

URGENTLY OF HARMONIZATION OF NATIONAL LEGISLATION ON JUVENILE CRIMINAL JUSTICE TOWARDS INTERNATIONAL STANDARDS: A REVIEW OF RULES OF DEPRIVATION OF LIBERTY OF CHILD OFFENDER

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Abstract

As a State Party to the Convention on the Rights of the Child (hereinafter: the CRC Convention), Indonesia is obliged to implement fully the Convention. For this purpose, Indonesia has to undertake some measures, among others to undertake all appropriate legislative measures for the implementation of the rights recognized in the Convention. Legislative measures in this regard include harmonization national legislation towards international standards.

This paper aims to examine one problem, namely why harmonization of national legislation concerning deprivation of liberty of child offender to international standards is urgent. This will be answered by pointing out discrepancies between national legislation and international standards based primarily on legal document analysis.

Refer to the analysis, first reason for doing harmonization is current national legislation still differs greatly from the CRC Convention. At one side, according to the CRC Convention, rules on deprivation of liberty are: (1) deprivation of liberty shall be used only as a measure of last resort; (2) deprivation of liberty shall be used for the shortest appropriate period of time; (3) States Parties ensure by strict legal provisions that legality of deprivation of liberty is reviewed regularly. At the other side, according to national legislation, especially Act no. 3 of 1997, rules on deprivation of liberty are: (1) deprivation of liberty, includes pre-trial detention is possible when a child has committed an offense punishable by a minimum sentence of five years imprisonment; (2) the maximum duration of deprivation of liberty is 175 days; (3) there is no provision on reviewing regularly of deprivation of liberty.

Second reason is Act no. 11 of 2012 that will eliminate Act no. 3 of 1997 and enter in to force at July 2014 does also not conform to the CRC Convention. According to Act no. 11 of 2012, rules on deprivation of liberty are: (1) deprivation of liberty will not be used if child offender guaranteed by parents or other relevant institution; (2) deprivation of liberty is unavoidable in case child offender has committed an offense punishable by a minimum sentence of seven years imprisonment and child has attained fourteen years old; (3) there is no provision on reviewing regularly of deprivation of liberty.

Recommendation that should be carried out is to amend urgently the Act no. 11 of 2012 in light of the CRC Convention.

Keywords: harmonization, rules of deprivation of liberty

1. INTRODUCTION

The government of Indonesia ratified the CRC Convention through a Presidential Decree in 1990. In this matter, Indonesia established its Presidential Decree No. 36 of 1990 (hereinafter: Presidential Decree 1990), dated 25.08.1990. Its preamble section (c) reaffirmed that the

Government of Indonesia has signed the Convention on the Rights of the Child at 26.01.1990¹ and it is furthermore a necessity to ratify the instrument by establishing a presidential decree.²

When a State ratifies the CRC Convention it takes on obligations under international laws to implement it.³ According to Committee on the Rights of the Child (hereinafter: the CRC Committee), implementation is the process whereby States parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction.⁴ It is the real issue of ratifying of the Convention, which requires the efforts and the cooperation of all those working in the field of children's rights, according to Bueren.⁵

Article 4 of the CRC Convention requires States parties to take "all appropriate legislative, administrative and other measures" for implementation of the rights contained therein. Furthermore, the CRC Committee in its General Comment elaborates that ensuring all domestic legislation is fully compatible with the Convention and that the Convention's principles and provisions can be directly applied and appropriately enforced is fundamental element. In addition, the CRC Committee has identified a wide range of measures that are needed for effective implementation, including the development of special structures and monitoring, training and other activities in Government, parliament and the judiciary at all levels.⁶

According to the CRC Committee, a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the CRC Convention is also an obligation. The review needs to consider the CRC Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation.⁷

Pertaining to review domestic legislation to make it full compliance with the CRC Convention, it can be informed that the review process at the national level has been started, but needs to be more rigorous. The process of revision of national legislation should be directed primarily at national legislation that is inconsistent with the provisions of the CRC Convention. This is aimed to ensure national legislation harmonize with the CRC Convention. In this regard, it will then deals with the matter of harmonization between national legislation towards international standards.

According to Jaap E. Doek (Chairperson UN Committee on The Rights of the Child of 2001-2007) there are two forms of harmonization of laws on children, namely external harmonization and internal harmonization.⁸ The first one means harmonization of existing national legal provisions on children with the provisions of the CRC Convention. For instance: the CRC Convention requires that primary education is compulsory and free and if the national law does not contain provision reflecting this, it should be amended to bring it in harmony with the CRC Convention.⁹

The other form of harmonization is limited to harmonize national laws by eliminating inconsistencies, contradiction or gaps; for example: harmonize the maximum age of compulsory education with the minimum age for admission to work or try to harmonize national laws with existing customary, traditional and/or religious laws.¹⁰

In the Indonesian context, there are other models in order to create harmonization as aforesaid. Model chosen by Indonesia is by enacting a new legislation to replace the old legislation that is

¹ Presidential Decree 1990, preamble section (C).

² *ibid*, preamble section (e).

³ Committee on the Rights of the Child, General Comment No.5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4,42 and 44, para 6) of 27 November 2003 (CRC/GC/2003/5).

⁴ CRC/GC/2003/5, paragraph 1.

⁵ Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers – Save the Children 1998) xvi.

⁶ CRC/GC/2003/5, paragraph 1.

⁷ *ibid*, paragraph 18.

⁸ Jaap E. Doek, "Harmonization of National laws and the CRC: some challenges", available at <http://www.jaapedoek.nl/publications/keynotes/keynote_383.pdf> accessed 09.09.2013.

⁹ CRC/GC/2003/5, paragraph 18.

¹⁰ *ibid*.

not harmonize to international rules. In this context, Indonesia enacted Act No. 11 of 2012 as a replacement for Act No. 3 of 1997.

2. STATEMENT OF PROBLEM

This paper aims to examine one problem, namely why harmonization of national legislation regarding rules of deprivation of liberty of child offender to international standards is urgent?

3. DEPRIVATION OF LIBERTY ACCORDING TO THE CRC CONVENTION

Juvenile Justice include rules on taking deprivation of liberty of child offender is laid down in Article 37 and 40 of the CRC Convention. At the moment of ratifying or acceding to a treaty, States Parties may notify reservations regarding any provisions by which they are unwilling to be bound, provided that the content is not deemed to go against the basic spirit and purpose of the treaty and that the majority of other States Parties make no objection to these reservations.¹¹

Several countries have registered reservations in connection with Articles 37 and 40 of the CRC. In this context, the main issue subject to reservations in this provision concerns point (c), non-recognition of systematic separation of detained children from adults.¹² While not contesting the principle itself, Australia, Canada, the Cook Islands, Iceland, New Zealand, Switzerland and the UK maintain that there are situations where separation is not feasible (lack of facilities) or is inappropriate (e.g. it would involve distancing the child unduly from his or her family).¹³

In reference to point (a) of Article 37 of the CRC Convention, the obligation to prohibit cruel or degrading treatment and punishment, Singapore retained the right to make “judicious” use of corporal punishment and to take any measures (of imprisonment) that may be required for national security and public order.¹⁴

More generally, the Netherlands specified that penal law can be applied to children as of the age of 16 in some cases; Belgium, Denmark, France, Germany, Monaco, the Netherlands, Switzerland and Tunisia all set limits Article 40 of the CRC Convention especially on cases that could be subject to higher judicial review, and the Republic of Korea declared that it would not be bound by this provision.¹⁵

Based on the illustration above mentioned, it is clear to say that reservation made by States parties to Article 37 of the CRC Convention, does not addressed in reference to point (b) in which the “leading principles” (see below mentioned) is stipulated. Indonesia did also not reservation in reference to point (b) of Article 37 of the CRC Convention. It means, Article 37 point (b) of the CRC Convention should be applied fully in Indonesia.

Article 37 of the CRC Convention contains the leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty. The respective elements are elaborated as follows.

3.1. Leading principles

The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.¹⁶ These principles are set out in Article 37(b) of the CRC Convention.

The CRC Committee explains this principle as follows:

The CRC Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article

¹¹ United Nations Children’s Fund – International Child Development Center Florence – Italy, “Juvenile Justice”, *Innocenti Digest*, page 2, available at < <http://www.unicef-irc.org/publications/pdf/digest3e.pdf>> accessed 09 September 2013.

¹² *ibid*, page 3.

¹³ *ibid*.

¹⁴ *ibid*.

¹⁵ *Ibid*.

¹⁶ CRC/C/GC/10, paragraph 79.

37 (b) of the CRC Convention. An effective package of alternatives must be available for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than “widening the net” of sanctioned children. In addition, the States parties should take adequate legislative and other measures to reduce the use of pretrial detention. Use of pretrial detention as a punishment violates the presumption of innocence. The law should clearly state the conditions that are required to determine whether to place or keep a child in pretrial detention, in particular to ensure his/her appearance at the court proceedings, and whether he/she is an immediate danger to himself/herself or others. The duration of pretrial detention should be limited by law and be subject to regular review.¹⁷

Furthermore, pertaining to pretrial detention, the CRC Committee also urges the States parties take adequate legislative and other measures to reduce the use of pretrial detention and ensure that duration of pretrial detention should be limited by law and subject to regular review, and the child should be provided with legal or other appropriate assistance.¹⁸

3.2. Procedural rights

According to article 37(d) of the CRC Convention, States parties shall ensure that every child deprived of his/her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his/her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

In this regard, the CRC Committee recommends that the State parties ensure by strict legal provisions that the legality of a pretrial detention is reviewed regularly, preferable every two weeks.¹⁹ The holder of this right is defendant/offender and/or his/her family and/or his/her lawyer. The proposal of challenging the legality of the deprivation of liberty is brought before the court and the procedure normally is performed under speedy process. In case the detention (includes pretrial detention) is qualified unlawfully or arbitrarily, then defendant shall be released as soon as possible. Rehabilitation and/or compensation as consequence of release are subject to the application made by the defendant.

Finally, the CRC Committee notes and recommends as follows:

In case a conditional release of the child, e.g. by applying alternative measures, is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than 30 days after his/her pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings, often more than once, urges the States parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than six months after they have been presented.²⁰

3.3. Treatment and conditions

Article 37(c) of the CRC Convention requires States Parties to separate child deprived from adults. In this regard, the CRC Committee elaborates as follows:

A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37(c) of CRC, ‘unless it is considered in the child’s best interests not to do so’ (...).²¹

¹⁷ ibid paragraph 80.

¹⁸ ibid paragraph 80-81.

¹⁹ Committee on the Rights of the Child: General comment No. 10 (2007) on children’s rights in juvenile justice, 25 April 2007 (CRC/C/GC/10), paragraph 83.

²⁰ ibid.

²¹ ibid paragraph 85.

According to the CRC Committee, every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. The CRC Committee encourages States parties to facilitate visitation and the child should be placed in a facility that is as close as possible to the place or residence of his/her family.²² Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.²³

The Committee urges also the States parties to fully implement the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113 of 14 December 1990) and recommends State parties to incorporate it in to the States party laws and regulations and make them available, in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice.²⁴

Finally, the CRC Committee wishes to emphasize that, *inter alia*, the following principles and rules need to be observed in all cases of deprivation of liberty:

- (1) Children should be provided with physical environment and accommodations, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- (2) Every child of compulsory school age has the right to education suited to his/her needs and abilities; every child should, when appropriate, receive vocational training in occupations likely;
- (3) Every child has the right to be examined by a physician and shall receive adequate medical care;
- (4) The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends, etc., and opportunity to visit his/her home and family;
- (5) Restraint or force can be used only when the child poses a threat of injury to him/herself or others, and only when all other means of control have been exhausted;
- (6) Any disciplinary measure must be consistent with upholding the inherent dignity of child and fundamental objectives of institutional care; disciplinary measures in violation of article 37 of the CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, etc;
- (7) Every child should have the right to make requests or complaints, without censorship as to the substance, and to be informed of the response without delay;
- (8) Independent and qualified inspectors should be empowered to conduct inspections on a regular basis.²⁵

4. DEPRIVATION OF LIBERTY ACCORDING TO EXISTING NATIONAL LEGISLATION

Deprivation of liberty of juvenile offender is mainly arranged by the Juvenile Tribunal Act 1997 (*Undang-Undang Nomor 3 Tahun 1997 tentang Pengadilan Anak*). This encompasses in general the amount of the 68 articles and has been applied since date of January 3th of 1998.²⁶ Part of this Act has been amended by the decision of the Constitutional Court, namely Decision No. 1/PUU-VIII/2010, was declared at February 24th of 2011. This constitutional court decision has increased the limit of criminal responsibility of the child up to 12 (twelve) years of age. The formerly limit is 8 (eight) years of age.²⁷ Just for comparison, according to English Law it is presumed that minors under 10 years of age are incapable of any crime and the presumption is irrefutable.²⁸ While Section 60 of the CJPO (Criminal Justice and Public Order Act) 1994

²² *ibid.*, paragraph 87.

²³ *ibid.*

²⁴ *ibid* paragraph 88.

²⁵ *ibid* paragraph 89.

²⁶ Juvenile Tribunal Act 1997, art 68.

²⁷ *ibid*, arts 1(1) and 5(1).

²⁸ Denis Keenan, Smith & Keenan's *English Law*, (Longman – Pearson Education Limited, 2001) 620.

provides for a new stop and search power in anticipation of violence and was introduced to deal with violent conduct, especially by groups of young men.²⁹

It can be noted, in general, that the Juvenile Tribunal Act 1997 establishes laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.

The structure of provisions of the Juvenile Tribunal Act 1997 will be explained below:

Chapter and articles	Title or contents
Part I (arts. 1-8).	<i>Ketentuan Umum</i> (general provisions): contains any definition of terminology used. This is intended to draw the scope of the Law and definitions used.
Part II (arts. 9-21).	<i>Hakim dan wewenang sidang anak</i> (judges and jurisdiction of the juvenile court). This part aims to formulate the requirement to be the judge specifically applicable to child, and the establishment of the appeal court for child tribunal.
Part III (arts.22-32).	<i>Pidana dan Tindakan</i> (sentencing and punishment)
Part IV (arts. 33-39).	<i>Petugas Kemasyarakatan</i> (rehabilitation officials). This part aims to formulate the requirement to be the specific personnel <i>in charged</i> in competent authority and institution, and also formulate the job of that personnel <i>in charged</i> , such as to provide social inquiry reports of the child criminal offender.
Part V (arts. 40-59).	<i>Acara Pengadilan Anak</i> (procedures of the juvenile court). This part aims to formulate the process of investigation and prosecution, adjudication and disposition.
Part VI (arts. 60-64).	<i>Lembaga Pemasyarakatan Anak</i> (juvenile detention center). This part aims to formulate the process of imprisonment of convicted child, including the condition and treatment during imprisonment.
Part VII (arts. 65-66).	<i>Ketentuan Peralihan</i> (transitory provisions). This is intended to determine the prevailing national legislation dealt with the previous cases of child criminal offender.
Part VIII (arts. 67-68).	<i>Ketentuan Penutup</i> (concluding provisions). This provisions are intended to determine which ones of the previous national legislation will be substituted, and determine the time when will this new legislation be operated.

Deprivation of liberty of juvenile offender is stipulated by in Article 43(1) of the Juvenile Tribunal Act 1997. There was expressed that *penangkapan anak dilakukan sesuai dengan ketentuan Kitab Undang-undang Hukum Acara Pidana* (arrest to child should be based on the Criminal Procedure Code 1981). According to this law, the generally grounds for deprivation of liberty are: (1) concern that the perpetrators will escape; (2) concern that the perpetrators would eliminate the evidence; (3) and concern that the perpetrator will repeat again committed the crime.³⁰

Specific grounds has been added by Article 21(4)(a) of the Criminal Procedure Code 1981, namely, *pelanggaran atau kejahatan tersebut diancam dengan pidana penjara minimum 5 tahun dan ditemukan minimum 2 alat bukti cukup* (an offense punishable by imprisonment performed a minimum of five years, and at the person who are suspected of committing a crime was found at least two items of evidence of criminal acts).³¹

Pertaining to procedure for deprivation of liberty, there was furthermore formulated that arrest and detention can only be done by the competent authority by submitting the warrant of arrest to alleged person and his or her family, and accompanied by an explanation of the reasons for arrest and or detention³².

Compliance with the lawfulness criterion and issues of “grounds and procedure” of deprivation of liberty, as stated by M. Nowak, includes also the further qualification by the twin

²⁹ Gary Slapper & David Kelly, *Sourcebook on the English Legal System*, (Cavendish Publishing Limited, 2001), 349.

³⁰ Criminal Procedure Code 1981, art 21(1).

³¹ Juvenile Tribunal Act, art 44(1).

³² *ibid*, art 45(2).

principles of using such measures as a last resort and for the shortest appropriate period of time (Article 37(b) second Sentence). Domestic legislation which does not reflect the principles of “last resort” and “shortest appropriate time” does not comply with the requirement of lawfulness under Article 37(b) first sentence of the CRC Convention.³³

In this regards, the Juvenile Tribunal Act 1997 has failed in formulating the twin principles above mentioned, besides failing because referring to the Criminal Procedure Code 1981. At one hand, Article 45(1) of the Juvenile Tribunal Act 1997 expresses, *penahanan dilakukan setelah mempertimbangkan kepentingan anak dan atau kepentingan masyarakat* (detention of child should be based on child’s interests and or community’s interests). By reasons of community’s interests can be interpreted based on certain reasons which does not comply with standards “a last resort”. At other hand, Articles 44(2)-(4), 46-49 of the Juvenile Tribunal Act 1997 has introduced the lengthy period of the detention. These standards are fully contrary with standards “shortest appropriate period of time”.

It may be therefore the CRC Committee recommended to Indonesia several suggestions.³⁴ It contains, among others: ensure that detained children are always separated from adults, and that deprivation of liberty is used only as a last resort, for the shortest appropriate time and in appropriate conditions³⁵; ensure the full implementation of juvenile justice standards, in particular article 37 (b) and article 40, paragraph 2 (b) (ii)-(iv) and (vii) of the Convention, as well as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), and in the light of the Committee’s 1995 day of general discussion on administration of juvenile justice.³⁶

In context of treatment with humanity and respect for dignity (see also 3.3. “treatment and condition” above mentioned), Article 31(1) of the Juvenile Tribunal Act 1997 stipulates that *anak nakal yang oleh hakim diputus untuk diserahkan kepada negara, ditempatkan di lembaga pemasyarakatan anak* (convicted child should be placed in correctional institutions specifically applicable to child). Furthermore, Article 45(3) of the Juvenile Tribunal Act 1997 formulates that *tempat tahanan anak harus dipisahkan dari tempat tahanan orang dewasa* (the separation between detention place for child and detention place for adults). In the context of detention prior to trial, Article 44(6) of the Juvenile Tribunal Act 1997 stipulates also that *penahanan terhadap anak dilaksanakan di tempat khusus untuk anak di lingkungan rumah tahanan negara* (detention of child should be held in detention place specifically applicable for child). All of three articles previously stated are in line with one of specific aspect stipulated by in Article 37(c) of the CRC Convention, namely treatment with humanity and respect for the inherent dignity of the human person.

The Juvenile Tribunal Act 1997 has also admitted child’s right as prescribed by in Article 37 (d) of the CRC Convention, even though it is not formulated within one article. According to Article 51(1) of the Juvenile Tribunal Act 1997, *setiap anak nakal sejak saat ditangkap atau ditahan berhak mendapatkan bantuan hukum dari seorang atau lebih penasehat hukum* (every child deprived of liberty shall have the right to attain legal assistance at all stages of proceedings). It provides only a legal assistance without other appropriate assistance. As elaborated earlier, access to a lawyer should be free to children, but paradoxically speaking, there was no explicit reference in the Juvenile Tribunal Act 1997 about it.

In context legal practice, there are three models of policy initiation or the birth of the legal aid program for the poor, including children, and vulnerable people at the local level.³⁷ The first model is based on the initiation of a political motive. The second model is based on the motif

³³ William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child: Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff Publishers 2006) 77- 78.

³⁴ Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding observations of Indonesia, 26 February 2004 (CRC/C/15/Add.223).

³⁵ CRC/C/15/Add.223, paragraph 78(b).

³⁶ *ibid*, paragraph 78(d).

³⁷ Julius Ibrani, editor, *Bantuan Hukum – Bukan Hak Yang Diberi*, (Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI), Juni 2013), 99.

accommodative, i.e. integrated with the legal aid program in a regulation. The third model is the initiative born from the ideas and public discourse. This third model was influenced by political conditions in each region..

As mandated by Act no. 16 of 2011 (regarding Legal Aid), the Government of Indonesia should register and accreditation Legal Aid Organization. There are 310 Legal Aid Organization among 566 organization have been accredited.³⁸ Unfortunately most of them are working in region of Java Island that has approximately 136.610.590 population in 2010.³⁹ It means, ratio of Legal Aid Organization to Population is 241,361.

Just for comparing to other countries, below mentioned is ratio of Lawyers to Population in Six Countries especially in 1994:⁴⁰

	Population	Lawyers	Population per Lawyer
UK	57,800,000	83,000	694
Germany	80,200,000	67,112	1,195
France	56,600,000	23,000	2,461
US	255,600,000	799,960	320
Japan	124,760,000	15,223	8,194
Korea	44,300,000	2,813	15,748

Source: This table is based on materials published by the Supreme Court of Japan

It can be noted that Article 8(4) of the Juvenile Tribunal Act 1997 provides actually other appropriate assistance for child. Nevertheless, this Article does not mention it as right of the child, but only mention that other appropriate assistance such as psychologist, religionist, probation officer or expert of education can get involved in proceedings before the court by virtue of permit of Judges. It also means that the initiative to get involve within proceedings came from psychologist, religionist, etc., and child just enjoining passively.

With regard to right to challenge legality of the decision leading to deprivation of liberty (see also 3.2. “Procedural rights” above mentioned), unfortunately, the Juvenile Tribunal Act 1997 has no explicit reference. By interpreting Article 40 of the Juvenile Tribunal Act 1997, it can be understood that right to challenge legality of decision leading to deprivation of liberty has also been recognized by in the Juvenile Tribunal Act 1997.

Article 40 of the Juvenile Tribunal Act 1997 stipulates that *hukum acara yang berlaku diterapkan pula dalam acara pengadilan anak kecuali ditentukan lain dalam undang-undang ini* (other related national law, including law of criminal process, shall also be applied on child tribunal proceedings). The Criminal Procedure Code 1981 has recognized right to challenge legality of decision leading to deprivation of liberty.⁴¹

5. DEPRIVATION OF LIBERTY ACCORDING TO ACT NO. 11 OF 2012

The main reason of enacting Act no. 11 of 2012 (this deals with juvenile criminal justice system) are to follow up legal obligation arises from ratify the CRC Convention and to terminate Act no. 3 of 1997. According to the first reason, Indonesia is required to provide special protection for children in conflict with the law as stated in preamble of those Act (number c).

³⁸ Ditjen Peraturan Perundang-Undangan – Kementerian Hukum dan HAM RI, “Bantuan Hukum dalam Rangka Penghormatan dan Penegakan Hak Asasi Manusia”, Focus Group Discussion Background Study RPJMN 2015 – 2019 tentang Identifikasi Permasalahan dan Kebutuhan dalam Upaya Pemenuhan, Perlindungan, Pemajuan, dan Penegakan Hak Asasi Manusia pada Konteks Pembangunan Hukum – BAPENAS (National Development Planning Agency), Jakarta, 24.07.2013.

³⁹ Badan Pusat Statistik, *Penduduk Indonesia Menurut Provinsi 1971, 1980, 1990, 1995, 2000 dan 2010*, http://www.bps.go.id/tab_sub/view.php?tabel=1&daftar=1&id_subyek=12 (accessed 09.09.2013).

⁴⁰ Meryll Dean, *Japanese Legal System*, (Cavendish Publishing Limited, 2002), 309.

⁴¹ Criminal Procedure Code 1981, arts 1(10), 77(a), and 79.

While according to the second reason, as stated in preamble of those Act (number d), the existing legislation concerning juvenile justice, namely Act no. 3 of 1997, is no longer proper. This will therefore be terminated as soon as possible.

According to Directorate General of Human Rights (Ministry of Law and Human Rights, Republic of Indonesia), there are seven aspects of amending of Act no. 3 of 1997 that be then incorporated in Act no. 11 of 2012. These are: (1) changing of philosophic of juvenile criminal justice system; (2) coverage of child terminology; (3) increasing of age of child criminal responsibility; (4) eliminating stigmatization come from using negative term of juvenile misdemeanor; (5) mainstreaming Restorative Justice at all levels of criminal process; (6) taking responsibility to take Diversion at all stages of juvenile criminal process; and (7) stressing of child's rights at juvenile justice.⁴²

Act no. 11 of 2012 will apply in practice at 30 July 2014. This requires other national regulation to support effective implementation. These are: (1) Government Regulation about Diversion, as requested by Article 15; (2) Government Regulation about educational and development program for children, as requested by Article 21; (3) Government Regulation concerning recording of child register, as requested by Article 25; (4) Government Regulation regarding doing criminal punishment, as requested by Article 71; (5) Government Regulation regarding doing coordination, control, evaluation and report, as requested by Article 94).

Additionally, Act no. 11 of 2012 requires also issuing of two Presidential Regulations, namely regulation on implementation of child rights as victim of crime and witnesses of crime (see Article 90), and regulation on doing training and education program (see Article 92).

According to Act no. 11 of 2012, rules on deprivation of liberty are stipulated in Articles 30 – 40. These are: (1) deprivation of liberty will not be used if child offender guaranteed by parents or other relevant institution; (2) deprivation of liberty is unavoidable in case child offender has committed an offense punishable by a minimum sentence of seven years imprisonment and child has attained fourteen years old⁴³; (3) there is no provision on reviewing regularly of deprivation of liberty.

National Legal Development Body (Badan Pembinaan Hukum Nasional), “Identifikasi Permasalahan dan Kebutuhan dalam Upaya Pemenuhan, Perlindungan, Pemajuan, dan Penegakan Hak Asasi Manusia pada Konteks Pembangunan Hukum” – Focus Group Discussion Background Study RPJMN 2015 – 2019, BAPENAS, Jakarta, 24 Juli 2013.

The second rule above mentioned deal with the ground of deprivation of liberty. This includes committing an offense punishable by a minimum sentence of seven years imprisonment; and also, child has attained fourteen years old. This ground does not actually reflect the leading principles for the use of deprivation of liberty as mandated by in Article 37 (b) of the CRC Convention. It is difficult to say that requirement stipulated in Article 32 (2)(a)(b) of Act no. 11 of 2012 has indicated a measure of last resort.

According to the CRC Committee General Comment, a measure of last resort require other alternative of institutional care of children. In this context, the CRC Committee states: “an effective package of alternatives must be available, for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort”.⁴⁴ Even though Act no. 11 of 2012 has also an alternative package, for instance Article 21(1), but it just apply to offender who is below twelve years of age.

The first rule on deprivation of liberty of child, according to Act no. 11 of 2012, is new rule that laid down in those Act. This rule does not known previously. According to the explanation of Article 32(1) of Act no. 11 of 2012, this guarantee that provided by parents or other relevant institution is aimed to ensuring the best interest of child. Nevertheless according to the text of Article 32 (1) of Act no. 11 of 2012, those guarantee comprise three specific goals, namely to assure that child offender does not escape, does not damage the criminal evidence, and does not

⁴² Direktorat Jenderal HAM – Kementerian Hukum dan HAM RI, “Roadmap untuk Implementasi UU no. 11/2012 tentang Sistem Peradilan Pidana Anak” - Focus Group Discussion Background Study RPJMN 2015 – 2019 tentang Identifikasi Permasalahan dan Kebutuhan dalam Sistem Peradilan Pidana Anak, - BAPENAS (National Development Planning Agency), Jakarta, 29.08.2013.

⁴³ See Article 32(2)(a)(b) of Act No. 11 of 2012.

⁴⁴ CRC/C/GC/10, paragraph 80.

willing to repeat to do other offense. Although these have positive aspect, nevertheless, it has no relation with a matter of taking deprivation of liberty as a measure of last resort.

Other aspect that has been occurred related to enacting of Act no. 11 of 2012 is reduce the duration time for deprivation of liberty. According to articles 33 – 38 of Act no. 11 of 2012, the duration time for deprivation of liberty is 110 days. This is shorter than previous duration time for deprivation of liberty, namely that indicates 175 days. It is not essay to conclude whether the newest duration of time has reflected the leading principles for the use of deprivation of liberty as stipulated in Article 37(b) of the CRC Convention.

In relation to “Procedural rights” as stipulated in Article 37(d) of the CRC Convention, Act no. 11 of 2012 has no explicit provision regarding right to challenge legality of deprivation of liberty. By interpretation to Article 16 of Act no. 11 of 2012 it will come in to conclusion that Act no. 8 of 1981 regarding Criminal Procedure Code is still apply in practice. In this context, rights to challenge legality of deprivation initiated by investigator and/or prosecutor, includes pre-trial detention, is stipulated by in articles 1(10), 77-83, and 95-97 of the Criminal Procedure Code 1981. Even though these rules are afforded to person who is alleged as, or accused of having infringed the penal law, these rules applies also in the juvenile criminal justice in accordance with article 16 of Act no. 11 of 2012. This right is commonly called *Praperadilan, rehabilitasi dan ganti kerugian* (Challenging Pretrial Detention, rehabilitation, and compensation).

In relation to reviewing regularly of deprivation of liberty as mandated by the CRC Committee, Act no. 11 of 2012 has also no provision that urge State parties to ensure by strict legal provision to deal with review. This is really a weakness of Act no. 11 of 2012.

6. CONCLUSION

There are two reasons why the national legislation regarding rules of deprivation of liberty of child offender should be harmonized urgently to relevant international standards. First reason is discrepancy current national legislation towards international standards. This discrepancies is caused by current national legislation still differs greatly from the CRC Convention. At one side, rules on deprivation of liberty are: (1) deprivation of liberty shall be used only as a measure of last resort; (2) deprivation of liberty shall be used for the shortest appropriate period of time; (3) States Parties ensure by strict legal provisions that legality of deprivation of liberty is reviewed regularly. At the other side, according to Act no. 3 of 1997, rules on deprivation of liberty are: (1) deprivation of liberty, includes pre-trial detention is possible when a child has committed an offense punishable by a minimum sentence of five years imprisonment; (2) the maximum duration of deprivation of liberty is 175 days; (3) there is no provision on reviewing regularly of deprivation of liberty.

Second reason is Act no. 11 of 2012 that will eliminate Act no. 3 of 1997 and enter in to force at July 2014 does also not conform to the CRC Convention. According to Act no. 11 of 2012, rules on deprivation of liberty are: (1) deprivation of liberty will not be used if child offender guaranteed by parents or other relevant institution; (2) deprivation of liberty is unavoidable in case child offender has committed an offense punishable by a minimum sentence of seven years imprisonment and child has attained fourteen years old; (3) no provision on reviewing regularly of deprivation of liberty.

7. RECOMMENDATION

Recommendation that should be carried out is to amend urgently Act no. 11 of 2012 in light of the CRC Convention before those Act come in to force at July 2014. Amendment of Act no. 11 of 2012 should be directed to add provision on reviewing regularly of deprivation of liberty therein. Additionally, the amendment should also be directed to review the ground for doing deprivation of liberty. By doing this, Act no. 11 of 2012 will harmonize it self to the CRC Convention.

REFERENCES

- [1] Badan Pusat Statistik, *Penduduk Indonesia Menurut Provinsi 1971, 1980, 1990, 1995, 2000 dan 2010*, available at http://www.bps.go.id/tab_sub/view.php?tabel=1&daftar=1&id> accessed 09 September 2013

- [2] Committee on the Rights of the Child, General Comment No.5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4,42 and 44, para 6) of 27 November 2003 (CRC/GC/2003/5).
- [3] Committee on the Rights of the Child: General comment No. 10 (2007) on children's rights in juvenile justice, 25 April 2007 (CRC/C/GC/10).
- [4] Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding observations of Indonesia, 26 February 2004 (CRC/C/15/Add.223).
- [5] Denis Keenan, *Smith & Keenan's English Law*, (13th edn, Longman – Pearson Education Limited 2001)
- [6] Ditjen Peraturan Perundang-Undangan – Kementerian Hukum dan HAM RI, “Bantuan Hukum dalam Rangka Penghormatan dan Penegakan Hak Asasi Manusia”, Focus Group Discussion Background Study RPJMN 2015 – 2019 tentang Identifikasi Permasalahan dan Kebutuhan dalam Upaya Pemenuhan, Perlindungan, Pemajuan, dan Penegakan Hak Asasi Manusia pada Konteks Pembangunan Hukum, – BAPENAS (National Development Planning Agency), Jakarta, 24 July 2013
- [7] Direktorat Jenderal HAM – Kementerian Hukum dan HAM RI, “Roadmap untuk Implementasi UU no. 11/2012 tentang Sistem Peradilan Pidana Anak” - Focus Group Discussion Background Study RPJMN 2015 – 2019 tentang Identifikasi Permasalahan dan Kebutuhan dalam Sistem Peradilan Pidana Anak, - BAPENAS (National Development Planning Agency), Jakarta, 29 Agustus 2013
- [8] Gary Slapper & David Kelly, *Sourcebook on the English Legal System*, (2nd edn, Cavendish Publishing Limited 2001)
- [9] Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers – Save the Children 1998)
- [10] Jaap E. Doek, “Harmonization of National laws and the CRC: some challenges”, available at <http://www.jaapedoek.nl/publications/keynotes/keynote_383.pdf> accessed 09 September 2013
- [11] Julius Ibrani, editor, *Bantuan Hukum – Bukan Hak Yang Diberi*, (Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI) Juni 2013)
- [12] Meryll Dean, *Japanese Legal System*, (2nd edn, Cavendish Publishing Limited 2002)
- [13] United Nations Children's Fund – International Child Development Center Florence – Italy, “Juvenile Justice”, *Innocenti Digest*, page 2, available at <<http://www.unicef-irc.org/publications/pdf/digest3e.pdf>> accessed 09 September 2013
- [14] William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child: Article 37, Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Martinus Nijhoff Publishers 2006)

STATUTES (UNDANG-UNDANG)

- [1] Undang-Undang Nomor 8 Tahun 1981 tentang Kitab Undang-Undang Hukum Acara Pidana.
- [2] Undang-Undang Nomor 3 Tahun 1997 tentang Pengadilan Anak.
- [3] Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum.
- [4] Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak.
- [5] Keputusan Presiden Republik Indonesia no. 36 Tahun 1990 tentang Ratifikasi Konvensi Hak Anak.