

## Conference Paper

# Divergency of Deprivation of Independence and Restrictions of Freedom in the Criminal Justice System in Indonesia

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Criminal law has various sanctions and is considered 'effective' as an effort to prevent, handle, and deal with criminal acts. The concept of sentencing is divided into three theories, and all of them contain elements that limit the freedom rights of a person who commits a criminal act. Therefore, it is very interesting to discuss the divergence of deprivation of independence and limitation of freedom in the criminal justice system in Indonesia. The focus of this research is the study of deprivation of freedom and limitation of freedom in the criminal justice system in Indonesia. The type of research used is normative legal research, where the approach to the problem is a statute approach, conceptual approach, comparative approach, case approach. Deprivation of freedom or restriction of freedom can be interpreted not only as a prison sentence but can be defined as a restriction of freedom in all forms. Restrictions on freedom, eats everything that regulates behavior, activities, and obliges someone to do something, eats can be defined as restrictions on freedom. Limitation of freedom is a broad definition, imprisonment is one type of restriction of freedom, as well as other crimes if there is control or restriction on someone.

**Keywords:** deprivation of independence, restrictions of freedom, Indonesia criminal justice

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## 1. Introduction

The rule of law exists as a means to mutually respect the rights of others while at the same time protecting oneself from arbitrariness [1]. Every human being and other living things have the right to live in safety and be protected from all things that are harmful. Based on this, the rule of law protects the rights of everyone so that they do not intersect with each other. The rules are made in such a way and include sanctions for anyone who violates them. Based on the form, there are written legal rules and unwritten legal rules. Written legal rules are rules that are not listed or not officially codified [2].

Unwritten legal rules can be seen in some customary laws. Customary law is an unwritten rule but has been in effect in society for a long time [3]. This rule becomes a

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guideline for life and governance in community life, is obeyed, obeyed and its nature is to supervise one another and protect members of the community so that violations do not occur. Unwritten law has weaknesses in terms of uncertainty, its relative nature can change according to conditions and the sanctions can also vary. Criminal law is often also referred to as law that discusses criminality [4]. Criminal law is related to things that are prohibited and not prohibited based on the Criminal Code.

Criminal law has various sanctions and is considered 'effective' as an effort to prevent, handle and deal with criminal acts. The concept of Punishment is basically divided into three theories of punishment, namely the absolute theory or often called the theory of retaliation, the Relative theory or also commonly called the utilitarian theory and the combined theory, namely the theory that combines the theory of retaliation and the relative theory. observing the justice system which tends to use prison as a means of deterrence or revenge for children so that restrictions on freedom and deprivation of freedom are still *primum remidium* or prioritized in the criminal justice system.

The criminal justice system in Indonesia recognizes the terms deprivation of liberty and restriction of freedom. So it is very important to be able to know the divergence between deprivation of liberty and restriction of freedom. This research focuses on examining philosophically the divergence between deprivation of liberty and restriction of freedom.

## 2. Method

This research will be carried out using the Juridical-Normative research method, what is meant here is Legal Research which has the character of a perspective or applied science, Law Science as *Sui Generis*. This is consistent with the characteristics of jurisprudence. Like previous research studies, this research uses several appropriate approaches and should be used in every legal research. The intended approach is:

- a. Statute Approach
- b. Conceptual Approach
- c. Comparative Approach

This research is normative, so the researcher used the Statute Approach first. Related to this, researchers will examine the nature of several relevant laws and regulations. A conceptual approach is needed to examine the views and thoughts of legal experts.

### 3. Result and Discussion

Crimes with limitations on freedom refer to imprisonment, but due to the absence of a more detailed explanation on the definition of crimes with restrictions on freedom, imprisonment does not become the only punishment within the scope of crimes with restrictions on freedom.

In general, restrictions on freedom are any action that requires children to carry out limited activities as stipulated in the decisions given to children. The term restriction of freedom is used in Article 72 which states “Criminal warning is a light crime that does not result in restrictions on the freedom of children”. Warning punishment is the main punishment in SPPA, in addition to warning punishment is a crime whose decision requires children to follow the rules both within and outside the institution. Children are required to do or not do things that are determined by a decision, which results in restrictions on children’s freedom. United Nations Rules for the Protection of Juveniles Deprived of their Liberty Part 3 states “..... minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteract the detrimental effects.....”.

Based on this statement, deprivation of freedom or restriction of freedom can be interpreted not only as imprisonment, but can be defined as a restriction of freedom in all forms. As the definition of freedom is everything that is done without any control from other people or institutions, acting without coercion

Drik E in European Fundamental Rights and Freedoms [5] states that one form of freedom is the freedom to move. Freedom in question is freedom without violating the provisions and human rights of others. So if we define restrictions on freedom, then everything that regulates behavior, activities and obliges someone to do something, then it can be defined as restrictions on freedom.

Limitation of freedom is a broad definition, imprisonment is one type of restriction of freedom, as well as other crimes if there is control or restriction on someone.

In the Criminal Procedure Code in force in Indonesia, restrictions on freedom are emphasized in terms of the process of detention in the process of examination at the Police, Prosecution at the Prosecutor’s Level and Detention in the trial process. Restrictions on freedom can be imposed on children and adults. Restrictions on the freedom of children are *Ultimum Remidium* so that detention is the last option as emphasized in the Law on the Indonesian Juvenile Justice System. In the Criminal Procedure Code itself, restrictions on freedom are regulated in Chapter V, Part Two

concerning Detention. Detention can be carried out for the purposes of investigation, prosecution and for the purposes of examining judges at court. The Criminal Procedure Code gives powers to investigators, including the authority to reduce a person's freedom and human rights, one of which is detention[6]. Regarding whether the arrest and detention are legal or not, a pre-trial request can be made [7].

Based on Article 21 of the Criminal Procedure Code, detention is carried out for a suspect or defendant who is likely to commit a crime based on sufficient evidence in the event that there are circumstances that raise concerns that the suspect or defendant will run away, damage or destroy evidence and or repeat the crime by including the identity of the suspect or the accused and state the reasons for the detention as well as a brief description of the crime case he is suspected of or charged with and the place where he is being detained [8]. Detention can only be carried out against suspects or defendants who have committed a crime and or attempted or provided assistance in said crime in terms of:

said crime is punishable by imprisonment of five years or more;

criminal act as referred to in Article 282 paragraph (3), Article 296, Article 335 paragraph (1), Article 351 paragraph (1), Article 353 paragraph (1), Article 372, Article 378, Article 379 a, Article 453, Article 454, Article 455, Article 459, Article 480 and Article 506 of the Criminal Code, Article 25 and Article 26 Rechtenordonnantie (violation of Customs and Excise ordinances, last amended by the Staatsblad of 1931 Number 471), Article 1, Article 2 and Article 4 of the Immigration Crime Act (Law Number 8 Drt. of 1955, State Gazette of 1955 Number 8), Article 36 paragraph (7), Article 41, Article 42, Article 43, Article 47, and Article 48 of the Law Number 9 of 1976 concerning Narcotics (State Gazette of 1976 Number 37

Detention in the Criminal Procedure Code is divided into detention in the State Detention House, House Detention, and City Detention.

Regarding restrictions on children's freedom, there is a convention related to limiting children's freedom, namely the United Nations Rules for the protection of juveniles deprived of their liberty (14 December 1990). This convention also confirms imprisonment as *Ultimum Remidium*.

"The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release[9]"

Part 3, Part 8, United Nations Rules for the protection of juveniles deprived of their liberty part 12 confirmed in the rules

“The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.”

Deprivation of liberty must be carried out in conditions and circumstances which ensure respect for the human rights of detained children, must be guaranteed the benefit of meaningful activities and programs which will serve to promote and maintain their health and self-esteem, to foster their sense of responsibility and encourage aptitudes and skills that will help them in developing their potential as members of society [10].

Meanwhile, with regard to deprivation of liberty, deprivation of liberty as a criminal sanction constitutes a limitation penalty which results in limitations, discomfort and loss for a person. In every country, criminal

Deprivation of liberty is still regulated as a criminal sanction with various classifications. Indonesia regulates deprivation of liberty as a prison sentence, stemming from individualistic views and *Wetboek Van Straf Recht* [11]. Deprivation of liberty in the category of imprisonment under the Standard Minimum Rules for the Treatment of Prisoners is an act that results in the severing of a person’s direct communication and connection with the outside world and limits a person’s physical freedom to protect society from crime. However, imprisonment as a type of deprivation of freedom must still pay attention to the human rights attached to that person. Based on the Standard Minimum Rules for the Treatment of Prisoners, deprivation of liberty is not only imprisonment as part 57 and 58:

“The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime.”

“Imprisonment and other measures which result in cutting off an offender from the outside world”

United Nations Rules for the Protection of Juveniles Deprived of their Liberty Part 3 states “..... minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects.....”.

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## 4. Conclusion

Restrictions on Freedom in Kirab The Criminal Procedure Code can be interpreted as anything that limits the freedom of a person/child during the pre-trial decision period, namely examination at the investigative stage, detention during prosecution by the prosecutor and examination in court. So that efforts to limit after a court decision, turn into deprivation of liberty carried out in Correctional Institutions or other Institutions based on court decisions that are inkra.

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