

A Critical Review of Setting the Threat of Imprisonment for Children

Diah Ratu Sari Harahap

Universitas Nasional, Indonesia

diahratusari@yahoo.com

Abstract

Discussions about the sentence for children always attract the public's attention because children are not spared from committing crimes. In Indonesia, a sentence for children has been regulated by Act Number 11 of 2012 concerning the Juvenile Criminal Justice System. This study aims to answer the following problems: 1.) Does the provision regarding the length of imprisonment for children who commit serious crimes in the Juvenile Criminal Justice System Act fulfil the principle of justice and can achieve the purpose of the sentence? 2.) What are the provisions regarding the length of imprisonment for children who commit serious crimes that meet the principles of justice and can achieve the expected sentencing goals in the future? This research is normative. The author realizes that children need to be protected from the trauma of imprisonment, but the suffering of the victims also needs to be considered.

Keywords

critical review; threat of imprisonment; setting; children



I. Introduction

Every violation of the law, including if the perpetrator is a child, will be legally processed because the Republic of Indonesia is a country based on law. In Article 1, point 3 of the Juvenile Criminal Justice System Act, it is stated: "Children in conflict with the law, from now on referred to as children, are children who are 12 years old but not yet 18 years old who are suspected of committing a crime". In Indonesia's positive criminal law, the problem of punishing children is regulated in Act Number 11 of 2012 concerning the Juvenile Criminal Justice System, referred to as the Juvenile Criminal Justice System Act.

According to Article 71 of the Juvenile Criminal Justice System Act, the main types of sentences for children are: 1) Criminal penalties. 2) Criminal with the following conditions: a. Development outside the institution, b. Community service, c. Supervision. 3) Job training. 4) Development within the institution. 5) Prison.

Imprisonment of children has attracted several criticisms. One of them is from Seto Mulyadi, who stated that it would be better if juvenile prisons were replaced by institutions for developing children's creativity with positive connotations. So far, the image of juvenile prisons has been negative. Consequently, when the children leave juvenile prison, they are labelled criminals. By changing the name to be more positive, the children are expected to be more creative (Seto Mulyadi, 2009). According to Hadi Supeno, the Chairman of the Indonesian Child Protection Commission (KPAI) for the period 2007-to 2011, there is no reason for anyone, let alone the State, to imprison children because prison does not provide any benefits for the children's maturation process. The process of going to prison is full of violence and cruel practices. Inside, the prison is also full of a culture of violence, discrimination, and internalization of criminal culture, and what kills the children is stigmatization and labelling as ex-convicts forever (Joni, 2012). Hadi Supeno asserted that this child is a victim of the unjust treatment of his/her parents, the education of his/her

teachers, the local government policies and the social environment that puts psychological pressure on him/her so that he/she does things that should not be done. Even because there were values internalized from an early age, he did not know that what he was doing was a violation of the law (Supeno, 2010).

This is in line with Article 28 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia: "Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination". In the Academic Paper of the Indonesian Criminal Code, it is regulated that criminal acts that carry a penalty of imprisonment between 1 and 7 years are classified as severe crimes (Naskah Akademik RUU KUHP, n.d.). Likewise, Barda Nawawi Arief said that a crime that carries a penalty of imprisonment between 4 and 7 years is classified as a severe crime (Arief, 1988).

There are several previous studies related to imprisonment for children, including:

- a. Research on the Application of Criminal Sanctions for Children Crime Perpetrators by Bilher Hutahean. The study results indicate that in criminal law, the notion of children essentially refers to the issue of the age limit for criminal liability (toerekeningvatsbaarheid). In the Juvenile Court Law, the age limit for criminal liability is set between 8 and 18. The existence of a range of age limits in the Juvenile Court Law is recognized as an improvement compared to the existing provisions in the Criminal Code, which do not regulate the minimum age limit. (Jurnal Yudisial, 2013).
- b. Research by Dwi Putri Melati on the Criminalization of Children as Perpetrators of the Crime of Murder. The result of the research is that the judge decides that the defendant fulfils the elements contained in Article 339 of the Criminal Code. In connection with the perpetrator being a child who is still a minor, Article 339 is accompanied by Article 26 paragraphs (1) and (2) of the Republic of Indonesia Act Number 3 of 1997 concerning Juvenile Court, which is subject to a ten-year prison sentence. The sentence of 10 years in prison is the maximum sentence under the laws and regulations, and the sentence is considered too severe for a child, which can be minimized from the maximum sentence for a child.

The judge's considerations in passing a verdict in which the perpetrator is a child are:

1. Legal facts obtained in court.
 2. Legal psychology of the case committed by the child.
 3. Restorative justice.
 4. The existence of a Correctional Center that accompanies the defendant and provides an opinion.
 5. The best advice on the matter.
 6. Age factor.
 7. Fulfilment of criminal elements.
 8. Looking at things that are aggravating. Meanwhile, there is no mitigating factor for the defendant.
 9. There was no justification or excuse for the defendant that could erase the defendant's guilt.
 10. Immediate consequences for the victim. (Jurnal Keadilan Progresif, 2015).
- c. Research from Dede Kania on Prison Penalties in Renewing Indonesian Criminal Law. The study results indicate that imprisonment, as one of the leading crimes, is the type of crime most threatened in the Indonesian Criminal Code and the Draft Law on the Indonesian Criminal Code. In implementing imprisonment, there are still many shortcomings that must be corrected so that the sentence imposed on the perpetrators of crimes does not harm the perpetrators and their families. In addition, the sentence imposed on the perpetrators of crimes must at the same time improve the condition of

the victim and the victim's family and restore the condition of the community following the development of the concept of sentence toward restorative justice. (Jurnal Yudisial, 2015).

- d. Research by Nashriana on Reformulation of Sanctions Arrangements for Children Perpetrators of Criminal Acts: as an Effort to Optimize the Application of Action Sanctions. The results show that when viewed from the perspective of regulatory/formulating policies, efforts that can be made so that decisions that are not imprisonment (action sanctions) are given to naughty children, of course, by reforming the criminal law, specifically by reconstructing the regulation of sanctions against children who commit delinquency. The basis for the value of substantive justice and the value of benefits for children must, of course, be considered so that legislators can make improvements to the system of threatening sanctions for actions that are more varied and not only intended for children aged between 8-12 years, but for all groups/qualifications classified as a child/adolescent (Nashriana, 2010).

Based on the background of the problem above, it encourages the author to conduct further research with the research title A Critical Review of Setting the Threat of Imprisonment for Children.

II. Review of Literature

2.1 Theory of Justice

According to Aristotle, in the theory of Vindicative Justice, retaliation is applied in criminal law with a balanced measure of proportionality between the acts committed and the retaliation or sanctions applied (Arifin, 1993). Aristotle's opinion aligns with Article 6 of Act Number 12 of 2011 concerning the Establishment of Legislation that every material contained in-laws and regulations must reflect proportional justice for every citizen. According to John Rawls:laws and institutions, no matter how efficient and well-regulated, must be reformed or abolished if they are unjust justice denies "the loss of liberty for some made righteous for the common good by others" (Rawls, 1999).

2.2 Legal Political Theory

Regulations needed by society in a country can be seen in its legal politics. Legal politics is a part of legal science that studies and examines changes that must be made to legal rules and legal provisions that are currently in effect to meet the needs of social life. In other words, legal politics is a part of legal science that discusses, understands, and examines the change from *ius constitutum* to *ius constituendum* to meet the needs of society which is constantly developing. Legal politics is needed for communities, nations, and countries undergoing change, development and development, either building the old into new ones or building new ones from nothing before (Soehino, 2010).

According to Sudarto, legal politics are: a.) Efforts to realize reasonable regulations by the circumstances and situations at a time (Sudarto, 1981). b.) Policy from the State through the competent bodies to establish the desired regulations expected to express what is contained in society and achieve what is aspired to (Sudarto, 1983).

2.3 Law Enforcement Theory

According to Soerjono Soekanto, the main problem in law enforcement lies in the factors that might influence it. These factors have a neutral meaning, so the positive or negative impact lies in the content of these factors. These factors are as follows:

- a. The legal factor itself
- b. Law enforcement factors, for example, the parties that form and apply the law
- c. Factors of facilities or facilities that support law enforcement
- d. Community factors, the environment in which the law applies or is applied
- e. Because of work, creativity, and taste, cultural factors are based on the human initiative in social life.

These five factors are closely related because they are the essence of law enforcement and a measure of the effectiveness of law enforcement (Soekanto, 2010).

2.4 Theory of the Purpose of Sentencing

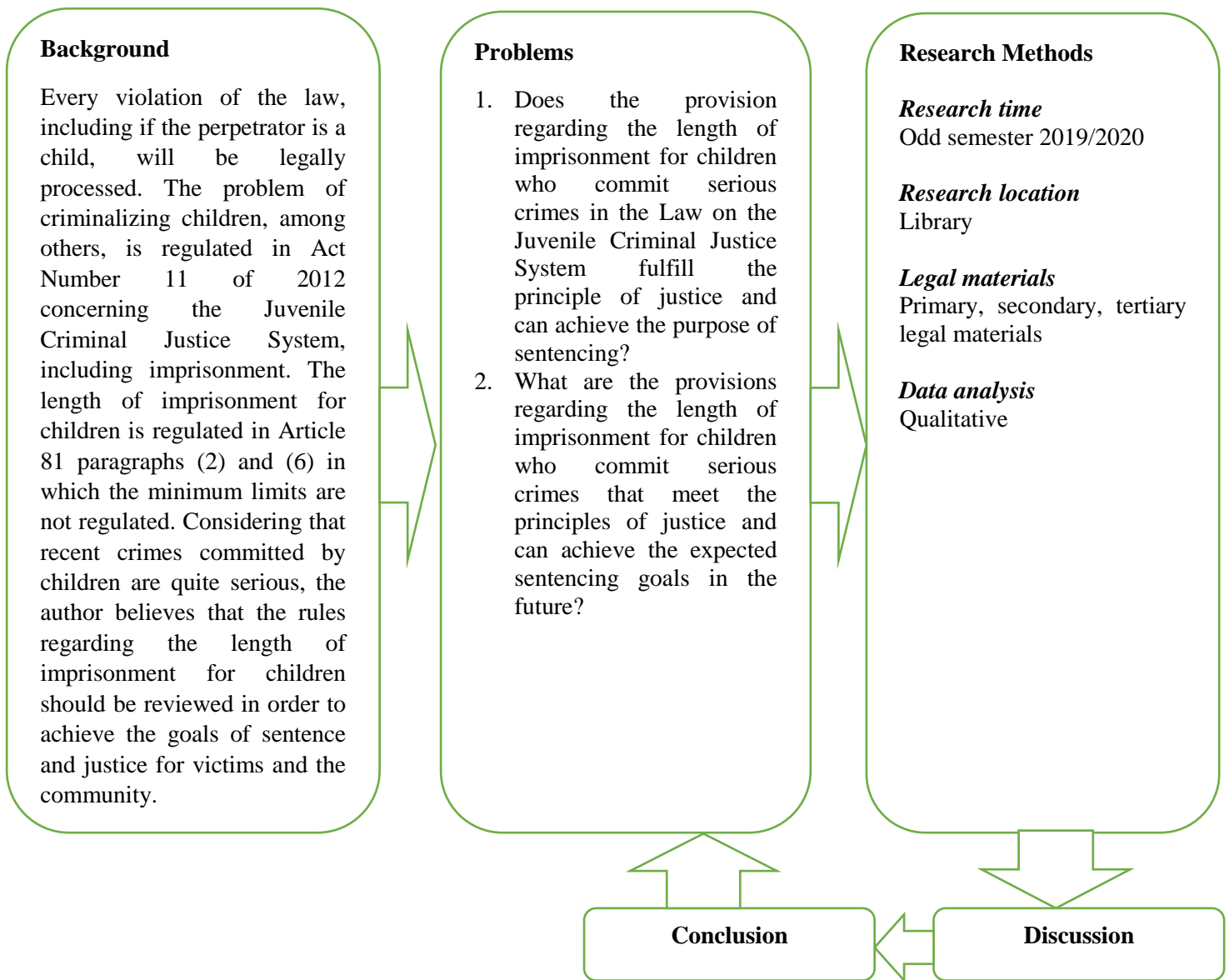
If the judge decides to impose a sentence on a child, the judge should consider the purpose of the sentence. In criminal law, there are several theories of criminal imposition, which are generally divided into three groups:

- a. Absolute Theory or Theory of Retaliation: the imposition of a crime is justified solely because a person has committed a crime or criminal act.
- b. Relative Theory or Theory of Purpose: the crime is not to retaliate against the perpetrators of the crime but has specific useful purposes. These goals are:
 - 1. Calming people who are restless as a result of crimes that have occurred
 - 2. Preventing crimes which can be divided into:
 - a) General prevention: prevent everyone who will commit a crime.
 - b) Special prevention: People who have committed crimes do not repeat crimes.
 - c) Combined Theory: is a combination of Absolute Theory and Relative Theory (Setiady, 2010)

III. Research Method

The research was conducted in the odd semester of 2019/2020, which was carried out in the library to obtain legal materials. The legal materials used are:

- a. The primary legal material used is the Criminal Code, Act Number 11 of 2012 concerning the Juvenile Criminal Justice System
- b. The secondary legal materials used are books, journals
- c. The tertiary legal material used is a dictionary.



The data obtained were analyzed qualitatively by conveying the research results in the form of sentences that are the answers to the problems. In finding the answer to the problems, several relevant theories are used as an analytical knife to generate the expected conclusions.

IV. Results and Discussion

Now we start from talking about provisions concerning the duration of the penalty of imprisonment for children committing serious crimes in the juvenile criminal justice system act. There is much crime nowadays. The perpetrators can come from various groups, affluent, poor, adults and children. If the perpetrator is a child, the solution must be specific and careful because children are a vulnerable group. Likewise, the formal criminal law used must be adapted to the child's condition. If a child who has committed a crime is sentenced to prison, it is feared that it will cause trauma for the child in the future. This condition will affect the development of his soul. However, it should be remembered that

the quantity and quality of child crime have increased, as stated above. So, the author believes that the threat of imprisonment for children still needs to be maintained. So that the purpose of the sentence is achieved, both preventive and repressive goals, in the end, it should give a sense of justice to the victim and the community.

According to Aristotle, the perpetrators of crimes need to be recompensed in a balanced or proportionate way to the actions committed by imposing sanctions on them. What is meant by proportionality is that the severity of the sentence that will be threatened for the perpetrator must be commensurate with the quality of the crime. The examples of crimes committed by children above that resulted in the victim's death show that the perpetrator was very heinous.

The author believes that the provisions in Article 81, paragraph (2) and paragraph (6) of the Juvenile Criminal Justice System Act do not guarantee a sense of justice for both the victim and the community. As part of public law, if the criminal law is violated, it will interfere with the comfort and safety of people. Based on Article 81 paragraph (2), the judge can impose a light sentence on the perpetrator considering the length of the sentence that can be imposed is only half of the maximum sentence for adults. Likewise, based on Article 81 paragraph (6), because the provision is a maximum of 10 years, the judge may impose a much lighter sentence than ten years because the minimum limit is not regulated. Imposing heavy penalties on children who have committed serious crimes, according to the author, can be justified for the common good, as stated by Aristotle in his theory.

The provisions regarding the length of imprisonment in Article 81, paragraphs (2) and (6), in which only the maximum limit is determined, allow the judge to impose a very light sentence for the perpetrator. This harms preventive and repressive purposes in tackling crime. For preventive purposes, if it is related to the age limit of children who can be sentenced to be fourteen years and over (Article 69 paragraph (2)) in which children at that age are still mentally unstable, easily influenced by many factors including friends and the environment, a threat of sentence is required. With a minimum limit, especially in imprisonment in the legislation. Thus, the children are not easily influenced by crime. Here the role of parents needs to be increased in assisting the development and association of children. It means that children aged fourteen to eighteen years are mentally immature. Thus they need to be supervised by their parents in determining what they will do to prevent them from committing a crime.

For repressive purposes, the threat of severe imprisonment with a minimum limit is needed so that judges do not punish children too lightly so that children are deterred and do not repeat their crimes. To achieve the goal of sentencing, it can be assisted with preemptive action by conducting legal socialization so that the public knows the regulations regarding certain crimes, including the threat of imprisonment.

Next part is about Provisions on the Length of Threats to Imprisonment for Children Committing Serious Crimes according to the Principle of Justice in Achieving the Expected Sentencing Goals in the future. In Article 1 point 3 of Act Number 11 of 2012 concerning the Juvenile Criminal Justice System, what is meant by Children in Conflict with the Law are children who are twelve years old but not yet eighteen years old who are suspected of committing a crime. If it is proven to meet the elements of the article of the crime charged, the child who commits a crime may be subject to criminal sanctions, including imprisonment. Provisions regarding the length of imprisonment for children who commit serious crimes expected in the future must pay attention to aspects of legal politics, aspects of justice and the purpose of the sentence, and law enforcement.

To tackle crimes committed by children, especially those classified as serious crimes, it is necessary to make regulations that are by the child's condition. On the one hand, children are the next generation of the nation that must be given attention. On the other hand, if a child commits a crime, he cannot escape from law enforcement. Making criminal regulations for children, especially those related to the prevention of crimes they have committed, in addition to paying attention to the child's condition, need also pay attention to the interests of the law that has been violated. This is following the nature of the criminal law, which is Monodualism. In this case, it is hoped that the government will follow developments in society, especially those related to crimes committed by children so that the government can make regulations or make changes to existing regulations per the development of the situation. For this reason, legal politics drawn up by the government must follow the needs and what the community wants.

This is in line with what was stated by Sudarto that through legal politics, the government, together with lawmakers, can make regulations that meet the community's wishes. In this case, it is a regulation for children who commit serious crimes with the threat of heavy imprisonment for the crimes they have committed. The provisions regarding the threat of imprisonment for children in the law above show that legal factors are already available to tackle crimes committed by children, specifically in the Correctional Law and the Juvenile Criminal Justice System Act. However, according to the author, the above provisions need to be improved, especially regarding the length of imprisonment.

According to Article 81 paragraph (2) of the Juvenile Criminal Justice System Act: imprisonment that can be imposed on children is a maximum of half of the maximum prison sentence for adults. According to Article 81 paragraph (6) of this act, if the crime committed by a child is a crime punishable by death or life imprisonment, the sentence imposed is a maximum imprisonment of 10 years. The author believes that given the increasing quantity and quality of crimes committed by children, the provisions regarding the length of imprisonment in Article 81 paragraph (2) need to be increased to more than half. Furthermore, according to the author, the provisions regarding the length of imprisonment in Article 81 paragraph (6) also need to be improved by including the minimum limit. This is in line with the Law Enforcement theory that several factors influence the success of law enforcement, one of which is the legal factor.

In making regulations, especially regarding the length of imprisonment for children, the factor of justice needs to be considered. According to the Elucidation of Article 6 of Act Number 12 of 2011 concerning the Establishment of Legislations, "every material content of laws and regulations must reflect proportional justice for every citizen".

According to the theory of the purpose of sentence, punishing the perpetrators of crimes is to avenge the perpetrators, pacify the community due to the crimes that have occurred, and prevent the occurrence of crimes. Criminal law has two purposes: to frighten everyone not to do evil deeds (classical school) and to educate people who have done evil deeds to be good and can be accepted back in their environmental life (modern school) (Prasetyo, 2011).

Educating people who have done evil deeds to be good and can be accepted back in their environmental life can be done by punishing the person. If the perpetrator is a child, the sentence that can be imposed is regulated in Article 71 of the Child Criminal Justice System Act, including imprisonment. Thus, the aspect of the sentence purpose needs to be considered in regulating future provisions regarding the length of imprisonment for children who commit serious crimes.

V. Conclusion

1. Provisions regarding the length of imprisonment for children who commit serious crimes in the Juvenile Criminal Justice System Act, according to the author, have not fulfilled the principle of justice and cannot be expected to achieve the purpose of the sentence.
2. Provisions regarding the length of imprisonment for children who commit serious crimes, which are expected in the future, should fulfil the principle of justice for both perpetrators and victims and can achieve the purpose of sentencing.

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