

## LEGAL PROTECTION OF CHILDREN AS PEOPLE OF NARCOTIC ABUSE

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### ABSTRACT

Based on Article 67 of Law Number 35 of 2014 concerning Child Protection, it is explained that special protection is for Children who are victims of abuse of narcotics, alcohol, psychotropic substances, and other addictive substances as referred to in Article 59 paragraph (2) letter e and Children involved in the production and its distribution are carried out through surveillance, prevention, treatment, and rehabilitation efforts. concerning child protection in Article 1 number (2) it states "Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, and develop. develop, and participate optimally in accordance with human dignity , and receive protection from violence and discrimination".

**Keywords:** Legal Protection of Children Perpetrators of Narcotics Abuse.

### Introduction

Developments in science and technology are used by perpetrators of crimes to carry out their actions, such as drug trafficking which has an impact on the number of drug addicts in Indonesia at this time.

Criminal punishment is inseparable from the criminal system adopted by the Indonesian justice system. An important part of the penal system is the determination of sentences. Existence will provide guidelines and considerations as to what should be used as a punishment in a crime to enforce the application of standards. On the other hand, sentencing itself is the

most complex process of the criminal justice system, as it involves many different people and organizations.

Criminal provisions in criminal law are not only a technical matter of law, but are an integral part of the nature or content of the law itself.<sup>1</sup> Issues of penalization, depenalization, criminalization, decriminalization must be understood comprehensively in all respects.<sup>2</sup> If it is based on a rational approach, the policy of defining punishment in criminal law is inseparable from defining the goals to be achieved by criminal policy in general, namely the protection of the people to achieve prosperity.

Setting this goal, according to Karl O. Christiansen, is considered a basic prerequisite:<sup>3</sup> *"The fundamental prerequisite of defining a means, method or measure as rational is that the aim or purpose to be achieved is well defined"*.

The basic prerequisites for determining rational means, methods or means are goals or objectives. The target to be achieved must be clearly defined. The justice system is quite in a dilemma, especially in determining whether punishment is intended as revenge for the crime committed or is the true purpose of the criminal process, namely to prevent anti-social behavior. It was found that these two views met if it was not successfully carried out requiring a new formulation in the system or purpose of punishment in criminal law. Punishment has several purposes which can be classified based on theories about sentencing. Traditionally, sentencing theories can generally be divided into two groups of theories, namely:<sup>4</sup>

- a. Absolute theory or theory of retaliation (retributive/vergelding theory) According to this theory, punishment is imposed solely because a person has committed a crime or crime (quia peccatum est). Criminal is an absolute consequence that must exist as a retaliation for those

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<sup>1</sup>Sholehuddin, Sanctions System in Criminal Law, Raja Grafindo Persada, First edition, Jakarta, September 2003, p. 5.

<sup>2</sup>, STATE OF LAW: Vol. 2, No. 2, h. 332, November 2011.

<sup>3</sup>Karl O. Christiansen, Some Considerations on the Possibility of a Rational Criminal Policy, as quoted in "System of Sanctions in Criminal Law" by Sholehuddin, *ibid.*, h. 118.

<sup>4</sup>*Ibid.*

who commit crimes. So the basic justification of a crime lies in the existence or occurrence of the crime itself.

- b. Relative theory or objective theory (utilitarian/doeltheorieen) According to this theory, punishment is not to satisfy the absolute demands of justice. Retaliation itself has no value, but only as a means to protect the interests of society. Criminal is not just to retaliate or reward people who have committed a crime, but has certain useful purposes.

Given the importance of criminal objectives as a guideline in giving or imposing a sentence, then in the Concept of the Draft Law on the 2010 Criminal Code, the objectives of punishment<sup>5</sup> formulated as follows;<sup>6</sup>

a. Punishment aims:

- 1) preventing the commission of criminal acts by enforcing legal norms for the protection of society;
  - 2) socialize the convict by conducting training so that he becomes a good and useful person;
  - 3) resolve conflicts caused by criminal acts, restore balance, and bring about a sense of peace in society; and 4) freeing the convict from guilt.
- b. Punishment is not intended to suffer and humiliate human dignity.

Talking about the basic concept of the double track system, it is meaningful to talk about the basic idea of a system of sanctions that forms the basis of policy and the use of sanctions in criminal law. In this case, the two-track system regarding sanctions in criminal law. Existing literature has never provided explicit confirmation of the idea of a double track system, but judging from the background of its emergence, it can be concluded that the basic idea of the double track system is equality between criminal sanctions and action sanctions. This idea of equality can be traced through developments in the criminal law sanction system from classical to modern and neo-classical.<sup>7</sup>

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<sup>5</sup>Muladi and Barda Nawawi A., Theories and Criminal Policy, Bandung: Alumni Publishers, 1992, p. 10-16.

<sup>6</sup>Article 54 of the 2010 Draft National Criminal Code, Ministry of Law and Human Rights, 2010.

<sup>7</sup>M. Sholehuddin, op. cit., h. 24



Particularly with regard to the determination of this type of sanction, initially only a single track system was adopted. In principle, the classical school only regulates a single track system, namely a single sanction system in the form of a type of criminal sanction (punishment). In this regard, Sudarto stated that the classical school of crime is retributive and repressive towards criminal acts.<sup>8</sup> This school emerged in the XVIII century, which had an indeterminism understanding of the freedom of human will, which emphasized the actions of the perpetrators of crimes so that criminal law was desired (*daad-strafrecht*). Therefore, this classical school of criminal and criminal justice system places great emphasis on actions, not on the perpetrators. The punishment system is determined with certainty (the definite sentence), meaning that the determination of sanctions in the law does not use a system of mitigating or aggravating factors related to age, mental state of the perpetrator, previous crimes committed or special circumstances of the act/crime. which is conducted.<sup>9</sup>

The influence of the development of people's legal awareness gave rise to the neo-classical school which emphasized its conception of freedom of human will (doctrine of free will). Around 1810 began to consider the need for individual guidance for perpetrators of criminal acts. The neo-classical school gives power to judges to determine imprisonment between the minimum and maximum limits specified in the law. Thus the definite sentence system was abandoned and switched to the indefinite sentence system.

#### Developmental Criminal Sanctions for Children Perpetrators of Narcotics Abuse

Criminalization of drug users cannot be separated from the criminal justice system adopted by the legal system in Indonesia. The purpose of the criminal system is essentially the operationalization of law enforcement carried out by the justice system based on legal instruments that regulate the criminalization of drug abuse and illicit traffic, namely Law Number 35 of 2009 concerning Narcotics as a substitute for Law no. 22 of 1997 concerning Narcotics.

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<sup>8</sup>Sudarto, A Dilemma in Reforming the Indonesian Criminal System as quoted in the Sanctions System in Criminal Law by M. Sholehuddin, *ibid.*, h. 25

<sup>9</sup>Muladi and Barda Nawawi Arief, Criminal Theories and Policies as cited in the Sanctions System in Criminal Law by M. Sholehuddin, *ibid.*



Muladi argues that the criminal justice system is a judicial network that uses material criminal law, formal criminal law, as well as criminal law enforcement. However, this institution must be seen in a social context.<sup>10</sup> The nature of being too formal if it is based only for the sake of legal certainty will bring disaster in the form of injustice for children. Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System. has provided several instructions as contained in Article 2 and Article 5. Article 2 and its elucidation stipulate that the juvenile justice system is implemented based on the following principles<sup>11</sup>:

1. Protection, which includes activities that are direct and indirect from actions that harm the child physically and/or psychologically.
2. Justice, namely that every settlement of child cases reflects a sense of justice for children.
3. Non-discrimination, namely the absence of differential treatment based on ethnicity, religion, race, class, gender, ethnicity, culture and language, legal status of children, order of birth of children and physical and/or mental conditions.
4. The best interests of the child, that is, all decision making must always consider the continuity of the child's growth and development.
5. Respect for children's opinions, namely respect for children's rights to have an interest and express their opinions in decision making.
6. The survival and development of children, namely the most basic human rights for children that are protected by the state, government, community, family and parents.
7. There is coaching, namely activities to improve quality, piety to God Almighty, intellectual, attitude and behavior, training, skills, professionalism and physical and spiritual health of children, both inside and outside the criminal justice process. There is guidance, namely the

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<sup>10</sup>M. Taufik Makarao, et.al., Law on Child Protection and Elimination of Domestic Violence, Rineka Cia, Jakarta, 2014, p.. 62.

<sup>11</sup>M. Taufik Makarao, et.al., Law on Child Protection and Elimination of Domestic Violence, Rineka Cia, Jakarta, 2014, p.. 94



provision of guidance to improve the quality of piety to God Almighty, intellectual, attitudes and behavior, skills training, professional, and physical and spiritual health of correctional clients.

As for Article 5 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System stipulates:<sup>12</sup>

- (1) The Juvenile Criminal Justice System must prioritize a restorative justice approach.
- (2) The Juvenile Criminal Justice System as referred to in paragraph (1) includes criminal investigations and prosecutions of children carried out in accordance with the provisions of laws and regulations, unless otherwise stipulated in this law, trials of children conducted by courts within the general court environment, and coaching, guidance, supervision and/or assistance during the process of executing a crime or action and after serving a sentence or action in the Juvenile Criminal Justice System as referred to in paragraph (2) letters a and b must seek diversion.

Based on the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, it has regulated children who are involved in the law, every child in the criminal justice process has the right to be treated humanely and aims to create a judiciary that truly guarantees the protection of the best interests of the child in conflict. law. The following are important matters regulated in the Juvenile Justice System Law, including:

The Law on the Juvenile Criminal Justice System defines a child as a child who is 12 (twelve) years old but not yet 18 (eighteen) years old, and distinguishes children who are involved in a crime into 3 categories<sup>13</sup>; Children who become perpetrators of crimes (Article 1 point 3 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System), Children who become victims of crimes (child victims) (Article 1 number 4 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Justice System Child Crime), Children who are witnesses to criminal acts (child witnesses) (Article 1 number 5 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System). Imposition

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<sup>12</sup>Ibid., p. 98.

<sup>13</sup>Taufik Makarao, *Narcotics Crime*. Indonesian Ghalia. Jakarta: 2005, p. 17.

of Sanctions According to the Law of the Republic of Indonesia No.11 of 2012 concerning the Juvenile Criminal Justice System, a perpetrator of a child crime can be subject to two types of sanctions, namely action sanctions and criminal sanctions, for perpetrators of crimes under the age of 14 according to Article 69 Paragraph ( 2) Juvenile Criminal Justice System Act.

According to Article 82 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, sanctions for actions that can be imposed on children<sup>14</sup>: Return to parents/guardians, Handover to someone, Treatment in a mental hospital, Treatment in LPSK, Obligation to attend formal education and/or training held by the government or private bodies, Revocation of a driver's license and or repair due to a crime. According to Article 71 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, the criminal sanctions that can be imposed on children are the main punishment and additional punishment. In further detail, the sentence is in the nature of Principal Crime and Additional Crime is determined as follows:<sup>15</sup>

- a. The principal crimes for children consist of: Warning sentence, Conditional punishment (coaching outside the institution, community service, supervision), job training, coaching in the institution, prison.
- b. Additional punishments consist of: Deprivation of profits derived from criminal acts, fulfillment of customary obligations.

Article 21 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System also stipulates that in the event that a child under 12 (twelve) years of age commits or is suspected of having committed a crime, investigators, Community Advisors, and Professional Social Workers make a decision to hand him back. to parents/guardians or, enroll them in educational, coaching and mentoring programs at government agencies or LPSK at agencies that handle the social welfare sector, both at the central and regional levels, for a maximum of 6 (six) months.

In Article 3 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System it is explained that every child in a juvenile criminal justice

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<sup>14</sup>Taufik Makarao, Narcotics Crime. Indonesian Ghalia. Jakarta: 2005, p. 17.

<sup>15</sup>Ibid.,



process has the right to be treated humanely by taking into account the needs according to his age, separated from adults, obtaining legal assistance and other assistance effectively, carry out recreational activities, free from torture, punishment or other cruel, inhuman and degrading treatment, not subject to death or life imprisonment, not to be arrested, detained, or imprisoned, except as a last resort and within the time specified in short, obtaining justice before a child court that is objective, impartial, and in a closed session to the public, whose identity is not published, get the assistance of parents/guardians and people trusted by the child, get social advocacy, get a private life, get accessibility, especially for children with disabilities, get education, get health services and get other rights in accordance with the provisions of laws and regulations.<sup>16</sup>

Article 4 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System states that a child who is undergoing a criminal period has the right to remission for reduced criminal past, assimilation, parole, leave before release, conditional leave, other rights in accordance with statutory regulations. 7 (seven) years or more. If the period of detention as mentioned above has ended, the child must be released from detention by law.

Judges in deciding cases of children who commit narcotics crimes are also based on the provisions in the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System. The application of criminal sanctions to children often creates problems that are dilemmatic both juridically, sociologically and philosophically. This is of course very different from criminal purposes. Juridically, children who abuse narcotics are qualified as criminals but conceptually.

Narcotics abuse is qualified as a crime without a victim, which means that the victim of the crime is the perpetrator himself, so in the case of abuse of narcotics the victim (crime) is

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<sup>16</sup>Sri Sutatiek, *Reconstruction of the Sanction System in Child Criminal Law in Indonesia*, Aswaja Pressindo, Yogyakarta, 2013, p. 20.



the perpetrator.<sup>17</sup> Conceptually a child who abuses narcotics, in addition to his qualifications as a perpetrator, he is also a victim.<sup>18</sup> Children as narcotics abusers where the child is sanctioned by the judge in the form of returning the defendant to the defendant's parents on the basis of Article 127 Paragraph (1) of the Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics, Article 24 Paragraph (1) letter a of the Law Republic of Indonesia Number 3 of 1997 concerning Juvenile Courts and Articles of Laws and other relevant regulations.<sup>19</sup>

In principle, narcotics abusers themselves are guaranteed rehabilitation. Rehabilitation is one of the best efforts given to children who commit drug abuse. There are two forms of rehabilitation, namely medical rehabilitation and social rehabilitation<sup>20</sup>. Medical rehabilitation is an integrated process of treatment activities to restore the physical condition of children, child victims and/or child witnesses. Social rehabilitation is an integrated process of recovery activities, physically, mentally and socially, so that children, children of victims and/or children of witnesses can return to carrying out their social functions in life in society. Based on the two models of rehabilitation above, children who commit crimes of narcotics abuse need to take part in therapy and rehabilitation programs in various forms<sup>21</sup>.

Inpatient is inpatient treatment in a special hospital (Drug Addiction Hospital), Mental Hospital or in one part (unit) of a General Hospital. This therapy is often called primary therapy

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<sup>17</sup>Indira Hapsari, "Criminal Law Policies in Efforts to Combat the Narcotics Crime of Child Actors", Journal of Diponegoro Law, Vol.5, No.3, 2016, p.. 5

<sup>18</sup>Marlina, Application of the Concept of Diversion to Children Offenders of Crime in the Juvenile Criminal Justice System, Journal of Equality, Vol. 13 No.1, 2008, p.. 98

<sup>19</sup>Ibid., p..7.

<sup>20</sup>Supeno, Hadi, 2010, Criminalization of Children: An Offer of Radical Ideas for Juvenile Justice Without Punishment, Jakarta: . Gramedia Pustaka Utama, p..60

<sup>21</sup>Marton, Lydia Harlina and Joewana, Satya, 2008, The Role of Parents in Preventing and Overcoming Drug Abuse, Jakarta: Balai Pustaka, p..89.

(primary treatment). Therapy can last up to 4-6 weeks or maybe more, depending on the type of service available, maybe even a rehabilitation program of up to 2 years.

Outpatient care is carried out in hospitals (special and general) outpatient departments, clinics, and health centers, usually lasting 10 weeks for 2-3 hours, 2-4 times a week. Outpatient programs have fewer program components than inpatients. Because patients are more easily accessible to drugs, random urine tests are an integral part.

Several types of rehabilitation facilities are social rehabilitation, spiritual rehabilitation and psychosocial rehabilitation. Some are managed by the government or private. Some of them apply the Therapeutic Community (TC) concept. Half Way House, namely the Assistance house as a place of transition between the hospital and returning home. This facility has not been developed in Indonesia.

Here 10-20 clients live together with supervision and responsibility for maintaining the house: shopping, cooking, cleaning and washing clothes. They go to school or work part time, but there is still a recovery program in place. This type of treatment is suitable for addicts who have not made much progress in primary therapy, those who do not have access to hospitals/rehabilitation therapy centers, and those who cannot be sent home due to unresolved family problems or a bad environment. Community Based Therapy and Rehabilitation is an outpatient program (although it can have an inpatient setting) as a model, developed to reach and help addicts in the community. The principle of this program is "self help group", namely groups helping each other using trained local community members.

Not all cases of Narcotics abuse can get rehabilitation. The effectiveness of imprisonment as a tool to achieve the goal of punishment is still being debated. This means that there is no guarantee that if the perpetrator of a crime is ultimately sentenced to imprisonment, he will automatically return to being a good and law-abiding member of society. Imprisonment sentences have a very detrimental negative impact on convicts, especially child convicts<sup>22</sup>. The existence of negative impacts with the application of criminal sanctions shows that the purpose of punishment by imposing criminal sanctions in the form of imprisonment in

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<sup>22</sup>Kusno Adi, "Diversion as an Alternative Effort to Combat Narcotics Crime by Children", Malang: UMM Press, 2009, p.. 89.

the case of children who abuse narcotics is inappropriate. The judge in his decision should apply appropriate criminal sanctions so that children are protected from the negative effects of the application of prison sanctions which can affect the fulfillment of the objectives of sentencing against children, namely by paying attention to the rights and best interests of children with the aim of guaranteeing the protection of children in serving their punishment. Another reason is that the imposition of imprisonment will have a negative impact and harm, especially for child convicts.

The impact of imposing a crime on deprivation of liberty on children includes that the child will be separated from his family so that it will have an impact on disruption of family relations such as being too short in providing education, direction, positive guidance from parents to convicted children, children become more expert about crime, this is due to the influence obtained from other convicts where this opens up the possibility for convicts to learn the criminal behavior of other convicts so that children will become more expert about crime, these children are labeled by society, We can relate this to the labeling theory put forward by Matza which views criminals not as evil people but as individuals who previously had bad status as a gift from the criminal justice system and society at large.<sup>23</sup>

Provisions regarding the age at which children can be subject to social work punishment also take into account the provisions of several countries. Singapore's Children And Young Persons Act regulates children aged 16 (sixteen) years, while in Rule 13 Children (Community Service Orders) Act 1987 No. 56 Australia stated that the age that can be sentenced to social work is under 16 (sixteen) years old can be sentenced to social work for 100 hours and over 16 (sixteen) years for 100 hours to 250 hours. Children (Community Service Orders) Act 1987 No. 56 New South Wales Australia, what is meant by a child is someone under the age of 18 years.

The concept that must be considered after analyzing various laws and regulations regarding children, both international provisions and Indonesian laws and regulations, is the concept in the provision of social work punishment for children who commit repeated crimes, including the following concepts in the future so that the age of the child who can be sentenced

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<sup>23</sup>Santoso, Topo, and Achjani, Eva, 2003, *Criminology*, Jakarta: Radja Grafindo Persada, p.. 90

to social work imprisonment is 14 (fourteen) years to 18 (eighteen) years. The specified age takes into account Law Number 13 of 2003 concerning Manpower. Children aged 13 (thirteen) to 15 (fifteen) years may do light work as long as it does not interfere with the child's physical development and physical, mental and social health.

### **Conclusion**

In accordance with the concept of restorative justice, punishment for perpetrators still exists, but the punishment is placed as part of the educational process, not as revenge and punishment. Punishment within the framework of the educational process is not a punishment that weakens the spirit of life let alone kills the child's future, but instead must serve to enlighten morally and mature as a whole person.<sup>24</sup>. Considering the specificity of children, both in terms of spiritual and physical, as well as in terms of criminal responsibility for their behavior and actions, it must be endeavored that the punishment of children, especially crimes of deprivation of liberty, is the last resort (*ultimum remedium*) if other efforts are not successful. Policies on the penal system children in the future will be sourced from the Draft Criminal Code.

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<sup>24</sup>Supeno, Hadi, 2010, *Criminalization of Children: An Offer of Radical Ideas for Juvenile Justice Without Punishment*, Jakarta: . Gramedia Pustaka Utama, p.40.



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