



Educative Penalty System as a Protection Implementation for Children who Commit Crime

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ABSTRACT

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Penalizing children who commit crime is actually intended for their-own sake. This kind of penalty has been created in such a way to suit the children. Therefore, the investigation carried out by the authorities before imposing the penalty should not eliminate the aspect of guidance and protection. The punishment formulations that give deterrent effect to those juvenile criminals should be the best effort through non-formal processes that have an optimal role to develop, such as families, schools, or social monitoring institutions. Namely: a). Informal warning; which involves the police to warn the children that they have done the wrong thing and make them not to do it again. There will not be any criminal minutes for this kind of punishment. b). Redeem mistakes with good deeds/ restitution: the children are asked to redeem their mistakes with good deeds, for example by paying compensation to the victim according to the children's capability. c). Community service: those children are ordered to do serve the community or fulfill certain tasks for several hours.

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1. Introduction

Every child that Allah send to the world is innocent. Children represent important assets for the development and life of the nation and state. Allah mentions: "Wealth and children are but adornment of the worldly life, but the enduring good deeds are better to your Lord for reward and better for hope". As in Q.S Al-Khafi: 46, children are reported as entertainment for the eyes, and living jewelry.(Jatmiko, Hartiwiningsih, & Handayani, 2019) 'Prone children' is a term that addresses a group of children who suffer from cultural and structural pressures in society which causes their rights to be unfulfilled and even violated. In such situation, prone children tend to feel inferior, vulnerable, and marginalized (Suyanto, 2003, p. 4).

With the importance of the children's role in the life of the state, the constitution has expressly regulated children's rights. The state guarantees that

every child has the right to live, grow and develop and has the right to be protected from violence and discrimination.(Karjoko, 2017) This is contained in Article 28B paragraph 2 of the 1945 Indonesian Constitution. We should always protect the best interests of the children because they represent the best interest for human life sustainability. Recently, deviant behavior such as crime has gone rampant. One of the examples is mass rape. The saddening truth is that this kind of crime also involves underage perpetrators (Hakim, 2016).

Crime, especially sexual crimes, is no longer an unlawful act committed by adults. Lately, minors also often commit this kind of crime. We cannot fully blame their behavior because it turns that this crime is not only triggered by the minor perpetrators themselves, but it is also affected by external factors which have devastating effect.(Utomo & Karjoko, 2018) However, according to national law, minors are still subject to prison terms. In fact,

imprisonment is not the only solution for children who commit this crime. The penalty system for children needs to be updated. Criminal law has the power to force. Those who violate the law will be imposed to penalty. (Iswantoro, Saputra, Doyoharjo, & Luthviati, 2020) However, a person indicated to have committed a criminal act, either committing a prohibited act or not carrying out an obligation according to the criminal law, is not absolutely subject to criminal penalties. For that reason, the law enforcement is essential to ensure whether the person has committed a criminal act or not. Even though the person concerned has been proven to commit a criminal act, there are still questions whether he be held responsible criminally or not.

2. Results and Discussion

The term 'penalty' is generally used in the fields of education, morals and religion. On the other hand, 'criminal' has a special meaning. There is a special meaning which indicates special characteristics or characteristics (Muladi & Arief, 1984, p. 2). The purpose of imposing the penalty to children who commit crime is to realize the well-being of the children who commit crime. At least, penalizing need to have certain characteristics which aim to provide a punishment process that is suitable for those children. Therefore, the investigation carried out by the authorities before imposing the penalty should not eliminate the aspect of guidance and protection. (Prasetyo, Handayani, Sulistyono, & Karjoko, 2019)

The use of the juvenile criminal justice system currently relies on the Juvenile Court Law, which is Law No. 11 of 2012. The preamble of the Juvenile Court Law regulated that Indonesia, as a state party to the Convention on the Rights of the Child which regulated the principle of legal protection for children, is obliged to provide special protection for children in conflict with the law. (Evingrum, Hartiwiningsih, & Jamin, 2019) In reality, the practice of imposing criminal penalty on children is still far from appropriate, especially for the children sentenced to imprisonment. In law, imprisonment is defined as a principal (criminal) punishment or corporal punishment intended to bring heavy suffering to the convict. Imprisonment is different from other corporal punishment, called the confinement, which aims to give minor suffering (Ikhsan, 1998).

The imprisonment for children mostly triggers the declining children mental development in the future. The children's rights guaranteed by the Child

Protection Act cannot be granted and fulfilled if they are imprisoned. The fact also shows that there is a limited number of detention centers and juvenile prisons. So, those children who commit crime will eventually be combined with adult inmates. From this point, they will get the negative effects and bad stigma when serving their criminal period. Imprisonment is one of the most severe forms of liberty deprivation. (Evingrum, Hartiwiningsih, & Jamin, 2020)

Mompang L.P. Mentioned that imprisonment is the most widely-used penalty to punish crime offenders. The Criminal Code (KUHP) itself does not explain in detail the reason that imprisonment is always used, compared to other penalty options. The logical possibility might be that imprisonment is the only basic penalty that allows directed and planned guidance against the criminal offender (Panggabean, 2006, p. 104). Aruan Sakidjo and Bambang Poernomo stated that imprisonment is one of the basic types of punishment, in the form of reducing or taking away someone's freedom. This punishment is said to deprive a person's liberty by the state through the court's decision because generally the imprisonment is carried out in the prison. Even though sometimes it is also carried out outside the prison building, the convict's freedom is still under the supervision of the prison officer (Sakidjo & Poernomo, 1990, p. 83)."

One of the basic penalty forms that deprives someone's independence is imprisonment. On the other hand, imprisonment does not merely provide retaliation for the crime that has been committed by giving suffering to the convict, but it also intends to provide guidance and return the convict to the society. Public already knows that imprisonment has a negative impact, especially for children's physical, mental, and psychological growth. Therefore it is necessary to modify the form, time limit and place of penalty administration as well as the regulation and application of the penalty (Poernomo, 1988, p. 21). There should be an effort to develop criminal penalties and punishment. Efforts should be made for the stages of thinking about alternative implementation of imprisonment and new ways of treating criminals. New ideas to avoid the negative impact on imprisonment have been carried out and developed with an integrated theory of the purpose of punishment (Muladi, 1985, p. 53).

The government should seek punishments that recover the children's moral character. The correctional institutions in Indonesia have exceeded the maximum occupancy limit. It would be unfair if

children convict is put in one cell with adult convicts. Psychologically, children will experience imbalances which can eventually lead to oppression, even forcing their character to mature rapidly. At this point, the children will get stressed even though in fact, the penalty aims to protect the children. (Evingrum et al., 2019)

Barda Nawawi Arief stated that the policy aspect, namely the law substance formulated in legal reform, is a means of supporting policies, such as social, criminal, and law enforcement policies (Arief, 2008, p. 26). The majority of penalty imposed by the government is imprisonment, whereas in fact, imprisonment will bring negative effect and stigma to the children's growth Jimly Asshiddiqie argued that theoretically, law is considered relevant to be adopted into an idea of legal reform if it meets several measures of relevance namely juridical, sociological, philosophical, and theoretical (Assiddiqie, 1996, pp. 12-13). Juridical relevance is a situation where the rule of law does not conflict with the constitution or higher norms. Sociological relevance is a condition when the rule of law is useful and is used as a reference for society. (Karjoko, Maret, & Riyadi, 2019)

Philosophical relevance is a situation if the rule of law works in accordance with the ideals of law in society as a positive value in the foundation of community life. Where the foundation and guidelines are Pancasila which is used as the source of all sources of law in the context of society, nation and state. (Jaelani, Ayu, Rachmi, & Lego, 2020) The theoretical relevance is based on the perspectives of theories or science of criminal law and the criminal justice system. Theoretically, law is considered relevant and then adopted in legal reform if it meets the elements: juridical, sociological, philosophical, theoretical and comparative relevance (Arief, 2008, pp. 12-13). Barda Nawawi Arief's "Pembaharuan Hukum Pidana" mentioned: "When viewed from a policy approach, the criminal law reform is essentially a part of social, criminal, and part of law enforcement policies. Meanwhile, when viewed from value approach, the criminal law reform is essentially an effort to review and reassess the socio-political, socio-philosophical, socio-cultural values that underlie and provide content to the normative and substantive content of the aspired law criminal" (Arief, 2008, p. 26).

In the future, the criminal law should not ignore aspects related to human, nature, and customs or traditions in Indonesia. The criminal law in the

future has to be responsive to advancements in technological science in order to increase the effectiveness of the criminal law's functions in society (Muladi, 1990). In addition, the children penalty system also aims to emphasize child protection during the penalty period. As explained above, this implementation aims to avoid the negative effects of the penalty system on children. So, there will not be any stigma judging the convicted children, then the person concerned does not bear the label of evil as a result of a court decision or when they leave prison. (Karjoko, 2017)

Bad influences can be avoided by making a criminal diversion. Penalty diversion can be implemented as a means of remedy, where children are made immune to the formal justice process and there will not be any recording of crimes for children. The children who commit crimes should be treated humanely. The penalty diversion will be used as a means of overcoming crime. The implementation of penalty diversion is to avoid stigma against children. The implementation of penalty diversion should be able to eradicate the stigma because the police do not record the children's crime data, and the public prosecutor does not prosecute, make indictments, or hand it over to the court. (Evingrum et al., 2019)

If the case has already entered the court, the judge selects and decides which case to be investigated or terminated. If the judge stops the investigation to implement penalty diversion, the judge will not make a conviction. The Indonesian Criminal Law System has entered a new chapter in its development. One form of reform that exists in Indonesian Criminal Law is the regulation of criminal law in the perspective of achieving justice for the improvement and restoration of conditions after criminal justice events and processes known as restorative justice which is different from retributive justice (emphasizing justice in retaliation) and restitutive justice (emphasizing justice in compensation). (Evingrum et al., 2020)

When viewed from the development of criminal law science and the nature of modern punishment, it has introduced and developed what is called the perpetrator-victim relationship approach or "Doer-Victims" Relationship. A new approach that has replaced the action or actor approach or "daad-dader strafrecht". (Karjoko, Jaelani, et al., 2019) Punishment for the perpetrator of the Child Crime does not then achieve justice for the victim, considering that from the other side, it still leaves its own problems that are not resolved even though the

perpetrator has been punished. (Karjoko, Jaelani, et al., 2019)

By observing the principles of child protection, especially the principle of prioritizing the best interests of the child, it is necessary to process the settlement of children's cases outside the criminal mechanism or what is commonly known as criminal transfer. Penalty institution is not a way to solve children's problems because it is prone to violations of children's rights. (Suriani, Hartiwingsih, Jamin, & Waluyo, 2020) An event and procedure is needed in the system that can accommodate case settlement, one of which is by using a restorative justice approach, through a legal reform that does not only change the law but also modifies the existing criminal justice system, so that all the desired objectives by law was achieved. One form of restorative justice mechanism is dialogue, better known as "deliberation for consensus". Therefore, the penalty diversion, especially by utilizing the concept of restorative justice, has to be considered thoroughly in order to resolving criminal cases committed by children. (Evingrum et al., 2019)

If the agreement on penalty diversion is not fully implemented by the parties based on the report from the Correctional Center, the judge will continue investigating the case in accordance with the Criminal Court Procedure for Children. Furthermore, the judge needs to consider the implementation of parts of the penalty diversion agreement when he imposes the penalty. (Adillah, Handayani, & Sulitiyono, 2019) Implementing imprisonment to child convicts of sexual crime cannot change their character if they only get physical punishment without any socialization and guidance from various parties in order to recover conditions and trauma experienced by the children after the incident up until the punishment takes place. So, there should be strong cooperation from various parties to carry out education, coaching, and mentoring for the sake of the child convicts' physical, mental, and psychological conditions. (Akhmaddhian, Hartiwingsih, & Handayani, 2017)

The imprisonment should differ adult and juvenile prisoners. However, if heterogeneous penalty keeps on going, it can danger the child convicts' psychology which may lead them to become even worse criminal offenders. (Rosidah, 2020) Furthermore, when returning to the society, it is possible that they repeat their previous crime. It means that imprisonment does not bring effective deterrent effect. The concept of restorative justice

has primary objectives of reducing the number of inmates in prison, and getting rid of the stigma of criminal offenders so they can live their life normally and not repeating his actions. Its orientation is the children's interests and well-being. (Tufiq, 2014, p. 139)

The formulation of punishment that gives deterrent effect to juvenile offenders is the law enforcement officials' concerns. On the other hand, the best efforts through non-formal processes are optimal, especially for crimes in which families, schools, or informal social supervision institutions can play a role in an appropriate and constructive way. (Triwanto & Aryani, 2020) These efforts are conducted by: a). Informal warning; which involves the police to warn the children that they have done the wrong thing and make them not to do it again. There will not be any criminal minutes for this kind of punishment. b). Redeem mistakes with good deeds/restitution: the children are asked to redeem their mistakes with good deeds, for example by paying compensation to the victim according to the children's capability. c). Community service: those children are ordered to do serve the community or fulfill certain tasks for several hours. (Nuryanto, 2019)

This kind of penalty serves for the psychological development and education of children. d). Involving children in skills programs: involving children (both the juvenile criminals and the children in general) in skills programs managed by social service agencies, NGOs. e). Formulating plans for police, children, and families: involving children, families, and police to discuss what should be done, for example, redeeming mistakes with good deeds for the victim and the community in general, strengthening family ties and support for other children, and preventing further unlawful acts. f). Plans decided by traditional customary institution: the handling of juvenile crime cases can also be delegated to traditional institutions. g). Plans that are based on the results of family meetings: meetings between family groups can involve all parties affected by the juvenile crime. (Erina & Yanis, 2020)

Educative penalty system is a system in which children who commit crimes are not only given a sanction in the form of mere punishments, but also given an action that can differ the position of children and adults when committing crimes. (Hutomo & Karjoko, 2018) These children should be treated as immature individuals who need moral, mental, and spiritual guidance so that they can become prospective adult individuals with better

character and morality in the future. Indonesia has the obligation to provide different treatment between adults and children who commit crimes. (Hanum, 2020)

The stages of the judicial process include basic procedural protections such as the presumption of innocence, the right to be informed of the charges against him, the right to remain silent, the right to a lawyer, the right to the presence of parents, the right to confront and cross-examine witnesses and the right to appeal to higher authorities, all of which will be guaranteed at all stages of the judicial process. (Nurhayati & Karjoko, 2019) The Convention on The Rights of The Child stated that arrest, detention and imprisonment will only be used as a last resort measure and for a very short or short period. It means that international law also considers that imprisonment should be used as the final step taken in dealing with juvenile crime. (Intaniasari, 2020)

In addition, it needs to be done in a very short period of time. Convention on The Rights of The Child also stated that any child accused, prosecuted or declared to have violated a criminal right has the right to be treated in a manner that is consistent with the advancement of the child's understanding of his or her dignity, strengthening the child's respect for the human rights and freedoms of others, taking into account the child's age and the desire to promote or develop the child's reintegration and the child's expectations of a constructive role in society (Arief, 2005, pp. 180-181).

The educative penalty system is used as a form of penalty system. in order to pay more attention to the children's rights and obligations, and provide them with something that can stimulate their growth and development so that they can have better roles amidst the society. Such action is carried out by placing them in institutions of care or guidance that do not only give education and work training, but also in religious institutions that seek to provide moral and behavioral improvement, in order to do mental improvement more easily. (Karjoko, Santosa, & Rachmi Handayani, 2019)

The children convicts' imprisonment cannot be declared null and void. Even though the sentence has been carried out, the children's position as criminal offenders will be handed back to their parents, care or guidance institutions, work training centers, or social institutions. (Handayani, 2012) The moral values should be improved by feeling the awareness of having a sense of obligation or fear of law. According to Ross, the law emerged as a mandatory

rule of society. A rule of law is deemed obligatory because of the correlation between juridical action and its sanctions. It means that someone will be free from penalties if he behaves according to the rules. Meanwhile, someone will sure be imposed to penalties if he behaves conversely (Tanya et al., 2010, p. 171). From the aforementioned explanations, it is expected that the child convicts have a sense of obligation to obey the rules of the law and a fear of repeating their crime. (Akhmaddhian et al., 2017)

The juridical approach to children prioritizes a persuasive educational approach and a psychiatric or psychological approach. This aims to avoid processes that are solely punitive in nature, mental-degrading and demoralizing, as well as to avoid stigmatization that can hinder the process of development, maturity and independence of children who commit crime. (Luthviati, Registration, & Maret, 2020) Reformation and changes to the prison system which puts forward human rights perspective should reach a point that gives hope to the inmates after they have completed their imprisonment period. The treatment of prisoners must also allow for proper placement in spaces, either individually or collectively. The existence of education on skills, skills and religion, as well as various things that reflect the great concern for the human rights of prisoners to return to society (Santoso, 2002, p. 37).

Penalizing is an effort to make prisoners or criminal children feel sorry for their actions and return them to a good, law-abiding society, upholding moral, social and religious values, so as to achieve a safe, orderly and peaceful community life. A correctional institution should have preventive, curative, rehabilitative and educational characteristics. (Karjoko, Winarno, Rosidah, & Handayani, 2020) Children convicts have the right to get spiritual and physical guidance and are guaranteed the rights to worship, maintain relationships with their families, and gain information through printed and electronic media, as well as to have decent education. (Ishak, Hasibuan, & Arbani, 2020) When viewed from the non-constitutional aspect, the theory of penal discretion is in accordance with the conditions amidst the Indonesian society that prioritizes balance, kinship, mutual cooperation. The discretion theory is expected to bring better changes for the juvenile offenders during their imprisonment and when they are returned back to the society. (Evingrum et al., 2019)

3. Conclusion

Imprisonment should not become the only sentence given to juvenile offenders because the society will put bad stigma on the children. Such thing can degrade the children's mental. Substantial justice is the ultimate goal in realizing the protection, well-being, and interests of the children. Children who have committed crime should be nurtured and re-educated in a special correctional facility. This separate placement should become the foundation of their coaching. A correctional institution should have preventive, curative, rehabilitative and educational characteristics. Children convicts have the right to get spiritual and physical guidance and are guaranteed the rights to worship, maintain relationships with their families, and receive education.

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