

Legal Protection of Children as a Practicer in the Criminal Justice Process

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Abstract: *The purpose of this study is to identify and analyze the legal protection of children as perpetrators in the criminal justice process of children, and to understand and analyze the factors that impede law enforcement in implementing legal protection of children as perpetrators in the criminal justice process. This research uses empirical law research method.*

Keyword: Legal Protection Of Children

1. Introduction

Human rights are inherent human rights that reflect their dignity, which must be comparable with legal guarantees, because rights can only be effective if those rights can be protected by law. Protecting rights can be guaranteed, if those rights are part of the law, which contains legal procedures to protect those rights. The law is basically a reflection of human rights, so that the law contains justice or not, determined by human rights in the birth and set or guaranteed by the law. The law is no longer seen as a mere reflection of power, but it must also radiate protection of the rights of citizens based on human values. Laws based on human values reflect norms that respect human dignity and recognize human rights. Norms that contain noble values that uphold human dignity and guarantee human rights, continue to grow in accordance with the demands of the human conscience (collected in the bonds of community associations acting on social or dualistic interests). The technique of formulating human rights in the Law is generally motivative for the basis of its work on legal officers. Human rights are not always specially formulated, but they are implicitly implied in the Articles of the Law in accordance with the souls contained in the considerations and explanations of the law.

On 20 November 1959 the United Nations General Assembly adopted the Declaration on the Rights of the Child. In the preamble to this Declaration, it is implied that humanity is obligated to provide the best for children. This Declaration contains 10 (ten) principles on children's rights, (Maidin Gulfom, 2006: 45, 46), namely:

- 1) The child shall be entitled to enjoy all of his or her rights in accordance with the provisions contained in this declaration. Every child without exception must be guaranteed his rights without discriminating ethnicity, color, sex, language, religion, political views, nationality, social level, rich poor, birth or poor status, both in himself and his family.
- 2) The child shall have the right to special protection and shall have the opportunity guaranteed by law and other means to enable him to develop himself physically, psychologically, morally, spiritually, and socially in a healthy, normal situation in accordance with his freedom and dignity. Pouring that goal into law, the best interests of the child should be a major consideration.
- 3) The child shall be born of the right to name and nationality.
- 4) Children are entitled and must be guaranteed in a community to grow flowers in a healthy manner. For this both before and after birth there must be special care and protection for the child and his mother. Children are entitled to adequate nutrition, housing, recreation, and health services.
- 5) Children who are physically, mentally, and socially disadvantaged due to certain circumstances must receive special education, care, and treatment.
- 6) In order for the child's personality to grow maximally and harmoniously, he needs love and understanding. As much as possible he should be released under the care and responsibility of his own parents, and should be kept in a loving, healthy, physical and spiritual environment. Children under the age of five are not justified separately from their mothers. The community and government are authorized and obliged to provide special care to children who do not have a family and to children who can not afford. In the hope that the government or other parties provide financial assistance for children who come from large families.
- 7) Children are entitled to free compulsory education at least at the primary school level. They shall have the protection of a common knowledge, and which permits, on the basis of equal opportunity to develop their abilities, personal opinions, and moral and social-responsible feelings, so that they may become useful members of society. The interests of the child must be made pedolan by those who are responsible for the education and guidance of the child in question first of all the responsibility lies in their parents. The child shall have the freedom of opportunity to play and recreate in the direction of education, the public and the competent government shall endeavor to promote the exercise of this right.
- 8) Under no circumstances should the child be first in receiving protection and help.
- 9) The child shall be protected from all forms of omission, violence, exploitation. He should not be made a trading subject. The child shall not work before a certain age, he shall not be involved in work that may be detrimental to his health or education, nor may affect the development of his body, soul, and morals.
- 10) The child shall be protected from acts that lead to other forms of social discrimination, religion or other forms of discrimination. They must be freed in the spirit of

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understanding, tolerance, and friendship among nations, peace and the universal brotherhood with full awareness that the energy and talent must be abdikan to fellow human beings.

In Indonesia the implementation of child rights protection as mentioned in the UN Declaration is poured in Law no. 4 Year 1979 Challenge Child Welfare. Article 1 of the Act determines:

Child welfare is a system of life and livelihood of children who can guarantee their growth and development properly, spiritually, physically, and socially. Child welfare effort is social welfare effort which aimed to guarantee the realization of child welfare especially fulfillment of child basic needs.

Arif Gosita (1989: 274-275) provides some formulas on Child Protection Law as follows:

- 1) Child Protection Law is a human problem which is a social reality. When viewed in proportionally dimensional terms, Child Protection Law is mentally, physically, and socially (law). This means, understanding and integrative application;
- 2) Child Protection Law is a result of interaction between certain parties, because there is an interrelation between existing phenomena and influence each other. Need to be in care, understood, and biologically involved in the existence of Child Protection Law. It is also in the deliberate, understood, and biological symptoms that affect the Child Protection Law (among other individuals and social institutions). Child Protection Law is a difficult and complicated issue;
- 3) The Law of Child Protection is an individual action that is of particular social or societal elements, such as: interests (can be individuals), social institutions (family, school, pesantren, government, etc.), social values, norm (law, status, role, etc.). Understand and comprehend precisely the causes of the person making the Law of Child Protection as an individual act (individually or collectively), understood by the social elements;
- 4) Child Protection Law may be subject to legal (juridical) issues that have legal consequences, which must be resolved by guiding and by law;
- 5) Child Protection Law can not protect the child, because the law is only a tool or means in use as the basis or guidance of the person protecting the child. So the important thing here is the lawmakers who are concerned with child protection. Often taught / interpreted wrongly, that the law can protect people. It makes people mistaken for the law and thinks the law is always right, should not be corrected in the update, and so on;
- 6) Child Protection Law is in various areas of law, because the interests of children exist in various areas of family life, community, state, and nation.

Essentially children can not protect themselves from actions that cause mental, physical, and social harm in various areas of life and livelihood. The child must be assisted by others in protecting himself, given his circumstances and conditions, especially in the implementation of the criminal justice of a child who is foreign to him. The child needs to be protected

from the misappropriation of the legislation granted to him, which results in mental, physical, and social harm. Child protection in this case is called legal protection.

As it is known that law is a set of rules regarding the behavior of people as members of society, and the purpose of that law is to establish salvation, happiness, and order in society. Each community member has various interests, so that members of the community in fulfilling their interests establish relationships that are governed by law to create a balance in people's lives. If a person or persons violate the law there is a shake of balance, because the violation of the law can bring harm to the other party. To recreate the balance in society, sanctions are imposed, namely administrative sanctions in the field of Constitutional Law, civil sanctions in the field of Civil Law, and criminal sanctions in the field of Criminal Law. In practice, if administrative sanctions and civil sanctions are not sufficient to achieve equilibrium in society, the criminal sanction According Wijono Prodjodikoro (1989: 15) is the last sanction or ultimum remedium. Criminal Law is the law that determines the criminal act and determines the fatigue for its penelanggarnya (substance of Criminal Law) and the determining law on the implementation of the substance of the Criminal Law (Criminal Procedure Code). In Indonesia, the Criminal Law is divided into two kinds, which are collected in a codification book (Criminal Code which is abbreviated to the Criminal Code) which is the Criminal Law of the General and the largest in various laws on matters, which are Special Criminal Law. Violations of Criminal Law may be qualified as a crime or offense.

Criminal Procedure Laws can be classified into three meanings: a) in a narrow sense, including the law of investigation, investigation, prosecution, trial, and regulation on the composition of the court; b) in the broad sense that in addition to covering a narrow sense, it also includes other judicial regulations only that the regulation has to do with criminal matters; c) The definition is very broad, that is when the regulation material has reached the stage of execution of the judge's decision (criminal) then developed into a law enforcement regulation (criminal) that regulates the alternative type of criminal from the beginning to finish criminal as a guideline for the implementation of criminal provision.

The courts dealing with criminal cases are referred to as criminal justice which is part of the general courts ranging from investigation, prosecution, trial and correctional law. The Child Criminal Court is a special court that deals with child criminal cases. Child Investigation, Child Procurator, Child Correctional Officer is a unit which is included in a system called Juvenile Justice System, aimed at tackling child abuse, as well as expected to provide protection to children who have problems with law .

Regarding the Child Criminal Court is regulated in Law No.11 of 2012 on Child Criminal Justice System. The law was established based on the following considerations:

- (a) That the child is a trust and gift of God Almighty who has the dignity and dignity as a whole person;

- (b) That in order to safeguard his or her dignity, the child is entitled to special protection, especially the protection of the law within the judicial system;
- (c) That Indonesia as a State Party to the Convention on the Rights of the Child governing the principle of legal protection of the child shall have the obligation to provide special protection for children in conflict with the law;

Article 16 stipulates that the law in the Criminal Procedure Code shall also apply in the event of a criminal justice of the child, unless otherwise provided in this law. In this case the legislation on Child Criminal Justice, among others are: Law no. 11 Year 2012 on Child Criminal Justice System, Law no. 8 of 1981 on the Criminal Procedure Code (KUHP), Law no. 2 years General Court, Law no. 1 of 1946 on the Criminal Code (KUHP), Law no. 12 of 1995 on corrections, Law no. 4 Year 1979 regarding Child Welfare, Government Regulation no. 27 of 1983 on the Implementation of Criminal Procedure Code, Ministerial Regulation No. Justice. M.06-UM. 01 of 1983 on the Proceedings of the Court and the Spatial Court, Circular Letter of the Supreme Court. 6 of 1987 on the Procedure of Children's Session, Government Regulation no. 2 Year 1988 regarding Child Welfare Enterprises. For Children with Problems, Presidential Decree of the Republic of Indonesia No. 36 of 1990 on the Ratification of the Convention on the Right of the Child (Convention on the Rights of the Child). Special Criminal Code Law such as: Law no. 5 of 1997 on Psychotropic, Law no. 22 of 1997 on Narcotics, Law no. 35 of 2014 on the amendment to Law no. 23 of 2002 concerning Child Protection.

A. Problem Formulation

- 1) What is the legal protection of children as perpetrators in the criminal justice process of children?
- 2) What factors hamper law enforcement in implementing legal protection of children as perpetrators in the criminal justice process?

2. Theoretical Framework

Theory of Legal Protection

The beginning of the emergence of this theory of legal protection derived from the theory of natural law or the flow of natural law. This flow was pioneered by Plato, Aristotle (Plato's disciple), and Zeno (founder of Stoic flow). According to the flow of natural law states that the law is sourced from God that is universal and eternal and between law and morals should not be separated. The followers of this school view that law and morals are a reflection and the internal and external rules of human life embodied by law and morals.

According to Thomas Aquinas said that the law of nature is the provision of reason that comes from God which aims for the good and made by people who take care of the community to be disseminated. The existence and concept of natural law has been contested and rejected by most philosophers of law, but in fact it is the writings of experts who reject it, many using the laws of nature that may not realize it. One of the reasons underlying the rejection of a

number of legal philosophers against natural law, because they still consider the search for the absolute of the laws of nature, is only a useless and unhelpful act.

Differences in the philosophers' view of the natural law exist, but in another aspect also raises some hope that the search for the "absolute" is the human longing for the nature of justice. The law of nature as a "universal, eternal, and absolute" rule, is evident in modern life even though it will still exist as evidenced by the increasing number of people talking about human rights issues. It is necessary to consider the legal protection of children and the criminal justice system. Legal protection, in this case, contains a definition of child protection under the applicable law (which regulates the Criminal Justice System of the Child), either as a suspect, a defendant, a convicted/ inmate. The Child Criminal Court contains an understanding of the process of examining child crime cases, ranging from the stage of investigation, prosecution, trial, and penalization. So this research reveals the existence of legislation about Child Criminal Court especially Law 11 Year 2012 about Child Criminal Justice System in relation to legal protection to children, either as suspect, defendant, convict / prisoner, its application in handling cases of child mischief start from investigations, prosecutions, courts, and corrections, barriers and mitigation efforts.

According to Von Thomas Aquinas says that natural law is a reflection of the eternal law (lex naturalist). Long before the birth of the historical school of law, it turns out that the flow of natural law is not only presented as a science, but also accepted as the basic principles of legislation. The seriousness of mankind will be longing for justice, is the essence that hopes for a law higher than positive law. The law of nature has shown that the essence of truth and justice is a concept that includes many theories. Various assumptions and opinions of philosophers of law emerged from time to time. In the 17th century, the substance of natural law has placed a universal principle that can be called human rights.

The Theory of Legal Certainty

The legal certainty is related to the judge's decision based on the principle of the binding for precedent (stare decisis) in the common law system and the persuasive for precedent (jurisprudence) in civil law. The judge's verdict containing legal certainty is a verdict containing predictability and authority. Legal certainty will be assured by the nature of predictability and authority on previous decisions. The law is in charge of ensuring legal certainty (rechtszekerheid) in human intercourse, in which the task is collected two other tasks, namely must ensure justice and the law remains useful. Both tasks are also summed up the third task is the law to keep the community does not happen to play the judge (eigenrichting). The application of legal theory can not be just one theory but must be combined from various theories. Based on existing legal theory, the main purpose of law is to create justice, benefit, legal certainty, order and peace.

Certainty is a feature that can not be separated from the law, especially for written legal norms. The law without a

certainty value will lose meaning because it can no longer be used as a behavioral guide for everyone. Certainty itself is referred to as one of the goals of the law. When viewed historically, the discussion of legal certainty is a conversation that has emerged since the idea of separation of powers from Montesquieu

The order of society is closely related to the certainty of the law, because order is the core of certainty itself. Regularity causes people to live in a way that can perform activities necessary in community life. In order to clearly understand the legal certainty itself, the following will describe the notion of legal certainty from some experts.

Gustav Radbruch proposed 4 (four) basic things related to the meaning of legal certainty, namely: First, that the law is positive, meaning that the positive law is legislation. Secondly, that the law is based on fact, its meaning is based on reality. Third, that facts must be formulated in a clear way so as to avoid mistakes in meaning, in addition to easy to implement. Fourth, positive law should not be easily changed.

Gustav Radbruch's opinion is based on his view that legal certainty is a certainty about the law itself. Legal certainty is a product of law or more specifically of legislation. Based on his opinion, then according to Gustav Radbruch, the positive law that regulates human interests in society must always be obeyed even though the positive law is not fair.

Lon Fuller in his book the Morality of Law (1971: 54-58) proposes 8 (eight) principles that must be met by law, which if not met, then the law will fail to be called law, or in other words must have legal certainty. The eight principles are as follows:

- 1) A legal system consisting of rules, not based on false decisions on certain matters;
- 2) The regulation shall be announced to the public;
- 3) Not retroactive, because it will damage the integrity of the system;
- 4) Made in a formulation understood by the public;
- 5) There should be no conflicting rules;
- 6) It shall not require an action that exceeds what can be done;
- 7) It should not be changed frequently;
- 8) There should be conformity between the rules and the day-to-day execution.

3. Discussion

The Criminal Justice Process of the Child from investigation, investigation, prosecution, court proceedings and in running a court decision in a Child Correctional Institution must be conducted by specially educated officials or at least aware of the problem of Naughty Children. Treatment during the Criminal Justice process Child must take into account the principles of child protection and keep up the child's dignity and value without neglecting the implementation of justice, rather than making the humanitarian value of the child inferior. For that it is endeavored that law enforcers are not only experts in the field of legal science but especially honest and wise and

have a broad and deep view of the weaknesses and strengths of humans and society. In reality this has not been implemented properly, it is seen that in conducting investigation of child investigation still wearing clothes of service, examination of case done open to public. The existence of a child who is sentenced to life imprisonment, imprisonment of 15 (fifteen) years, 14 (fourteen) years, 10 (ten) years.

Judging from the juridical aspect, the definition of Child in the eyes of Indonesian positive law is commonly defined as an immature person (*minderjarig / person under age*), a person under the age / *underage (minderjarigheid/ inferiority)* or often also referred to as a child under guardian supervision (*minderjarige ondervoordij*). Thus, by rejecting the above mentioned aspects, the Indonesian law of positiveness (*ius constitutum/ius operatum*) does not regulate the existence of standard and universally applicable legal unification to determine the criteria for age restriction for a child.

In the provisions of Article 1 paragraph (3) of Law 11/2012 it is determined that a child who is in conflict with the law hereinafter referred to as a Child is a child who is 12 (twelve) years old but not yet 18 (eighteen) years old who is suspected of committing a crime. In the provisions of this law is set minimum and maximum limits to be called children. Minimum child limit is 12 (twelve) years old. What if the child is not yet 12 (twelve) years old and is suspected of a criminal offense? to this aspect the investigator, the Counselor of the Community, and the Professional Social Worker shall decide to: Submit back to the parent / guardian; or Inclusion in education, coaching and mentoring programs in government agencies or Witness and Victim Protection Institutions in institutions that handle social welfare, both at the central and regional levels, no later than 6 (six) months.

The decision shall be submitted to the court to be determined in court for a maximum of 3 (three) days, after which Breathing is obliged to evaluate the implementation of education, coaching and development programs to the Child and in such evaluation the Child still needs education, coaching and furthermore, the period of education, guidance and counseling may be extended within the next 6 (six) months. Government agencies and LPSK as meant in letter b shall submit monthly reports of child development to Breathing periodically (Article 21 paragraph (1), (2) (3), (4), (5) (Law 11/2012) And what if the child has not reached the maximum limit but has married and then divorced and committed a crime? To this aspect juridically can not be called a child again but has been deemed adult. Concretely, the jurisdiction of the child's hearing in accordance with Law 11/2012 is not authorized to judge him. abide more intensively the provisions on the maximum limit jurisdiction of the child's hearing may reach the maximum limit of 21 (twenty-one) years if a child commits a crime before the age of 18 (eighteen) years and be brought to court after the child exceeds the age limit of 18 (eighteen) years but have not reached the age of 21 (twenty one) years then according to the provisions of Article 20 of Law 11/2012 is still the jurisdiction of the children's hearing.

Of 1995, it is determined that the juvenile, criminal, state and custodian children shall be at the latest until the age of 18 (eighteen) years and for civilian children to be placed on the child's dilapas, the extension of their placement may only be the longest until the age of 18 (eighteen) years (Article 32 paragraph (3) of Law 12/1995) and the provisions of this age limit are identical to "Convention on the Rights of the Child "(Convention on the Rights of the Child).

Under the provisions of Article 45 of the Criminal Code, the child restriction is a person under the age of 16 (sixteen) years. To this matter both theoretically and in practice, if the child commits a criminal act the judge may determine that the child is returned to his or her parent, guardian or caretaker without criminal detention, submitted to the government without crime as a child of a state or also subject to criminal sanction. However, the provisions of articles 45, 46 and 47 of the Indonesian Criminal Code under the provisions of Article 69 Paragraph (1), (2) of Law 11/2012 are declared no longer valid. Whereas in the case of the limitation of children in the Criminal Code as victims of crime as Chapter XIV the provisions of Articles 287, 290, 294 and 295 of the Criminal Code are less than 15 (fifteen) years old.

Of the eight provisions of the positive law of Indonesia, the provision of age limit for a child criteria vary. There is a positive Indonesian law that determines the age limit of a child with a maximum age limit of 18 years (Law 11/2012, Law 12/1995 and Law 8/1981), age limit below 17 years (Article 153 syst (5) of Law 8/1989), under the age of 21 years (Law 4/1979), Article 330 of the Civil Code), under 16 years (Criminal Code) and under 15 years (Article 171 of Criminal Procedure Code, Criminal Criminal Sections).

If comparative comparison or comparative review of age restrictions of a child in another country Lilik Mulyadi (205: 8) suggests that the maximum age limit of 18 years (Law 11/2012, Law 12/1995, Act 1/1974) equals the age limit of 27 (twenty seven) states in the United States, Cambodia, Taiwan and Iran. While for the maximum age of 17 years (Act 8/1981) is in 6 (six) countries in several states in the US, Australia, Philippines, Malaysia and Singapore. Similarly, the minimum age limit of 12 years in Indonesia (Act 11/2012) is identical with the average minimum age of children in the US and Australia, whereas for English and Dutch countries the minimum limit is 15 years, Taiwan minimum 14 years, Iran minimum 6 years, Japan and Korea for at least 14 years while the Philippines, Malaysia and Singapore are 7 years old.

Implementation of child protection, must meet the requirements, among others, is the development of truth, justice and welfare of children; must have a philosophical, ethical and legal basis; rationally positive; can be accounted for ; useful for the concerned; prioritizing the perspective of regulated interests, not the perspective of regulating interests; not accidental and compliment, but must be done consistently, have an operational plan, take into account the elements of management; implement a restorative justice response (for recovery); do not constitute a container and opportunity for people seeking personal gain / group; children are given the opportunity to participate according to

the circumstances and conditions; based on a precise image of the human child; problem-oriented and not target-minded; not a criminogen factor; is not a viojtimogen factor.

Child protection can be done directly or indirectly, means its activities directly addressed to children who become the target of direct treatment. Case activities can include, among other things, protecting the child from various threats from outside and within himself, educating, nurturing, assisting children in various ways, preventing children from starving and seeking health in various ways, providing self-development tools and so on. Indirect child protection is an indirect activity directed to the child, but another person engaged / involved in child protection efforts. Such protective measures are for example by parents or those involved in child protection efforts against threats from outside or inside the child, those in charge of nurturing, fostering, assisting children in various ways; those involved prevent children from starvation, seek health and so on in various ways, those who provide means of developing children and others; those involved in the implementation of the criminal justice system.

4. Conclusion

- a) The child is part of the young generation as one of the human resources that is the potential and successor of the ideals of the nation's struggle, which has a strategic role and has special characteristics and characteristics, requires guidance and protection in the framework of management of growth and development of physical, mental and social intact, harmonious and balanced.
- b) Having been thoroughly traced, the sense of affection is the most basic psychic need in the life and life of a real child relying on the conscience of the parents. In reality many parents are not aware of this, which affects the development of the child's life. Child misbehavior can be affected by the background of his life. Child delinquency is not only a disruption to the security and public order, but also threatens the nation's sense of the future. On this basis children need to be protected from harmful acts, so that children as the nation's successor are preserved from the future of the nation and state.

References

- [1] Arif Gosita. 1989. *Masalah Perlindungan Anak*. Akademi Pressindo, Jakarta.
- [2] A.Syamsuddin Meliala dan E. Sumaryono. 1985. *Kejahatan Anak Suatu Tinjauan dari Psikologi dan Hukum*. Liberty. Yogyakarta.
- [3] Barda Nawawi Arief. 1986. *Penetapan Pidana Penjara dalam Perundang-undangan dalam Rangka Usaha Penanggulangan kejahatan (Disertasi)*. Unpad, Bandung.
- [4] Bimo Walgito, 1982, *Kemukakan Anak* (Juvenile Delinqueny I, Yayasan Penerbit Fakultas Psikologi UKM, Yogyakarta
- [5] Simanjuntak,B. 1984. *Latar Belakang Kenakalan Anak dan Remaja*. Bandung: Rineka Cipta , Bandung.
- [6] Gatot Soepramono. 2000. *Hukum Acara Pengadilan Anak*. Djambatan, Jakarta.

- [7] Kartini Kartono. 1992. *Patologi Sosial Kenakalan Remaja*. Rajawali Press, Jakarta.
- [8] _____. 1995. *Psikologi Anak (Psikologi Perkembangan)*. Mandar Maju, Jakarta.
- [9] Lilik Mulyadi, 2005, *Pengadilan Anak di Indonesia Teori Praktek dan Permasalahannya*, Mandar Maju, Bandung.
- [10] Maidin Gultom, 2008, cetakan Pertama *Perlindungan Hukum Terhadap Anak dalam Sistem Peradilan Anak di Indonesia*, PT. Refika Aditama, Bandung

