

## COMPARISON OF THE REGULATIONS ON RECIDIVIST JUVENILES IN INDONESIA, NORWAY, AND THAILAND

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### Abstract

As the future leaders of the nation, children must obtain protection from all sides. This protection is also needed when children become recidivists. The Indonesian Criminal Code states that for recidivists, the punishment in a repeat of criminal action will be added by a third. Surely, this will bring much loss to the future of the children who repeated actions of criminality (recidivist juveniles). This research is aimed to analyze and to describe how the regulations on repeated criminal action are for juveniles in Indonesia, Norway, and Thailand. This is a juridical-normative research, with constitutional and comparison approaches. Provisions of the Norway Criminal Code Article 61 and provisions of the Thailand Criminal Code Article 94 have some similarities. It is stated that the repeated action of crime is only given to those who repeated the criminal action who are above 18 and 17 years of age.

**Keywords:** recidivist, children, protection.

### A. INTRODUCTION

Children are blessings and responsibilities from God the Almighty who must be protected as they have dignity. They also have rights as human beings which must be protected. The children's human right is a part of the human rights which is protected in the Republic of Indonesia's 1945 Constitution<sup>1</sup> and the United Nations Convention on Children's Rights.<sup>2</sup> If seen from the aspect of the nation's and the people's lives, children are the future leaders of the nation. Thus, every child has the right to survive, to participate, to grow, and to develop. They also have the right to be protected from criminal actions and discrimination. They have civil rights and freedom.

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<sup>1</sup>Undang-Undang Dasar Negara Republik Indonesia Tahun 1945Selanjutnya akan disebut UUD 1945

<sup>2</sup> Angger Sigit Pramugti dan `Faudy Primaharsya, *Sistem Peradilan Pidana Anak*, (Jakarta: Piustaka Yustisisa, 2015), p. 5.

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Protection for children is one of the nation's responsibilities. This is explained in Article 28B<sup>3</sup> of the Republic of Indonesia's 1945 Constitution, which states that every child has the right to survive and to receive protection without discrimination. Thus, there should not be any stigmatization or labelling in handling children who are conflicting with the law.<sup>4</sup> There should be enough guidance or rehabilitation for them so that they may keep their dreams and they may become beneficial people for the nation in the future.<sup>5</sup>

Delinquent juveniles<sup>6</sup> basically do not entirely understand what they were doing. This is because in the adolescent phase, children experience a transition. They experience inner conflicts which are added with anti-social behavior. It causes children to lose self-control, which become boomerangs for themselves. This will become a dangerous threat if it is left alone without proper surveillance from all sides. The symptoms of children's delinquency will lead to criminal actions.<sup>7</sup>

Theoretically, the punishment of imprisonment does not only rip one of his/her freedom. Yet, it also causes negative impacts. Further, prisoners may become more evil post-freedom from the prison. Muladi argues that the punishment of imprisonment may cause dehumanization. There is a higher risk to be imprisoned again. It also causes the stigma or label of 'evil'. Experience in the Correctional Institution is very dangerous, and it affects the prisoners. It makes it difficult for the prisoners to comply with the law after having been freed from the Correctional Institution. Even, The American Correctional Association on 1959 at last states that the punishment of imprisonment which is only done based on the view of imprisonment will actually create more criminals instead of preventing criminality.<sup>8</sup>

The best interests of the delinquent juveniles should be the benchmark in giving criminal punishments. The punishments given to the the delinquent juveniles create their future. An unwise verdict of imprisonment sanction for the juvenile

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<sup>3</sup> Pasal 28B UUD 1945: Setiap anak berhak atas kelangsungan hidup, tumbuh, dan berkembang serta berhak atas perlindungan dari kekerasan dan diskriminasi.

<sup>4</sup> Anak yang berkonflik dengan hukum selanjutnya akan disebut dengan ABH

<sup>5</sup> M. Nasir Djamil, *Anak Bukan Untuk Dihukum*, (Jakarta: Sinar Grafika, 2013), p. 4.

<sup>6</sup> *Juvenile* artinya *young*, Anak-Anak, Anak muda, ciri karakteristik pada masa muda sifat-sifat khas pada periode remaja, sedangkan *delinquency* artinya *doing wrong*, terabaikan, mengabaikan yang kemudian diperluas artinya menjadi jahat, a-sosial, kriminal, pelanggar aturan, pembuat ribut, pengacau, dan penteror.

<sup>7</sup> Wagiati Soetedjo dan Melani, *Hukum Pidana Anak*, (Bandung: Refikak Aditama, 2013), p. 15.

<sup>8</sup> Sri Sutatiek, *Hukum Pidana Anak Di Indonesia*, (Jakarta: Aswaja Pressindo, 2012), p.54.

delinquency will disturb the growth of the children. It is known that the repeat of criminal action is the basis of a heavier sanction. Thus, how will it be if the children are the perpetrators of that action. And, how is the regulation on repeated criminal action for children in Indonesia, in Norway, and in Thailand.

This research is aimed to compare the regulation on recidivist children between those in Indonesia, in Norway, and in Thailand. For Indonesia, the researcher will describe the regulations on repeated criminal actions which are written in the Criminal Code No. 11 of 2012 on the Children's Criminal Justice System. The research problem is how is the regulation on recidivist children in Indonesia, Norway, and Thailand?

## **B. RESEARCH METHOD**

This research uses a juridicial-normative method. It is in the form of literature review. The writing method is done by analyzing constitutional regulations and literature. It uses a constitutional approach and a comparison approach. All series of this reseach is aimed to collect legal sources, which are then processed and linked to legal concepts. The results obtained will be written in the form of juridicial thoughts. The data of this research is obtained through primary legal sources which is the constitution, and secondary legal sources which are text books written by experts of law.

## **C. DISCUSSION**

### **The Regulation on Recidivists in the Indonesian Criminal Code**

The repeat of criminal action (Recidivism) is one of the factors which may lead to increased criminal punishment. It is written in the criminal code, that recidivism is a special repeat. This means that the increased severity of repeated criminal punishment is not given to all repeats. Yet, it is given only to criminal actions with certain requirements. Not all repeats of criminal action become the basis for increased imprisonment. Thus, in the Criminal Code, the repeat is called the special repeat.<sup>9</sup>

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<sup>9</sup> Masruchin Ruba'i, *Huku Pidana*, (Malang: Media Nusa Creative, 2014), p. 228.

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The basic philosophy of a more severe imprisonment for repeated criminal actions are based on these three factors:<sup>10</sup>

- 1) The perpetrator has carried out criminal action more than once;
- 2) The perpetrator has been given sanctions by the state for the first criminal action; and
- 3) That sanction of imprisonment has been carried out by that person.

The first increased punishment factor is the same as the increasing severity factor in concurrence. The difference between that and concurrency is on the second and the third factors. The most important factors in increased severity are the second and the third factors. The verdict of imprisonment for a criminal action may be regarded as the state's warning against a wrong action. By carrying out criminal actions for the second time, it may be said that the perpetrator did not obey that warning. It shows that he/she has bad character. The warning of imprisonment was not enough to stop him/her from undergoing criminal actions. The sanction of imprisonment given is not only a reflection of the perpetrator's quality and quantity of criminal action (basis of retaliation), yet it is part of a therapy determined by the judge in order to improve the perpetrator's character. Rehabilitation for recidivists and those who have gone through imprisonment must be longer and more severe. This is the basis of why the imprisonment sanction for repeated crime is more severe.<sup>11</sup>

The severity of sanction is added by a third of the maximum threat from the criminal action the perpetrator carried out as determined

in Article 486<sup>12</sup>, Article 487<sup>13</sup>, and Article 488<sup>14</sup>. It must fulfill these two essential requirements:<sup>15</sup>

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<sup>10</sup> Adami Chazawi, *Penafsiran Hukum Pidana, Dasar Pemidanaan, Pemberatan & Peringatan, Kejahatan Aduan, Perbarengan & Ajaran Kausalitas*, (Jakarta: Raja Grafindo Persada, 2016), p. 82.

<sup>11</sup> Adami Chazawi, *Ibid*, p. 82.

<sup>12</sup> Pasal 486 KUHP:

"Pidana penjara yang ditentukan dalam Pasal 127, 204 ayat pertama, 244-248, 253-260 bis, 263, 264, 266-268, 274, 362, 363, 365 ayat pertama, kedua dan ketiga, 368 ayat pertama dan kedua sepanjang di situ ditunjuk kepada ayat kedua dan ketiga Pasal 365, Pasal 369, 372, 374, 375, 378, 380, 381-383, 385-388, 397, 399, 400, 402, 415, 417, 425, 432 ayat penghabisan, 452, 466, 480 dan 481, begitupun pidana penjara selama waktu tertentu yang dijatuhkan menurut Pasal 204 ayat kedua, 365 ayat keempat dan 368 ayat kedua sepanjang di situ ditunjuk kepada ayat keempat pasal 365, dapat **ditambahkan dengan sepertiga, jika yang bersalah ketika melakukan kejahatan, belum lewat lima tahun, sejak**

1. That person has gone through all or some of the imprisonment sanctions given by the judge, or he/she has been freed from carrying out the imprisonment sanction, or in the time of undergoing the criminal action for the second time, the state's right to undergo the imprisonment sanction has expired.
2. The perpetrator carried out the repeated criminal action not less than five years since he/she gone through some or all of the imprisonment sanctions given for verdict.

In the first requirement, it is said that there are four possibilities:

1. He/she has gone through all of the imprisonment sanctions given for verdict;
2. He/she has gone through some of the imprisonment sanctions given for verdict;
3. He/she is cancelled from having to go through imprisonment; or
4. The state's right to punish him/her has not expired.

The perpetrator must have been imprisoned for undergoing the first criminal action. This is because in Articles 486, 487, and 488 it is said that he/she must have gone through the punishment given. Even though there is no mention regarding the requirement of having had the verdict of punishment, yet with the mention of

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**menjalani untuk seluruhnya atau sebagian dari pidana penjara yang dijatuhkan kepadanya**, baik karena salah satu kejahatan yang diterangkan dalam pasal-pasal itu, maupun karena salah satu kejahatan, yang dimaksud dalam salah satu dari Pasal 140-143, 145 dan 149, Kitab Undang-Undang Hukum Pidana Tentara, atau sejak pidana tersebut baginya sama sekali telah dihapuskan (*kwijtgescholde*) atau jika pada waktu melakukan kejahatan, kewenangan menjalankan pidana tersebut belum daluwarsa.”

<sup>13</sup> Pasal 487 KUHP:

“Pidana penjara yang ditentukan dalam Pasal 130 ayat pertama, 131, 133, 140 ayat pertama, 353-355, 438-443, 459 dan 460, begitupun pidana penjara selama waktu tertentu yang dijatuhkan menurut Pasal 104, 105, 130 ayat kedua dan ketiga, Pasal 140 ayat kedua dan ketiga, 339, 340 dan 444, dapat **ditambah sepertiga**. **Jika yang bermasalah ketika melakukan kejahatan, belum lewat lima tahun, sejak menjalani untuk seluruhnya atau sebagian, pidana penjara yang dijatuhkan kepadanya**, baik karena salah satu kejahatan yang diterangkan dalam pasal-pasal itu, maupun karena salah satu kejahatan yang dimaksudkan dalam Pasal 106 ayat kedua dan ketiga, 107 ayat kedua dan ketiga, 108 ayat kedua, 109, sejauh kejahatan yang dilakukan itu atau perbuatan yang menyertainya menyebabkan luka-luka atau mati, Pasal 131 ayat kedua dan ketiga, 137 dan 138 KUHP Tentara, atau sejak pidana tersebut baginya sama sekali telah dihapuskan, atau jika pada waktu melakukan kejahatan, kewenangan menjalankan pidana tersebut belum daluwarsa.”

<sup>14</sup> Pasal 488 KUHP:

“Pidana yang ditentukan dalam Pasal 134-138, 142-144, 207, 208, 310-321, 483 dan 484, dapat **ditambah sepertiga**, **jika yang bersalah ketika melakukan kejahatan, belum lewat lima tahun, sejak menjalani untuk seluruhnya atau sebagian, pidana penjara yang dijatuhkan kepadanya**, karena salah satu kejahatan diterangkan pada pasal itu, atau sejak pidana tersebut baginya sama sekali telah dihapuskan atau jika waktu melakukan kejahatan, kewenangan menjalankan pidana tersebut belum daluwarsa.”

<sup>15</sup> Adami Chazawi. *Op cit*, p. 83.

having had gone through punishment, it is certain that in it contains the requirement of having the verdict of punishment. Regarding the implementation of the punishment given for verdict, there are some possibilities which are as follows: <sup>16</sup>

1. It must be holistically implemented;
2. It must be partially implemented;
3. Its implementation is cancelled; and
4. It cannot be implemented due to a certain obstacle which cannot be avoided, for example, before the punishment verdict *in kracht van gewisjde*, or before the verdict is executed, the prisoner ran away.

It is important to remember the crucial aim of punishments as guidance in giving or dropping the verdict of punishment, as written in the concept of Book of Criminal Code. Apart from that, there needs to be a development of thought on the theory of punishment which results to the ideal aim of punishments. In its development, the repeat of criminal actions may be divided into some groups. From the aspect of criminology, there are three kinds of repeated criminal action, which are:

1) General Recidive

If someone carried out a criminal action which has been given punishment, and then he/she carried out another criminal action in all forms, thus he/she will receive an increased severity of punishment. <sup>17</sup>

2) Speciale Recidive

If someone carried out a criminal action which has been punished, and then he/she carried out the same (similar) criminal action, thus he/she will receive an increased severity of punishment. <sup>18</sup>

3) Tussen Stelsel

If someone carried out a criminal action in which according to the constitution is regarded as part of the group of the preceeding criminal action.

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<sup>16</sup> Adami Chazawi. *Ibid.* p. 83.

<sup>17</sup>H. M.Rasyid Ariman & Fahmi Raghil, *Hukum Pidana*, (Malang: Setara Press, 2016), p. 197.

<sup>18</sup> H. M.Rasyid Ariman & Fahmi Raghil. *Ibid.*

Modern criminology categorizes recidives into: *Accidentale recidive*, which happens if the repeated criminal action is an impact of the condition which forces or coerces him/her to do it. *Habituele recidive*, which happens if the repeated criminal action is done because he/she has already had the inner criminal situation, which is bad character, so criminal actions are normal actions for him/her.<sup>19</sup>

The Indonesian Criminal Code uses two recidive systems, which are *tussen steksel* system and the special recidive system. The Indonesian Criminal Code regulates this repeated criminal action as follows:<sup>20</sup>

1. Mentions with the grouping of certain criminal actions with certain requirements which may possibly repeated. The repetition is limited to the criminal action mentioned in Article 486 (repeated criminal action which regards wealth and fraud), Article 487 (repeated criminal actions towards individuals), and Article 488 (repeated criminal action which regards insult).
2. Apart from the criminal actions categorized in Article 386<sup>21</sup>, Article 387<sup>22</sup>, and Article 388 of the Criminal Code<sup>23</sup>, the Criminal Code also determines some special criminal actions which may be repeated, for example: Article 216 paragraph (3)<sup>24</sup>, Article 489 paragraph (2)<sup>25</sup>, Article 495 paragraph

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<sup>19</sup>H. M.Rasyid Ariman & Fahmi Raghil. *Ibid*, p. 200.

<sup>20</sup>Adami Chazawi. *Op Cit*, p. 81.

<sup>21</sup> Pasal 386 KUHP:

1. Barang siapa menjual, menawarkan atau menyerahkan barang makanan, minuman atau obat-obatan yang diketahuinya bahwa itu dipalsu, dan menyembunyikan hal itu, diancam dengan pidana penjara paling lama empat tahun.

2. Bahan makanan, minuman atau obat-obatan itu dipalsu jika nilainya atau faedahnya menjadi kurang karena sudah dicampur dengan sesuatu bahan lain.

<sup>22</sup> Pasal 387 KUHP:

1. Diancam dengan pidana penjara paling lama tujuh tahun seorang pemborong atau ahli bangunan atau penjual bahan-bahan bangunan, yang pada waktu membuat bangunan atau pada waktu menyerahkan bahan-bahan bangunan, melakukan sesuatu perbuatan curang yang dapat membahayakan amanan orang atau barang, atau keselamatan negara dalam keadaan perang.

2. Diancam dengan pidana yang sama, barang siapa yang bertugas mengawasi pemhangunan atau penyerahan barang-barang itu, sengaja membiarkan perbuatan yang curang itu.

<sup>23</sup> Pasal 388 KUHP:

1. Barang siapa pada waktu menyerahkan barang keperluan Angkatan Laut atau Angkatan Darat melakukan perbuatan curang yang dapat membahayakan kesempatan negara dalam keadaan perang diancam dengan pidana penjara paling lama tujuh tahun.

2. Diancam dengan pidana yang sama, barang siapa yang bertugas mengawasi penyerahan barang-barang itu, dengan sengaja membiarkan perbuatan yang curang itu.

<sup>24</sup> Pasal 216 ayat (3) KUHP:

Jika pada waktu melakukan kejahatan itu belum lagi laku dua tahun sejak keputusan hukuman tersalah yang dahulu lantaran kejahatan yang serupa itu juga, maka hukuman itu dapat ditambah dengan sepertiganya.

<sup>25</sup> Pasal 489 ayat (2) KUHP:

(2)<sup>26</sup>, Article 501 paragraph (2)<sup>27</sup>, and Article 512 paragraph (3) of the Criminal Code<sup>28</sup>.

Apart from the criminal actions stated above, there cannot be repetitions.

### **Regulation on Repeated Criminal Actions (Recidive) in the Constitution No. 11 of 2012 on Juvenile Criminal Justice System**

The description on the repeated criminal actions (recidive) are not only explained in the Criminal Code in Indonesia, yet it is also explained in the Constitution No. 11 of 2012 regarding the Juvenile Criminal Justice System. The definition of the repeated criminal action (recidive) is explained in Article 7 paragraph (2) letter b of the Constitution on the Juvenile Criminal Justice System. It is written that the repeated criminal action in this case is the repeated criminal action done by juveniles:

- a) Similar criminal action
- b) Different criminal action
- c) Criminal action solved through diversion

The regulation in the Criminal Code on repeated criminal action or recidive is actually different from that which is regulated in the Constitution No. 11 of 2012 regarding Juvenile Criminal Justice System. In the Criminal Code, recidives are regulated on *Speciale Recidive* and *Tussen Stelsel*. Meanwhile, in the Constitution No. 11 of 2012 regarding Juvenile Criminal Justice System it is regulated with general recidivism.

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Jika pada waktu melakukan pelanggaran itu belum lalu satu tahun, sejak ketetapan putusan hukuman yang dahulu bagi siteralah karena pelanggaran serupa itu juga, maka denda itu dapat diganti dengan hukuman kurungan selama - lamanya tiga hari.

<sup>26</sup>Pasal 495 ayat (2) KUHP:

Jika ketika melakukan pelanggaran belum lewat satu tahun sesudah adanya pemidanaan yang menjadi tetap karena pelanggaran yang sama, pidana denda dapat diganti dengan pidana kurungan paling lama enam hari.

<sup>27</sup> Pasal 501 ayat (2) KUHP:

Jika pada waktu melakukan pelanggaran itu belum lagi lewat 2 tahun sejak tetap keputusan hukuman yang dahulu bagi siteralah lanataran pelanggaran serupa itu juga maka denda itu dapat diganti dengan hukuman kurungan selama - lamanya enam hari.

<sup>28</sup> Pasal 512 ayat (3) KUHP:

Jika pada waktu melakukan pelanggaran itu belum lalu dua tahun sejak ketetapan hukuman yang dahulu bagi siteralah karena pelanggaran serupa itu juga, maka dalam hal yang tersebut pada ayat pertama denda itu dapat diganti dengan hukuman kurungan selama - lamanya dua bulan dan dalam hal tersebut pada ayat kedua dengan hukuman kurungan selama - lamanya satu bulan.

Another difference found is the explanation of Article 7 paragraph (2) letter b of the Constitution on Juvenile Criminal Justice System also does not mention the period of time given to the juveniles in conflict with the law. Not only that, in the Constitution on Juvenile Criminal Justice System there is also a broader definition on repeated criminal action (recidive), which includes similar criminal action, different criminal action, and criminal actions solved through diversions. From the explanation above, we can conclude that the repeat of criminal action or recidive is regulated differently from that in the Criminal Code.

The consequence which happen due to the different regulations on repeated criminal action (recidive) from the Criminal Code is that the juvenile in conflict with the law may be easily processed through the formal method. This is supported by the data from the Director of Social Guidance and Child Alleviation, the General Director of Correctional Facilities, which show that on 2015, the total number of juveniles who were in conflict with the law was as much as 10.000 children. The number placed in prisons and in correctional facilities are 3.812 children. Meanwhile, around 5.229 children are still going through assimilation<sup>29</sup> as well as the diversion process, paroles, or leave before freedom. Many of them were in conflict with cases such as fights, drugs, or decency crimes.<sup>30</sup> Then, based on the data from the Correctional Facility Database on 2015, the number of juvenile inmates is 2017 people. At the end of 2016, the number has increased to 2.123 juveniles. Then, on June 2017, the rate further increased to 4.017 children.<sup>31</sup>

The cases which dominate the number of juvenile delinquencies are fights, drugs, and decency crimes. The cases of fights which are carried out by juveniles should be solved through the effort of diversion, as these fights are one of the manners of children to show their self-existence. It becomes the character of children. Juvenile delinquency or children in conflict with the law basically do not yet understand and are not yet aware of what they were doing. This is because in the

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<sup>29</sup> Asimilasi adalah proses pembinaan Narapidana dan Anak yang dilaksanakan dengan membaurkan Narapidana dan Anak dalam kehidupan masyarakat. Pada dasarnya semua Narapidana dapat diberikan asimilasi, kecuali bagi narapidana yang terancam jiwanya atau yang sedang menjalani pidana penjara seumur hidup, **Pasal 1 angka 4 Peraturan Menteri Hukum dan Hak Asasi Manusia Nomor 3 Tahun 2018 tentang Syarat dan Tata Cara Pemberian Remisi, Asimilasi, Cuti Mengunjungi Keluarga, Pembebasan Bersyarat, Cuti Menjelang Bebas, dan Cuti Bersya.**

<sup>30</sup><http://www.pikiran-rakyat.com/bandung-raya/2015/08/04/337054/sepuluh-ribu-Anak-kini-berhadapan-dengan-hukum>, (diakses pada 26 Maret 2019).

<sup>31</sup><http://smslap.ditjenpas.go.id>, diakses pada 27 Maret 2019.

adolescence stage, children experience a transition. They experience a potential phase of anti-social behavior which is added with much inner conflicts. This makes the adolescents lose control. They cannot manage their emotion, thus it becomes a boomerang for them. This will become a dangerous threat if left alone without proper surveillance from all parties. The symptoms of juvenile delinquency may become actions which lead to criminal actions.<sup>32</sup>

Yet, with the broadening definition of repeated criminal action in the Constitution on Juvenile Criminal Justice System, indirectly, it will pull the juvenile delinquency into a justice system which is terrible for their growth and development. Ironically, Constitution on Juvenile Criminal Justice System was born due to the Constitution on Juvenile Justice which is no longer relevant to the situation in this era, and also not relevant with the society's need for justice. This is because it has not holistically given protection to children in conflict with the law, thus there needs to be the issuing of a new constitution. Diversion is a form of protection for the juvenile delinquency which is born in the Constitution on Juvenile Criminal Justice System. Yet, the diversion requirement's existence for repeated juvenile criminal action is actually the opposite of the Constitution on Juvenile Criminal Justice System's aim.

### **Regulations on Repeated Criminal Action (Recidivism) in Norway and in Thailand**

The requirements of repeated criminal actions (recidives) are as follows:

1. The perpetrator has carried out a criminal action;
2. The perpetrator has been punished for the previous criminal action with a certain legal verdict;
3. After having punished, the perpetrator carried out another criminal action in a certain period of time.<sup>33</sup>

Some requirements on recidives from foreign Criminal Codes are rather interesting to be compared to the provisions in the Indonesian Criminal Code. The comparisons are as follows:

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<sup>32</sup>Wagiati Soetedjo dan Melani, *Hukum Pidana Anak*, (Bandung: Refika Aditama, 2013), p. 15.

<sup>33</sup>Barda Nawawi Arif, *Perbandingan Hukum Pidana*, (Jakarta, Raja Grafindo Persada, 1994), p.

### **Norwegian Criminal Code**

Article 61 of the Criminal Code states that:

*“Provisions concerning increased punishment in case of recidivism are applicable only to persons who have completed their eighteenth year at the time of the commission of the earlier offense”*

From the provisions above, thus, according to the Norwegian Criminal Code, if a juvenile under 18 years of age carried out a repeated criminal action (recidivism), they will not be imposed with increased punishment. This means that there is no recidivism or increased punishment for children under 18 years of age. Such provision does not exist in Indonesia. According to the Indonesian Criminal Code, principally, a child who is under 16 years of age (Article 45 jo. Article 47) may still be punished. Yet, the maximum threat is subtracted by a third (1/3). If the child carried out a repetition of criminal action, thus the maximum threat of punishment for the alleged crime is still increased based on the regulations of recidivism (the repeat of criminal action) for that alleged crime (for example, it is increased by a third). Yet, if the judge has decided upon the punishment, thus the possible maximum punishment is the increased maximum punishment subtracted by a third.

Another interesting provision of the Norwegian Criminal Code Article 61 is the provision which states that:

*“The court allows previous punishment imposed in other countries to serve as a basis for increased in the same manner as punishments imposed in this country”*

This means that punishments given by other countries may be used as a reason to impose increased punishment for the repeat of criminal actions (recidivism). Such provision does not exist and is not explicitly written in the Indonesian Criminal Code regarding repeat of criminal action (recidivism). The explicit regulations on the punishments given by other states and other judges can only be seen in the regulation of *ne bis in idem* (Article 76 of the Criminal Code).

### **Thailand Criminal Code**

Article 94 of Thailand’s Criminal Code states that the regulation on increased punishment in the case of repeated criminal actions (recidivism) does not apply for:

- 1) Accidental criminal actions;
- 2) Light criminal actions;
- 3) The criminal action perpetrator is under 17 years of age (both at the time of carrying out the previous or the next criminal actions).

From the comparison of the regulations on repeated criminal actions (recidivism) in Indonesia, Norway, and Thailand, there are some differences regarding the basis for increased punishment. The differences between these regulations are written as follows:

Table 1. Comparison of Regulations on Repeated Criminal Action between Indonesia, Norway, and Thailand

Country	Indonesia	Thailand	Norway
<b>Basis of Increased Punishment</b>	Articles 486, 487, and 488, For repeated criminal action, the punishment is added by a third (1/3).	Article 94 of Thailand's Criminal Code: Increased punishment for repeated criminal action (recidivism) does not apply for: <ul style="list-style-type: none"> <li>• Accidental criminal action</li> <li>• Light criminal action</li> <li>• There is no basis of increased punishment for repeated criminal action by those under 17 years of age.</li> </ul>	Article 61 of the Norwegian criminal code: Norwegia: There is no basis of increased punishment for repeated criminal action by those under 18 years of age.

(Sources: primary legal sources).

Provisions of Article 61 in the Norwegian Criminal Code and Article 94 of the Thai Criminal Code have a similarity. Increased punishment for repeated criminal actions is only given to criminal perpetrators who are above 18 or 17 years of age. This means that juveniles who carried out repeated criminal actions cannot be grouped as repeated criminal action (recidivism). This is different to the Criminal Code in Indonesia, where in Articles 486, 487, and 488 it is stated that the repeat of

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criminal action (recidivism) is the basis for increased punishment. It is increased by a third, and it applies generally, not only to adult recidivists but also juveniles. This applies even though in Article 17 paragraph (2) of the Constitution on the Children's Criminal Justice System, there is an exception for children who carried out criminal actions in emergency situations. There is no increased punishment for them.<sup>34</sup>

The explanation on the repeated criminal action (recidivism)'s definition in the Constitution on the Children's Criminal Justice System above states that the meaning of repeated criminal action (recidivism) experienced a broadened definition. Before, in the Criminal Code, there are only two kinds of repeated criminal action (recidivism), which are the *Speciale Recidive* and the *Tussen Stelsel*. Now, there is also the general recidivism, which in it includes the solving of cases through diversion. Surely, with the existence of such requirement, it will be hard for juvenile delinquents who carried out a repeat of criminal action. This is because, if a child carried out a repeat of a light criminal action and it has been solved through diversion, then the child repeated the action of light criminality again, thus that child can no longer obtain diversion. Not only that, yet that action will become the basis for increasing the punishment of that child.

Bentham states that benefit is the main aim of law. This benefit is defined as happiness. Thus, the basis of the good, the bad, the justice, and the unjust in law depends on whether that law brings happiness to human beings or not. Because of that, the role of law is to bring human beings towards happiness in the majority of society.<sup>35</sup>

Reflecting from the regulations on repeated criminal action (recidivism) in Norway and in Thailand, the repeat of criminal action should not be the basis of increased punishment for children. With the basis of Bentham's opinion that the law must bring benefits, there should be a change in the regulations on repeated criminal action for juveniles which reflect the benefit and protection for those juveniles.

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<sup>34</sup>Pasal 17 UU No. 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak

(1) Penyidik, Penuntut Umum, dan Hakim wajib memberikan perlindungan khusus bagi Anak yang diperiksa karena tindak pidana yang dilakukannya dalam situasi darurat (situasi pengungsian, kerusuhan, bencana alam, dan konflik bersenjata).

(2) Perlindungan khusus sebagaimana dimaksud pada ayat (1) dilaksanakan melalui penjatihan sanksi tanpa pemberatan.

<sup>35</sup>Muhammad Erwin, *Filsafat Hukum Refleksi Terhadap Huku dan Hukum Indonesia*, (Jakarta: Raja Grafindo Persada, 2016), p. 254.

#### D. CONCLUSION

There is a similarity in the regulations on repeated criminal action for children in Norway and in Thailand. Article 61 of the Norwegian Criminal Code and Article 94 of the Thai Criminal Code states that increased punishment for repeated criminal actions are only imposed to perpetrators who are above the ages of 18 and 17. This is different from the regulation in Indonesia. In the Indonesian Criminal Code, Articles 486, 487, and 488, it is stated that the repeat of criminal action (recidivism) is a basis of increased punishment. The punishment will be added by a third and this applies generally. Yet, there is an exception which is regulated in Article 17 paragraph (2) of the Constitution on the Children's Criminal Justice System, which states that increased punishment does not apply for children who carried out criminal actions in emergency situations.

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