

Comparative Criminal Law Policy Positives With Foreign Countries In The Criminal Law Prosecuting Perpetrators Of Criminal Acts Of A Child In Indonesia

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Abstract. In this study the issues to be discussed are: the policy positive criminal law in the prosecution of perpetrators of criminal acts of a child, criminal law policy of foreign countries in the prosecution of perpetrators of criminal acts of children and the barriers prosecutor in carrying out the task of prosecuting perpetrators of criminal acts of child and how the efforts countermeasures. The research method that will be used is the juridical sociological approach. In order to obtain primary data and secondary data that is accurate to the writing of this study, the data collection by means of a literature study to find materials relating to the principles and rules of law relating to criminal procedure law and the criminal justice system of children. Based on the results of this research is still fragmented between the investigator and the prosecutor so that ultimately the criminal justice system is not optimal child be a solution to cope with the child as a criminal. The issue of children as criminals not only be approached only by using purely legal approach, but also must use the instrument of social and economic approaches. That in conducting the prosecution against children, public prosecutors are often encountered problems due to its law system, the apparatus structure and legal culture. therefore it is necessary for the reconstruction of the criminal justice system of Indonesia, so it can be used as a reference for events that are special laws such as the juvenile justice system.

Keywords: *Comparative, Policy, Criminal Law.*

1. Introduction

Act No. 16 of 2004 on the Prosecutor has made it clear that the Attorney is government agencies that implement state power in the prosecution were conducted independently for justice based on law and conscience. The prosecution task carried out by the Public Prosecutor that the Prosecutor is authorized by law to prosecute and carry out the determination of the judge. Prosecutors are officials who are authorized by law to act as Public Prosecutor and to implement court decisions that have obtained permanent legal force.

Philosophically, Attorney picture in particular and the Attorney general employee is a professional figure, integrity and discipline. Integrity involves all aspects of human life that is noble and virtuous, morally clean, honesty, and sincerity towards each other and God. To be Attorney integrity, there are a number of integrity capability that must be met. One, the ability to connect authentically that leads to trust. Two, the ability oriented to truth that leads to the discovery of the fact and work in accordance with reality. Three, the ability to work in a way that produces and finish well towards

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achieving the goal or mission. Four, the ability to engage in the face of the negative things that lead to the resolution or change the problem. Five, ability for growth-oriented, leading to an increase. Six, the ability to be a transcendent leads to the expansion of the bigger picture of yourself.²

However, on the other hand, as the carrier of dominus litis determine the feasibility of a case can be brought to justice, the good relations that have been established remains to be built on the professionalism of the fulfillment completeness of formal and material a case as the basis for prosecution, so the results are legally defensible and sense of fairness in society. In that context, it can not be ruled out aspects of local wisdom in dealing with each case including the possibility of applying the principle of restorative justice wherever possible by legislation, as well as diversion in handling cases of children in conflict with the law.³

In the conduct of the prosecution duties relating to children in conflict with the law of the Public Prosecutor refers to the provisions of Act No. 11 of 2012 on the Criminal Justice System Center (SPPA Act).

Based on the preamble, it is known that the purpose of publishing Law Criminal Justice System Children is to maintain and position the child, which is a trust and the gift of God Almighty, as a person's dignity as human beings through the provision of special protection, particularly protection in the criminal justice system that is based on a restorative justice approach. It is geared as an effort to fulfill the obligations of the state of Indonesia as a state party to the Convention on the Rights of the Child (Convention on the Right of the Child) in which regulate the principle of legal protection of children, has the obligation to provide special protection to children in conflict with the law, and justice will also be felt by victims of crime. In addition, the issuance of this Law as Act No. 3 of 1997 on Juvenile Justice, as the main legal provisions in handling children in conflict with the law, not in accordance with the development and needs of the community law. Given that, in the Constitution of it has not been comprehensively provide protection to children in conflict with law and children in conflict with the law.⁴

In Act of Criminal Justice System Children, it is set in full on modern juvenile justice system based restorative justice. So that in the prosecution of children in conflict with the law of course is not the same as adults who deal with the law, which in practice would not be out of the rules of the law, which could ultimately harm the interests of children in conflict with the law itself.

To support the comprehensive of article, I have also seen how the criminal prosecution of a child in a foreign country, therefore the authors also discuss in this article. Based on author background already described above, this research will be limited and focused on a number of formulation of the problem is as follows: 1) How do criminal law policy of positive efforts against criminal prosecution of children?; 2) How does the criminal law policy of foreign countries in efforts against criminal prosecution of

² D. Andhi Nirwanto *Strategi Membentuk Jaksa Yang Profesional Menuju Kejaksaan Yang Ideal* Adhyaksa Indonesia Ed. 1 August 2014 p. 14-15

³ Jan. S. Marinka 2017 *Reformasi Kejaksaan Dalam Sistem Hukum Nasional* Sinar Grafika Jakarta p. 142

⁴ Sri Sutatiek *Politik Hukum Undang-undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak* Varia Peradilan No 328 in March 2013 p. 62

children?; and 3) What are the barriers to public prosecutors in performing criminal prosecution of the child and how the efforts countermeasures?

2. Results And Discussion

2.1. Positive Criminal Law Policy In Efforts Against Criminal Prosecution Of Children

Indonesia as a country that adheres to the legal system of civil law, the prosecution is done by the state institutions namely the Attorney of the Republic of Indonesia. This as the embodiment of the principle of single prosecution system, the only attorney who can do as a public prosecutor to prosecute a criminal case in court.

The prosecution is sufficiently important process steps in the criminal justice system, because at this stage that a case can be declared eligible transferred to the court or not. In general the Indonesian criminal justice system stipulated in Act No. 8 of 1981 on Criminal Proceedings (Criminal Code) as the backbone of a formal criminal law (procedural law) Indonesia. Criminal Code as a product legislation also contains a principle or principles in it as a guideline or benchmark in its implementation. The principles or the principles contained in the Code of Criminal Procedure by Yahya Harahap is as follows:⁵

- Principle of legality
- The principle of balance
- The presumption of innocence (presumption of innocence)
- The principle limitation of detention
- The principle of compensation and rehabilitation
- Merging criminal compensation claim
- The principle of unification
- The principle of functional differentiation
- The principle of mutual coordination
- The principle of justice is fast, simple and inexpensive
- Judicial principle open to the public

Act No. 11 of 2012 is grammatically more logical than by Act No. 3 of 1997 because of the criminal justice process does not only involve court proceedings alone, but also includes the process of investigation and prosecution of the whole is an integral part of the criminal justice system. In this study the author will only focus on the policy and the prosecution because of the scope of this research area is only about policies and prosecution.

The enactment of Act No. 11 of 2012 is one of the political form of legal policies or state law in tackling the crimes committed by children. In the Act there are several different things than those stipulated in the Criminal Code, including:

- The period of detention stipulated in Act No. 11 of 2012 shorter than the period of detention stipulated in the Criminal Code.
- Law enforcement obligations do versioned.
- Provision of surety guarantees more specific and imperative.

⁵*ibid.* p. 36-56

- Their child's age limit to be processed criminal and detention.
- Judges and prosecutors are not allowed to use toga at trial.
- The trial is closed to the public
- Their obligation to assist the suspect / defendant by Correctional Center and Social Service.

Placement of a separate detention room with adult offenders.

2.2. Criminal Law Policy Of Foreign Countries In Efforts Against Criminal Prosecution Of Children

2.2.1. Comparative Criminal Justice System of Children in Indonesia and Philippines

• Child Protection System

The Philippines is a country that is applying Self Executing Principle, that any international conventions which have been ratified, it automatically becomes a national law. In the area of child protection, the Philippines has ratified international conventions bebarapa include Child Rights Convention, the Beijing Rules, the Tokyo Rules, Rules and Riyadh Havana Protocol. The Conventions in principle mandates on the protection and fulfillment of children's rights and welfare. Therefore, in a report, UNICEF stated that the Philippines is one country in Asia Pacific which is increasing its activities in improving the justice system and child protection in recent years.

In the framework of the protection and fulfillment of child welfare, RA 9344 of 2006 also mandates the creation of the Juvenile Justice and Welfare Council (JJWC). JJWC is a state institution headed by the Minister of Social Affairs in the implementation of their daily activities under the coordination of the Ministry of Justice. The agency was created aiming to ensure the protection and juvenile justice process in accordance with the Act, coordinate with national and local government, as well as programs, policies and interventions related to the protection and juvenile justice. The JJWC membership consists of:

- Department of Social Welfare and Development (DSWD)
- Department of Justice (DOJ);
- Council for the Welfare of Children (CWC)
- Department of the Interior and Local Government (DILG)
- Commission on Human Rights (CHR)
- National Youth Commission (NYC);
- NGOs (2 year term)

• Child Criminal Justice System

In the Philippine justice system, problems of children is not only regarded as a legal issue, but also social and economic problems. Therefore handling of juvenile offenders, not just involve an element of law enforcement, but also involves other parties related to the social and economic.

As described above, that the minimum age limit of children who have criminal responsibility is 15 years. So that the handling of the child who committed a criminal act would have been different if the offense is committed by a child over the age of

fifteen years and children under the age of 15 years. Although the criminal liability attaches only to children over the age of fifteen years, but for children who are not yet 15 years old and still attached to civil responsibility and responsibility towards the community / society (community liability).

BCPC where the role of village heads and big enough to solve the problems of child offender. BCPC can conduct negotiations, mediation, intervention even do the diversion of children who committed the crime. Diversion can only be done if the crime committed by a child threatened with imprisonment of six years. BCPC institution comprised of social workers, human rights defenders (kids), as well as people / communities of the villages concerned. The approach taken in solving the problems of juvenile offenders are using social approach, communities and the economy. This means that even if a child does not have criminal liability, but if he committed a crime,

BCPC Membership is voluntary and members BCPC did not get a salary from the government. In BCPC there are six committees / divisions that served to make the protection and fulfillment of child welfare. The sixth of these committees are as follows:

- Protection committee, works to protect children who are at out put and monitoring of juvenile offenders.
- Livelihood committee, serves to provide training to the children to be able to live independently and beneficial to society.
- Survival committee.
- Education Committee, which serves to provide and facilitate education for children, either formal or in alternative training system
- Participation committee, which serves to accommodate the participation, opinions and needs of children
- Restorative Justice, serves to complete the child who committed a crime and versioned.

In the field of investigation, the prosecution has a very central function. The public prosecutor acting as Quasi Judicial and Leader of Investigation. If the public prosecutor receives the case from the police, the public prosecutor has three alternative positions that could be taken, namely:

- Forward the case to court if the prosecution convinced the case is competent to stand trial
- Deviation case if the prosecution is not sure of the evidence submitted by the police and it is impossible to find new evidence
- Doing supervise and lead the police to conduct further investigations.

2.2. Barriers prosecutors in performing criminal prosecution of the child and how the efforts countermeasures

However, in practice, prosecution policy formulated by the Attorney RI implementation is having some problems as follows:

- Constraints associated with the statutory regulations
That the juvenile justice system as stipulated in Act No. 11 in 2012 still adheres to

the principle and the principles contained in the Criminal Code, one of which is the principle of functional differentiation that is their real separation of the respective functions. Investigation into the absolute authority of the police and the public prosecutor is authorized only at the stage of prosecution. Consequently the public prosecutor can not be involved directly since the case is still at the stage of investigation or investigation, despite the investigation by the prosecution are two things that can be distinguished but can not be separated.

By following the principle of functional differentiation, then in the prosecution of children not covered possibility of alternating dossiers and causing the length of time of case handling. Though keeping in mind the principle of "the best treatment for children" then should the handling of cases must be resolved quickly, simply and efficiently.

- Obstacles that are legal structure

That the child alleviation system who commits an offense as stipulated in Act No. 11 in 2012 still treat the child as a criminal from a legal standpoint, whereas the issue of children not only a legal issue but also the social and economic problems.

By because it is necessary for structural change in approach to addressing child against the law. Ministry of social, religious ministries and ministries engaged in the economy should become the frontline, and law enforcement officers into efforts to end (last resort).

From the standpoint of human resources, the number of prosecutors who have certificates and competence to deal with its cases committed by children are still relatively few in number. This is because since the prosecutor certification requires additional education, also an attorney who handles child criminal offenders should have not only the approach of how to think in terms of the law rather than the social and economic aspects.

- Constraints legal culture.

As understood in the Criminal Justice System According Mardjono Reksodiputro is an operational or a system that aims to tackle crime, a community effort to control the crimes that are within the boundaries of acceptable tolerances.⁶

It can be concluded that the criminal justice system can not only in terms of juridical, but also in terms of sociological, because of concerns about public business. Although it is not only the police and the prosecutor as sub-systems within the criminal justice system, but as mentioned earlier, that the principle of functional differentiation more emphasis on police and prosecutors. Therefore, the discussion of police and prosecutors always get the attention of the public. Many angle of approach that can be used in highlighting the problems of police and prosecutors has become a hot topic in the community.

Law is not only a juridical construction, but also a sociological construction. The complexity is reflected in the difference prosecutors and police work. Satjipto Rahardjo describe the police as law enforcement road who dwell on the sociological reality and facts in the field (factual guilty), while the prosecutor and the judge is law enforcement who dwell on the legislation (judicial).⁷

⁶ Mardjono Reksodiputro *Kriminologi dan Sistem Peradilan Pidana Op.Cit*

⁷ Satjipto Rahardjo *Membangun Polisi Sipil Op.Cit.* p. 210

An important step to make the system can work as a system is to instill (1) awareness of the system, (2) the judicial system, and (3) the culture system. These things need to be emphasized, because in the end the system (and its elements) can only operate through (action) human. The behavior of those who support the elements of the system need to be made to depart from the same values and perceptions of the purpose and operation of the system⁸, To obtain the equation of values and perceptions can be done with exemplary leaders of the police and prosecutors, and can also do an integrated education and training to get a feeling about consciousness and culture systems.

3. Conclusion

Based on the discussion and analysis as described in the previous chapter, it can be deduced as follows:

- Policies prosecution of criminal child in Indonesia as stipulated in Act No. 1 SPPA together with its implementing regulations in general are still referring to the provisions contained in the Criminal Procedure Code. This causes the still fragmented between the investigator and the prosecutor so that ultimately the criminal justice system is not optimal child be a solution to cope with the child as a criminal.
- Policy on children as criminals in Indonesia still puts penanaman from the legal aspect, it is different to the practice in the Philippines. The issue of children as criminals not only be approached only by using the legal pendekatan only, but it should use the instruments of social and economic approach.
- That in conducting the prosecution against children, public prosecutors are often encountered obstacles because undang-nya law system, the apparatus structure and legal culture. therefore it is necessary for the reconstruction of the criminal justice system of Indonesia, so it can be used as a reference for events that are special laws such as the juvenile justice system

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⁸*ibid.* p.222

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