

# The Best Interest of Child Principle for Protection on Rights' Children of Judge Decision in Indonesia Legal System

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## Abstract

In the Convention on the Rights of The Child of 1996, specifies that the state which in its policy and regulation obtaining the child as a subject, it should place the best interest of child for protection on rights's children. Actually, this paper examines implementation of "The Best Interest Of Child Principle" in judge decision in Indonesia legal system. In doing so, the result of research in this paper indicates that judges in the Indonesia legal system, penalizing toward child in offense, they do not implementation well that principle in their decision. The judges in Indonesia legal system still place legal value as procedural and formal system without justice consideration for child in their decision, whereas justice consideration as the way to be good. This paper uses conceptual approach and by legislation in paper's analysis.

**Keywords:** Judge Decision and Child in Crime

## 1. Introduction

The child of a mandate as well bounty of God, which in growth based on age level. The child adheres value of life depending on neighbourhood where it is grew up. Every child is expected to be responsible, noble, useful for the family and the state. In the context of a country life, the existence of child is very important. Actually, the child will be next generation which it will accept the leadership baton of a country for the future. Based on that argumentation, every state should set up the child as next generation for continuation of leadership in the future. Therefore, each child should get legal protection for the justice. Occasionally, the child does get mental changes which affected in behaviour. This child is being bad and behaving aggressively. The bad child sometimes gets punishment by court as a child in crime. In the Indonesia legal system, the child in crime, the judge will place it in the special children's prisons. The child in crime, of course, it will be society burden. The state will get loss the next generation for continuation of leadership in the future.

According to General Explanation of Law Number 11 Year 2012 on Juvenile Justice System of Indonesia, it indicates that the child in crime which in increasing crime. These crimes, for example, abuse of narcotics and sale of illegal drugs. In Indonesia, the child in crime always is affected by milieu. Moreover, the prison into a place of learning for a child to do a crime. In the fact, Indonesia prison as one of institution which comitted to coach for children, it still less in contribution for child education. The prison becomes negatively place for the personality of children<sup>1</sup>. Muladi and Nawawi Arief in their writing, say that the warder has failed to eliminate harm afflicting child in the prison. Bernes and Teeters also says that prison becomes a home which in a place of contamination. The prison also becomes a place for accidental offenders who undermine for child's personality<sup>2</sup>.

According to the Convention On The Rights of The Child of 1996 stated that a state should be guided to protection for child's rights. This convention was ratified by Indonesia government in Indonesia Presidential Decree Number 36 of 1990 on Ratification of Convention on the Rights of the Child. Then, this decree was embodied into Act No. 23 of 2002 on Protection for Children. Later, this Act was changed into Act No. 35 of 2014. This Act stated that children was a human who gotten legal protection. Based on that, the regulation or policy on children, it should be based on the principle of the best interest of the child.

Based on the argument, according to my analysis, the good understanding of the legal does not place legal as a destination, but the legal should be an instrument for human happiness. In paradigm of progressive legal in Satjipto Rahardjo view<sup>3</sup>, it places human for live in justice, welfare, and peacefulness. Actually, legal is a process that never stops in form of ideality. Progressive legal always creates an improvement over the existing shortage. If the society gets unjustice problem, then it do not blame society itself. We must do something towards the legal existing, namely, repair and realignment to legal principle, legal doctrine, legal substance, legal procedure in existing. The Progressive legal means which it repairs the lack of legal substance which does not

<sup>1</sup> Sri Sutatiek (2007), *Putusan Pengadilan Anak sebagai Manifestasi Perlindungan dan Kesejahteraan Anak*. Disertasi. Fakultas Hukum Universitas Brawijara, Malang, p. 53.

<sup>2</sup> Barda Nawawi Arief (2004), *Kebijakan Legislasi dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Ananta, Semarang, p. 79.

<sup>3</sup> Satjipto Rahardjo (2009), *Hukum Progresif Sebuah Sintesa Hukum Indonesia*, Genta Publishing, Yogyakarta, p. 4 and 142.

meet justice as a legal expectation. Everyone should read the law and it places human role in its. This is very important for achievement of justice. Law is read its meaning of substance not only its text. Reading of law is primarily empathy, dedication, honesty, and bravery in law enforcement<sup>1</sup>. So that, the judge who will pass sentence child in a crime, it must be considered to be brave, honest, and fair.

In fact, a child who carries out the punishment in Indonesia Prison, it gets a treatment as a person who is not independent. Based on that, this paper examines comprehensively the research on legal protection for children in a crime. Also this research analyses to judge decision to it. Does judge decision create of guarantee for legal protection to child in crime? The aim of implementation to principle of the best interest of child in judge decision, is to meet legal protection for children. Does judge decision have it?

This paper only examines judge decision of Indonesia adjudicating child in crime in relation to implementation of the best interest of child principle. For that reason, this paper exercises research type in normative legal<sup>2</sup>. Using approach this paper is regulation approach., namely to analyse all regulations on legal issues in existing<sup>3</sup>. This paper also uses conceptual approach, namely a research type which based on legal experts' doctrine who is relevant to this my topic. Instrument of analysis for this paper, namely primary legal materials and secondary legal materials. Primary legal materials contain legal materials that are original and first, namely judge decision and regulation in document. Secondary legal materials contain legal publications, legal journals, and legal articles. This paper also uses substance legal analysis technique. The technique of legal analysis of substance means using to analyses legal documents which futher describes legal protection for criminal child in judge decision of Indonesia.

## 2. Result and Discussion

### 2.1. Description of Criminal Children in Indonesia

This result of research in my paper, indicated that Indonesia children who involved crime at least 6000 children. According to the Comission for Child Protection of Indonesia, that child who involved crime in differnt age and social status. The children in crime, not all who are placed in children prison, but they also were in the prison inhabited adults<sup>4</sup>. Concrete data from Director General of Corrections Ministry of Law and Human Rights of Indonesia, it still indicated that Indonesia children in crime who sentenced in the prison, had shown the numbers increasing every year. This data which indicated that children in crime have been very concerned. In 2004, they were 2.189 children, consisting of 2.068 boys and 121 girls. In 2005, they were 1.719 children, consisting of 1.648 boys and 71 girls. In 2006, they were 1.960 children, consisting of 1.814 boys and 146 girls. Also in 2007, they were 2.210 children, consisting of 2.149 boys and 61 girls<sup>5</sup>.

Sri Sutatiek's result of research on judge decision in Indonesia Court, she explained that judge had sentenced bad children in the prison as a punishment. Children in crime by decision judge into prison, they had gotten punishment between 1 to 7 years in prison. Futhermore, after Act No 11 of 2012 on Juvenile Justice System was enacted in Indonesia, children who were sentenced into the prison, were more increasing, namely 2950 children<sup>6</sup>. They were very concerned. It described fact children in prison, were gotten deprivation of liberty.

### 2.2. The Principle of The Best Interest Of Child in the Decsion Judge

In the literature, According to Kartini Kartono<sup>7</sup>, the term of delinquency means delinquent behavior of children caused by a form of social neglect. They perform acts that constitute social deviation. Fuad Hasan in his opinion, that delinquency means opposed social actions that can be categorized as a crime. Romli Atmasasmita, also in his opinion that any behavior of a child under the age of 18 years and unmarried is a violation of legal norms that could endanger the child's personality.

According to Indonesia Criminal Law that everyone should be accountable for the special action who based on the certain awareness. For a child, the special action can be accountable, it should be on awareness of thinking. Since, a child is still categorized as immature. There should be special consideration for a child in Indonesia's criminal law. As a comparison, in USA, this country makes a difference for action who is

<sup>1</sup> Muhammad Akbar (2011), *Penguatan Kemandirian Hakim bagi Pengemban Hukum Praktis yang Progresif di Indonesia (Dari Paradigma Positivisme menuju Paradigma Hukum Progresif)*, Disertasi, Pascasarjana Univesitas Hasanuddin, Makassar, p. 92.

<sup>2</sup> Johny Ibrahim (2005), *Teori dan Metode Penelitian Hukum Normatif*, Bayu Publishing, Surabaya, p. 252.

<sup>3</sup> Peter Marzuki (2007), *Penelitian Hukum*, Kencana Predana Media Group, Jakarta, p. 141.

<sup>4</sup> Kamaruddin, *Restorative Justice atas Diversi dalam Penanganan Juvenile Delinquency*, Journal of Al-'ADL, Vol. 8 No. 2 Juli 2015, 127-130.

<sup>5</sup> Nandang Sambas (2010), *Pembaruan Sistem Pemidaan Anak di Indonesia*, Graha Ilmu, Bandung, p. 131-132.

<sup>6</sup> Suprpto (2013), *Restorative Justice sebuah Alternatif Pelasanaan Pemedanaan terhadap Anak yang berkonflik dengan Hukum di Indonesia*, Disertasi. Program Pascasarjana Universitas Hasanuddin, Makassar, p. 182.

<sup>7</sup> W.A. Gerungan (2004), *Psikologi Sosial Suatu Ringkasan*, Eresco, Bandung, p. 199.

performed by adult and child. A person who performs in anti social actions in above 21 years, it can be categorized as a crime, while a person who is under 21 years, it can not be categorized as a crime. It only means *delinquency*<sup>1</sup>. Anti-social actions who is done by a child, it can be caused by two factors, namely, internal factor and external factor. Internal factor, namely lack of affection and lack of parental control. External factor, namely the negative impact of globalization and technological advances that led to the parents ignore the morality of children.

Actually, The Act No 11 of 2012 on The Juvenile Justice System of Indonesia does not make terminology for bad children clearly. This Act makes terminology on child in conflict with the law, namely a person who makes an anti social action under 12-18 old years. According to data from Indonesia Prison which called *Rumah Tahanan Negara* or *Lembaga Pemasyarakatan* in Indonesia Language, it seems that children who places on Indonesia prison, they are treated as criminals. Children who are placed in the prison of Indonesia, they are seized of their liberty. Moreover, according to expert's research on prison as a punishment. Prison is not exactly creates improvement of perpetrator. In Bentham's opinion that *all punishment is mischief. All punishment is in itself devil. It ought only to be admitted in as far as it promises to exclude some greater evil...*<sup>2</sup>.

In my analysis to The Act No 11 of 2012 on The Juvenile Justice System of Indonesia and The Act No 3 of 1997. Both regulations are is not intended to sentence children in crime into prison as a person in criminal act. These act provide option to the judge for child in crime, not only punishment but also certainty act. According to article 25 (1) that the brat as Article 1 paragraph 2 letter a, the judge dropped the criminal as well as Article 23 or measures referred to in Article 24.

Article 24 The contents are as follows:

- (1) Measures to impose such a bad boy is:
  - a. Returns to parents, guardians or foster parents;
  - b. Handed over to the state for education, pembidaan, and job training; or
  - c. Submit to the Ministry of Social Affairs, or social organizations engaged in education, training, and job training.
- (2) The act referred to in paragraph (1) may be accompanied by strikes and additional requirements set by the judge.

With a view to make improvements, the Act No. 11 of 2012 on the System of Juvenile Justice, to take back the dignity of children in crime. This act puts under penalty of imprisonment as a last resort (*ultimum remedium*) for the sake of the child, as specified in:

Article 69:

- (1) Children can only be punished or subjected to action under the provisions of this Act.
- (2) Children who are no older than 14 (fourteen) years, can only be subject to action.

Article 71

- (1) Capital punishment for Children consists of:  
Criminal warning;
- (2) Criminal terms:
  - a) development outside the institution;
  - b) community service;
  - c) work training;
  - d) coaching in the institution; and
  - e) jail.
  - f) Criminal additional consisting of:
    - a. appropriation of profits derived from the crime; or
    - b. fulfillment of customs obligations.

Article 69:

- (1) Children can only be punished or subjected to action under the provisions of this Act.
- (2) Children who are no older than 14 (fourteen) years can only be subject to action.

Article 71

- (1) Capital punishment for Children consists of:
  - a. Criminal warning;
  - b. criminal terms:
    - 1) development outside the institution;
    - 2) community service; atauww.hukumonline.com

<sup>1</sup> Wagiaty Soetodjo, 2010, *Hukum Pidana Anak*, Refika Aditama, Bandung, h. 21.

<sup>2</sup> Harkristuti Harkisnowo (2003), *Rekonstruksi Konsep Pemidaan: Suatu Gugatan terhadap Proses Legislasi dan Pemidanaan di Indonesia*, Orasi pada Upacara Pengukuhan Guru Besar Tetap dalam Hukum Pidana Fakultas Hukum UI, Depok, p. 9-10.

- 3) supervision.
  - c. work training;
  - d. coaching in the institution; and
  - e. jail.
- (2) Criminal additional consisting of:
- a. appropriation of profits derived from the crime; or
  - b. fulfillment of customs obligations.

According to my point, the problem of child in crime in the Indonesia Judge perspective, it still does not place the children as a person is in legal protection. Children regulation of Indonesia, however, it makes to create for *the best interest of the child* philosophically. Moreover, existence of Indonesia prison called *Lembaga Pemasyarakatan* or *Rumah Tahanan Negara*, does fail as institution to change a bad child into a good child. Fundamentally, the children regulation is made for function of *the best interest of the child*. It means that every judge decision should be intended for children's good future.

Based on empirical data in R.M. Jackson's research<sup>1</sup>, children who placed in prison, can be a recidivists with high quality. In Indonesia, especially, people still does not trust the prison which called *Rutan* or *Lapas* as a institution which serves for perpetrators to be good. Some of the Indonesia people assume that ex-offenders are potentially to be high quality perpetrators. R.M. Jackson also reported about effectiveness of prison as education for perpetrators. His research said that perpetrators who ever had entered into prison, about 50%, they returned to villain. About 70%, some of them are villain under 21 years old. Moreover, some of children who ever had sentenced into prison, they had returned villain.

Today, Indonesia people assumes that *Rutan* or *Lapas* as "school of crimes". Furthermore, it becomes the closed building which is a mystery. Whereas, *Rutan* or *Lapas* should be guidance for the perpetrators, but instead it became a means of learning a crime. The children who sentence punishment of prison, their rights can be ignore. This case not only in Indonesia but also in other countries. According to The Commission on Safety Band Abuse in American Prison reported that children who were sentenced into prison for adult, they got violence in twice than children were into prison for children. According to Muladi and Barda Nawawi Arief that increasing of criminal children, is caused by formulation of sanction which is less. Punishment for child in crime does not contain the best interest of child principle.

The Indonesia judges should adjudicate child in crime in independent and to be brave. Their decision should take sides to justice for children. A judge is not only funnel of legislation but also inventor law. Judge as inventor law, should consider justice value in legal decision for bad child. Judge not only is a implementor of the law but also a seeker of justice. In view's Philippe Nonet and Philip Selznick, law should having a sense of community. Law does not only give procedural justice but also substancial justice<sup>2</sup>.

The Indonesia judges adjudicate bad child, they may not ignore justice for all including legal protection for children's interest. The legal protection of children, fundamentally, it is a legal obligation. Moreover, Indonesia regulation for children protection (Act No. 23 of 2002 and Act No. 35 of 2014) sets up chance for child in crime to be not in a prison only. It means that a bad child who is sentenced by judge, is not punished. A child must not only be treated a person in gulty, but also a person who gets education for improvement of personality to be a good generation. Punishment for children is only ultimum remedium for the sake of children self. A child, fundamentally, has a distinct personality with adults. A child has a personality of its own who is in difference with adult.

### 3. Conclusion

Indonesia judge, actually, does not consider the best interest of the child principle in its legal decision for children's legal protection as the mandate of Indonesia Regulation for protection of right's children. Such decision judge is only intended to justice procedural and formal. A child in crime is treated as villain by judge. This is, of course, not fair. Moreover, children are really human who can be changed in good. Criminal punishment must not be implemented to children by judge. Since, punishment only does create infliction for the children of all. Judge should adjudicate a child in crime to consider the best interest for child. It considers empathy, dedication, sincerity, honesty, and the courage which based on intelligent solution as part of protection for rights' children. Punishment of prison, fundamentally, is ultimum remedium only, not for others.

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<sup>1</sup> Barda Nawawi Arief, *op. cit.*, p. 47.

<sup>2</sup> Philippe Noonet dan Philip Selznick (2008), *Hukum Perponsif*, (terjemahan dari *Law and Society Intansition: Toward Responsive Law*) Cet. II. Nusa Media, Bandung, p. 73.

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