type of punishment (strafsoort) they want,<sup>25</sup> in connection with the use of an alternative system in the imposition of punishment in law. From several articles in the Criminal Code, it can be seen that several main punishments are often charged to the same criminal offender alternatively, meaning that only one of the main punishments charged can be imposed by the Judge and it is left to the Judge to choose which one is appropriate. This often plays an important role in determining the type and severity of punishment, rather than the nature of the crime itself and the personality of the offender. In the Supreme Court Judge Decision No.2184K/Pid.Sus/2022 which imposed an imprisonment of 5 (five) years and a fine of Rp30,000,000.00 (thirty million rupiah) with the provision that if the fine is not paid, it will be replaced by imprisonment for 2 (two) months because the charges filed were indeed more than the Supreme Court Judge Decision Number 2199K /Pid.Sus/2022.

Factors causing criminal disparity originating from judges include internal and external characteristics. Internal and external characteristics are difficult to separate, because they are integrated as an attribute of a person referred to as “(human equation) or personality of the judge” in a broad sense which involves the influence of social background, education, religion, experience, temperament and social behavior. The above often plays an important role in determining the type and severity of punishment, rather than the nature of the act itself and the personality of the perpetrator<sup>26</sup>

As recorded in the Surabaya High Court and the Supreme Court Cassation Decision in Decision Number 2184K/Pid.Sus/2022 and Number 2199K/Pid.Sus/2022, several cases that received permanent decisions, in fact there were differences between one case and another. Although the articles imposed are the same, the increase in the crime of sexual intercourse has affected the judges' decisions, resulting in disparities. One of the factors that cause differences in decisions is due to the different conditions of the case presented to the judge.

The factors that influence the occurrence of this disparity are classified into two things, namely, First, Internal Factors are factors that originate from the personal of judges who are autonomous and cannot be separated, they are integrated with the attributes of a

<sup>25</sup> Muhammad Akbar, “Kebebasan Hakim Dalam Melahirkan Putusan Progresif,” *Bilancia: Jurnal Studi Ilmu Syariah Dan Hukum* 17, no. 1 (29 Juni 2023): 156, <https://doi.org/10.24239/blc.v17i1.1853>.

<sup>26</sup> Ketty Nella Simbolon, “Pemenuhan Hak Tersangka Pada Proses Penyidikan Tindak Pidana Umum Di Polda Sulawesi Utara,” *Lex Crimen* 6, no. 4 (5 Juli 2017): 18.

person called a <sup>2</sup>judicial person (human equation). Second, external factors, namely factors that influence judges' decisions that come from outside the judge. External factors are factors that determine the personality of a judge in giving a decision. This external factor can be caused, for example, by the circumstances of the perpetrator/defendant.<sup>27</sup>

Judges as one of the law enforcers are required to be truly professional and prioritize the values of justice. In fact, there are many mistakes made by law enforcers, starting from the police, prosecutors, advocates, and even the judges themselves. Following Lord Acton's assumption that "power tends to corrupt", this can happen to a judge, Judges have enormous power in the Judiciary, so there is also the possibility of abuse of authority, both when leading the judiciary, and in giving decisions.<sup>28</sup>

## CONCLUSION

As recorded in the Surabaya High Court and the Supreme Court Cassation Decision in Decision Number 2184K/Pid.Sus/2022 and Number 2199K/Pid.Sus/2022, several cases that received permanent decisions, in fact there were differences between one case and another. The differences in the appeal decision of the Surabaya High Court, to the difference in the Supreme Court judge's cassation decision where in the Supreme Court Judge's Decision No.2184K/Pid.Sus/2022, the Supreme Court rejected the Cassation Petition of the Cassation Petitioner so that the defendant Haris Bin Mattari was sentenced to an appeal decision by the Surabaya High Court Judge No.1375 /PID.SUS/2021/PTS. /PID.SUS/2021/PTSBY with 5 years imprisonment and a fine of Rp.30,000,000.00 and in Supreme Court Judge Decision No. 2199K /Pid.Sus/2022, the Supreme Court rejected the Cassation Petition of the Cassation Petitioner by correcting the appeal decision of the Surabaya High Court No.1334 /PID.SUS/2021/PTSBY which upheld the District Court of Sumenep Decision No.169/Pid.Sus/2021/PNSmp so that the defendant Hosaini alias Sai bin Hasanuddin was sentenced to 2 years imprisonment and a fine of Rp. 20,000,000, which if the fine is not paid is replaced by 2 months imprisonment.

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<sup>27</sup> Firdaus Firdaus dan Nalom Kurniawan, "Kekuatan Putusan Mahkamah Partai Ditinjau Dari Sistem Kekuasaan Kehakiman Menurut UUD 1945," *Jurnal Konstitusi* 14, no. 3 (2017): 646, <https://doi.org/10.31078/jk1439>.

<sup>28</sup> Safi Safi, *Politik Hukum Penyatuan Kewenangan Judicial Review: Rekonstruksi Model Kewenangan Judicial Review dalam Sistem Ketatanegaraan Republik Indonesia* (Yogyakarta: Diva Press, 2016), 45.

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# Criminal Disparity In Judges' Decisions On The Crime Of Sexual Intercourse Against Minors

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