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RESEARCH ARTICLE

The Philosophical of Imprisonment against Child in the Indonesian Criminal Law System

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Abstract

The philosophical of imprisonment was still applicable on children in the legislation of Indonesia, but the legal system in Indonesia has changed into the correctional system. The method of research used was normative-legal research, with a philosophical approach. The results of research and discussion showed that imprisonment was still applicable on children can be seen from: The first, principles as a basis of bringing to imprisonment as an option; The second, legislations since the draft of Criminal Law, Act No. 3 of 1997 concerning Protection of Children and the latter Act No. 11 of 2012 concerning the Child Criminal Justice System that adheres two systems punishment (double track system) that is criminal (straf) and action (maatregels). The existence of rehabilitative and restorative punishments, the imprisonment as an alternative of last resort; The third, due to the growth of crime characteristics by a child is equal by adults.

INTRODUCTION

The legal protection of child contained in the Convention on the Right of the Child in 1989 which has been ratified by Indonesia through Presidential Decree No. 36 of 1990. In fact, in Indonesia legal protection of child can also be found in Act No. 4 of 1979 concerning Child Welfare and Act No. 35 of 2014 concerning amendments of the Act No. 23 of 2002 concerning Child Protection, as well as Act No. 11 of 2012 concerning the Child Criminal Justice System. Legal protection is not only includes welfare but for children in conflict with the law that is child as offender, as victim and as witnesses. The Supreme Court also responded by signing a Supreme Court Regulation (PERMA) No. 4 of 2014 concerning Guidelines for Diversion in the Child Criminal Justice System.

A study that ever conducted by the National Narcotics Agency (BNN) found that 50 - 60 percent of drug users in Indonesia are student. Total of all drug users based on research of BNN and UI are as many 3.8 million to 4.2 million. Among the number was 48% of them are addicts, and the rest just try and users (Detik Health, 2012). According to the Director of Child Welfare of Social Minister, every year an average of 7.000 children into the prison and mostly involved in thievery (Antara News, 2012).

Theoretically, efforts to overcome the problem of juvenile delinquency as a social phenomenon. Stigmatizing or private label to the human figure as many “sense” identified “rogue” by family or the surrounding community. Though this phenomenon occurs due to differences in perception between people who have not been perfect so many to explore with the human perception that is considered perfectly so that bound to the rules and norms of its surrounding (Nurihsan and Agustin, 2011: 33).

On the other hand, child who are given protection be not optimal, because the other hand child are also required to bear criminal responsibility. So it still looks for protection positively, but there are negative as well, because it does not deter and make people conduct criminal acts. So, the author is important to conduct further research on the imprisonment of children, although in the implementation is no longer a term in prison because the

prison system has been replaced with the correctional system, but author see this is a dilemma for the protection of child. Because, if observed through criminology, there are still labeling for child prisoner.

As described above, the issue of research in this paper is; why the philosophy of imprisonment is still applicable to the child?

Method of Research

Type of research in this dissertation was normative-legal research and also called as literature research (Soekanto, 1986:51), there is also called as doctrinal-legal research (Marzuki, 2007:33). An approach used in this study was philosophical approach, as a comprehensive approach, fundamental, and explores in depth.

The location of research was Banjarmasin. Banjarmasin as South Kalimantan Province was chosen due to this region has a very religious culture although the community life is quite heterogeneous. Types and sources of legal materials used in this research include legal materials of primary, secondary and tertiary.

The procedures of collecting primary legal materials through literature study by inventory the legal materials for primary, secondary and tertiary. Then, the materials are qualified and systematized with card system to ease the processing and analysis.

Results and Discussion

The philosophical of imprisonment or retributive justice is still applicable to the child, there are three arguments. **First**, the principles that became a basis of criminal law. According to Harkrisnowo (2003), it cannot be separated from the principles of fundamental basis of bringing to justice that can be classified into two groups, that is:

1. Negative group, they have arguments:
    a. That about punishment, the state does not intervene in matters outside the jurisdiction that are outside of public order;
    b. Punishment does not directly lead to chaos.
2. Positive group, they have arguments:
    a. Punishment must prioritize the actions that maintain order in society. Therefore, the punishment should also be daunting;
    b. Punishment should prevent the occurrence of acts that disrupt.
    c. The state should maintain the existing social order.
    d. The state should restore peaceful in the community, when peace was disrupted or no longer exists.

Relating to the state's authority to bringing to justice or impose punishment, the important issue is also very essential are the justification basis to impose punishment than in the scope of criminal law as a result is sorrow or suffering.

The basic of justification has been sought by experts on criminal law since before; generally the adherents of natural law discipline have been looking for punishment on the basis of understandings commonly applicable law. They look this state as the embodiment of human will, has been looking for a basic justification of punishment from the individual will. That method has been used, i.e Hugo de Groot, to obtain reasons for why an offender should be deemed worthy to bear the consequences of their actions, has been seen from the nature desire, that anyone who has done something that is evil, then it is proper, if he also treated evil (Sambas, 2010:8).

The followers of natural law such as JJ Rousseau, looking for a basic justification of criminal on the theory of social contract, while Beccaria looking for a basic justification of free will of the citizens. The basic justification of this criminal is written by German's jurist, in criminal law known as the absolute theory. In their theories they looking for a basic justification of the criminal on the crime itself that are as a corollary that arises from every crime conducted by person.

In order to look the philosophical of imprisonment is still applicable, it must also look at the philosophy of what punishment was adopted in the legislation which provides criminal sanctions for children, and the philosophy of punishment is a fundamental part in the discussion of punishment, which is about the foundation of philosophy in punishment. On the basis of this philosophy, the fairness of punishment in criminal law given the size of which is reflected in the determination of criminal.

An alternative of punishment option is said to be proper and fair depends on the basis of philosophy in punishment. The base of philosophy is different from the base of basic justification in punishment, because the basic justification is a part of the philosophy of punishment followed. The philosophical view of punishment as stipulated in the Criminal based on the retributive philosophy, so the punishment intended for suffering offenders, regardless whether the suffering related to the suffering of victims or not.

The second argument were viewed from criminal sanctions system, based on Article 45, 46 and 47 of the Criminal Code apply two sanction (double track system) to the child, that is; criminal (straf) and act sanction (maatregels). Although both of sanction is different where the criminal (straf) is more contain the suffering, while the action (maatregels) is more oriented to the protection, education, and advocacy, forms of sanctions in the form of action; returned to the parent or guardian to receive coaching and education, and or transferred to the state as state child. Hence, the Criminal Code of Indonesia adheres to deterrent justice or the author called as a retributive justice for children who conduct a crime.

In general, the provisions of Criminal Code which is the parent legislation, explicitly formulate criminal sanctions for children. Even though, legalizing the use of criminal sanctions for children in the Criminal Code are not interpreted, that any delinquency given criminal sanctions (Astuti, 1997:5). Article 45 set the maximum limit of a child can be held accountable for criminal acts that he did, then Article 46 set the administrative rules related to the what should be done a judge after he gave orders, that the guilty be transferred to the government, and Article 47 set the reduction of punishment in the case a judge would convict the child (Susilo, 1988: 62).

Actually, Juvenile Court Act gives the opportunity to children who conduct criminal acts be sanctioned action, and the criminal is the last resort. But the judge's decision is more disconnected with the convict. This is because not many options in punishment system in Juvenile Court Act that is punishment and action systems. Has not been regulated for diversion by applying restorative justice, or other options as rehabilitation.

The emergence of Act No. 11 of 2012 concerning the Child Criminal Justice System (hereinafter referred to as UU SPPA), bringing a good opportunity for the protection of child, since this act undergoing revisions, both concerning the age under 12 (twelve) is not categorized as a conflict child with the law. Then, this act is also embraced restorative justice through diversion. The arrangement of criminal and action set out in Chapter V concern criminal and action contained in Article 69 through 83. In Article 69 paragraph (1) states that the child are only punished under the provisions of this Act.

The types of criminal that can be imposed on children who conduct criminal consists of: (1) the main criminal is divided into: warning criminal, conditional criminal, work criminal, coaching in the prison, and imprisonment. (2) Additional criminal includes the deprivation of benefits derived from the crime, and the fulfillment of customs obligations. Then other sanctions are not the main criminal that is action, as described in Table 1.

Table 1. Types of criminal and action in UU SPPA

No	Types of sanction	Provisions
I	**Criminal**	
1.	Warning	Article 79 and Article 82
2.	Conditional criminal	Article 71 paragraph (1) letter b and Article 73 to Article 77
	- Coaching outside the correctional;	Article 71 paragraph (1) letter b number 1. Article 74, Article 75 paragraph (1) & (2)
	- Public service	Article 71 paragraph (1) letter b number 2, Article 76 paragraph (1),(2), and (3)
	- Surveillance	Article 71 paragraph (1) letter b number 3, Article 77 paragraph (1), (2)
3.	Job training	Article 71 paragraph (3)
4.	Coaching in the correction	Article 80
5.	Imprisonment	Article 79 and Article 81
6.	Additional criminal	Article 71 paragraph (2)
7.	Fine	Article 71 paragraph (3)
II	**Actions**	Article 82
a.	Return to the parent/guardian	
b.	Return to the anyone	
c.	Treatment in the mental hospital	
d.	Treatment at LPKS	
e.	Obliged to follow a formal education and/or training held by government or private	
f.	Revoke a driver license; and/or	
g.	Recover as a result of criminal act	

And also with UU SPPA adhere to the sanction system of double tract system are criminal (straf) and action (maatregel). The provisions of imprisonment that stipulated in UU SPPA does not very different to the Act of Child Protection, namely imprisonment for child ½ (one-two) of adults, and for children who punished the death sanction, then the maximum applicable punishment is 10 (ten) years. The difference is the UU SPPA, child aged twelve (12) years shall be versioned, because the child is categorized as conflict child with the law aged after 12 (twelve) years old and no older than 18 (eighteen) years, while the Act of Child Protection who reach the age of 12 (twelve) years is given an action punishment. UU SPPA confirms that imprisonment is due to the criminal conducted by children have been endangering the public. Then imprisonment of child is the last resort.

As mentioned above, UU SPPA many options for the judge to convict, due to the type of main criminal there are approximately 7 (seven) types of crime, then to the conditional crime there are 3 (three) options, ranging from a misdemeanor such as a warning, the conditional crime is divided into: (1) coaching outside the prison; (2) community service; (3) surveillance. Other main criminal such as job training, coaching in the prison and the last resort is imprisonment. Additional punishment is the deprivation of benefits derived from the crime or the fulfillment of customs obligations. As if the substantive law is cumulative punishable such as imprisonment and fines, fines replaced with job training.

Thus, the system of sanctions in the Criminal Code, Act of Child Protection and UU SPPA is using two-sanction systems (double track system) such as the criminal (straf) and action (maatregels). It is known that the criminal sanctions there is imprisonment, the third of legislation are indeed always include imprisonment as an option for judges. Although the UU SPPA is somewhat different, because it confirms the choice of imprisonment as a last effort applicable on children in conflict with the law or conduct a crime.

Thought the need to develop the kind of criminal that expected to realize a balance between the interests of protection or security of public and individual interests, or in other words, needed as kind of criminal that can be compromised or utilize positive sides (vice versa avoiding negative sides) of imprisonment on one side and surveillance on other. Such a need, according to the judges can be met with the limited availability of imprisonment; the combine of imprisonment and control criminal.

The providing of conditional punishment is the combine of imprisonment and control, given a judge to convict this punishment combination, and it is expected the practical advantages, as follow:

1. Providing a more solid motivation for the law enforcement agencies (police, prosecutor, judge) to further streamline the criminal types that contain non-custodial properties. With the availability of possibility to convict surveillance criminal (which can be equated with conditional criminal) together with imprisonment, then in addition to providing a way out for the "reluctance" of law enforcement officers, is also a kind of bridge in transition era to truly be effective of criminal is non-custodial.
2. Providing stability and relief for the community in general and victims of crime in particular and even prisoner, that considers that conditional or surveillance criminal is the same as not convicted at all.

It is important to remember that conditional criminal, actually there are prison criminal elements, so the child remains imprisoned, although a somewhat mild punishment than imprisonment that had been set in the Criminal Code and other legislation.

The affirmation of UU SPPA stating that imprisonment is only a last resort, must understand that law enforcement officers when dealing with cases of children in conflict with the law or doing a crime, look the case of child is classified as a criminal act punishable mild or severe. Here the necessary accuracy of law enforcement officials such as police, prosecutors and judges in analyzing cases to convict them.

Based on the kind of main criminal described in UU SPPA, a warning main criminal is the mildest criminal, while the other kind is still a criminal offense adheres deterrent or retributive justice. This UU SPPA according to author applied the combined theory, so the philosophical of justice contained in it is deterrent, improvement in the form of criminal sanctions, and there is also recovery as the embodiment of restorative justice, with the diversion.

The third argument, still enactment of imprisonment to the children, because the characteristics of crimes that have been developed and similar to those conducted by adults. The results showed that the criminal offenses conducted by child aged after 12 (twelve) years and before reaches the age of 18 (eighteen) years in the District Court of Banjarmasin in 2014 and 2015 showed a significant development.

Restorative justice as a form of justice involving the offender and victim, law enforcement officials, community leaders, religious leaders, psychologists, correctional officer. This concept is considered various parties as the concept of win-win solutions, and provides benefits are not only to the offender but the victims and the country because the Correctional Agency will not be filled with the child offender.

The advantages of restorative justice is revealed by Quaker Chaplain Kate Johnson (2015) which says:

"Restorative justice was an effective way to make life safer for corrections officers, cheaper for the taxpayer, and would help rehabilitate offenders back into the community – all while taking ownership of their crimes and the impact it had had on the victims"

In practice, it is not all criminal acts can be sought diversion to realize the goal of child criminal justice system the judge would have to look case by case, the impact both for victims and offender, as well as on society. The need to consider the trauma of crime victims, for example certain criminal against the morality crime, as discussed by Angel C in ""Victims meet their offenders: Testing the impact of restorative justice conferences on victims' post-traumatic stress symptoms."

Recently, the development of characteristic or forms of crimes is a reason why the judge imposed imprisonment, and also the reason why the legislators still include this imprisonment in its sanctions. Now, the child conduct an equal crime as adults, such as murder, robbery (theft with violence), rape, sexual abuse, narcotics crime, terrorism, torture, even pedophilia were also conducted by children.

A child has been able to conduct a crime whose characteristics are categorized as severe as that conducted by an adult. Legislative policy formulation was finally makes the threat of imprisonment or criminal sanctions that restrict the child's independence as an option. This is evident from the provisions of Article 79 paragraph (1): "The restriction of independent is applicable in terms of the child conduct a severe crime or accompanied by violence."

With the characteristics of an increasingly vicious crime, including severe and then about pedophilia crimes against children, is proposed to be punished emasculated that in the medical world is called Kasatri, generally interpreted to disable the sexual hormones (reproductive function) in humans. Emasculated sanctions and life imprisonment aims to give deterrent effect to the offender of pedophile, so the philosophy of retributive is still influence a thinking and understanding and application of the criminal law in Indonesia. According to medical experts, children who are victims of pedophiles be potential as offender in the future, certainly emasculated sanction and life imprisonment becoming a double-edged sword. The criminal threats will also be subject to the child as pedophiles.

The idea of balance in punish is also developed in the Draft of Criminal Law (RKUHP) in the Chapter III of Paragraph 1 about the purpose of punishment in Article 54 that:

(1) Punishment aims:
   a. Preventing the crime by enforce the norm of law for the sake of community;
   b. Socializing prisoner by conducting coaching so as to be good and useful person;
   c. Resolve conflicts caused by a criminal act, restore balance, and bring a sense of peace in the community; and
   d. Liberating guilt on prisoner.

(2) Punishment is not intended to suffer and humiliate of human dignity.

Muladi (2008:12) explains "the idea of balance" in RKUHP which includes:

(1) The balance between morality with regard to the interests of state, public interest/community and the interests of individual;
(2) The balance between protection of public interest, the interests of criminal offender (criminal individualization idea), and the interests of victim (victim of crime);
(3) The balance between the elements/factors "objective" (action/physical) and "subjective" (person/mental/mental attitude); the idea of "Daad-daader Strafrecht";
(4) The balance between the criteria of "formal" and "material";
(5) The balance between "legal certainty", "flexibility, elasticity, or flexibility," and "justice", and
(6) The balance between local wisdom/particularistic or unwritten law, national values and global/international or universal values.

Based on the philosophical of punishment as stipulated in RKUHP, it appears that RKUHP has shifted quite sharply, compared to the philosophical of Criminal adopted. The philosophical of the Criminal Code as the influence of the classical thought that developed in French criminal law. The philosophical of punishment in the Criminal Code is based on the retaliation for the actions that have been conducted by offender. Thus, the principle of punishment is to give a sense of fear, revenge (Sambas, 2010).

Thus, the philosophical of deterrence is applied merely a formality in legislation policy. Imprisonment as favorite choice for the judges in criminal cases to convict child. As research data shows that of 47 cases in 2014 and 2015, diversion effort is only 1 case, the rest as many 46 (forty six) cases decided judges to imprisonment. It is also strongly influenced by the provisions of legislation which requires judges to choose imprisonment as the best option to see the characteristics of crimes conducted by children.

Conceptually, this is in line with Koesno Adi (2014: 122) in his book "Diversi Tindak Pidana Narkotika Anak", according to him, an alternative model of drug abuse settlement by children is through diversion. Thus, in

the case of narcotics can be done diversion, although this will also be a dilemma like double-edged sword, because the next child will be a "tool" in conduct crimes by criminals, for example, children used as couriers to deliver drugs, or as dealer.

The research in the District Court of Banjarmasin, a prosecutor also told the phenomenon of children used as couriers, drug dealers. Here is the carefulness of the law enforcement official, ranging from police while doing investigation and prosecutor in making the indictment, really careful to position the role of child offender as addicts or users, dealers/seller, or as a recidivist, if the child is not as addicts/users, then the claim is not to rehabilitation, so the judge ruled absolutely right. The enforcement of drug criminal cases is actually based on the name of Almighty God, not others.

On the other hand, in this kind of ordinary theft crime, when it was first conducted by the child, according to the researchers it would be nice to do diversion first, if it cannot be pursued between the offender and the victim, then in fact there is other alternative for instance the conditional criminal, job training, or coaching within the correction. So, also with the theft with violence, if the criminal act was first conducted by children, because the maximum threats of 7 (seven) years, cannot be diversion, so the judge's decision should also be absolutely in the interests of child by providing criminal aside imprisonment.

Then for the criminal of traffic accidents can also be performed diversion, even becoming a habit in Banjarmasin, people prefer "to peace" when a traffic accident, so before UU SPPA, people have applied the restorative justice. Ever there was a case to cause fatalities, the offender is a student, then as the family of offender visit to the victim, and apologized and asked "to peace", the good wishes of offender, was welcomed by the families of victims, by providing material for funeral mourning when it reached Rp 50.000.000, - (fifty million), the case did not proceed to court.

Here is a form of justice in the form of recovery and balance, the author admit that not all cases can be generalized, but with the customary approach, a touch of religion, or so-called local wisdom, the justice can be achieved between the parties. In line with Gustav Radbruh's view that justice is the ideals of law and as purpose of law, the law did not exist when not justice. According to Radbruch law is an element of culture, such as elements of other cultures law embodies values in the concrete life of human. That value is justice (Huijbers, 1995). From this statement, can conclude, that the law is only meant as a law if that law is the embodiment of justice, or at least an attempt in that direction. The meaning of this law as a benchmark for justice or not the legal order established in the society.

In order to achieve a Radbrcuh's justice about the natural law, that law to achieve justice, then the law should contain some basic demands, which always must be obeyed. The first demand is that every individual should be treated according to justice in front of the court. The second demand is that human rights should not be violated must be recognized. The third demand is that there should be a balance between offense and punishment.

In addition, the theory of Radbruch that there should be a balance between offense and punishment, then in relation to the child as offender of criminal acts, certainly the crime conducted by child, there must also be a balance between the offense with a sanction, then it will be achieved justice. The punishment of adult and child offenders cannot be equated. Criminal law applicable to the child made especially for the child, because the position between adults with children is different.

Therefore, it can be concluded that the philosophical of deterrence is still applied with the existence of criminal law in Indonesia, including arrangements for the Criminal Law of Child, especially in legislation. Criminal law in Indonesia has also been developments with the philosophical of rehabilitative and restorative. Law enforcement agencies (police, prosecutors and judges) are given the option to use the kind of criminal punishment other than imprisonment that is warning, conditional criminal, job training, imprisonment, additional criminal as well as other alternative such action.

CONCLUSION

The philosophical of imprisonment as an embodiment of retributive justice was adopted in the Criminal Law of Child, especially in legislation, but imprisonment for children is the last resort), UU SPPA adopt the philosophical of rehabilitative and restorative justice, thus giving an opportunity for the judge to convict punishment other than imprisonment such as a warning, conditional criminal, job training, punishment placed in the correctional, additional criminal as well as other alternative such action.

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