

# Minimum Criminal Liability for Immoral Perpetrators That Conducted by Children in the Indonesian Criminal Justice System

Ida Satriani

*Doctor of Law Program, Universitas Jayabaya, Jakarta-Indonesia*

**Abstract**— The purpose of this study is to analyze the minimum criminal liability for child offenders in immoral matters that fulfill a sense of justice in the Indonesian Child Criminal Justice System. The method used in this study is a normative legal research method/descriptive analysis approach. Descriptive analytical means are describing and depicting something that is the object of research critically through qualitative analysis. Because what is intended to be studied is within the scope of jurisprudence, the normative approach includes: legal principles, synchronization of laws and regulations, including efforts to find legal *inconcreto*. In this study, the researcher focused on several cases involving minimum criminal liability for child offenders in immoral cases that have fulfilled a sense of justice in the Criminal Justice System of Children in Indonesia. The results of this study are the presence of a law relating to juvenile justice, and child protection currently does not provide adequate protection both from the law of the event and from other related legislation such as the juvenile justice law, child protection law, and provisions such as diversion, in practice it is not in line with human rights.

**Keywords:** minimum criminal liability, criminal justice system, children

## I. INTRODUCTION

Legal protection for children is necessary because a child according to a psychological, under the age of 18, has a brain that has not yet developed and is not perfect and this relates to the child's way of making decisions and thinking where he cannot yet think whether the actions he did and the impact from his actions for others[1].

According to Atmasasmita, there are 2 (two) motivations that cause juvenile delinquency, namely the first intrinsic motivation (within the child) which includes intelligence, age, sex and the child's position in the family, and secondly extrinsic motivation (outside the child's self) which includes household factors, education and school factors, child association factors and mass media factors [2].

At each stage of the court system for light cases starting from the investigation, prosecution to trial proceedings must be diversified through a deliberative forum (diversion) with the aim of recovery for perpetrators, victims, and the community.

To protect the rights of children, Salam state that "Child Protection is efforts that support the implementation of the rights and obligations"[3], Soemitro also stated that legal

aspects of Child Protection are more focused on children's rights regulated by law and not the obligation to remember legally (law). Children are not burdened with those responsibilities [4].

Based on the opinion above, it is clear that child protection itself is an action that needs to be taken against children from various aspects of law both civil laws, even more so in criminal law. The aim is none other than to protect the interests of the child itself so that it can be protected, especially concerning the rights of the child which aims at the welfare of the child and the interests of the child. This is in accordance with the opinion raised by Arief that "Legal protection for/can be interpreted as an effort to protect the law of children of various freedoms and children's rights (Fundamental rights and freedom of children) as well as interests related to child welfare [5].

In Law Number 23 Year 2002 concerning Child Protection (LN Number 109 TLN Number 4235) in conjunction with Law Number 35 Year 2014 concerning Child Protection (LN Number 297 TLN Number 5606) in Article 1 number 2 child protection is defined as "Every activity to guarantee and protect children and children's rights so that they can live, grow and develop and participate optimally in accordance with human dignity, and receive protection from violence and discrimination. "

Every child has the right to protection from the targets of persecution, torture, or inhuman punishment. Every child has the right to obtain freedom in accordance with the law. Arrest, detention, or criminal offenses of juveniles are only carried out if they are in accordance with applicable law and can only be done as a last resort (Article 16 paragraph (1), (2), (3) of Law No. 23 of 2002).

The granting of special protection for children in conflict with the law is an obligation and responsibility of the state as stipulated in Article 64 of Law No. 23 of 2002, carried out in the forms:

- a. Humane treatment of children in accordance with the dignity of the child;
- b. The provision of special assistant for children from an early age;
- c. Provision of special facilities and infrastructure;

- d. Impose appropriate sanctions for the best interests of the child;
- e. Continuous monitoring and recording of the development of children in conflict with the law;
- f. Providing guarantees to maintain relationships with parents or family; and
- g. Protection from reporting of identity through mass media and from avoiding labeling.

## II. METHODS

The method used in this study is a normative legal research method/descriptive analysis approach. Descriptive analytical means describing and depicting something that is the object of research critically through qualitative analysis. Because what is intended to be studied is within the scope of jurisprudence, the normative approach includes: legal principles, synchronization of laws and regulations, including efforts to find legal *inconcreto* [6].

In this study, the researcher focused on a number of cases involving minimum criminal liability for child offenders in immoral cases that have fulfilled a sense of justice in the Indonesian Child Criminal Justice System.

In a normative juridical study, the use of the statute approach is mandatory. It is said for sure, because logically, normative legal research is based on research conducted on existing legal materials. Although for example the research was conducted because it saw a legal vacuum, but the legal vacuum can be known, because there are already legal norms that require further regulation in positive law[7].

## III. RESULTS AND DISCUSSION

There are six categories of children who need special protection (children in need of special protection - CNSP), namely (1) child labor; (2) war and all forms of organized violence that endanger children; (3) commercial sexual exploitation of children (eksploitasi seksual komersial anak or “ESKA”); (4) children with disabilities; (5) children who have lost care (parents/caregivers) temporarily or permanently; and (6) children in conflict with laws and unfavorable laws. Of the six categories related to the condition of children in Indonesia, the child and child laborers in the formal and informal sectors need attention. ESKA and trafficking children, street children, disabled children and children in conflict with the law, and the legal system that does not benefit children.

There are three well-known juvenile justice paradigms, namely the individual treatment paradigm, the retributive paradigm, and the restorative paradigm.

### *The purpose of SPPA with the Individual Coaching Paradigm*

What is important is the emphasis on the problems faced by the perpetrators, not on the actions/losses caused. This responsibility lies in the responsibility of the system in meeting the needs of actors. Imposing sanctions in the

juvenile justice system with an individual coaching paradigm, is irrelevant, incidental and generally inappropriate. Achieving the objectives of sanctions is highlighted in indicators relating to whether the perpetrators need to be identified, whether the perpetrators have been asked to be fostered in a special coaching program and the extent to which the program can be completed. The verdict was emphasized on the order of giving the program for therapy and service. The main focus is on identifying actors and developing a positivist approach to correcting problems. The condition of delinquency is determined in the context of fostering the perpetrators. Perpetrators are considered incompetent and unable to act rationally without therapeutic interference. In general, the perpetrators need to be fostered, because the perpetrators will benefit from therapeutic interference.

### *The purpose of SPPA with Retributive Paradigm*

Determined when the offender has been convicted. The aim of imposing sanctions is achieved in view of the fact whether the perpetrators have been convicted and with the right, certain, and fair punishment. Forms of punishment include confinement, electronic surveillance, punitive sanctions, fines and fees. To create community protection is carried out with supervision as the best strategy, such as detention, confinement, and electronic surveillance. The success of community protection by looking at the conditions whether the perpetrators have been detained, whether recidivists are reduced by prevention or detention.

### *The purpose of SPPA with Restorative Paradigm*

There is an assumption in the juvenile criminal justice system with a restorative paradigm, that in achieving the goal of imposing sanctions, the victim is included to have the right to be actively involved in the judicial process. Indicators of achieving the goal of imposing sanctions are achieved by looking at whether the victim has been restored, the satisfaction of the victim, the amount of compensation, the perpetrators' awareness of their actions, the number of corrective agreements made, the quality of work services and the overall process that occurred. The forms of sanctions are restitution, mediation of the perpetrators of victims, victim services, community restoration, direct services to victims or restorative fines.

In sanctions the active involvement of perpetrators, victims, the public and law enforcers. Actors work actively to restore victims' losses, and deal with victim/ victim's representatives. The victim is active in all stages of the process and will assist in determining sanctions for the offender. The community is involved as a mediator, helping victims and supporting the fulfillment of the perpetrators' obligations. Law enforcers facilitate mediation.

Rehabilitation goals can be seen in terms of whether the actors have started positive things recently, whether the actors are given the opportunity to practice and demonstrate compliance with norms, can stigmatization be prevented, has there been

an increase in attachment to the community? Rehabilitation of actors in the form of practical activities so that children gain work experience, and children are able to develop their own cultural projects. In this aspect of rehabilitation, we need to synergize the roles of the perpetrators, victims, the community and law enforcement. Active actors in developing the quality of self in people's lives. Victims provide input into the rehabilitation process. The community develops opportunities for children to make productive contributions, develops new roles for child actors to practice and demonstrate their competence, access and build partnerships with the community.

#### *The Purpose of SPPA According to The Beijing Rules*

The purposes of the juvenile justice system in The Beijing Rules, are listed in Rule 5.1. as follows: "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence".

Thus, an important goal in juvenile justice is to advance the welfare of children (avoidance of sanctions that are merely punitive) and emphasize the principle of proportionality (not only based on consideration of the severity of violations of the law but also on consideration of personal conditions, such as social status, circumstances family, losses incurred or other factors related to personal circumstances that will affect the equivalence of his reactions) [8].

#### *Purpose of SPPA According to the Convention on the Rights of the Child*

The aim is to emphasize the protection and welfare of children, as determined in article 37 and article 40.

Article 37: (1) A child will not be subjected to torture or crime and other cruel, inhuman and degrading acts; (2) capital punishment or life imprisonment without the possibility of obtaining release/release will not be imposed on children under the age of 18 (eighteen) years; (3) no child is deprived of his liberty illegally or arbitrarily; (4) arrest, detention and imprisonment will only be used as an action in a last resort and for a very short/short period of time; (5) every child deprived of liberty will be treated humanely and with respect for his dignity as a human being; (6) children deprived of liberty will be separated from adults and have the right to make contact/contact with their families; (7) Every child deprived of liberty has the right to obtain legal assistance, has the right to oppose/oppose the legal basis for depriving him of liberty before a court or other authorized and impartial official and has the right to get a quick/correct decision on his actions.

Article 40: (1) Every child who is accused, prosecuted or declared to have violated criminal law has the right to be treated in ways that are in accordance with the child's understanding of his dignity and status; in ways that strengthen children's respect/respect for the rights and freedoms of others; by ways of considering the age of the

child and the desire to advance/develop the reintegration of children and develop children's expectations of their constructive role in society; (2) the state must try to establish laws, procedures, authorized officials and institutions specifically intended/applied to children who are accused, prosecuted or declared to have violated criminal law, specifically: (a) establishing the minimum age limit for children deemed unable violating criminal law; (b) if necessary measures are taken against children without going through a judicial process, it must be determined that human rights and legal guarantees for children must be fully respected.

The problem of children in conflict with the law is very worrying. Law Number 3 of 1997 concerning Juvenile Court (LN No. 3 TLN No. 3668) is no longer sufficient in providing solutions to children who are dealing with the law. Based on this, the Indonesian Parliament and the Government of Indonesia discussed the Bill on the Criminal Justice System for Children from 2011 to 2012.

Every good law formation must include philosophical, juridical, and sociological foundations. In the Academic Paper on the Draft Criminal Justice System for Children, it is stated the basic thoughts in the formation of the Bill, among others:

#### *Philosophical Basis*

The philosophical basis is the Indonesian way of life in the nation and state, namely Pancasila. The translation of the values of the Pancasila in reflecting the justice, order and welfare desired by the people of Indonesia. It is stated that children are the mandate and gift of God Almighty who have dignity as whole human beings, so as to maintain their dignity and worth, children are entitled to special protection, especially legal protection in the juvenile justice system.

This philosophical basis affirms the values of Pancasila namely Godhead, and fair and civilized humanity, so that as a nation that is dignified and upholds the values of religiosity, then the problems of children facing the law must be given the best priority for children.

#### *Sociological Basis*

The realization of the implementation of a juvenile criminal justice institution can benefit or harm the mental, physical and social welfare of the child. Child crime, currently in terms of quantity and quality tends to increase compared to other crimes, almost all criminal acts committed by adults are also carried out by children. The various factors that cause it are less conducive socio-economic conditions, the influence of globalization in the fields of communication and information, entertainment, the development of science and lifestyle changes. Besides this, this problem is also caused by internal family factors such as lack of attention, affection and supervision from parents, guardians or foster parents of children so that they are easily influenced by negative relationships in the community.

Law Number 3 of 1997 concerning Juvenile Court (LN No. 3 TLN No. 3668) is intended to protect and nurture children who are in conflict with the law so that children can meet their long future and provide opportunities for children so that through guidance will be obtained teach himself to become an independent human, responsible, and useful for himself, family, community, nation and country. However, in practice the child is positioned as an object and the treatment of children in conflict with the law tends to harm the child. In addition, the law is no longer in accordance with the legal needs in the community and has not comprehensively provided special protection for children in conflict with the law. Thus, there needs to be a paradigm shift in the handling of children in conflict with the law, among others based on the roles and duties of the community, government, and other state institutions that are obliged and responsible to improve children's welfare and provide special protection for children who are in conflict with the law.

#### *Basic juridical*

In theory, the law must help humans develop in accordance with their nature: uphold the dignity of human dignity, be fair, guarantee equality and freedom, advance public interests and prosperity.

Article 28 paragraph (2) of the 1945 Constitution states that "every child has the right to survival, growth and development, and is entitled to protection and discrimination". This is spelled out in Law No. 39 of 1999 concerning Human Rights (LN No. 165 TLN No. 3886) and Law No. 23 of 2002 concerning Child Protection (LN No. 109 TLN No. 4235).

The principle of legal protection for children must be in accordance with the Convention on the Rights of the Child as ratified by the government of the Republic of Indonesia by Presidential Decree Number 36 of 1990.

Law Number 3 of 1997 concerning Juvenile Courts (LN No. 3 TLN No. 3668), many contain weaknesses and are not in accordance with the principles in the Convention on the Rights of the Child that have been ratified by Indonesia.

#### *Psychopolitical Basis of Society*

Psychopolitics of the community is a real condition in society regarding the level of acceptance or the level of rejection (resistance) to statutory regulation. Crimes committed by children both directly and indirectly are a result of actions and actions taken by adults in contact with children or as part of the process of interaction of children with their environment, where children have not been able to react adults. This paradigm must be instilled for the community and law enforcement apparatus in dealing with children who are suspected of committing a crime

#### IV. CONCLUSIONS

In the juvenile justice process investigators, prosecutors and judges should be able to use the best way for children first, namely by using a solution outside the court. Juvenile justice

aims to provide the best for children, without sacrificing the interests of the community and upholding the authority of the law. Children as young people are the successors of the ideals of the struggle of the nation and human resources for national development. In order to realize quality Indonesian human resources capable of leading and maintaining national unity within Republic of Indonesia based on the Pancasila and the 1945 Constitution, continuous guidance is needed for the survival, growth, and development of physical, mental, and social and protection from all possibilities that endanger children and the nation in the future.

In various ways, efforts to foster and protect, faced with problems and challenges in society, are found deviations of children's behavior, even more than that there are children who commit acts that violate the law without knowing social and economic status. Also, they are not having a chance of getting attention physically, mentally, or socially. As a result of this situation, both intentionally and unintentionally often children take actions or conduct that can harm themselves and/or society. Unlawful acts by children, caused by various factors, including the negative impact of rapid development, the flow of globalization in the field of communication and information, advances in science and technology and changes in the style and way of life of parents, have brought fundamental social change in community life which is very influential on children's values and behavior. Children who lack love, care, guidance, and coaching in the development of attitudes, behavior, adjustment, and supervision and parents/guardians or foster parents will be easily dragged into the flow of unhealthy societies and environments and are detrimental to their personal development.

The presence of the Law concerning juvenile justice, child protection currently does not provide adequate protection both from the law of the event and from other related laws such as the juvenile justice law, child protection law, or provisions such as diversion, in practice, not in line with human rights. As with children who are categorized as a recidivist, the child in the judicial process is not enforced like other children, as it is known that the philosophy of the Child Protection Act is to protect these children to not to be punished.

#### REFERENCES

- [1] Sahetapy, Elfirra L. (2011) *Restorative Justice Dalam Wujud Diversi: Khusus Anak yang Berkonflik Dengan Hukum*, Jakarta: FH UNAIR.
- [2] Atmasasmita, Romli (1993) *Problem Kenakalan Anak-anak Remaja*, Bandung: Armico.
- [3] Salam, Moch. Faisal (2005) *Hukum Acara Pidana Peradilan Anak*, Bandung: Mandar Maju.
- [4] Soemitro, Irma Setyowati (1988) *Aspek Hukum Perlindungan Anak*, Jakarta: Bumi Aksara.
- [5] Arif, Barda Nawawi (1998) *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*, Bandung: Citra Aditya Bakti.
- [6] Soekanto, Soerjono & Sri Mamudji, (1985) *Penelitian Hukum Normatif*, Jakarta: Rajawali.
- [7] Marzuki, Peter Mahmud (2006) *Penelitian Hukum*, Cetakan Kedua, Jakarta: Kencana Prenada Media Group.
- [8] Marzuki, Peter Mahmud (2006) *Penelitian Hukum*, Cetakan Kedua, Jakarta: Kencana Prenada Media Group.