
RESEARCH ARTICLE

Policies and Formulations of Legal Protection for Children against Violations of Children's Rights

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ABSTRACT

This study aims to analyze the policies and formulations of criminal law in tackling street children who commit crimes. The lack of realization of the state's responsibility for neglected children is due to the fact that the government system has not been running properly, and there is no strong desire from the government to take care of neglected children. The research uses a normative juridical approach (*socio-legal research*) as the basis for describing ideas. The results of this study are the obstacles that occur in the protection of the rights of Indonesian children, especially against street children who commit criminal acts, including: The implementation of law enforcement itself; this concerns the ability of law enforcement officers, supporting facilities and infrastructure, government programs have not been fully able to realize effectively considering the level of the economic capacity of most Indonesian people is still low, lack of public knowledge, especially parents about children's rights, lack of understanding and related agencies and the community about the provisions of the International Convention on the Rights of the Child, Coordination between social and government organizations as well as between organizations relatively less social and cross-sectoral and international cooperation is not well established.

KEYWORDS

Policy, Formulation, Child, Protection, Legal

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1. Introduction

The legal problems of criminal acts of children are very complex; all components are required to play an active role in giving maximum attention to children. So, children should not fall into the wrong path, which eventually leads to criminal acts; Therefore, children should not be perpetrators of criminal acts; the state must provide protection. One of the components of the nation that can play an active role in paying attention to the protection of children, both victims and children in conflict with the law, is the police. The apparatus has an obligation to carry out investigations and investigations. An investigation is a series of actions by an investigator in terms of and according to the method regulated by law to seek and collect evidence of a criminal act that occurred in order to find the suspect.¹

In the development of the application of criminal law in Indonesia, the existence of children who commit crimes or criminal acts commonly known as children are still subject to legal proceedings. This happens because the child's crime has caused harm to other parties (victims) both materially and in life. In the regulation concerning children, it is regulated in Law Number 23 of 2002 Juncto Law Number 35 of 2014 concerning Child Protection. The Child Protection Act states that children are a mandate as well as a gift from God Almighty, which we must always protect because they have inherent dignity, worth and rights as human beings

¹ Andik Prasetyo, "Perlindungan Hukum Bagi Anak Pelaku Tindak Pidana," *Mizan: Jurnal Ilmu Hukum* 9, no. 1 (2020): 51–60.

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that must be upheld. In relation to child protection, children's rights are also regulated in Law Number 39 of 1999 concerning Human Rights (HAM), formulated as many as 15 articles.²

In addition to the Child Protection Act, it also regulates the Juvenile Justice System. This is regulated in Law Number 11 of 2012 concerning the Juvenile Justice System, hereinafter abbreviated as the SPA Law, which states, "children in conflict with the law, hereinafter referred to as children, are children who are 12 years old, but not yet 18 years old who are suspected of committing crimes. Legal protection, as well as the application of the law for children, have been regulated in such a way in certain provisions and will continue in the criminal system. Sentencing or often referred to as giving criminal sanctions by the legislators, is a matter of sanctions for determining criminal law sanctions. Prior to the enactment of the Juvenile Justice System Act, the child's material law which also includes sentencing, was formulated in Article 45 of the Criminal Code, hereinafter abbreviated as KUHP.³

The imposition of criminal sanctions so far for children does not provide a deterrent effect; even children are increasingly committing crimes. This can be proven in several cases that children return to committing crimes repeatedly. The function of the penitentiary does not work, and the purpose of punishment in law enforcement efforts against children as perpetrators of criminal acts has not changed. The imposition of a crime against a child should not only be revenge, but what is important is the provision of guidance and protection so that the child does not commit another similar crime. Protection at the same time to the community and the convicts themselves so that they become converted and can become good members of society.⁴

Article 28 B, paragraph 2 of the 1945 Constitution relating to children's rights, states, "every child has the right to survival, growth and development and the right to protection from violence and discrimination." This explains that children who are in trouble with the law also have the right to be protected and not be discriminated against. Children become perpetrators of crimes due to the weakness of legal protection for children, and the implementation of punishment for these children leads to suffering (*nestapa*) rather than guidance.⁵

Crime committed by children can be caused by various factors. Judges in imposing criminal sanctions should also pay attention to certain conditions for children so that law enforcement efforts for children do not cause children not to lose their rights in growing and developing. Recidivists or repetition of a crime is where a person commits several or more acts that have been sentenced by a judge. Recidivists in the legal dictionary are defined as repeat crimes, the event that someone who has been convicted of a crime commits another crime.⁶

The repetition of criminal acts is not new in the legal world because where there is a crime, there is also a repetition of crime and repetition of crime is considered a continuation of evil intentions as stated by Bartolus, a legal expert that "Humanum enimest peccare, angilicum, seemendare, diabolicum perseverare" or evil and the repetition of evil is considered a continuation of evil intentions, so it is certain that the practice of repeating evil itself is as old as the practice of evil. The increase in cases of crimes committed by children that result in repeated criminal acts (recidivism) is caused by the criminal justice system for children, which does not provide a deterrent effect, and even punishment for children is only suffering (*nestapa*). In addition, someone repeats a criminal act due to several factors, including; a lack of effective working of one of the sub-systems of the criminal justice system in Indonesia, errors in law application, and economic, social and cultural factors.⁷

Based on the above legal events relating to children as perpetrators of criminal acts, it is necessary to protect children's rights in law enforcement efforts. The application of the law for children and making them perpetrators of criminal acts will disrupt the future of children. The protection of children's rights is directly related to the regulation in laws and regulations. Things that need to be considered are the existence of groups of children who experience obstacles in their growth and development, both spiritually, physically and socially.⁸

Child protection is beneficial for children and their parents as well as the government, so coordination of cooperation in child protection needs to be held in order to prevent imbalances in child protection activities as a whole. Abdul Hakim stated that: "The issue of legal protection for children is one side of the approach to protecting Indonesian children. The problem is not merely a

² Friwina Magnesia Surbakti and Rizkan Zulyadi, "Penerapan Hukum Terhadap Anak Sebagai Pelaku Tindak Pidana Pencurian Dengan Kekerasan," *Journal of Education, Humaniora and Social Sciences (JEHSS)* 2, no. 1 (2019): 143–62.

³ Angger Sigit Pramukti, "Sistem Peradilan Pidana Anak," 2015.

⁴ Pramukti.

⁵ Laurensius Arliman, *Komnas HAM Dan Perlindungan Anak Pelaku Tindak Pidana* (Deepublish, 2015).

⁶ Arliman.

⁷ Putu Eka Trisna Dewi, "PENEGAKAN HUKUM TERHADAP RESIDIVIS TINDAK PIDANA PENCURIAN DALAM SISTEM PERADILAN PIDANA ANAK," *Jurnal Hukum Saraswati (JHS)* 3, no. 2 (2021): 1–10.

⁸ Prasetyo, "Perlindungan Hukum Bagi Anak Pelaku Tindak Pidana."

juridical approach, but a broader approach is needed, namely economic, social and cultural." Thus, the imposition of law on children as perpetrators of criminal acts (recidivists) must pay attention to the interests of children. If viewed from the juvenile justice system, the judicial process for children should pay attention to the interests of the child because the handling of children who are in trouble with the law must pay attention to the welfare of the child. Legal protection (written or unwritten) guarantees children can actually carry out their rights and obligations. Whereas the legal aspects of child protection are more focused on children's rights which are regulated by law and not obligations, considering that legally (juridically) children have not been burdened with obligations.⁹

Based on the description above, the researcher is interested in conducting research entitled policies and formulations of criminal law in tackling street children who commit crimes. Regarding the imposition of criminal sanctions for children as perpetrators of criminal acts, it does not provide a deterrent effect but can threaten the future of children. For this reason, it is necessary to guarantee children's human rights in obtaining legal assistance and to look at other factors that cause children to commit crimes. The formation of the Law on the Criminal Justice System for Children is a consequence of the legal politics of protecting children's rights. The important thing is that children are not punished, so the guarantee of children's rights is the embodiment of efforts to provide education and guidance to children in conflict with the law. Child punishment for children is not the end of educating children but makes children commit more and more crimes.

2. Research Methods

This study uses normative legal approach, namely examining the laws and regulations in a coherent legal system. In this case, the law is a positive norm that applies at a certain time and is issued as a product of a certain political power that has legitimacy¹⁰ with a statutory approach, namely reviewing and researching laws and regulations in the field of child protection and other laws and regulations related to the principles of children's rights. Sources are obtained from laws and regulations relating to child protection. The analysis used is legal interpretation, namely principal, systematic and grammatical interpretation. While the legal material analysis method used in this research is the normative method in prescriptive optics with deductive-inductive reasoning to produce propositions or concepts as answers to problems or research findings.¹¹

3. Results and Discussion

1. Definition and Objectives of Criminal Law

Policy Crime prevention policies can be carried out through two approaches, namely the penal approach (application of criminal law) and the non-penal approach (approach outside criminal law). The term in Indonesian is often translated with the word "politics"; therefore, criminal law policies are also known as criminal law politics. The politics of criminal law is an effort to determine which direction the implementation of Indonesian criminal law will take in the future by looking at its current enforcement.¹² Regarding legal policy, namely that carrying out criminal law politics means holding elections in order to achieve the best results of criminal legislation by fulfilling the requirements of justice and efficiency. Implementing "criminal law politics" means efforts to realize criminal laws and regulations that are in accordance with the circumstances and situations at a time and for the future. Crime prevention efforts with criminal law are essentially part of law enforcement efforts (especially criminal law enforcement). Therefore, it is often said that politics or criminal law policies are also part of law enforcement policies.¹³

In detail about the scope of criminal law politics, according to Mulder, criminal law politics is a policy line to determine:¹⁴

- a. the extent to which the applicable criminal provisions need to be amended or updated;
- b. what can be done to prevent crime;
- c. the manner in which investigations, prosecutions, trials and criminal prosecutions must be carried out.

Crime prevention is essentially an integral part of efforts to protect society (*social defense*) and efforts to achieve social welfare (social welfare); therefore, it can be said that the ultimate goal or main goal of criminal law politics is the protection of society to achieve public welfare. Thus, it can be said that the politics of criminal law is essentially an integral part of social politics. The criminalization policy is a policy in determining an act that was originally not a criminal act (not punished) to become a criminal

⁹ Bianca Reity Posumah, "PERLINDUNGAN HUKUM TERHADAP ANAK DALAM PELAKSANAAN PIDANA DI LEMBAGA PEMASYARAKATAN ANAK," *LEX CRIMEN* 8, no. 3 (2019).

¹⁰ Ani Purwati, "Metode Penelitian Hukum Teori & Praktek" (Jakad Media Publishing, 2020).

¹¹ S H I Jonaedi Efendi, S H Johnny Ibrahim, and M M Se, *Metode Penelitian Hukum: Normatif Dan Empiris* (Prenada Media, 2018).

¹² Jacob Hattu, "Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan Anak," *Sasi* 20, no. 2 (2014): 47–52.

¹³ Beby Suryani Fithri, "Pendekatan Integral Penal Policy Dan Non Penal Policy Dalam Penanggulangan Kejahatan Anak," *Doktrina: Journal of Law* 1, no. 2 (2018): 69–89.

¹⁴ FERNANDES E D Y SYAHPUTRA SILABAN, "KEBIJAKAN HUKUM PIDANA TERHADAP PENGATURAN TINDAK," n.d.

act (a criminal act). So, in essence, the criminalization policy is part of the criminal policy (criminal policy) by using the means of criminal law (penal) so that it is part of the criminal law policy (penal policy).¹⁵

The use of legal remedies, including criminal law, as an effort to overcome social problems, including in the field of law enforcement policies. In addition, because the goal is to achieve the welfare of society in general, this law enforcement policy is also included in the field of social policy, namely, all rational efforts to achieve public welfare. As a matter of policy, the use of criminal law is actually not a must. There are no absolutes in the field of policy because, in essence, in policy matters, people are faced with the problem of evaluating policies and choosing from various alternatives.¹⁶

Based on the nature of the criminal law policy, it means that in tackling a crime, there is no obligation that requires tackling the crime by means of criminal law (penal), considering that crime prevention by using a criminal law policy in the form of giving a criminal has a bad impact as stated by Herman Bianchi. that the institution of imprisonment and imprisonment must be abolished forever and in its entirety. Not a bit (used) that should be taken from the dark side in the history of humanity.

Penal policies are repressive in nature but actually also contain a preventive element because, with the threat and imposition of criminal charges against offenses, it is hoped that there will be a deterrent effect. In addition, the penal policy is still needed in crime prevention because criminal law is one of the means of social policy to channel "social dislike" or prevent social disapproval ("social disapproval social abhorrence"), which is also expected to become a means of "social protection" ("social defense"). That is why it is often said that "penal policy" is an integral part of "social defense policy".¹⁷

Prevention and control of crime by means of "penal" is a "penal policy" and penal law enforcement policy which functionalized several stages as follows:¹⁸

1. Formulation stage (legislative policy);
2. Application stage (judicial policy);
3. Execution stage (executive policy).

With the formulation stage, crime prevention and control efforts are not only the task of law enforcement/enforcement officers but also law-making officials; even the legislative policy is the most strategic stage of the penal policy. Therefore, the error/weakness of the legislative policy is a strategic error that can become an obstacle to crime prevention and control efforts at the application and execution stages. Criminal law policy (penal policy) is essentially a criminal law enforcement policy.¹⁹

Criminal law enforcement policies are a series of processes consisting of three policy stages. First, the formative policy stage or the legislative policy stage, namely, the stage of drafting/formulating criminal law. The second stage, the judicial/applicative policy stage, is the stage of applying criminal law. The third stage, the administrative/executive policy stage, is the implementation/execution stage of criminal law. M. Cherif Bassiouni²⁰ referred to the three stages as the formulation stage (the legislative process), the application stage (the judicial process) and the execution stage (the administrative process). The three stages of the criminal law enforcement policy mentioned above contain three legislative powers or authorities that formulate or determine an act; this is also a term related to the jurisdiction of the authority to impose a criminal.²¹

At the legislative policy stage, a criminal system is established; in essence, the criminal system is a system of authority/power to impose criminal penalties. It should be noted that the notion of "criminal" can not only be seen in a narrow/formal sense but also in a broad/material sense. In a narrow/formal sense, the imposition of a crime means the authority to impose/impose criminal sanctions according to law by an authorized official (judge). In a broad/material sense, the imposition of a crime is a chain of legal action processes from authorized officials, starting from the investigation process and prosecution to the criminal decision handed

¹⁵ Fithri, "Pendekatan Integral Penal Policy Dan Non Penal Policy Dalam Penanggulangan Kejahatan Anak."

¹⁶ Fithri.

¹⁷ Titus Adhi Sanjaya, Ramlani Lina Sinaulan, and Mohamad Ismed, "Pendekatan Integral Penal Policy Dan Non Penal Policy Dalam Penanggulangan Kejahatan Anak," *SALAM: Jurnal Sosial Dan Budaya Syar-I* 9, no. 1 (2022).

¹⁸ Hardianto Djanggih, *Konsepsi Perlindungan Hukum Bagi Anak Sebagai Korban Kejahatan Siber Melalui Pendekatan Penal Dan Non Penal* (Gadjah Mada University, 2018).

¹⁹ Yulia Kurniaty, "Pengaruh Lingkungan Pergaulan Terhadap Peningkatan Kejahatan Yang Dilakukan Anak," *Proceeding Of The URECOL*, 2020, 415–20.

²⁰ M Cherif Bassiouni, *Introduction to International Criminal Law* (Brill Nijhoff, 2013).

²¹ A A A Ngurah Tini Rusmini Gorda and I Gede Agus Kurniawan, "Jagaddhita Family Saves Children from Violence and Exploitation: A Perspective on the Usage of the Non-Penal Policy," *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)* 9, no. 2 (2020): 269–80.

down by the court and carried out by the criminal implementing apparatus. In a process, the "investigative authority" is essentially a part of the "criminal authority".²²

Legislative policies that are integral in the field of criminal law enforcement do not mean that they have to be written down in one law book. Various laws such as today (there is a material criminal law inside and outside the Criminal Procedure Code, and there is a criminal implementing law). In each of these laws, the authority of each official/law enforcement officer related to the four stages/processes above may be regulated. So it can be said that the purpose of criminal law policy is to provide legal reform in order to realize legal goals, especially for children. Based on the stages of legal policy, starting from the legislative, judicial and executive, special legal policies for children that are made must provide values of justice in criminal law reform so that children's rights are not neglected and are given protection.²³

2. Position of the Government and Institutions against Street Children.

In Indonesia, the task of the government must be in accordance with the objectives of the establishment of the Indonesian government according to the preamble to the 1945 Constitution, namely: "to protect the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educate the nation's life". In order to carry out tasks according to the goals of the state, the government, as one of the organizers, must be given the right authority and clear goals and objectives. According to SF Marbun, the nature of government authority with clear aims and objectives is bound at a certain time and subject to written and unwritten legal boundaries. While the content can be general (abstract), for example, making a rule, and can also be concrete in the form of a permit granting decision or a plan.²⁴

Efforts that can be made to improve the administration of government are, among others, by making effective supervision both through the supervision of the judiciary and the community and based on general principles of good governance. The implementation of good governance, in turn, will also make the community obtain and feel inner and outer peace in the form of:²⁵

- 1) Survival and exercise of rights do not depend on physical and non-physical strength;
- 2) As long as it does not violate the rights and harm others, the community can freely practice what they believe to be the truth and can freely develop their talents and pleasures;
- 3) Feeling treated fairly, humanely, fairly and civilly even if they make mistakes.

The government, as the leader of the state, has the main task of advancing the welfare of the people; in that context, it is entitled and has the authority to collect taxes from its citizens according to their respective abilities. On the other hand, the government is obliged to ensure that every citizen achieves basic welfare or a minimum standard of living that is worthy of humanity. Article 34 Paragraph (1) of the 1945 Constitution states: "The poor and neglected children are cared for by the state". This shows how high the desire and dignity of the Indonesian people are to advance their nation in order to realize the welfare of the people who are evenly distributed at all levels of society. The human rights of neglected children are essentially the same as human rights in general, as stated in Law Number 39 of 1999 concerning Human Rights and Presidential Decree Number 36 of 1999. 1999 concerning the *Ratification of the Convention on the Right of the Child* (Convention on the rights of the Child).²⁶

They need to get their rights normally like children, namely *civil rights and freedoms*, family environment and choice of care (*family environment and alternative care*), basic health and welfare, education, recreation and culture (education, leisure and culture activities), and special protection (special protection). The Convention on the Rights of the Child, as ratified by Presidential Decree No. 36/1990, states that because children are physically and mentally immature, they need attention and protection. Abandoned children themselves are generally children who come from different family backgrounds. Some come from poor families, so they grow and develop with a background of street life that is familiar with poverty, persecution, and loss of love, thus burdening their souls and making them behave negatively. Even more sad is that there are abandoned children who have no family at all (live alone). There are abandoned children whose mothers live in a different city from where their father lives because of work, remarriage, or divorce. There are street children who still live with their families, there are those who live separately but still often

²² Maksum Hadi Putra, "Sanksi Pidana Terhadap Anak Yang Melakukan Pengulangan Tindak Pidana (Residive)," *Jurnal IUS Kajian Hukum Dan Keadilan* 4, no. 2 (2016).

²³ Aristo Evandy A Barlian and Barda Nawawi Arief, "Formulasi Ide Permaafan Hakim (RECHTERLIJK PARDON) Dalam Pembaharuan Sistem Pidanaan Di Indonesia," *Law Reform* 13, no. 1 (2017): 28–44.

²⁴ Darmi Roza and Laurensius Arliman, "Peran Pemerintah Daerah Di Dalam Melindungi Hak Anak Di Indonesia," *Masalah-Masalah Hukum* 47, no. 1 (2018): 10–21.

²⁵ Nizar Apriansyah, "Peran Pemerintahan Dalam Pembentukan Kebijakan Hukum (Role of Government in Legal Policy-Making)," *Jurnal Ilmiah Kebijakan Hukum* 10, no. 2 (2017): 187–96.

²⁶ Pramukti, "Sistem Peradilan Pidana Anak."

return to their families, there are those who have never lived with their families at all, or there are even children who do not know their families.²⁷

In addition, rapid development activities in urban areas also have a negative effect on the lives of neglected children. The state of the city actually invites the rise of abandoned children. Densely populated cities and many troubled families make children who are malnourished, lack attention, lack education, lack love and warmth of soul, and lose the right to play, have fun, socialize, and live independently, or even result in children being mentally abused, physically, and sexually by family, friends, and other adults. Neglected children, in essence, are "children", just like other children who are not neglected children.²⁸

They need education. The fulfillment of education must pay attention to aspects of their physical and mental development because children are not small adults. Children have their own worlds and are different from adults. We don't just give him food and drink or just protect him in a house because children need love. Love is the foundation of education. Without love, ideal education is impossible. The most basic problem experienced by neglected children is the slight possibility of getting opportunities in the field of proper education. This is due to several factors, namely:²⁹

- 1) Absence of fees; most neglected children come from families with very low economic strata, so the education costs that should be provided by the family are not available at all;
- 2) Limited time; To meet the needs of daily life, most of the neglected children work odd jobs to earn income; some even try to earn income from inappropriate ways such as begging, stealing, pickpocketing and others. So that their day-to-day time is consumed at work, on the streets, in slum areas and in other;
- 3) Low willingness to learn; this condition is caused by the condition of the surrounding environment (friends), which is dominated by children who are not in school (dropping out of school), thus causing the neglected child to have a perspective that not getting a formal education is not something to worry about;
- 4) Apathy towards education and their ability to make money in a short time causes them to be apathetic towards education. It's really unfortunate because they don't always have to be on the street to earn a fortune, and when they decide to leave the street children's environment, educational capital is needed;
- 5) Failure of control function by family, community and government; This condition is caused because each of them is busy with their respective activities. Besides the educational problems above, the problem that is no less important for neglected children is health problems. Because the place they live in is any place that is unfit for habitation, at night, they feel cold, while during the day, they are hot.

As we all know, one of the factors that cause children to be neglected is poverty. Poverty is a portrait of a nation's failure to prosper its citizens. Based on the conditions of neglected children described above, the problems experienced by neglected children can be formulated as follows:³⁰

1. Abandoned children take to the streets because of the family's economic pressure;
2. The low level of education of the parents of neglected children;
3. There is no policy umbrella regarding children taking to the streets;
4. Social control is not yet optimal in society;
5. The role of social organization institutions has not been played;
6. The social environment in which abandoned children live does not support them from a mental and psychological perspective to enter formal schools;
7. Lack of public appreciation of the potential and creativity of abandoned children.

The government has set regulations related to child protection, of course, including street children. In the Child Protection Law Number 23 of 2002, it is stated that child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and protection and receive protection from violence and discrimination. Likewise, in Law Number 39 of 1999 concerning Human Rights, Article 1 of the Law of the Republic of

²⁷ Ni Made Ita Ariani, Ni Putu Rai Yuliantini, and Dewa Gede Sudika Mangku, "Implementasi Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Terhadap Curanmor Yang Dilakukan Oleh Anak Di Kabupaten Buleleng (Studi Kasus Perkara Nomor: B/346/2016/Reskrim)," *Jurnal Komunitas Yustisia* 2, no. 2 (2020): 100–112.

²⁸ Sri Rahayu, "Diversi Sebagai Alternatif Penyelesaian Perkara Tindak Pidana Yang Dilakukan Anak Dalam Perspektif Sistem Peradilan Pidana Anak," *Jurnal Ilmu Hukum Jambi* 6, no. 1 (2015): 43317.

²⁹ Mardi Candra, *Aspek Perlindungan Anak Indonesia* (Prenada Media, 2018).

³⁰ Siti Nurul Hamidah et al., "EVALUASI PROGRAM KESEJAHTERAAN SOSIAL ANAK TERLANTAR (PKSAT) DI LEMBAGA KESEJAHTERAAN SOSIAL ANAK (LKSA) MADANI BANTEN," *Lembaran Masyarakat: Jurnal Pengembangan Masyarakat Islam* 7, no. 1 (2021): 67–88.

Indonesia Number 23 of 2002 concerning the Protection of Human Children, it is also stated that every child has the right to protection by parents, family, society and the State. Children's rights are human rights, and for their interests, the rights of children are recognized and protected by law even from the time they are in the womb.³¹

The government, as one of the organs of state administration, has the responsibility for the maintenance and development of neglected children. The obligations and responsibilities of the State and Government in providing protection for children can be seen in Law Number 23 of 2002 concerning Child Protection, including: Article 21. The state and government are obliged and responsible for respecting and guaranteeing the human rights of every child without distinction of ethnicity, religion, race, class, gender, ethnicity, culture and language, the legal status of children, child's birth order, and physical and/or mental condition. In Article 22, 'The state and the government are obliged and responsible for providing support for facilities and infrastructure in the implementation of child protection'. In Article 23 (1), The state and the government guarantee the protection, maintenance, and welfare of the child by taking into account the rights and obligations of parents, guardians, or other persons who are legally responsible for the child. (2) The state and the government supervise the implementation of child protection. Article 24 The state and government guarantee children exercise their right to express opinions according to the age and level of intelligence of the child.³²

Based on the several articles above, it is clear that the Government as a state administrative organ must be able to carry out the mandate of this article and must be ready to overcome all problems with an accurate strategy and policy so that it can be implemented easily. The task of the government is to provide protection and care for neglected children because this is their responsibility. However, the problem of protecting and caring for children, especially neglected children, is not solely the responsibility of the state and government but is our collective responsibility. Article 20 of Law Number 23 of 2002 concerning Child Protection stipulates that "the state, government, community, family, and parents are obliged and responsible for the implementation of child protection. Article 25 of Law Number 23 of 2002 concerning Child Protection regulates the obligations and responsibilities of the community towards child protection carried out through community role activities in the implementation of child protection. Meanwhile, Article 26 paragraph (1) regulates the obligations and responsibilities of parents to:

- a) Nurturing, nurturing, educating, and protecting children;
- b) Growing children according to their abilities, talents and interests; and
- c) Preventing child marriages.

Whereas Article 26 paragraph (2) reads, "in the event that the parents are absent, or their whereabouts are unknown, or for some reason, cannot carry out their obligations and responsibilities, the obligations and responsibilities as referred to in paragraph (1) may be transferred to the family, which is carried out in accordance with the provisions of the applicable laws and regulations".³³

So, the one who seeks child protection is every member of the community according to their abilities with various kinds of efforts in certain situations and conditions. Every citizen is responsible for the implementation of child protection for the welfare of the child. Children's happiness is shared happiness, and protected happiness is protective happiness. There is no anxiety in children because child protection is carried out properly, and children become prosperous. Child welfare has a positive influence on parents, families, community, government and state. Child protection benefits children and their parents, families, communities, governments, and the state. Coordination of cooperation in child protection activities needs to be carried out in order to prevent an imbalance in overall child protection activities.³⁴

3. Criminal Law Policy Based on

a. The formulation of punishment according to the Criminal Code (KUHP)

The book of the Criminal Code (hereinafter referred to as the Criminal Code) basically does not distinguish the sanctions that can be imposed on adults and children; there are only some reductions in punishment for children. Based on Article 10 of the Criminal Code, sanctions that can be imposed on people who commit criminal acts are criminal sanctions in the form of:³⁵

- a) The main penalties include:

³¹ Rudi Kurniawan et al., "Optimalisasi Pemberian Bantuan Sosial Kepada Fakir Miskin Pada Dinas Sosial, Pemberdayaan Perempuan Dan Perlindungan Anak," *Asia-Pacific Journal of Public Policy* 6, no. 2 (2020): 126–49.

³² B I P Tim, *Undang-Undang Perlindungan Anak* (Bhuana Ilmu Populer, 2016).

³³ Achmad Akbar Rosyidi, "PENEGAKAN HUKUM PASAL 26 AYAT (2) HURUF A UNDANG-UNDANG NOMOR 32 TAHUN 2002 TENTANG PENYIARAN TERKAIT SENSOR INTERNAL TERHADAP ISI SIARAN PADA TELEVISI BERLANGGANAN," *JURNAL NOVUM* 5, no. 1 (2018): 113–21.

³⁴ Saraswati, *Hukum Perlindungan Anak Di Indonesia*.

³⁵ S H Moeljatno, *KUHP (Kitab Undang-Undang Hukum Pidana)* (Bumi Aksara, 2021).

- 1) Death penalty;
- 2) imprisonment;
- 3) imprisonment;
- 4) Fines;

b) Additional penalties include:

- 1) Revocation of certain rights;
- 2) confiscation of certain goods;
- 3) Announcement of judge's decision.

Sentencing a child is the last legal remedy that is *ultimum remedium*, meaning that a criminal sentence against a child can only be carried out if there are no other legal remedies that are beneficial to the child, for example, the child is already very disturbing to the family and society, the child commits a crime repeatedly, or no one is able to educate and supervise him.³⁶ If the judge has to impose criminal sanctions on a child who commits a crime because there is no other choice, then the judge must apply the contents of Article 47 of the Criminal Code, namely:³⁷

- 1) If the judge imposes a sentence, the maximum principal penalty for the crime must be reduced by one third;
- 2) If the act committed is a criminal offense punishable by death or life imprisonment, a maximum imprisonment of 15 (fifteen) years is imposed;
- 3) Additional penalties in the form of revocation of certain rights and the announcement of the judge's decision cannot be applied to children.

With regard to additional punishment in the form of confiscation of certain goods, which is the only additional penalty that can be imposed on a child, Article 39 of the Criminal Code is regulated as follows:

- 1) Goods belonging to the convict obtained from a crime or which are intentionally used to commit a crime can be confiscated.
- 2) If the sanction is imposed because of a crime that was not committed intentionally or because of a violation, a decision on the confiscation of certain goods can also be imposed based on matters specified in the law.
- 3) Confiscation can be carried out against guilty persons who are handed over to the government but only on goods that have been confiscated.

In addition to criminal sanctions, the Criminal Code also recognizes action sanctions which are specific to children who commit criminal acts. Action sanctions can only be imposed on children, as contained in Article 45 of the Criminal Code as follows:

"In the case of a criminal prosecution of an immature person for committing an act before the age of sixteen years, the judge may determine to order that the guilty be returned to his parents, guardians or guardians, without any punishment, or order that the guilty be handed over to the government without any crime, if the act is a crime or one of the offenses under articles 489, 490, 492, 496, 497, 503-505, 514, 517-519, 526, 531, 533, 536, and 540, and two years have not passed since being found guilty of committing a crime or one of the violations mentioned above, and the decisions have become final, or have imposed a sentence on the guilty person."

Then in Article 46 of the Criminal Code, it is explained that if the judge makes a decision so that a child who commits a crime is handed over to the government, then he is included in a state education house so that he can receive education from the government or in other ways in the future, or be handed over to certain people who live in Indonesia. Indonesia, or to a legal entity, foundation, or charitable institution domiciled in Indonesia to provide education, or at a later date, at the expense of the government. These two things are done the longest until the child reaches the age of 18 years.³⁸

Basically, the Criminal Code has adopted a two-track system or a double track system because it divides sanctions into criminal sanctions and action sanctions, but the regulation in the Criminal Code is not very clear. The makers of the Criminal Code have

³⁶ Duwi Handoko, *Kitab Undang-Undang Hukum Pidana* (Hawa dan AHW, 2018).

³⁷ Saraswati, *Hukum Perlindungan Anak Di Indonesia*.

³⁸ Arliman, *Komnas HAM Dan Perlindungan Anak Pelaku Tindak Pidana*.

also paid great attention to children by providing specific sanctions against children considering that children are human beings who have unique characteristics and are still in the stage of development, so sometimes they do not realize that their actions have violated the law. Therefore, it is more advisable for children to impose sanctions for actions, as contained in Article 45 of the Criminal Code, rather than limiting their freedom.³⁹

With the imposition of action sanctions on children, children will be sought to receive education and guidance in their growth and development so that they can become better human beings. Based on the descriptions above, it can be concluded that the sanctions that can be imposed on children who commit criminal acts in the Criminal Code are divided into two, namely;

- a) Criminal sanctions include:
 - 1) imprisonment for a maximum of 15 (fifteen) years;
 - 2) imprisonment;
 - 3) Criminal fines;
 - 4) Additional punishment in the form of confiscation of certain goods.
- b) Sanctions for action include:
 - 1) Returned to parents or guardians or their guardians;
 - 2) Submitted to the government or social institutions such as foundations and charities.

The formulation of punishment known in the Criminal Code against children is more about retaliation for crimes committed against children.

b. The formulation of punishment according to the SPPA Law and the Child Protection Law.

The establishment of a law regarding protection for children consists of Law Number 11 of 2012 concerning the Juvenile Justice System and Law Number 35 of 2014 concerning Child Protection. In the Child Protection Act, the position of children is more directed at protecting children as victims of crime so that their rights can be guaranteed and not under pressure. Whereas in the SPA, the position of children is more directed at how to handle children as perpetrators of crime so as not to commit crimes again, children who commit crimes are fostered and directed to be better.⁴⁰

The formation of Law No. 35 of 2014 on amendments to Law No. 23 of 2002 concerning Child Protection is based on the consideration that child protection in all aspects is a juridical basis and part of national development activities, especially in realizing children's lives in the nation and state. The birth of the Child Protection Act is a form of public concern in fighting for children's rights. For the effectiveness of supervision of the implementation of Child Protection, an independent institution is needed, which is expected to support the Government and Regional Government in the implementation of Child Protection.⁴¹

The obligations and responsibilities of the State and Government in child protection efforts are regulated in Law Number 35 of 2014, namely;

- a) Respect and guarantee the human rights of every child without distinction of ethnicity, religion, race, class, gender, ethnicity, culture, language, the legal status of the child, order of birth of the child and physical and/or mental condition (article 21).
- b) Provide support for facilities and infrastructure in the implementation of child protection (article 22).
- c) Guarantee the protection, maintenance, and welfare of children by taking into account the rights and obligations of parents, guardians or other people who are generally responsible for children overseeing the implementation of child protection (article 23).
- d) Ensuring children exercise their right to express opinions according to the child's age and level of intelligence (article 24).

The implementation of child protection is based on Pancasila and is based on the 1945 Constitution as well as the basic principles of the Convention on the Rights of the Child, including:⁴²

³⁹ Pramukti, "Sistem Peradilan Pidana Anak."

⁴⁰ Candra Hayatul Iman, "Kebijakan Hukum Pidana Perlindungan Anak Dalam Pembaruan Sistem Peradilan Pidana Anak Di Indonesia," *Jurnal Hukum Dan Peradilan* 2, no. 3 (2018): 358–78.

⁴¹ Diah Ratu Sari Harahap, "Kebijakan Formulasi Tindak Pidana Oleh Anak Yang Dapat Diupayakan Diversi Berdasarkan Aspek Keadilan Dan Tujuan Pemidanaan," *Jurnal Ilmu Dan Budaya* 41, no. 67 (2020).

⁴² I Dewa Putu Gede Anom Danujaya, "Formulasi Model Sistem Pemidanaan Anak Di Indonesia," *Jurnal Daulat Hukum* 1, no. 1 (2018).

- a) Non-discrimination;
- b) the best interests of the child;
- c) Right to life, survival and development; and
- d) Respect for children's opinions.

Child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with human dignity and protection from violence and discrimination. Whereas in the Juvenile Justice System Law (SPA) that children who are in conflict with the law/as perpetrators of crimes must be handled based on the following provisions:⁴³

- a. Investigation and criminal prosecution of children are carried out in accordance with the provisions of laws and regulations unless otherwise stipulated in this law,
- b. The trial of children conducted by the court in the general court environment,
- c. Guidance, guidance, supervision, and/or assistance during the process of carrying out a crime or action and after undergoing a crime or action.

There are several approaches taken for children in conflict with the law according to the SPA Law:

- a. Based on restorative justice, juvenile criminal justice with restorative justice aims to seek peace between victims and children, prioritize settlements outside the judicial process, keep children away from the negative influence of the judicial process, instill a sense of responsibility in children, realizing child welfare, preventing children from being deprived of independence, encouraging the community to participate, and improving children's skills.
- b. Discretion in the juvenile criminal justice system, discretion is known as the policy of child investigators in determining a naughty child case, not continuing the examination with legal considerations in accordance with the legislation and in the best interests of the child.
- c. Diversion aims to achieve peace between victims and children, resolve children's cases outside the judicial process, prevent children from deprivation of independence, encourage the community to participate and instill a sense of responsibility in children. Diversion is carried out in the event that the crime committed is punishable by imprisonment for under 7 (seven) years and is not a repetition of the crime.

In addition, Law Number 11 of 2012 concerning the Juvenile Justice System outlines several principles in handling children:⁴⁴

- a. The principle of protection, including activities that are direct and indirect from actions that harm children physically and/or psychologically,
- b. The principle of justice is that every settlement of a child's case must reflect a sense of justice for the child.
- c. The principle of non-discrimination is the absence of different treatment based on ethnicity, religion, race, class, gender, ethnicity, culture and language, the legal status of children, order of birth of children, as well as physical and/or mental conditions.
- d. The principle of respect for children's opinions is respect for children's rights to participate and express their opinions in decision making, especially when it comes to matters that affect children's lives.
- e. The principle of the best interests of the child is that all decisions must always consider the survival and development of the child.
- f. The principle of survival and child development is the most basic human right for children, which is protected by the State, government, family, and parents.
- g. The principle of fostering and guiding children, "coaching", is an activity to improve the quality, devotion to God Almighty, intellectual, attitude and behavior, skills training, professional, as well as physical and spiritual health of children both inside and outside the criminal justice process. While "guidance" is the provision of guidance to improve the quality

⁴³ Amrizal Siagian, Wiwit Kurniawan, and Tri Hidayati, "Sanksi Pidana Kenakalan Anak Sebagai Pelaku Bullying Menurut Uu No. 11 Tahun 2012 Tentang Sistem Peradilan Pidanan Anak," *Jurnal Ilmiah Humanika* 3, no. 3 (2020): 1–11.

⁴⁴ Lihat dalam ketentuan pasal 2 Undang-undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Anak.

of devotion to God Almighty, intellectual, attitude and behavior, training, skills, professional, as well as physical and spiritual health of correctional clients.

- h. The principle of proportionality is that all treatment of children must take into account the limits of the child's needs, age, and condition. i) The principle of deprivation of liberty and punishment as a last resort is basically that children cannot be deprived of their liberty unless they are forced to in the interest of resolving cases.
- i. The principle of avoiding retaliation is the principle of avoiding retaliation in the criminal justice process.

The SPA Law also adheres to the term double track system; in addition to regulating criminal sanctions, it also regulates actions. Regarding the sanctions imposed on naughty children, the Juvenile Criminal Justice System Law has regulated it, namely in Article 71, namely the main punishment for children who commit criminal acts is a warning, conditional punishment, and additional penalties in the form of fulfilling customary obligations and depriving of profits obtained from criminal acts, as well as criminal acts in Article 82 of the SPPA Law.⁴⁵

The purpose of this punishment is then the application of criminal sanctions that are applied to children. Treatment as the purpose of punishment is put forward by positive schools who argue that punishment is very appropriate to be directed at the perpetrators of crimes, not their actions. However, punishment is intended by this school to provide treatment and rehabilitation to criminals as a substitute for punishment. This flow is based on the notion of determinism which states that a person commits a crime not based on his will because humans do not have free will and are limited by various factors, both personal character, biological factors, and environmental factors. Therefore, punishment for children must be in the form of treatment because crimes committed by children are caused by various factors and environmental influences.⁴⁶

The sentencing of children is different from that of adults, and the purpose of punishment must be based on guidance because it has been previously regulated in the Criminal Code because the punishment for children has been regulated more specifically. Regulations regarding children are regulated in Law Number 23 of 2002 as amended based on Law Number 35 of 2014 concerning Child Protection. Furthermore, juvenile justice is regulated in Law Number 11 of 2012 concerning the Juvenile Justice System (SPA).

The purpose of punishment for children is related to the growth and development of children physically, mentally, spiritually and socially. According to Law Number 23 of 2002, it is stated that the responsibility of parents, family, community, government, and the state is a series of activities that are carried out continuously for the protection of children's rights. 128 So, the purpose of punishing a child is not only to give suffering (suffering) as a whole absolute theory but to educate children and foster (treatment) in a better direction, of course, which cannot be separated from parental supervision.⁴⁷

The formulation of punishment regulated in the SPPA Law and the Child Protection Law is more about child protection. Based on the SPA Law states that there is legal protection for children as perpetrators of crimes; the provisions of known criminal sanctions consist of imprisonment and action sanctions, while the Child Protection Law is more directed at protecting children as victims of crime.⁴⁸

4. Conclusion

Entering the adolescent phase experienced by children is generally the most important and most difficult period for children. During this period, children generally begin to have the desire to show their abilities. In this stage, it is necessary to have control from adults in the environment so that children do not fall into negative things. Children's self-development beyond the control of adults, coupled with advances in science and technology, can have a bad influence on children. The lack of realization of state responsibility for neglected children in the operation of the government is partly because the government system has not been running well; there is no strong desire from the government to take care of neglected children. Besides that, there are also obstacles that often occur in the protection of the rights of Indonesian children, especially for neglected children, including the implementation of law enforcement itself; this concerns the ability of law enforcement officers, supporting facilities and infrastructure, Government programs have not been fully realized effectively considering the level of the economic capacity of most Indonesian people is still low, Lack of public knowledge, especially parents about children's rights, Lack of understanding from relevant agencies and the community about the provisions of the International Convention on the Rights of the Child,

⁴⁵ Irfan Ardiansyah et al., *Tata Hukum Positif Indonesia* (Hawa dan AHWA, 2018).

⁴⁶ Abintoro Prakoso, *Hukum Penitensier*, 2019.

⁴⁷ Tim, *Undang-Undang Perlindungan Anak*.

⁴⁸ Danujaya, "Formulasi Model Sistem Pemidanaan Anak Di Indonesia."

Coordination between social organizations and the government as well as between social organizations is relatively lacking and inter sectoral and international cooperation is not well established.

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