

Review Of The Juvenile Justice System For Children With Disabilities As Juvenile Offender In Indonesia

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Abstract- In dealing with children with disabilities who are juvenile offenders, law enforcers face obstacles in interacting because the special needs of the children with disabilities are not understood and the children lack understanding of criminal law enforcement processes. Indonesian Law Number 11 of 2012 on the Criminal Justice System for Children is an effort to minimize this matter and to fulfill the rights of children including children with disabilities in undergoing the judicial process. This study examines the laws and regulations that govern juvenile justice system for persons with disabilities and the obstacles for law enforcement agencies in understanding these regulations. This normative legal research uses statutory approach to address legal issues of laws and international instruments regarding the criminal justice system against children with disabilities. It was discovered that the children with disabilities have equal rights to other groups of people and even more. However the laws in Indonesia have not been specific in regulating children with disabilities when they are confronted by the law. This study recommends that the Indonesian government revise laws on Juvenile criminal Justice System to include explicit provisions regulating children with disabilities who are confronted by the law.

Keywords- Children With Disabilities, Juvenile Justice System, Juvenile Offender

I. INTRODUCTION

Indonesia is one of the countries that is law-based by adopting the system of constitutionalism, which is stated in the *Undang-undang Dasar 1945* (hereinafter referred to as the 1945 Constitution). This concept of law rule was born as the struggles of individuals to free themselves from any attachment and arbitrary actions by the authorities.

This constitution is stated in the amended UUD 1945 in Article 1, Paragraph 3, which stipulates:

“The State of Indonesia is a state based on the rule of law.” To ensure equal law, persons with disabilities also have equal rights and positions before the law as referred to in Article 27 paragraph (1) of the *Undang-Undang Dasar* 1945 of the Republic of Indonesia. In addition, Article 28I of the 1945 Constitution indicates the absolute human rights of a person with disabilities. This particular regulation is also a guarantee that a person with a disability is treated specifically when dealing with the law. The interesting thing here is that when a person with a disability is a child who is under 18 (eighteen) years of age, the person must undergo judicial process. The Article 28I Number 1 specifically states that, “The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.”

Children with complete disabilities became known as persons with disabilities. Their protection is considered as a measure of a state’s civilization, a form of justice in a society, and also a form of national development, in meaning that protecting children is protecting human as a whole [1]. Hence, this issue needs to be taken into account. Therefore, in Indonesian law, this is regulated in the Article 1 Number 1 of Law Number 8 of 2016 concerning Persons with Disabilities, are sometimes exploited by certain people or groups to become perpetrators of criminal acts. Even though the children with disabilities are exploited, they must still be held accountable for their actions before the law. In criminal acts, the children with disabilities are vulnerable as they have a tendency to become

perpetrators because they are easily influenced and they can easily be victims because of their limitations. In dealing with children with disabilities, law enforcers sometimes experience problems related to interactions and existing facilities at law enforcement agencies. The interaction between law enforcers and the children with disabilities is hampered because not all investigators can understand the special needs of children with disabilities. In addition, the children with disabilities as perpetrators do not understand the process of the criminal law enforcement. The Law Number 11 of 2012 concerning the Juvenile Criminal Justice System in Indonesia was born as an effort to minimize this impact and to fulfill the children's rights in undergoing the judicial process stating that every child in criminal justice process has the rights to:

- a. Treated humanely with attention to the needs according to age;
- b. Separated from adults;
- c. Obtain legal and other assistance effectively;
- d. Doing recreational activities;
- e. Free from torture, punishment or other cruel, inhuman and degrading treatment of dignity and status;
- f. Not sentenced to death or life;
- g. Not arrested, detained or imprisoned, except as a last resort and for the shortest time;
- h. Obtain justice before the Juvenile Court that is objective, impartial, and in a closed court session to the public;
- i. Identity not published;
- j. Obtain assistance from parents / guardians and people trusted by the child;
- k. Obtain social advocacy;
- l. Get a personal life;
- m. Obtain accessibility, especially for children with disabilities;
- n. Obtaining education;
- o. Obtaining health services; and
- p. Obtaining other rights in accordance with the provisions of laws and regulations.

Regarding the phenomenon of juvenile offenders, it has been normatively determined that children cannot be detained like adults, yet there are exceptions to this provision as stipulated in Article 7 paragraph (1) of the Law Number 11 of

2012 concerning the Juvenile Justice System which regulates that children can be convicted if they are over 14 (fourteen) years old and by imprisonment of more than 7 (seven) years. The detention of children during police investigation is a deviation from the concept of children interests in the principles of juvenile justice enforcement [2].

The large number of persons with disabilities and their involvement in criminal acts become obstacles for legal officials in sentencing juveniles fairly. This is based on the principles of juvenile justice enforcement which makes children interests the crown of the juvenile justice system [2]. On the other hand, law enforcement officials also play a role as guardian of justice so that they are faced with a difficult situation. On the level of legal progressivity, as expressed by Satjipto Rahadjo, ideal justice is the justice that fixes behavior, not textual justice [3].

Interpreting Rahardjo's statement about justice, Faisal argued that the indicator of fairness or unfairness of an action is related to a change in behavior [3]. The ideal definition of fairness must include a change in attitude, such as when a child with a disability is detained like an adult because of a case. However, this definition of fairness is debatable after the ratification of the Indonesian Government Regulation in lieu of the Law Number 1 of 2016 on Child Protection because justice reflected in this regulation actually shows inclination for children [4]. Based on the elaboration, this study was compiled with the intention of reviewing the juvenile justice system from the perspective of critical legal thinking about law enforcement against children with disabilities.

Some related studies on juvenile justice system have become center of interest of several researchers. Syahputra [5] conducted a study entitled "Legal Protection of Children as Perpetrators of Immoral Crime (Fornication) Based on the Law Number 35 of 2014". Then, Yudha & Utari's [6] study is entitled "Legal Protection of Children as Actors of Narcotics Crime". Next, a study entitled "Legal Protection of Children as Criminal Actors in the Juvenile Justice System (Comparative Study of the Law Number 3 of 1997 concerning Juvenile Courts and the Law Number 11 of 2012 concerning the Child Criminal Justice System" was carried out by Sopian [7]. Furthermore, Prihastomo [8] did a study titled

“Legal Protection of Children as Perpetrators of the Crime of Fornication (Case Study of Court Decisions Number: 14/Pid.Sus-Anak/2015/PN.SMG)”. In a similar theme, a study entitled “Legal Protection of Children in Conflict with the Law in Cases of Rape” was carried out by Jayanti [9].

Based on the analysis of aforementioned previous study, a study emphasizing on children with disabilities as juvenile offender has not been found to be conducted, which becomes the novelty of this study. Therefore, this seeks to analyze the rights of child with disabilities who is confronted by the law as a criminal offender in Indonesia and to examine the obstacles in implementing the juvenile justice system for persons with disabilities in Indonesia after the issue of the Law Number 17 of 2016 on Stipulation of Government Regulations in lieu of the Law Number 1 of 2016 on the Second Amendment to the Law Number 23 of 2004 on Child Protection into Law.

II. PROBLEMS

Based on the background described above, the following research questions were formulated. First, What are the rights of child with disabilities who is confronted by the law as a criminal offender in Indonesia? And, second What are the obstacles in implementing the juvenile justice system for persons with disabilities in Indonesia after the issue of Law Number 17 of 2016 on Stipulation of Government Regulations in lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2004 on Child Protection into Law?

III. AIMS OF THE STUDY

1. To describe the rights of children with disabilities who is confronted by the law and is a criminal offender in the review of the national juvenile justice system in Indonesia
2. To describe the obstacles in implementing the juvenile justice for persons with disability in Indonesia after the ratification of the Indonesian Government Regulation in lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2004 on Child Protection into Law.

IV. RESEARCH METHOD

This article is a normative legal research using secondary data. This method places laws, principles, principles, and doctrines as primary materials that support the author’s frame of mind [10]. The approach used to answer legal issues is a statutory approach which examines statutory regulations using primary legal materials, secondary legal materials, and tertiary legal materials.

V. DISCUSSION

The United Nations (UN) ratified the Convention on the Rights of the Child on November 20, 1989, which binds UN member states. As a result, the states have made efforts to promote, disseminate, and enforce children rights, and then the efforts have been mobilized throughout the world. This international instrument legally binds states to implement the Convention on the Rights of the Child which consists of 54 articles. As a convention, the ratifying states have an international legal obligation to absorb it into their national positive law so that it is valid and has permanent legal force [11].

This convention tried to find a balance in a sensitive triangle between children, parents and the state. Article 5 recognizes the responsibility of parents to care for their children, while the state is responsible for helping with protection and welfare. The Convention is very clear on the matter that the responsibility of the parents does not give them any absolute rights, but only rights that benefit the children. This means that the parents provide appropriate direction and guidance to the children according to their abilities in a manner consistent with the rights recognized in the convention. To protect children rights is the obligation of all parties [12]. The fundamental rights of children are divided into 4 categories as follows:

1. Survival rights;
2. Protection rights;
3. Development rights; and
4. Participation rights.

Indonesia issued a national law as a consequence of the ratification of the Convention. The law in question is Law Number 23 of 2002 on Child Protection. With the establishment of the

law, there is at least clarity regarding the age limit of children considering that the limitations regarding children are very diverse in various laws and regulations. For instance, Law Number 35 of 2014 on Child Protection defines a child as a person who is under 18 years of age, including an child still in the womb [13].

Every regulations of human rights, as the basic rights possessed by every human being, has a purpose to promote and protect the human rights. One of the targets is fulfilling the rights of vulnerable groups who require more attention and protection than others, such as children, women, people with disabilities, migrant workers, indigenous peoples or isolated communities, minority groups, people with certain sexual orientation or certain gender identity, who are often called lesbian, gay, bisexual, and transgender (LGBT), people with Human Immune Deficiency Virus (HIV) or Acquired Immuno Deficiency Syndrome (AIDS), people who are forced to move out of their permanent residence but are still in their own country (internally displaced persons - IDPs), and refugees [14].

In this case, persons with disabilities are categorized as vulnerable. Disability is a concept that refers to problems faced by humans due to long-term physical, mental, intellectual, or sensory disorder. It hinders interaction and makes participation in society difficult, based on equality with humans in general. In reality, the rights of the persons with disabilities are often denied [15]. In fact, persons with disabilities are just like any other humans in general, that is, they have rights that must be protected. Eventually, they advocate for the recognition of their rights to become an international instrument.

On December 13, 2006, the UN then adopted the Convention on the Rights of Persons with Disabilities (CRPD). This Convention still recognizes that persons with disabilities are holders of rights and was also created to protect the rights of persons with disabilities. So far, many people with disabilities have been discriminated. An international legal document is needed to ensure that this will not happen again [16]. Disability is an evolving concept. This condition does not lie in a person, rather in the interaction with the environment. In other words, disability is not about the physical body, but it is about social aspects.

Inadequate facilities in the surrounding environment limit the activities of the persons with disabilities [16].

Indonesia has ratified the CRPD which is included in Law Number 8 of 2016. The convention, that was ratified the Indonesian government, means to make a point. The state must take positive steps so that the rights of the persons with disabilities can be fulfilled. These rights include civil, political, economic, social, and cultural rights [16]

Law Number 8 of 2016 on Persons with Disabilities (Law of Persons with Disabilities), although still far from perfect, has brought a new hope to the fulfillment of the rights of persons with disabilities. Article 1 letter a of the Law of Persons with Disabilities stipulates that a disability is defined as any person who experiences physical, intellectual, mental, and/or sensory limitations for a long period of time who may experience obstacles and difficulties in interacting with the environment and in participating fully and effectively with other citizens based on equal rights. This definition adopts the definition of disability in the CRPD, whose main focus is no longer about physical condition, but rather on the obstacles faced by persons with disabilities in interacting.

The rights to justice and legal protection are regulated in detailed in Article 9 which reads as follows:

- a. for equal treatment before the law;
- b. to be recognized as a legal subject;
- c. to own and inherit movable or immovable property;
- d. to control financial matters or appointing people to represent their interests in financial matters;
- e. to obtain access to banking and non-banking services;
- f. to obtain the provision of accessibility in judicial services;
- g. for protection from all pressures, violence, abuse, discrimination, and/or seizure or expropriation of property rights;
- h. to choose and appoint people to represent their interests in civil matters inside and outside the court; and
- i. for protection of intellectual property rights.

Regarding this matter, when a person under 18 years old with a disability is confronted by the law as a juvenile offender, there are 3 (three) types of

legal rules that can be used to address this issue, namely Law Number 11 of 2012 on the Juvenile Criminal Justice System, Law Number 17 of 2016 on Ratification of Government Regulations in lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection, Law Number 8 of 2016 on Persons with Disabilities. Children with disabilities also have the same rights as children without disabilities. Henceforth, the rights of children confronted by the law are regulated in Law Number 11 of 2012 on Juvenile Criminal Justice System [17].

In the juvenile justice system in Indonesia, the rights of every child in the criminal justice process are regulated in Article 3 letters a to j of Law Number 11 of 2012 on the Juvenile Criminal Justice System [18]. Furthermore, Article 5 paragraph (1) letter d Law Number 8 of 2016 on Persons with Disabilities has integrated the principles of justice and legal protection for persons with disabilities so that regardless of their status as a citizen, persons with disabilities are also allowed to obtain special legal protection. Article 36 paragraph (1) of Law Number 8 of 2016 on Persons with Disabilities states that adequate accommodation for persons with disabilities must be provided by law enforcement agencies. The fact is that persons with disabilities have the right to equal treatment before the law, which is stated in Article 9 paragraph (1) of Law Number 8 of 2016 on Persons with Disabilities. However, it does not mean that persons with disabilities do not need special procedures in the law enforcement process so that they can have their rights guaranteed. This premise is in line with the principles of the Criminal Justice System which focuses to persons with disabilities [19].

In the framework of law enforcement, persons with disabilities are facilitated to gain accessibility to achieve equality in the law enforcement process [20]. The absence of the law on procedural guidelines for persons with disabilities can have implications for the rights of children who are persons with disabilities. It is interesting to observe that when a child with a disability has the status of a defendant, the child will be treated as a normal child when he is under assistance [21].

There is also a legal gap in the formal aspect in which there are no rules that specifically regulate the rights of persons with disabilities facing the law

similar to regulations for children facing the law in the Criminal Justice System Law for Juvenile Offender and for women facing the law in the Supreme Court Regulation Number 13 of 2017 on Guidelines for Adjudicating Female Offender. This can also be a stumbling block that could potentially distort the rights of a person with disabilities in the process of realizing equality and justice before the law in Indonesia both progressively and restoratively.

The juvenile justice system in Indonesia still has many limitations both in material and formal aspects in its enforcement. In the material aspect, the formulation contained in Law Number 11 of 2012 on the Juvenile Criminal Justice System does not rigidly explain the rights of children with disabilities when facing the law. The law only focuses on children who have normal conditions. Therefore, it implies that the weakness of the juvenile justice system in Indonesia lies in the limited guarantees given to persons with disabilities meaning that it is not in accordance with national commitments, namely increasing public and government recognition to respect and maintain a culture of tolerance between persons with disabilities and other members of the community [19].

VI. CONCLUSION

The conclusions of this study are as follows.

1. The rights of children with disabilities who are faced with the law in Indonesia as criminal offenders have not been clearly regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which has the potential for violating the rights of children with disabilities.
2. There are weaknesses in the juvenile justice system in Indonesia for children with disabilities in both material and formal aspects. Law Number 17 of 2017 on Stipulation of Government Regulation in lieu of Law Number 1 of 2016 on the Second Amendment to Law Number 23 of 2004 on Child Protection into Law only accommodates the rights of children confronted by the law and has not specifically recognised the rights of persons with disabilities. As a result, the rights of persons with disabilities become vulnerable to being violated in its enforcement process.

As for the recommendations, the Indonesian government needs to make changes to the Law on the Juvenile Criminal Justice System to include explicit provisions regulating children with disabilities who are confronted by the law.

In addition, the Indonesian government needs to formulate regulations governing legal proceedings for persons with disabilities as well as other vulnerable groups such as women and children. In the material aspect, the government needs to increase the intensity of articles that regulate the rights of persons with disabilities so as to provide legal certainty for persons with disabilities in Indonesia. Furthermore, regulations regarding procedural guidelines for children with disabilities in the Juvenile Criminal Justice system in Indonesia need to be supported with trained human resources who are sensitive to the special needs and conditions of the persons with disabilities. Thus, the criminal justice process for children with disabilities in Indonesia will be able to fulfill the rights to justice and legal benefits for the perpetrators and victims of criminal acts.

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