

**RINGKASAN**

**PEMIDANAAN ANAK DALAM PERSPEKTIF PERLINDUNGAN HUKUM ANAK**

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Penelitian dengan judul Pidana Anak Dalam Perspektif Perlindungan Hukum Anak, diharapkan akan memberikan kontribusi konseptual yang memiliki validitas teoritis dan praktis dari aspek hukum pidana khususnya terkait pidana anak, sehingga akan memberikan kejelasan terkait dengan pidana anak dalam perspektif perlindungan hukum anak. Sedangkan tujuan khusus dari penelitian ini, antara lain (a) mengkaji, menganalisis dan menemukan *dasar filosofi* pidana anak dalam perspektif perlindungan hukum anak; (b) mengkaji dan menganalisis serta menemukan *karakteristik pidana anak yang berlandaskan Keadilan Restoratif* ; dan (c) menemukan Implementasi pidana anak. Selain itu, penelitian ini juga diharapkan dapat memberikan manfaat terhadap pengembangan ilmu hukum. Oleh karena itu, Manfaat teoritik yang ingin dicapai dalam penelitian ini adalah pembangunan ilmu hukum, khususnya hukum pidana disamping diharapkan dapat bermanfaat untuk pengembangan konsep-konsep serta teori-teori hukum yang berkaitan dengan pidana anak dalam perspektif perlindungan hukum anak. Sedangkan, Manfaat praktis hasil penelitian diharapkan dapat menjadi sumbangan pemikiran tentang pengaturan pidana anak dalam perspektif perlindungan hukum anak bagi negara atau pemerintah (pusat maupun daerah)

dalam tanggung jawab menyelesaikan perkara-perkara yang pelakunya adalah anak.

Adapun alasan sebagai dasar argumentasi akademik yang mendasari perlunya penelitian tentang pemidanaan anak dalam perspektif perlindungan hukum anak, antara lain Pertama, secara faktual anak adalah bagian yang sangat penting bagi kelangsungan dan kualitas hidup serta penentu masa depan suatu bangsa. Lahirnya Konvensi Hak Anak (*Convention of The Rights Child*) berbagai Negara meratifikasi KHA sebagai bentuk komitmennya terhadap penegakan hak anak tak terkecuali Indonesia yang meratifikasinya pada tanggal 25 Agustus 1990 menjadi Keppres RI No. 36 Tahun 1990 yang terdapat prinsip-prinsip dasar di dalamnya. Diantaranya adalah non diskriminasi (*non discrimination*), kepentingan terbaik bagi anak (*best interest on the child*) dan hak untuk hidup, kelangsungan hidup dan perkembangan (*the right to life, survival and development*).

Ditegaskan di dalam Pasal 28B ayat (2) Amandemen ke-2 UUD 1945 disebutkan bahwa setiap anak berhak atas kelangsungan hidup, tumbuh dan berkembang serta berhak atas kelangsungan hidup, tumbuh dan berkembang serta berhak atas perlindungan dari kekerasan dan diskriminasi. Dalam Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia disebutkan bahwa anak berhak atas perlindungan orang tua, keluarga dan Negara dan bahwa hak anak adalah HAM dan untuk anak kepentingannya hak anak diakui dan dilindungi oleh hukum sejak anak dalam kandungan (Pasal 25). Berdasarkan Undang-Undang Nomor 23 Tahun 2002 tentang

Perlindungan Anak yang telah dirubah dengan Undang-Undang Nomor 35 Tahun 2014, mereka yang terlibat dalam kasus hukum perlu mendapatkan perlindungan khusus. Anak yang terlibat dalam sebuah kasus perlu mendapatkan pemulihan yang baik, tidak bisa dianggap pelaku pelanggar saja namun juga sebagai korban pola penyelesaian yang salah. Artinya selain sistem peradilan anak tidak bisa dilakukan secara maksimal, tindakan rehabilitasi yang dilakukan juga adalah untuk menyelamatkan masa depan mereka.

Kedua, ketentuan yang terbaru mengenai pengaturan Pidana anak sudah diatur dalam Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak (SPPA), Undang-Undang Nomor 35 Tahun 2014 tentang Perlindungan Anak yang mana di dalam aturan-aturan tersebut telah memberikan penegasan dan pengaturan tentang proses hukum yang mesti dijalankan terhadap seorang anak yang melakukan tindak pidana serta mendapatkan perlindungan khusus. Mereka yang terlibat dalam sebuah kasus perlu mendapatkan pemulihan yang baik. Selain sistem peradilan anak tidak bisa dilakukan secara maksimal, tindakan rehabilitasi yang dilakukan juga untuk menyelamatkan masa depan anak.

Ketiga, meningkatnya jumlah perkara anak dan *recidivis* anak menunjukkan bahwa yang diatur dalam Undang Undang Pengadilan Anak masih menerapkan banyak sekali kelemahan fundamental. Padahal diketahui bersama banyaknya putusan pengadilan anak yang cenderung menjatuhkan pidana penjara daripada tindakan terhadap anak nakal, esensinya sebenarnya

tidak sesuai dengan *filosofi* dari pemidanaan dalam hukum pidana anak. Penjatuhan pidana secara tidak tepat dapat mengabaikan pengaturan perlindungan, karena pemidanaan anak seharusnya adalah jalan keluar terakhir (*ultimum remedium atau the last resort principle*) dan dijatuhkannya hanya untuk waktu yang singkat. Penjatuhan pidana sebagai *ultimum remedium* atau *the last resort principle* adalah salah satu bentuk perlindungan terhadap kepentingan terbaik anak. Dengan demikian Keadilan Restoratif ini sangat diperlukan dalam pembaharuan sistem peradilan pidana anak. Karena hal ini diamanatkan di dalam Pembukaan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan peraturan Perundang-undangan yang mengatur tentang Pidanaan Anak di Indonesia. Ini sesuai dengan semangat yang tercantum di dalamnya mengandung nilai yang mengutamakan musyawarah untuk mencapai mufakat dalam suasana kekeluargaan dalam konteks pelaksanaan perlindungan terhadap anak, maka di dalam melindungi anak sesuai dengan kehendak anak yang dilindungi dan tidak memaksakan kehendak dari pihak yang akan melindungi anak tersebut. Selain itu, mediasi terhadap tindak pidana sebenarnya sudah dikenal sejak lama dalam tradisi masyarakat adat yang ada di Indonesia.

Beranjak dari latar belakang permasalahan sebagaimana diuraikan di atas, maka isu hukum dalam penelitian ini adalah tentang Pidanaan Anak Dalam Perspektif Perlindungan Hukum Anak. Untuk lebih fokus maka permasalahan dalam penelitian ini antara lain (1) filosofis Pidanaan anak; (2) Karakteristik pemidanaan anak yang berlandaskan pada Keadilan

Restoratif; dan (3) Implementasi Pemidanaan Anak. Analisis terhadap pemidanaan anak dalam perspektif perlindungan anak dalam penelitian ini didasarkan pula pada konsep-konsep hukum (*legal concept*) yang nantinya akan digunakan untuk memberikan pemahaman mengenai proposi-proposisi yang menjadi dasar perumusan isu hukum. Selanjutnya akan ditentukan langkah-langkah untuk mengkaji dan menganalisis isu-isu hukum tersebut yang dilakukan melalui konstruksi berfikir dalam ilmu hukum dengan mengkedepankan aspek sistematisasi dan strukturisasi terhadap isu hukum yang dikemukakan dalam penelitian ini.

Secara keseluruhan, kesimpulan yang diperoleh dari hasil dan pembahasan atau penelitian terhadap 3 (tiga) pokok permasalahan di atas, dapat diuraikan di bawah ini: Secara filosofis, pemidanaan anak adalah bagian yang tidak dapat terpisahkan dari keberlangsungan hidup manusia dari sebuah bangsa dan negara. Berdasarkan semua peraturan perundang-undangan dan konvensi-konvensi Internasional yang terkait dengan anak secara tegas dinyatakan bahwa negara menjamin setiap anak berhak atas kelangsungan hidup, tumbuh dan berkembang serta berhak atas perlindungan dari kekerasan dan diskriminasi. Pemidanaan anak dalam perspektif perlindungan anak dilaksanakan dalam rangka menjaga harkat dan martabat anak dan anak berhak mendapat perlindungan khusus terutama perlindungan hukum dan sistem peradilan pidana anak secara adil. Asas-asas yang terkandung di dalam konsideran ketentuan internasional yang mengatur tentang anak, konsideran tentang pengaturan anak memuat tentang asas persamaan hak, asas keadilan,

asas bebas dari rasa takut, asas perlindungan, asas kesejahteraan dan asas kepentingan yang terbaik bagi anak.

Karakteristik Pidana Anak dalam Perspektif Perlindungan Hukum Anak dapat dilihat dalam prinsip-prinsip perlindungan hukum anak yang dilakukan sebagai upaya perlindungan hukum terhadap berbagai kebebasan dan hak asasi anak. Asas-asas tentang hak-hak anak dijunjung tinggi dalam undang-undang. Mengenai upaya Diversi yang berlandaskan Keadilan Restoratif, bahwa penormannya sudah memberikan perlindungan hukum yang sudah lebih baik bagi anak yang berkonflik dengan hukum namun di dalam implementasinya belum semua aparat penegak hukum mengupayakan Diversi. Lembaga-lembaga pendukung yang menangani perkara anak yang berkonflik dengan hukum belum optimal menjalankan fungsi dan perannya sesuai ketentuan undang-undang yang berlaku.

Implementasi pidana anak, dasar pertimbangan hakim dalam memutuskan suatu perkara masih melihat aturan yang bersifat umum (*lex generalis*) dan tidak memperhatikan aturan yang khusus (*lex specialis*). Putusan Hakim yang masih menjatuhkan pidana penjara bagi anak belum mengakomodir Keadilan Restoratif yang terdapat di dalam UU 11/2012. Hakim dalam memutuskan perkara anak belum maksimal mempertimbangkan dan memperhatikan laporan penelitian kemasyarakatan (litmas), akibat hukum dari putusan hakim ini putusan batal demi hukum. Putusan Hakim yang masih menjatuhkan pidana penjara bagi anak belum mengakomodir Keadilan Restoratif yang terdapat di dalam UU Nomor 11 Tahun 2012. Pengaturan

norma pemidanaan anak di Australia dan Belanda telah sesuai dengan prinsip-prinsip perlindungan hukum anak. *Ius constituendum* pengaturan pemidanaan anak dalam batasan Diversi dan sanksi penormannya belum diatur secara spesifik di dalam UU Nomor 11 Tahun 2012. Lembaga Diversi khusus anak di awal penanganan perkara anak sebelum ke tingkat penyidikan yang mempunyai kewenangan untuk melakukan upaya Diversi. Serta sarana dan prasarana yang meliputi LPKA, LPAS, LPKS Sumber Daya Manusia (SDM) dari petugas-petugas yang menangani anak pelaku tindak pidana yang disiapkan untuk penerapan Keadilan Restoratif.

Dari penelitian ini diharapkan adalah Diversi yang berlandaskan Keadilan Restoratif, yang tertuang dalam UU Nomor 11 tahun 2012 tersebut seharusnya diterapkan dari setiap proses dan tahapan proses sistem peradilan pidana sebagai upaya menjauhkan dan menghindarkan stigmatisasi anak serta untuk kepentingan terbaik bagi anak sebagai bentuk perlindungan hukum bagi anak yang berkonflik dengan hukum dapat terwujud. Oleh karena itu aparat penegak hukum yang terlibat dalam pelaksanaan Sistem Peradilan Pidana Anak harus dapat meningkatkan dan mengintegrasikan kemampuan SDM sesuai penanganan anak yang berkonflik dengan hukum, supaya lebih profesional dalam penanganannya demi perlindungan hukum anak. Disamping itu pengaturan norma pemidanaan anak pelaku tindak pidana di Australia dan Belanda dapat dijadikan acuan bagi Indonesia.

Perlu adanya lembaga Diversi khusus anak di awal sebelum tahap penyidikan dalam perkara anak yang mempunyai kewenangan untuk

melakukan upaya Diversi, juga segera direalisasikan pembentukan lembaga-lembaga baru yang khusus menangani anak dalam menjalani pemidanaan (pembinaan) seperti LPKA, LPAS, LPKS sebagaimana diatur dalam UU Nomor 11 Tahun 2012. Selain itu, perlu menyiapkan sumber daya manusia pelaksana Keadilan Restoratif melalui pelatihan-pelatihan dan sosialisasi.





SUMMARY

*Criminalization In The Perspective of Legal Protection On Child*

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*Criminalization research titled child in the Perspective of Legal Protection of the Child, is expected contribute to the conceptual validity of the theoretical and practical aspects of criminal law, especially related to the criminalization of children, so that will provide clarity related to the criminalization of children in the perspective of the legal protection of children. While the specific objectives of this study, among other things (a) assess, analysis and find the philosophical basis of punishment of children in the perspective of the legal protection of children; (B) reviewing and analyzing and finding the characteristics of punishment of children, which is a based Restorative Justice; and (c) find Implementation a punishment of children. In addition this research is also expected to provide benefits to the development of legal science. Therefore the theoretical benefits to be achieved in this research is the development of jurisprudence, in particular the law of penal law in addition expected to be useful for the development of the concepts and theories of criminal law relating to children in the perspective of the legal protection of children. Meanwhile, the practical benefits of research results are expected to be contribute ideas on setting the criminalization of children in child's perspective of legal protection for the state or the*

*government (central and local) in responsibility resolve those cases that the culprit was a child.*

*As for the reason as the basis of academic arguments underlying the need for research on the criminalization of children in the perspective of the legal protection of children, among others First, in fact the child is a very important part for the survival and quality of life as well as determine the future of a nation. The Convention on the Rights of the Child (Convention of the Rights of the child) various countries ratified the CRC as a form of commitment to up holding the rights of children including Indonesia which ratified it on August 25, 1990 into a Presidential Decree No. 36 1990 contained the basic principles. Among them are non-discriminatory (non-discrimination), the best interests of the child (best interest of the child) and the right to life, survival and development (the right to life, survival and development).*

*Affirmed in Article 28B paragraph (2) Amendment 2 1945 that every child has the right to live, grow and develop as well as the right to live, grow and develop and are entitled to protection of violence and discrimination. In Act No. 39 of 1999 on Human Rights stated that the child is entitled to protection of their parents, the family and the State and that child rights are human rights, and for children conceived child rights are recognized and protected by law since the unborn child (Article 25). Based on Law No. 23 of 2002 on Child Protection was amended by Act No. 35 of 2014, those involved in legal cases need special protection. Children who are involved in a case*

*needs to get a good recovery, can not be considered violators but also as a victim of the wrong patterns of settlement. This means in addition to the juvenile justice system can not be done an optimally, the rehabilitation measures do also is to save their future.*

*Secondly, the provisions latest on setting Punishment of children has been regulated in Law Number 11 Year 2012 on the Criminal Justice System Child (SPPA), Act No. 35 of 2014 on Child Protection, which in these rules have given affirmation and regulation of the legal process that must run against a child who commits an offense as well as special protection. Those involved in a case needs to get a good recovery. In addition to the juvenile justice system can not be done optimally, rehabilitation measures undertaken also to save the child's future. Third, the growing number of cases of children and child recidivis show that stipulated in the Juvenile Court Act still apply a lot of fundamental weaknesses. Though known together the many court rulings that children to drop out of the action against the imprisonment of juvenile delinquents, its essence is not in accordance with the philosophy of punishment in juvenile criminal law. Criminal punishment incorrectly may ignore protection arrangements, since punishment of children should be a last resort (*ultimum remedium* or the last resort principle) and dropped it only for a short time. *Ultimum remedium* criminal punishment as a last resort or principle is one form of protection against the child's best interests. Restorative Justice is an indispensable in reform juvenile justice system. Because it's mandated in the Preamble of the Constitution of the Republic of*

*Indonesia Year 1945 and regulations Legislation governing criminalization Children in Indonesia.*

*This is in accordance with the spirit contained therein contains a value that promotes deliberation to reach consensus in a family atmosphere in the context of child protection, then in protecting children in accordance with the will of the child are protected and not to impose the will of the parties that will protect the child. In addition, the mediation of the offenses has actually been known since long in the traditions of indigenous peoples in Indonesia.*

*Moving from the background of the problems as described above, then the legal issues in this study is about Punishment Children In Perspective of Legal Protection of the Child. To further focus the problem in this research include (1) the philosophical Criminalization of children; (2) Characteristics of punishment of children that is based on Restorative Justice; and (3) Implementation of the Child Punishment. Analysis on criminalization children in child protection perspective in this study is based also on legal concepts (legal concept) that will be used to provide an understanding of proportions- proportions on which the formulation of legal issues. Next will be determined measures to assess and analyze the legal issues are done through the construction of thinking in the science of law as highlighting aspects of systematization and structuring of the legal issues raised in this study.*

*Overall the conclusions derived from the results and discussion or study of three (3) principal above problem, can be described below: Philosophically, punishment of children is inseparable part of human survival*

*of a nation. Based on all legislation and the International Conventions related to children as expressly stated that the state guarantees every child the right to live, grow and develop and has the right to protection from violence and discrimination. Criminalization of children in child protection perspective implemented in order to maintain the dignity of the child and the child is entitled to special protection, especially protection of law and juvenile justice system is fair. The principles contained in the preamble international regulations governing the child, the child preamble about setting load on the principles of equality, fairness, the principle of freedom from fear, the principle of the protection, welfare principle and the principle of the best interests of the child.*

*Characteristics Punishment of Children in Legal Protection of Children's Perspective can be seen in the principles of the legal protection of children who performed as a legal protection of the freedoms and rights of children. The principles of child rights up held in law. Regarding efforts are based a Diversion Restorative Justice, that norm already provides legal protection has been better for children in conflict with the law but in its implementation, not all law enforcement officials searching a Diversion. Supporting institutions that handle cases of children in conflict with the law have not been optimal function and its role in accordance with applicable laws.*

*Implementation of punishment of children, the basic consideration of the judge decide on a case still see the general regulation (lex generalis) and does not pay attention to special rules (lex specialist).*

*Judge's decision that still impose imprisonment for a child not accommodated Restorative Justice contained in Law 11/2012. The judge in the case decided the child is not maximized consideration and attention to social research report (Litmas), the legal effect of the decision of the judge's decision null and void. Judge's decision that still impose imprisonment for a child not accommodated Restorative Justice contained in Law 11/2012. Setting norms of sentencing children in Australia and the Netherlands are in accordance with the principles of legal protection of children.*

*Ius constituendum arrangements with in the limits of sentencing child a norm Diversion and sanctions have not specifically regulated in Law 11/2012. Diversion institutions especially for children in the early handling of cases of children prior to the level of investigation which has the authority to make an effort Diversion. And facilities that include LPKA, LPAS, LPKS Human Resources (HR) of officers who deal with children perpetrators of criminal acts are prepared for the application of Restorative Justice.*

*So expected from this study, is Diversi which is a based Restorative justice as stipulated in Law 11/2012, was supposed to be implemented from the process and stages of the criminal justice system in order to attempt to distance and avoid stigmatization of children and the imposition of*

*appropriate sanctions for the best interests of the child as a form legal protection for children in conflict with the law can be realized.*

*Forms handling of children involved in criminal acts of the Dutch State and the State of Australia is a form of Restorative Justice can be developed and realized in the formulation of policy reform juvenile justice system in Indonesia. Therefore, law enforcement officers involved in the implementation of the Criminal Justice System Children should be able to improve and integrate the appropriate human resource capabilities of handling children in conflict with the law, to be more professional in handling the sake of legal protection of children. Child norm setting criminal punishment in Australia and the Netherlands can be used as a reference for Indonesia.*

*There needs to institute Diversi special child at the start before the investigation stage in the case of children who have the authority to make an effort Diversi, and also soon realized the establishment of new institutions that specifically deal with children in undergoing punishment (coaching) as LPKA, LPAS, LPKS as stipulated in Law 11/ 2012. In addition, the need to prepare the human resources involved in the Justice Restorative through socialization and training.*

## ABSTRACT

*This is research lacking generally aims find a form of legal arrangements relating to the setting of punishment of children in the child protection perspective, therefore research is expected to contribute to the concept that the validity of the theoretical and practical aspects of criminal law, especially criminalization of children, so that will provide clarity associated with criminal sanctions children in child protection perspective. In this study, there are three legal issues raised, namely: 1. Philosophical punishment of children in the child protection perspective; 2. Characteristic of punishment of children, which is based Restorative Justice; 3. Implementation punishment of children.*

*Analysis of the criminalization of children in child protection perspective in the study on legal concepts that will be used to provide an understanding of the propositions on which the formulation of the law. The next step will be determined to assess and analysis legal issues are done through the construction of thought in the science of law by promoting a systematic and structuring aspects of the legal issues raised. This is study normative approach using legislation, the concept approach, the comparative approach and approach cases.*

*The results achieved by the existing legal issues are philosophically, punishment of children as children in conflict with the law is inseparable part of human survival of a nation. The principles contained on the principles of equality, fairness, the principle of freedom from fear, the principle of the protection, welfare principle and the principle of the best interests on the child. Criminalization characteristics in the perspective of the legal protection on child can be seen in the effort, which is based Diversion Restorative Justice, that's a norm already provides legal protection has been better for children in conflict with the law but it's an implementation, all law enforcement officials seeking Diversion. Judge's decision that still impose imprisonment for a child accommodated Restorative Justice contained in Law 11/2012. Implementation of punishment of children, child Ius constituendum arrangements with in the limits of punishment and norm sanction Diversion a specifically regulated in Law 11/2012 so institution specialized Diversion child at the handling of cases of children to the level of investigation which has the authority to make an effort Diversion. And facilities that include LPKA, LPAS, LPKS Human Resources (HR) of officers who deal with children perpetrators of criminal acts are prepared for the application of Restorative Justice.*

**Keyword : Criminalization, Legal Protection On Child, Restorative Justice, Diversion**