

The Ultimum Remedium Principle In The Context Of Criminal Punishment Against Children As An Actor Of Narcotics Crime

Syachdin, H.M. Said Karim, Aswanto, Muhadar

Abstract: Drug abuse has grown over the days with significant development. Narcotics crime actually not only brings individual actors but tends to be a criminal offense syndicate or covert organization over the worlds. In this case, the syndicate allegedly not only brings perpetrators of adults but feared the actors who are categorized as a child in accordance with the applicable laws. On the other side, children occupy a special place in the law. Basic philosophy of the treatment of juvenile delinquents is for the best interests of the child, but the fact that people's behavior lately is very alarming, how society is so easy to judge people suspected as perpetrators of criminal acts. The objective of this research is to understand the essence of the ultimum remedium principle as the basis for criminal punishment in the Indonesian criminal system in order to understand how the crisis is influencing drug phenomenon and drugs users' lives and the extent of their impact on the settlement of narcotics crime against children as an offender. The outcomes of the research indicate that the Law No. 11 of 2012 regarding the Criminal Justice System for Juvenile Delinquency, Rules of the Supreme Court of the Republic of Indonesia No. 4 of 2014 on Guidelines for Diversion, and Law No. 35 of 2009 regarding Narcotics Crime have been given the freedom and legitimacy to the judge to apply the principle of ultimum remedium in handling cases of children in conflict with the law. As it turns out in practice, however, the ultimum remedium principle is rarely applied and tends to be overlooked in the process of juvenile justice.

Index Terms: Children, Juvenile Delinquency, Narcotics Crime, Ultimum Remedium

1 INTRODUCTION

Those who arrive at virtually any airport in Indonesia are greeted with a large, cheerful sign informing them that drug traffickers who are apprehended will be put to death penalty. This narcotic crime not only bring individual actors but tends to be a criminal offense syndicate or covert organization over the world. In this case, the syndicate allegedly not only bring perpetrators of adults but feared the actors who are categorized as a children in accordance with the applicable laws. The history of the world community's attention to the child can be traced from a deep concern and effort thanks to Eglantyne Jebb, who has drafted the Declaration of Rights of the Child by 10 (ten) points. In 1925, the first International Child Welfare congress was held in Geneva. The Declaration was widely discussed and supported by organisations and governments. An expanded version would be adopted by the United Nations in 1959, and it was one of the main inspirations behind the 1989 UN Convention on the Rights of the Child. In the context of Indonesia, attention and protection to the rights of the child can be traced from what has been mandated by the opening of the 1945 Constitution which states:

"...and then to form a Government of the State of Indonesia that protects all Indonesian people and the entire land of Indonesia and to develop the welfare of the people, the life of the nation, and participate in the world orderliness based on freedom, eternal peace and social justice, National Freedom of Indonesia is prepared in a Constitution of the State of Indonesia."

- *Syachdin, is a Lecturer at Faculty of Law, Tadulako University, Center Sulawesi, Indonesia. PH-085354759111. E-mail: syachdin@yahoo.com*
- *H.M. Said Karim, Aswanto, and Muhadar are Lecturer at Department of Crimina Law, Faculty of Law, Hasanuddin University, Makassar, South Sulawesi, 90245, Indonesia.*

Based on these formulations are known attention to children is also part of the '*philosophische grondslag*' of the Republic of Indonesia. In addition to the Law No. 3 Year 1997 concerning the Juvenile Court which is updated by the Law No. 11 Year 2012 concerning the Criminal Justice System for Juvenile Delinquency, which is intended as a legal device which is more steady and sufficient in carrying out construction and providing legal protection of children as well as law enforcement regarding the rights of the child and the implementation of the best interests of the child principle. Existing provisions in the law concerning the juvenile court has been partly refers to the signs of this kind. Children as immature individuals need to get legal protection/juridical (legal protection) in order to secure his interests as a member of the community. One of the issues of child protection in Indonesia is the high number of children which in conflict with the law. In US Courts, as an effort to establish a Special Courts for children, Juvenile delinquency becomes the main topic to be discussed. As cited by Wagiati Soetodjo, there are two things that the major topic of discussion, namely from the aspect of legal violations and the nature of the child's actions, whether it deviates from the norm and breaking the law or not. Juvenile delinquency is an act or acts of violation of norms, both legal norms and social norms committed by children younger ages. Children occupy a special place in the law. Legal systems presume that children do not have the mental capacity to care for themselves or make their own choices. Instead, many of the choices a child has are often made by the child's parent. Special Courts for children (juvenile courts) was held in order to solve the problem of criminal acts committed by those who belong to the children, all who are living in a judicial hearing is mandatory for children in the courts in the judicial environment. The law on the juvenile court will provide a legal basis for the protection of national laws through a judicial order. Conceptually, children in conflict with the law is defined as a person under the age of 18 who are dealing with the criminal justice system is concerned because the suspected or accused of committing a crime.

According to the National Commission for Child Protection of Indonesia (NCCP), related to children which in conflict with the law throughout the mid of 2010 there were 1,471 children. Furthermore, data from the Indonesian Commission on Child Protection (KPAI), shunt each year about 150 complaints regarding children which in conflict with the law. Narcotics crime can be a massive problem, particularly in major urban centers in Indonesia. Through several sources, the Indonesian National Police (INP) and the National Narcotics Agency (BNN) stationed at the air and seaports of major cities (Jakarta, Surabaya, Bali, and Medan) continue to arrest drug couriers. Further investigation of many of these smuggling attempts has revealed that Indonesia has become a primary destination for drug smuggling operations controlled by Iranian and West African drug trafficking organizations. The demand for illegal drugs remains high. As a result, INP and BNN continue to coordinate with other foreign and domestic law enforcement agencies to stem the steady flow of illegal drugs. Based on data from the Directorate General of Corrections of the Ministry of Justice and Human Rights, the number of child prisoners increased from 5,630 children in March 2008 to 6308 children in early 2010. These conditions are not only extremely poor, but also very worrying because it illustrates that the actual handling of children in conflict with the law have not actually reflect the perspective of child protection. Various improvement efforts have been made, but the situation has not much changed. Children in conflict with the law are always resolved by imprisonment. A child related his personality has the logical reasoning which not good enough to distinguish between good and bad things. Therefore, a criminal offense by children in generally is a process of imitating or affected persuasion from adults. Then criminal justice system, which in turn puts the child in prisoners status would bring considerable consequences in terms of child development. As cited by Zulchaina's report on Gregorius, that the imprisonment even make the child more professional in doing a crime. Basic philosophy of the treatment of juvenile delinquents is for the best interests of the child, but the fact that people's behavior lately is very alarming, how society is so easy to judge people suspected as perpetrators of criminal acts. No matter whether the suspected perpetrator is an adult or a kid. Another phenomenon is happening at the moment is so easy to use penal institutions as a first choice in handling cases. It is true, that this option is in line and in accordance with the law, but it is certainly contrary to the idea of punishment as a "ultimum remedium" or the last resort when all efforts are taken already deemed no longer able to resolve it. The consequences of what is described in the many cases, including cases in court brat from year to year shows an increase in so impressed every act brat can certainly always processed through legal actions. This certainly is contrary to the philosophy of handling bad boy who put the interests of children above all else (the best interest of the child). In line with the view of Satjipto Rahardjo which states that, it's not a mistake if people expect too much to the law, whilst in some cases it may be true because this country is indeed as a constitutional state. But unfortunately, our laws have not been meet these expectations.

2 The Objective of Research

Based on the premise as stated above, objective of this research is to understand the essence of the ultimum remedium principle as the basis for criminal punishment in the

Indonesian criminal system in order to understand how the crisis is influencing drug phenomenon and drugs users` lives and the extent of their impact on the settlement of narcotics crime against children as an offender.

3 METHOD OF RESEARCH

The type of research used in this paper is normative research also known as doctrinal research, reviewing the ultimum remedium principle from the perspective of the criminal law system, with the aim of constructing a sentencing concept which is ideal to be applied in criminal law enforcement against children as an actor of narcotics crime. The data being used include secondary data consisting of primary law materials in the form of laws and regulations, tertiary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as tertiary law materials in the form of language dictionaries, scientific law dictionary, and Black's Law Dictionary. The analysis method applied in this paper starts with the abstraction of primary law materials, secondary law materials and tertiary law materials, leading to an understanding of the essence of the ultimum remedium principle as well as criminal law theories, analyzing the weaknesses of the settlement of narcotics crime against children in the criminal law enforcement system, followed by systematization and synchronization, and finally, drawing conclusions based on the deductive syllogism reasoning method.

3 RESULTS AND DISCUSSION

3.1. The Formulation of Criminal Punishment for Children Performers Narcotics Crime

Have to recognise that Indonesian government looks somewhat late in forming the legal tools to combat narcotics crime. This is evident from the ratification of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 newly adopted by issuing the Law No. 7 of 1997. The establishment of the rule or law in Indonesia is considered late because it is done after a lot of increased incidence of narcotics crime. As it turns out in practice, criminal sanctions actually being reactive to an act, while action sanctions (*maatregel*) more preventive approach against the perpetrators. Furthermore, when the focus of criminal sanctions concerning on actions of one through the imposition of suffering, then focus sanctions directed in order to do the best thing in offender interest. So the fundamental difference between the two approaches is the criminal sanction focuses on the element or elements of punishment, while the action (*maatregel*) is more didactic or education purpose or more focused on efforts to bring relief to the offender. Drug abuse is the use of which is done not for the purpose of treatment, but because they want to enjoy influence, in excessive amounts, less regular, and lasts long enough, causing disruption of physical health, mental and social life. After using the drug without medical supervision and without a valid license, then it can lead to dependence. Drug dependence is a condition characterized by an urge to use narcotics continuously with increasing doses to produce the same effect and if its use is reduced or stopped suddenly, causing physical and psychological symptoms. Addiction is a term used to describe the state of someone who is abusing drugs such that the body and soul need the drug to function normally. Law No. 35 of 2009 regarding Narcotics formulates

more humanity because in this law, abuser or drug addicts can possible get rehabilitation. But, here in the sense of rehabilitation as a sanction, imposed because someone did drug abuse. For example, the number of ecstasy pills seized dropped by nearly 71% from 2008 (1.1 million pills) to 2009 (319,000 pills) but has since risen steadily, back to about 1.1 million pills seized in 2011. At the same time, both the number of cases and persons arrested in relation to ecstasy have shown a considerable decline since 2008. Indonesian law enforcement authorities estimated that they intercept between 2% to 3% (2.6%) of all ecstasy trafficked in the country in recent years. However, the fact that ecstasy seizures in the first nine months of 2012 totaled more than 4.2 million pills indicated that traffickers are continuing to target the large and highly profitable Indonesian market (**Table 1**).

Table 1. Ecstasy seizures by region and nationally in Indonesia, 2008-2011

Region	2008	2009	2010	2011
Sumatera	145,228	57,872	116,656	180,068
Java	898,495	224,926	296,812	908,924
Kalimantan	44,074	27,705	11,618	3,446
Sulawesi	1,092	4,994	1,211	692
Bali/Nusatenggara	2,213	3,358	8,363	3,042
Mahuku/Papua	102	80	0	25
Total	1,091,204	318,935	434,660	1,096,197

Source: Secondary data (edited).

Regardless of the data above, Constitutional Court of the Republic Indonesia has been broadly used by experts, both presented by the Government and some experts invited by the Court, and also has been intensively brought forward by the Government and BNN, that capital 160 punishment has deterrent effect towards perpetrators, and is badly needed to prevent the ever increasing narcotics crimes, which have caused many victims, and have endanger the future of the nation. It has also been said that even when the capital punishment is still implemented, the level of narcotics crime is still so high, and Indonesia will become heaven for narcotics distributor if capital punishment is abolished. It is not denied that the level of narcotics crime and its effect on young generation are very apprehensive, in fact, has reached the limit of patience of many families, which have caused anger and high emotion, so that it might be possible that we are trapped in a desire for a concept of deterrence with a cruel element. It is also undeniable, that capital punishment, like any other types of punishment, certainly has certain deterrence towards potential perpetrator individually as well as towards the society as a whole.

3.2 Analysing the Ultimum Remedium Principle in the Context of Criminal Punishment against Children as an Actor of Narcotics Crime

Criminal offense committed by a child is a serious problem faced by every State. In Indonesia, many raised the issue in the form of seminars and discussions held by government agencies and other related institutions. The tendency of increasing abuses a child or young offenders that lead to crime, encourage efforts to make prevention and treatment. It is closely related to the special treatment of the perpetrators of the crime of child. Children have special characteristics which cannot be equated with adult offenders. The term 'children in conflict with the law' refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence. Most children in conflict with the law have committed petty crimes or such minor offences as vagrancy, truancy, begging or alcohol use. Some of these are known as 'status offences' and are not considered criminal when committed by adults. In the process of juvenile justice, the judge in imposing sanctions on children should use the paradigm that the sanctions imposed on children should really have or have educational value in order for the best interests of the child as a philosophical basis. In addition, sanctions against children must apply the ultimum remedium principle that where the purpose of the principle that sanctions in the form of criminal sanctions is the final attempt nor a last resort for the best interests of the child. The outcomes of the research indicate that the ultimum remedium principle is rarely applied and tends to be overlooked in the process of juvenile justice. In addition, as the data found the authors of the research conducted in the District Court of Palu, Central Sulawesi and generally in the Police Resort of Palu, Central Sulawesi Regional Police, as well as the National Agency for Narcotics (BNN). The abandonment of ultimum remedium principle in the process of juvenile justice, can be proved by empirical data that since 2011 to the Year 2012 that the District Court of Palu has received and prosecute eight cases of narcotic crimes which committed by children. Then all of the cases were found guilty and sentenced to a criminal punishment. As an example the case with the initials ME, where the judges of Palu District Court gives imprisonment for one year, actually increased to 2 years 6 months in the High Court of Central Sulawesi, and at the Cassation level, the judge Supreme Court gave the verdict *inkracht van gewijsde* by imprisonment of 2 years 6 months. In accordance with the aims of the Indonesian sentencing system, both criminal sanctions and action sanctions also have a different point of views. Criminal sanctions aim to give preferential suffering (*bijzonder leed*) to the offender so that he felt as a result of his actions (deterrent effect). Besides addressed to the imposition of the suffering of the offender, criminal sanctions also constitute a statement of disapproval of the actions of the perpetrator. On the other side, action sanctions (*maatregel*) is more didactic or education purpose as described previously. Based on the criminal sentencing theories, the action sanctions aimed at specific prevention, namely to protect the public from threats that could harm the interests of society in a whole. Based on the premise as states above and the aims of the Indonesian sentencing system, then according to the authors, the most ideal and appropriate sanctions to be given to children in conflict with the law who committed a criminal act is action sanctions (*maatregel*). The action sanctions as stipulated in Article 71(1) of the Law No. 11 of 2012 regarding the Criminal Justice System for Juvenile Delinquency, which asserted the main punishment for the children consist of:

1. Warning punishment;

2. Punishment with the following requirements:
 - a) Coaching outside prison;
 - b) Community service order; or
 - c) Supervision.
3. Job training;
4. Coaching inside prison; and
5. Imprisonment.

Unfortunately, reality is often in contradiction with the rules. It is clear that the imprisonment based on the Law No. 11 of 2012 have been mandates as the last resort, in line with the *ultimum remedium* principles. Whatever the reasons, imprisonment and detention will always contrary to the principle of the right to the child. Because of prison life, can turn off the development of the child, full of violence and become media internalization of higher crime, psychological traumatics, as well as the labeling of children throughout his life. In addition, according to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as "the Beijing Rules") point 19.1 stated that, "*The placement of a juvenile in an Institution shall always be a disposition of last resort and for the minimum necessary period*". Historically, the *ultimum remedium* principles in the Indonesian sentencing system is closely linked to international law development, as described in several international instruments concerning children in conflict with the law as follows:

a) *Convention of the Right of the Child 1989*

Legal protection towards children in conflict with the law on this convention can be seen in Article 37(b) which asserted that, "*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*"

Convention of the Right of the Children in particular in Article 37 provides protection for children in conflict with the law i.e: *First*, this convention requires uniformity age children receive special protection that is below 18 years. *Second*, protection of children in conflict is done by him away from the criminal justice system of children by making it as a last resort and when the child issues must be resolved through the imposition of life imprisonment sentence then should receive legal aid and facilities adequate.

b) *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*

Children in conflict with the law in Riyadh Guidelines also received attention, in addition to the main purpose of the establishment of the Riyadh Guidelines, namely the prevention of delinquency. This provision as confirmed in Article 46 as follows, "*The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interest of the young person should be of paramount importance*".

Article 46 above is a basic policy that must be taken by each country to put children in conflict with the law into prisons as a last resort and its implementation should be in a short period as possible. The policy is part of a social policy that has been set in the Riyadh Guidelines.

c) *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)*

Pre-trial detention as a last resort is also regulated in Rules 16.1 of the Tokyo Rules as follows: "*Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim*".

Pre-trial detention as a last resort by the Tokyo Rules above meaning to reduce the independence restrictions that will be imposed on perpetrators of criminal acts, it is to provide the opportunity for criminals to be directly responsible to the people who are disadvantaged as a result of the offense.

d) *United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules)*

Havana Rules states imprisonment as a last resort in solving the problems brat. Setting last resort in Havana Rules confined to imprisonment of a child or adolescent. It is expressed in the view of the fundamental perspectives of Havana Rules which asserted that, "*Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release*". In contrast to existing arrangements in the Convention of the Right of the Child which makes the entire criminal justice system of children starting from the arrest, detention and imprisonment as a last resort for juvenile delinquents. Restrictions on freedom provisions against juveniles above further refer to the mechanisms and procedures contained in the Beijing Rules as basic rules governing children in conflict with the law. Last but not least, in accordance with all of international legal instruments as described above, all of them have the same purposes regarding the settlement of children in conflict with the law and in line with the *ultimum remedium* principles as the last resort. If the prison become the elixir to cure the child as an offender of narcotics crime, the authors worry will grow crowded prisons due to the judge's decision that the child is less instructive and provide less benefit to the child interest..

4 CONCLUSION

The Law No. 11 of 2012 regarding the Criminal Justice System for Juvenile Delinquency, Rules of the Supreme Court of the Republic of Indonesia No. 4 of 2014 on Guidelines for Diversion in the Criminal Justice System for Juvenile Delinquency, and Law No. 35 of 2009 regarding Narcotics Crime have been given the freedom and legitimacy to the judge to apply the principle of *ultimum remedium* in handling cases of children in conflict with the law. But the outcomes of the research indicated that the *ultimum remedium* principle is rarely applied and tends to be overlooked in the process of juvenile justice. In accordance with the aims of the Indonesian sentencing system as well as international legal instruments namely: Convention of the Right of the Child; United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines); United Nations Standard Minimum Rules

for Non-custodial Measures (The Tokyo Rules); and United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Havana Rules) have the same purposes concerning the settlement of children in conflict with the law and in line with the ultimum remedium principles as the last resort..

REFERENCES

- [1] Constitutional Court of the Republic Indonesia Decision Number 2-3/PUU-V/2007 in the case of petition for judicial review of Law Number 22 Year 1997 regarding Narcotics against the 1945 Constitution of the State of the Republic of Indonesia.
- [2] Gregorius H. Kristyanto, Slamet Sampurno, Said Karim, and Syamsuddin Muchtar. "Legal Protection of Children in Conflict with the Law through Restorative Justice Principle (A Review of the Prosecutor's Role)", *International Journal of Advanced Research* (2015), Volume 3, Issue 7, 1352-1359
- [3] Jumlah Anak di LP Meningkat. *Kompas*, April 6, 2010.
- [4] Mark Theoharis. (2011). *Child Abuse: Laws & Criminal Penalties*. Berkeley: Nolo Publisher.
- [5] National Commission for Child Protection of Indonesia, *Menuju Sistem Peradilan Anak di Indonesia*, Report of Rapat Dengar Pendapat (RDP) with Komisi VIII DPR RI, September 22, 2010.
- [6] Satjipto Rahardjo. (2006). *Sisi-Sisi Lain dari Hukum di Indonesia*, Penerbit Buku Kompas, Jakarta.
- [7] Soerjono Soekanto and Sri Mamudji. (2011). *Penelitian Hukum Normatif*. Jakarta: Rajawali Pers.
- [8] U.S. Government inter-agency website managed by the Bureau of Diplomatic Security. (2015). *Indonesia 2015 Crime and Safety Report: Jakarta*. Available online at: <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17089> (Accessed Feb 10, 2015).
- [9] UNICEF, (2006). *Child Protection Information Sheet*, p.19. Available online at: http://www.unicef.org/publications/files/Child_Protection_Information_Sheets.pdf [Accessed Juni 6 2012]
- [10] United Nations Office on Drugs and Crime. (2013). *Indonesia: Situation Assessment on Amphetamine-Type Stimulants*. UNODC Global SMART Programme.
- [11] Wagiyati Soetodjo. (2006). *Hukum Pidana Anak*. Bandung: PT Refika Aditama.