



ISSN 2809-7572 (Online)

YURIS (Journal of Court and Justice)

<https://journal.ifpublisher.com/index.php/jci>

Vol. 1 Issue. 4 (2022)

doi.org/10.56943/jci.v1i4.208

The Judge Considerations in Making Decision Against Narcotics in Children

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ABSTRACT

The narcotics abuse in Indonesia is closely related to narcotics users who obtain it from Illicit trafficking that caused by drug attacks in Indonesia that reached the point of endangering the nation life and security. The Indonesian Child Protection Commission (KPAI) noted that 5.9 million children from 87 million child population in Indonesia are became drug addicts. This research aims to find out how the application of criminal law to children as perpetrators of drug abuse and how the juridical analysis based on judge's considerations in making criminal decisions for children as perpetrators of narcotics crimes. This research uses normative legal research that confines itself to the study of the law as an object and excludes any non-legal information from discussed problem. This research shows that when a child commits a crime within the specified age limit, it is a legal obligation for law enforcement officials to conduct special procedural law for children, and it is prohibited to apply general procedural law. However, if a child commits a crime beyond their age limit, the law enforcement official has an authority to implement the general procedural law.

Keywords: *Children, Judge's Consideration, Juridical Analysis, Narcotics Crime Actors*

INTRODUCTION

Child delinquency comes from foreign term Juvenile Delinquency that caused by the delinquency referred to Article 489 of Criminal Code. Kartini Kartono stated that juvenile delinquency is bad behavior (*dursila*), or crime/ delinquency in early childhood that a symptom of social disease (pathological) in children and adolescents caused by a form of social neglect which developing the deviant behavior.¹

Child Protection Crimes are regulated in Child Protection Law no. 23 of 2002 which changes to Child Protection Law no. 35 of 2014 and Law no. 17/2016. The existence of Child Protection Justice System (SPPA) No. 11/2012 Becomes a Moment of Special Protection for Children in Conflict with the Law (ABH). The Law Number 11 of 2012 concerning Juvenile Criminal Justice System that stipulated in July 2012, is an important step for children law in the future. This law uses restorative principles to handle cases involving children, including rehabilitation and introduces a mechanism to make effective diversion outside the court.²

The narcotics abuse in Indonesia is closely related to narcotics users who obtain it from Illicit Trafficking that caused by drug attacks in Indonesia that reached the point of endangering the nation life and security. Then, the government stipulated Law Number 35 of 2009 concerning Narcotics as a Basis for Crimes Imposition for Narcotics Users and Dealers in Indonesia. In reality, the number of drug abusers in Indonesia is estimated at around 3.5 million people in 2017, of which 1.4 million are regular users and nearly one million are become drug addicts. The increase in drug crimes cannot be separated from the decisions handed down by judges.³

This is inseparable from the large number of drug users from its profession and users' age. The Indonesian Child Protection Commission (KPAI) noted that 5.9 million children from 87 million child population in Indonesia are became drug addicts. The legal protection for children is conducted from the fetus in the womb until the child is born. In the guidance, development and children protection, the role of the community is needed, both child protection institutions, religious institutions, non-governmental organizations, community organizations, social

¹ Pradhita Rika Nagara, "Pertimbangan Hukum Oleh Hakim Dalam Menjatuhkan Putusan Terhadap Anak Yang Melakukan Penyalahgunaan Narkotika," 2014.

² Andina Arityas Islamianiati and Hartanto, "Analisis Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pidana Penjara Atau Rehabilitasi Terhadap Anak Pelaku Penyalahgunaan Narkotika (Studi Kasus Di Pengadilan Negeri Kota Pekalongan)" (Universitas Muhammadiyah Surakarta, 2020).

³ Roni Edi Wanto and Niken Subekti Budi Utami, "Disparitas Penjatuhan Putusan Pidana Oleh Hakim Pada Penyalahgunaan Narkotika Yang Dilakukan Oleh Anak" (Universitas Gadjah Mada, 2015).

organizations, business world, mass media and educational institutions.⁴ This research aims to find out how the application of criminal law to children as perpetrators of drug abuse and how the juridical analysis based on judge's considerations in making criminal decisions for children as perpetrators of narcotics crimes.

LITERATURE REVIEW

ABH cases (Children against the law) that solved in judicial process are only serious cases that must always prioritize the principle of children interests and the sentencing process is the last way (Ultimate Remedium) while not ignoring the children rights. Apart from that, children's cases can be resolved through non-formal mechanisms based on standard guidelines. The children who commit criminal acts that are declared prohibited for children, both according to legislation and other legal regulations applied in society. The children's actions that violate criminal law or do not violate criminal law are called "child delinquency."⁵

Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semi-synthetic, which can cause a decrease or change in consciousness, loss of taste, reduce to eliminate pain, and dependence. Narcotics are drugs or substances that are useful for treatment, health services, and scientific development. On the other hand, narcotics can cause detrimental dependence when used without control and supervision. The formulation of criminal provisions relating to eradication of narcotics crime and narcotics precursors has been stipulated with the hope that it will be effective and achieve the desired goals. Therefore, the application of criminal provisions of Law Number 35 of 2009 regarding Narcotics must also be implemented carefully.⁶

law enforcement is an effort to enforce or function legal norms as behavioral guidelines in legal relationships in social and state life.⁷ Even if necessary, law enforcement is allowed to use force during its implementation. Law enforcement itself is in the activity of balancing the relationship of values in existing rules and applies as a series of values to create and maintain the peace in social life.

The decisions are taken based on a secret trial of judges according to Article 14 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power. In

⁴ Nagara, "Pertimbangan Hukum Oleh Hakim Dalam Menjatuhkan Putusan Terhadap Anak Yang Melakukan Penyalahgunaan Narkotika."

⁵ Islamianiati and Hartanto, "Analisis Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pidana Penjara Atau Rehabilitasi Terhadap Anak Pelaku Penyalahgunaan Narkotika (Studi Kasus Di Pengadilan Negeri Kota Pekalongan)."

⁶ Putri Setiyawati and Ike Cahyani, "Dasar Pertimbangan Hakim Menjatuhkan Pidana Penjara Bagi Anak Sebagai Pelaku Tindak Pidana Narkotika," *Jurnal Mahasiswa Fakultas Hukum Universitas Brawijaya* (2014).

⁷ Misnar Syam et al., "Consumer Protection Enforcement Law Characteristics on Civil Law Aspects in Indonesia," *Linguistics and Culture Review* 5, no. S2 (December 13, 2021): 1471–1481, <https://lingcure.org/index.php/journal/article/view/1976>.

deliberation session, paragraph (2) states that each judge is obliged to convey written considerations or opinions regarding the problems under consideration, which are an integral part of the decision.

The judge's decision is a judge's statement in deciding a case at trial and has permanent legal force. The Judge's decision is as follows: "A decision pronounced by a judge since the position of a criminal case is open to the public after going through the process and the criminal procedural law is generally punishing or acquitting all lawsuits made in written form with the aim of completing the words."⁸

RESEARCH METHODOLOGY

This research uses normative legal research that confines itself to the study of the law as an object and excludes any non-legal information from discussed problem.⁹ Normative legal research is focus on positive legal norms (laws and regulations) regarding law enforcement against children as narcotics users. This research was conducted to obtain secondary data consisting of primary legal materials and secondary legal materials. The researchers will examine the efforts to compensate for illegal and illegal detention. The compensation efforts will be adjusted to the provisions of Criminal Procedure Code and government regulations related to discussed problem.¹⁰

RESULTS AND DISCUSSION

The Aspects of Criminal Justice Against Children Using Narcotics

Throughout the course of Juvenile Court Law from 1997 to 2012, many criticisms were made by the Child Protection NGO, that the Juvenile Court Law has not been fully lex specialist law in its implementation since there are several parts of the procedural law that still refer to Criminal Procedure Code. Then, the spirit of law (legal reform) in juvenile justice becomes insignificant in juvenile justice process.¹¹

Then, a discourse was created to amend the Juvenile Court Law. After a long discussion in DPR, the Draft Law (RUU) for Juvenile Justice System was ratified in the Plenary Session at DPR Building, Senayan, Jakarta, Tuesday, July 3rd, 2012

⁸ Sri Dewi Rahayu Dewi and Yulia Monita, "Pertimbangan Hakim Dalam Putusan Perkara Tindak Pidana Narkotika," *PAMPAS: Journal of Criminal Law* 1, no. 1 (April 23, 2021): 125–137, <https://online-journal.unja.ac.id/Pampas/article/view/8314>.

⁹ Dhimas Joeantito Hartono and Sugiharto, "The Criminal Responsibility for Pornography Video Maker Through Digital Forensics on Social Media," *YURIS (Journal of Court and Justice)* 1, no. 2 (2022).

¹⁰ Islamianiati and Hartanto, "Analisis Dasar Pertimbangan Hakim Dalam Menjatuhkan Putusan Pidana Penjara Atau Rehabilitasi Terhadap Anak Pelaku Penyalahgunaan Narkotika (Studi Kasus Di Pengadilan Negeri Kota Pekalongan)."

¹¹ Dewi and Monita, "Pertimbangan Hakim Dalam Putusan Perkara Tindak Pidana Narkotika."

to become Law Number 11 of 2012 concerning the Juvenile Justice System (referred as SPA Law).¹²

The SPA Law means that the law is a formal regulation or procedural law in criminal justice process when the children become perpetrators of criminal acts. This means that Indonesia does not have a special institution for Juvenile Courts yet. Then, in processing children as criminal acts, it no longer refers to Criminal Procedure Code.¹³

From a juridical point of view, the definition of "child" in Indonesian positive law is defined as a person who is not an adult yet (*minderjaring* or *underage*), *underage* (*minderjaringheid* or *inferionity*) or often also referred to as a person under the parents' guidance (*minderjarige onvervoodij*).¹⁴

At international level, there is no uniformity in the formulation of children limits, the age level of a person that can be categorized as a child between one country with various kinds, such as: twenty-seven regions in United States determine the age limit between 8-17 years, there are also other regions that determine the age limit between 8-16 years. In the UK, the age limit is between 12-16 years. Australia, in most states, has an age limit of 8-16 years. The Netherlands determines the age limit between 12-18 years. Asian countries include Sri Lanka determining the age limit between 8-16 years, Iran 6-18 years, Japan and Korea determining the age limit between 14-18 years, Cambodia determining between 15-18 years, while the Philippines determine the age limit between 7-16 years.

Starting from this point, it comes out that Indonesian positive law (*ius constitutum*) lacks a uniform and globally applicable legal framework to establish the age requirements for children. The definition of children and the age at which someone is considered a child are hotly debated topics. The definition of children can be seen in how various laws and regulations are created, as well as in the judgments of specialists who may have different constraints.¹⁵

Every person under the age of 18 is considered a child, according to article 1 of the Convention on Children Rights which was ratified by Indonesia on November 20th, 1989, the television mandates that adulthood is attained sooner. According to Article 1 of the Juvenile Court Law, a kid is defined as a person who has turned 8 (eight) but hasn't become 18 (eighteen) or isn't married.

¹² Setiyawati and Cahyani, "Dasar Pertimbangan Hakim Menjatuhkan Pidana Penjara Bagi Anak Sebagai Pelaku Tindak Pidana Narkotika."

¹³ Nur Sari Dewi et al., "Peranan Hakim Dalam Menjatuhkan Putusan Terhadap Anak Pelaku Tindak Pidana Pengguna Narkotika," *Usu Law Journal* 1, no. 1 (2013).

¹⁴ Alexander Kristomi Yudono, "Pertimbangan Hakim Dalam Putusan Perkara Terhadap Anak Pelaku Tindak Pidana Narkotika Di Pengadilan Negeri Sleman" (Universitas Atma Jaya Yogyakarta, 2012).

¹⁵ Heidy Fabiolla Kusumastuti, "Pertimbangan Hakim Dalam Penjatuhan Pidana Penjara Terhadap Anak Sebagai Kurir Narkotika (Studi Kasus Putusan Nomor: 802/Pid. A/2014/Pn. Bdg) (Doctoral Dissertation, Uajy)" (Universitas Atma Jaya Yogyakarta, 2019).

Children are defined as in Article 1 of Law No. 4/1979 Concerning Child Welfare (hence referred as Child Welfare Law): Individuals who have not attained the age of 21 (twenty) years and are not married. The perspective on children is also provided by the adoption of Law No. 23/2002 Concerning Child Protection (hereafter referred as Child Protection Act), as confirmed in Article 1 number 1 as follows: A child is defined as someone under the age of 18 (or even when they are still in the womb).¹⁶

Whereas in the Criminal Code relating to children as legal subjects in criminal justice, Article 45 of Criminal Code provides the meaning of a child who is not an adult when he is not 16 (sixteen) years old yet. Therefore, when he is involved in a criminal case, the judge can request that his guilt be returned to his parents or guardian without being punished or coordinated to be handed over to the government without being punished. The provisions of Articles 45, 46, and 47 of the Criminal Code were abolished with the issuance of Juvenile Court Law.

According to the aforementioned idea, anything must remain to be parents or the government responsibility as long as it is considered to be a child's obligation. The definition of a child and the minimum age for a kid are also governed by different laws and regulations in civil law area, such as Article 1 No. 26 of Law No. 13/2003 Concerning Manpower states that: Any person under the age of 18 (eighteen years) is considered a child. Additionally, it is governed by Article 330 of Civil Code (KUHPperdata), which stipulates that minors are defined as those who have never been married and are under the 21 years old. They do not revert to their status as children when the marriage is annulled before they turn twenty-one; instead, those who are immature and not under their parents' supervision are subject to guardianship based on and under guardianship.

The additional rules can be found in Articles 50 and 47 of Law No. 1/1974 Concerning Marriage, that give the restrictions on who can be referred to as a child based on whether they have never been married or have not attained the age of 18 (eighteen) yet. According to Romli Atmasasmita, the age limit for children is the same when they become adults, i.e. 18 years for women and 20 years for men, as was the case in America, Yugoslavia, and other western countries. As long as the body's growth and their development process is still ongoing, the person is recognized as a child. They only become adults when this process is complete.¹⁷

According to Zakiah Daradjat, the age and adult boundaries are also based on adolescents who state that nine years between thirteen and twenty-one years as adolescence is a period between children who experience rapid growth and they are no longer in children's body shapes, attitudes of thinking and acting but not adults. Meanwhile, Article 1 of Children Convention Rights (CCR) which was ratified by

¹⁶ Ibid.

¹⁷ Yora Rolin Bangun, "Pertimbangan Hakim Dalam Menjatuhkan Putusan Pidana Dan Rehabilitasi Terhadap Pelaku Tindak Pidana Penyalahgunaan Narkotika," *Jurnal Ilmu Hukum* (2015): 1–22.

Indonesia in 1990, defines that a child is every human being under 18 years old, except according to the laws for children, it is determined that their age has reached into adulthood.¹⁸

In Article 2.2 letter (a) of The Beijing Rules, it is stated as Children are teenagers who according to each system can be regulated a criminal act in a different way from adults' justification. Various criteria for the age limit of children are basically the maximum age grouping as a manifestation of child's ability in legal status then the children will change his status to become an adult or become a legal subject who is independently responsible for their actions. From the various literatures on Child Protection Law, almost all child law experts always put various kinds of legal basis and various definitions of children that causing confusion not only in society, even students of Faculty of Law rarely experience dilemmas in responding to it. The understanding the needs is that the age difference of children is based on legal actions that intersect with children. The age limit of children in criminal law cannot be applied to children in civil law perspective since the difference of its legal actions.¹⁹

It means that the legal apparatus does not have an authority to take the legal action for children who commit a crime that he has not reached the age limit for becoming adult. When a child commits a crime within the specified age limit, it is a legal obligation for law enforcement officials to conduct special procedural law for children, and it is prohibited to apply general procedural law. By looking at the conditions of this child investigator, it is predictable that the investigation of the child should take care of the child's protection, or to be said to emphasize the need for child protection rather than the wider public interest.²⁰

The analysis of judges' considerations regarding children who use narcotics

Children who commit crimes must be rehabilitated as a form of children development. The penalties on children is too severe since children who use narcotics are actually the victims of drug trafficking, especially for those still in underage. The basic considerations in making decisions about children who commit narcotics crimes from a juridical aspect, consist of the indictment of public prosecutor, criminal prosecution, witness statements, the records of evidence found in court, while non-juridical aspects consist of aggravating and mitigating matters. The judges use scientific approach theory that the judges may not be based solely

¹⁸ Hemptri Tampubolon, "Pertimbangan Hakim Dalam Penjatuhan Sanksi Pidana Terhadap Anak Yang Melakukan Tindak Pidana Narkotika Jenis Sabu Dikaitkan Dengan Undang - Undang Perlindungan Anak (Studi Kasus No. 1/Pidsus-Anak/2015/Pn.Mdn)" (Universitas Medan Area, 2016).

¹⁹ Ibid.

²⁰ Hardanti Widya Khasna, "Criminal Enforcement for Children in Progressive Studies," *Indonesian Journal Of Criminal Law Studies* 3, no. 1 (2018): 49–60.

on intuition or instinct by himself, and must be equipped with knowledge and also scientific insight in solving the case.

The decisions aimed at children who commit narcotic crimes often do not fulfill a sense of justice, because children who commit narcotic crimes should become victims of narcotics trafficking and they must do the rehabilitation and social rehabilitation, which more focus on punishing them. The rehabilitation aims to help children for narcotics-free and provide the opportunities for them in dealing with their problem, as well as does not conduct the same mistakes in the future.

In general, the basic considerations of judges used to impose (severe) prison sentences on children who abuse narcotics are:²¹

1. Aggravating considerations:
 - a) The defendant's actions were considered disturbing the community
 - b) The defendant's actions damaged the nation's mentality
 - c) The defendant's actions damaged the nation's generation
 - d) The defendant's actions did not support the government's program to eradicate narcotics crimes
2. Mitigating considerations:
 - a) The defendant honestly confessed his mistake
 - b) The defendant has never been convicted before
 - c) The defendant is still young
 - d) The defendant was polite during the trial
 - e) The defendant is still a student
 - f) The defendant felt guilty and regretted his actions

This is an analysis of basic considerations used by judges to impose (type and severity) punishment on children as follows:²²

1. The judge's decision to impose a prison sentence on children based on the considerations mentioned above shows that judge is only oriented towards prohibited actions based on aggravating considerations. Since these actions (children as perpetrators of criminal acts) are considered to be bothering the community, damaging the nation's morals and not supporting government programs in narcotics crime, then it is concluded that the child needs to be punished to jail.
2. The judge imposed a criminal deprivation of liberty (prison) against the child offender.
3. The judge imposed a prison sentence on a child who abused narcotics, stating that the child was not only the perpetrator of the crime, but also the victim.

²¹ Yudono, "Pertimbangan Hakim Dalam Putusan Perkara Terhadap Anak Pelaku Tindak Pidana Narkotika Di Pengadilan Negeri Sleman."

²² Erlina Maria Christin Sinaga and Sharfina Sabila, *Narkotika Anak Pidana Dan Pemidanaan* (Depok: Rajawali Pers, 2020).

4. The judge in imposing prison sentences on children does not pay attention to the fact that the negative impact of applying prison sentences on children is contrary to the effort of supporting and protecting the children.

Theoretically, the judges' tendency to always impose the prison sentences on children can be questioned for the following reasons:²³

1. Criminal, including prison is basically just a medium to achieve the punishment. The medium can remain to be used to achieve a predetermined goal; it depends on how the medium implement itself. When the medium cannot fulfill its intended purpose, then there is no reason to keep using it. The use of medium that are not in accordance with their designation will have an inefficiency result. In various theories, it still debated the effectiveness of imprisonment as a medium to achieve the goal of punishment. It means, there is no guarantee that when the perpetrator of a crime is eventually sentenced to prison, he will automatically return to being a good and law-abiding member of society. The common things is that prisons have a very detrimental negative impact on prisoners, especially child prisoners.
2. The use of criminal law as a medium of preventing crime, including as a way in dealing with Narcotics, it can only be used when the impact of the crime is not bigger than that which is not used, since there is a fact that the use of imprisonment as a medium in dealing with crimes committed by children is a fundamental weakness. This is because the effectiveness of prisons as a medium in dealing with narcotics is still unknown.

The authority to take humane steps has been mandated by each legal institution, from police to supreme court. Police and Prosecutors have a discretionary power over the problem which can be resolved without prolonging the conflict or dispute, and rarely used unless there is a clear financial advantage. The judges have the expertise to make discoveries and create laws, both through laws and through the principles of jurisprudence, but judges are rarely successful.

Restorative Justice is an approach that focuses on victims needs, perpetrators, involves the community participation, and solely fulfills the legal requirements or simply the criminal penalties. In this case they are also involved in the process, while other crimes have been committed by correcting their mistakes they made by asking, returning the stolen money, or by doing community service. In addition, the Restorative Justice approach helps criminals to prevent other crimes in the future.

²³ Tampubolon, "Pertimbangan Hakim Dalam Penjatuhan Sanksi Pidana Terhadap Anak Yang Melakukan Tindak Pidana Narkotika Jenis Sabu Dikaitkan Dengan Undang - Undang Perlindungan Anak (Studi Kasus No. 1/Pidsus-Anak/2015/Pn.Mdn)."

This is based on the theory of justice which considers crimes and violations, in principle, as violations against individuals or society and not against the state. Restorative Justice develop the dialogue between victims and perpetrators which will show the highest level of victim satisfaction and perpetrator accountability. The concept of Restorative Justice is simple. The measure of justice is no longer based on retribution from the perpetrator's victim (whether physically, psychologically or punished); but the community that did it was healed by providing support to the victim and holding the perpetrator accountable with the help of their family.²⁴

In Indonesia, Restorative Justice itself is defined as a balance among the perpetrator, victim, family and other parties involved in a crime with its settlement.

Based on the data that associated with various provisions governing child protection both in the form of international instruments and national instruments, the following matters can be stated as:²⁵

1. The decision of judges who always impose prison sentences on children and even fines is shows that imprisonment is actually the judges' priority in juvenile crimes. This fact is not different from the sentences that will be imposed on adults, that most of which are also prison sentences. In the perspective of child protection, the tendency of judges to always impose prison sentences on children is due to basic problems:
 - a) The crime of liberty deprivation, including imprisonment can only be applied to children as a last medium. In this case, when other effective means are available, the use of prisons should be avoided. The improper application of imprisonment will cause problems considering the effectiveness of practices that is still in doubt, while the negative impacts are already known.
 - b) The application of imprisonment for children in various international instruments concerning the application of imprisonment, such international preferences do not according to reality.

Judges only fulfill the formal requirements in imposing criminal sanctions on children. The application of sanctions against children who commit acts is still aimed at the interests of children growth and development. The law enforcers from investigators, public prosecutors and judges are implementing their duties and authorities based on the policies contained in laws and regulations without considering other relevant provisions and the conditions of community development from locally, nationally and internationally.

²⁴ Moh. Taufik Makarao and H. Moh. Zakky A.S, *Tindak Pidana Narkotika* (Jakarta: Ghalia Indonesia, 2004).

²⁵ Tampubolon, "Pertimbangan Hakim Dalam Penjatuhan Sanksi Pidana Terhadap Anak Yang Melakukan Tindak Pidana Narkotika Jenis Sabu Dikaitkan Dengan Undang - Undang Perlindungan Anak (Studi Kasus No. 1/Pidsus-Anak/2015/Pn.Mdn)."

CONCLUSION

The legal protection for children who are in conflict with the law in criminal justice system is regulated in international and national legal instruments. In Indonesia, the government stipulated a special law by Law No. 11/2012 concerning Juvenile Criminal Justice System in dealing with children who conflict with the law. This law prioritizes restorative justice in the form of the obligation to seek diversion in handling juvenile criminal cases, whereby the settlement of cases is avoided as far as possible from the judicial process which will stigmatize the children. The judge's decision to impose a sentence on a child as a perpetrator of a narcotics crime is based on various considerations consisting of aggravating considerations and useful considerations to show that the judge focuses on prohibited acts which only focuses on aggravating considerations.

The researchers suggest that the sanctions for children as perpetrators which at the same time the nation must integrate the protection for children as social victims. Then, it is not appropriate to sentence the prison sanctions for children who commit the narcotic crimes.

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