

# Legal Protection for Children Taken by Their Mothers as Convicts in Correctional Institutions

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## Abstract

This research aimed to address the problem of how to fulfil the rights of children brought by their mothers into correctional institutions and the form of protection for the rights of children brought by their mothers as convicts into correctional institutions. This research method is a document (normative) study. The results of this research show that according to Article 20 paragraph (4) Government Regulation Number 32 of 1999, it is determined that a child whom their mother brings into prison must only reach the age limit of 2 (two) years. This is inappropriate if it is linked to the principle of The best interests of the child and the mandate of Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare. The presence of parents beside the child is not enough to only reach the age of two years. Above the age of two years, children still need a mother figure by their side. A special study is required regarding the age limit for a child to be in the care of their mother in prison. This is a consideration for lawmakers to formulate regulations in children's best interests to separate them from other prisoners.

**Keywords:** Children, correctional institutions, legal protection, mother.



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## INTRODUCTION

Legal protection of children is defined as an effort to legally protect children's freedom and human rights related to their welfare. Legal protection for children in Indonesia is regulated in the constitution. Article 28B, paragraph (2) of the 1945 Amendment stipulates, "Every child has the right to survival, growth and development, and the right to protection from violence and discrimination."

This mandate is in line with the provisions of Article 2, paragraph (1) of the Convention on the Rights of the Child (KHA), which determines that every child has the right to live in prosperity. A state must guarantee legal protection to achieve child welfare. The Convention on the Rights of the Child has been ratified by almost all members of the United Nations (UN), including Indonesia, which has confirmed it with the issuance of Presidential Decree (Keppres) Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child.

According to the provisions of Article 1 point 2 of Law Number 35 of 2014 concerning Child Protection (from now on abbreviated to the Child Protection Law), "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 receive protection from violence without discrimination."

In reality, many children still do not receive legal protection. One of them is a child who, through no fault of his own, has to enter a correctional institution (LAPAS) because his parents (mother) are serving a sentence in prison. This condition is, of course, deplorable because the prison environment is not a good environment or place for children. After all, its influence will harm the child's mental development. This condition should not occur, considering the prison environment's negative impact on children's growth and development.

One form of protection for children brought by their mothers as prisoners in prison is Article 20 of Government Regulation Number 32 of 1999 concerning Requirements and Procedures for Implementing the Rights of Prison Inmates (from now on abbreviated as PP Number 32 of 1999). Referring to the provisions of Article 20, paragraph (3), and paragraph (4) of Government Regulation Number 32 of 1999, the form of protection for children brought by their mothers to undergo punishment in prison is limited to providing additional food based on doctor's advice.<sup>1</sup> Meanwhile, the placement of minors brought by their mothers to undergo punishment in prisons is not regulated in statutory regulations. Therefore, it is essential to pay attention to the negative impact of the prison environment on children's development and health, especially with the current condition of prisons, which, on average, are overcrowded.

Based on the background review above, this research is about to address the problem of how to fulfil the rights of children brought by their mothers into correctional institutions and the form

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<sup>1</sup> Habibah Mutiara Triano, Moch Zainal Hakim, and Enung Huripah, "Pemenuhan Hak Pengasuhan Bayi Oleh Narapidana Perempuan Di Lembaga Masyarakat Perempuan Kelas II A Tangerang," *PEKSOS: Jurnal Ilmiah Pekerjaan Sosial* 19, no. 1 (October 11, 2020): 102, <https://doi.org/10.31595/PEKSOS.V19I1.239>.

of protection for the rights of children brought by their mothers as convicts into correctional institutions.

## METHOD

This research uses a qualitative description method, with the technique being a document (normative) study. The form of this research is to analyze and describe national policies regarding the needs of children brought by their mothers to prison. The data sources used in this research are secondary data sources taken through applicable laws and regulations, including scientific books and journals. The data obtained was then collected using the data collection technique used in this research, namely document study. Meanwhile, the data analysis used in this research is descriptive.

## ANALYSIS AND DISCUSSION

### **Fulfillment of the rights of children brought by their mothers to correctional institutions**

According to Barda Nawawi Arief, legal protection for children can be interpreted as an effort to legally protect children's fundamental rights and freedoms and multiple interests related to children's welfare.<sup>2</sup> Child welfare is the primary orientation of legal protection. In general, child welfare is a system of life and living for children that can guarantee their spiritual, physical, and social growth.

The formulation of children's rights contained in Article 3 and Article 4 of the Juvenile Criminal Justice System Law seeks to provide legal guarantees in accordance with the principles of child protection, namely the principle of non-discrimination, the principle of the best interests of the child, the principle of the right to life, survival and development, as well as the principle of respect for children's opinions. Regarding the fulfillment of the rights of children brought by their mothers to correctional institutions, Government Regulation No. 32 of 1999 concerning Conditions and Procedures for Implementing the Rights of Correctional Inmates, Article 20 stipulates that:

- (1) Prisoners and correctional students who are sick, pregnant or breastfeeding have the right to receive additional food according to the doctor's instructions;
- (2) Additional food is also provided to prisoners who perform certain types of work;
- (3) Children of female prisoners who are taken to a correctional institution or who are born in a correctional institution can be given additional food under the doctor's instructions, no later than until the child is 2 (two) years old;
- (4) In the event that the child, as intended in paragraph (3), has reached the age of (2) two years, he must be handed over to his father or relatives or another party with the consent of his mother and made in one official report;
- (5) In the interests of children's health, the Head of the Correctional Institution may determine additional food other than as intended in paragraph (3) based on the doctor's consideration.

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<sup>2</sup> Barda Nawawi Arief, *Beberapa Aspek Kebijakan Penegakan Dan Pengembangan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1996), 155.

So, a child born to a female prisoner while in prison does not result in the detention of the pregnant female prisoner being postponed. The implementation of the crime continues. The child of a pregnant female prisoner is cared for and raised in prison until the age of 2 (two) years. After reaching the age of 2 (two) years, the family receives care.

Suppose it is related to the principle of child protection. In that case, the legal regulations regarding the whereabouts of children brought by their mothers into prison can still be said to fulfil still not the principles of child protection, especially the principle of the child's best interests. The principle of the best interests of children means that the State and public and private bodies must ensure the best interests of children in all actions. In the formulation of Article 3 paragraph (2) of the Convention on the Rights of the Child, the principle of the best interests of the child emphasizes that participating States guarantee the protection of children and provide care for children within their jurisdiction.

One of the international rules, namely the Bangkok Rules, emphasizes that the rules regarding the prohibition of punishment in the form of terminating contact with family, especially children,<sup>3</sup> as stated in Article 23 of the Bangkok Rules, cannot be implemented by simply providing communication facilities such as public telephones in prisons. This regulation is also closely related to the issue of placing women involved in criminal acts in prisons in that country. Article 43 of the Bangkok Rules accommodates the policy that women involved in criminal acts can be in public prisons if the decision is made to fulfil the woman's need to be close to her family. Of course, this decision must be accompanied by guarantees that adequate facilities suit women's needs. Permitting female prisoners in general prisons close to their domicile is not without reason. Long distance from children is considered to be emotionally disturbing for women as convicts.<sup>4</sup>

In its statement at the United Nations General Assembly Special Session on Drugs (UNGASS), the UN Development Program emphasized that women's high imprisonment rate and its impact on their families and children results in human development problems. In hereternormative social construction, the absence of women's role as caregivers of children due to their involvement in criminal acts is considered negligence, violating maternal roles and norms. One study states that women who are involved in criminal acts often experience deep feelings of guilt because they cannot provide for the welfare of their children. Upon leaving prison, they must also struggle with self-shame and social rejection as they try to repair their identity as mothers after receiving evaluation from society.<sup>5</sup>

To implement the principle of the child's best interests, the formulation of Article 3 paragraph (2) of the Convention on the Rights of the Child emphasizes that participating States guarantee the protection of children and provide care for children within their jurisdiction. The state enables parents to be responsible for their children, as do other legal institutions. In situations where the

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<sup>3</sup> Kasmanto Rinaldi, "Efforts of Class IIA Pekanbaru Women's Penitentiary in Fulfilling the Rights of Inmates to Interact with Family in the Covid-19 Pandemic," *Mimbar Keadilan* 16, no. 2 (2023): 170, <https://doi.org/https://doi.org/10.30996/mk.v16i2.8476>.

<sup>4</sup> Arinta Dea, Astried Permata, and Naila Rizqi Zakiyah, *Yang Terabaikan: Potret Situasi Perempuan Yang Dipenjara Akibat Tindak Pidana Narkotika* (Jakarta Selatan: Lembaga Bantuan Hukum Masyarakat, 2019), 90.

<sup>5</sup> Dea, Permata, and Zakiyah, 87.

responsibilities of the family or parents cannot be carried out, the State must provide a "social security" program.

### **The Protection of the Rights of Children Whose Mothers Bring as Convicts to Correctional Institutions**

Bismar Siregar said that the aspect of child protection is more focused on children's rights, which are regulated by law, not obligations, considering that legally, children are not yet burdened with obligations.<sup>6</sup> In this case, children brought into prison or born in prison must receive intensive protection and care. As regulated in Article 20, paragraph (3) and paragraph (4) Government Regulation Number 32 of 1999 concerning Requirements and Procedures for Implementing the Rights of Correctional Inmates. According to the provisions of Article 20 of the Child Protection Law, it is determined that those who are obliged and responsible for the implementation of child protection are the State, society, family and parents, which must be carried out jointly so that the implementation of child protection is effective, positive rational, responsible and beneficial. Can be achieved.

In connection with the existence of minors (toddlers) who, through no fault of their own, have to enter the prison environment because their mothers are serving a sentence, it can be said that these minors (toddlers) have not received legal protection. The causes include legal/regulatory factors. The issue of child protection in Indonesia is regulated by the Child Protection Law. However, the Child Protection Law does not yet adequately regulate the protection of children brought by their mothers into prison. Therefore, a criminal policy is needed to protect children brought by their mothers to serve sentences in prison.

Concerning criminal policies regarding protecting children brought by their mothers as prisoners in prison, the legislators must pay attention to children's best interests. In the Convention on the Rights of the Child, there are 4 (four) child protection principles that underlie all child protection efforts, namely: The principle of non-discrimination (Article 2), The principle of the best interests of the child (Article 3), The principle of the right to life, survival and development (Article 6) and the principle of respect for children's opinions (Article 12). Of the four principles, the principle of the child's best interests is the most important principle, which underlies all children's rights stated in the Convention.<sup>7</sup>

The child's best interests must be the first and foremost consideration in every decision made regarding a child. The principle of the best interests of children is stated in Article 3 of the Convention on the Rights of the Child, which states: "In all actions concerning children carried out by the state or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the child's best interests shall be the primary consideration."

As a country that has ratified the Convention on the Rights of the Child, Indonesia is bound to make children's best interests the primary consideration in every policy decision, including children-related policies. Based on the provisions in the Convention on the Rights of the Child,

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<sup>6</sup> Bismar Siregar et al., *Hukum Dan Hak-Hak Anak* (Jakarta: Rajawali Press, 1998), 22.

<sup>7</sup> Michael Freeman, *A Commentary on The United Nations Convention on The Rights of The Child Article 3: The Best Interests of The Child* (Leiden: Martinus Nijhoff Publishers, 2007), 25.

which Indonesia has ratified, the conditions in Article 20 of Government Regulation Number. 32 of 1999 concerning Requirements and Procedures for Implementing the Rights of Prisoners, which regulates the protection of female prisoners, especially those who bring their children into prison, has not been able to fulfil the child's best interests.<sup>8</sup> This can be seen in Article 20 of Government Regulation Number. 32 of 1999, only give additional food to children as directed by the doctor.<sup>9</sup>

Of course, this kind of thing does not meet the needs of children as mandated by the Child Protection Law, where Article 1 number 2 of the Child Protection Law states that child protection is all activities to guarantee and protect children and their rights so they can live, grow, develop and participate optimally in accordance with human dignity, and receive protection from violence and discrimination.<sup>10</sup> The presence of children in prison will influence or disrupt the child's growth and development. The prison environment is not a good environment for children because it can have a bad influence on children, affecting their mental and mental development.

It is very dilemmatic when a child has to be taken by his mother to prison. On the one hand, children still need a mother, but on the other hand, bringing children into jail is not the right choice. The government itself is currently trying to prevent children from criminal sanctions in the form of prison. This is because there are too many negative impacts if you leave children in jail. Several studies revealed that the atmosphere and facilities in prisons are inadequate, which causes children to become increasingly psychologically and mentally depressed and isolated from their home environment. There is a gap between the service mechanism of the Department of Social Affairs and the Social Service and the guidance mechanism by Correctional Institutions for Correctional Students.<sup>11</sup>

The results of research regarding the negative impacts of placing children in prison include psychological, physical, biological, and social impacts.<sup>12</sup> Apart from that, the results of study by the National Law Commission (KHN) revealed that the facilities in prisons were inadequate, for example, facilities for sleeping, checking health and eating. From the research results, it can be seen that the facilities provided are far from adequate, for example, equipment for sleeping, eating and entertainment. The lack of allocated funds causes this. Therefore, the officers adopted

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<sup>8</sup> Sulaiman Sulaiman, "The Urgency of Legal Protection of Children's Rights Post-Divorce in Caring for Mothers Who Undergoing Criminals in Correctional Institutions," in *Proceedings of the International Conference On Law, Economics, and Health* (Atlantis Press, 2023), 266, [https://doi.org/10.2991/978-2-38476-024-4\\_29](https://doi.org/10.2991/978-2-38476-024-4_29).

<sup>9</sup> Triano, Hakim, and Huripah, "Pemenuhan Hak Pengasuhan Bayi Oleh Narapidana Perempuan Di Lembaga Pemasarakatan Perempuan Kelas II A Tangerang," 102.

<sup>10</sup> Rininta Gustiyani, *PENERAPAN KEADILAN RESTORATIF Bagi Anak Yang Berhadapan Dengan Hukum Di Dunia Maya*, ed. Zaid, CV. Strata Persada Academia (Cirebon: CV. Strata Persada Academia, 2023).

<sup>11</sup> Sri Sutaiek, *Rekonstruksi Sistem Sanksi Dalam Hukum Pidana Anak Di Indonesia* (Jakarta: Aswaja Pressindo, 2012), 41.

<sup>12</sup> dita Adistia, "Dampak Penempatan Anak Di Lembaga Pemasarakatan Berkaitan Dengan Tujuan Pembinaan Dalam Sistem Pemasarakatan (Studi Di Lembaga Pemasarakatan Klas I Malang)," *Brawijaya Law Student Journal*, March 5, 2015.

a policy of allowing convicts to complete the facilities they deemed lacking by themselves by bringing them from outside the prison.<sup>13</sup>

Regarding the possibility of prisonization and lebelization if children are in prison, Makaroda Hafad revealed in the results of his research that there is concern about contamination of the conceptions of thought in children in jail.<sup>14</sup> The risk of prisonization is increasing, considering that the prisoner placement system in prisons usually places several prisoners gathered in one room, including their beds. This, of course, has a significant impact on children's development and health.

Therefore, as part of the State's obligation to protect children's rights from birth as stated in the constitution, it is appropriate to find a solution regarding the whereabouts of children brought by their mothers into prison. Children who are brought by their mothers into prison need to be given more protection, not just providing additional food to the children as regulated in Article 20 of Government Regulation Number. 32 of 1999. The government should provide the children with more facilities, such as separate rooms from other prisoners or placing children and their mothers in juvenile prisons.

Other provisions in Article 20 of Government Regulation Number. 32 of 1999 concerning Requirements and Procedures for Implementing the Rights of Correctional Inmates, namely "In the event that the child as intended in paragraph 3 has reached the age of 2 (two) years, he must be handed over to his father or family members, or another party with the consent of the mother and made in the news program. In principle, children have the right to be raised by their parents. However, it is in the child's best interests and is a final consideration that children can be separated based on valid reasons and/or legal regulations. One of the reasons for the separation is the result of parents, especially mothers, being detained or imprisoned. The separation is carried out without eliminating the relationship between the two people, especially the mother and the child, regarding the situation of mothers who must be detained or imprisoned because they are serving a prison sentence.

Protection for children of prisoners who no longer have the right to follow their mother is a necessity because, affectionately and psychologically, the child no longer receives complete love from his mother until his mother's criminal term is over. Basically, no party agrees that children, especially children aged 2 (two) years, must be separated from their mothers. Still, conditions require that children must be physically separated from their mothers by law.

Insensitivity to gender aspects in the criminal justice system is sociologically closely related to societal culture. As well as state policies in a broader context. Currently, the international world has created a formal consensus on protection against gender discrimination through several international instruments, such as the Universal Declaration of Human Rights, the Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of

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<sup>13</sup> Adistia.

<sup>14</sup> Nuansa Falsafia, "Analisis Penggunaan Laporan Penelitian Kemasyarakatan Dalam Penjatuhan Sanksi Pidana Anak Yang Berhadapan Dengan Hukum Di Pengadilan Negeri Sleman Tahun 2020," *Jurnal Restorasi Hukum* 5, no. 2 (December 26, 2022): 157, <https://doi.org/10.14421/JRH.V5I2.2386>.

Discrimination against Women, the Declaration on the Elimination of Violence against Women, General Recommendation No.19 on Violence against Women, and many others.

Regarding Indonesia's position, which has ratified two human rights instruments related to gender bias and children, namely CEDAW (Convention on the Elimination of Discrimination against Women) and CRC (Convention on the Rights of the Child), government policies, including in the criminal justice system, especially in punishment must begin to consider gender and child-specific. In reality, approaches in criminal justice, especially punishment (correctional settings), have not fully adapted to international demands.

In the Penitentiary System policy, gender-specific matters are only limited to differentiating places in the development process for female prisoners, namely in prisons specifically for women. Likewise, with particular policies regarding guidance, gender sensitivity and sensitivity towards new children are demonstrated in providing food for female detainees and inmates. In principle, what should be done is to make gender-specific aspects the basis for consideration in every policy decision in correctional institutions. This is well reflected in the management (structure) of the organization, the planning and budgeting process, the development of human resources in the Correctional System, the technical aspects of the Correctional System, and the aspects of supervision and participation. The ultimate goal is to produce correctional system policies specifically for women and children that are different from correctional policies for adult male prisoners. So far, the coaching process for women and children tends to have no specific and measurable differences from that of adult men. The main thing that is needed is a special policy that is comprehensive and not partial, such as making special regulations regarding coaching patterns for women and children and in the budgeting process.

Apart from that, the protection of children's rights is also regulated in the Child Welfare Law. The Child Welfare Law regulates children's rights as stated in Article 2. The Child Welfare Law stipulates that children have the right to receive care and guidance from the family and have the right to grow and develop naturally. Children also have the right to live and develop in an appropriate environment, namely, an environment that does not harm or hinder the child's growth and development. It becomes a problem or dilemma if the child brought by the mother to prison must be separated when the child is 2 (two) years old. On the one hand, children still need love and attention from parents, especially mothers, but on the other hand, the current prison environment is not the right environment for children.

One solution to dealing with this problem is that the government must be present in an effort to provide welfare for children in the conditions mentioned above. Article 11, paragraph (2) of the Child Welfare Law determines that the government and the community carry out child welfare efforts. Therefore, the government is obliged to protect children brought by their mothers into prison by improving the facilities in jail to suit the child's life. Later, when the child is 2 (years old) and must be separated from his mother due to legal orders, the government must guarantee the child's life, such as ensuring a place to live and care if the child does not have a caregiver as well as providing education and other things.

## CONCLUSION

According to Article 20 paragraph (4) PP Number 32 of 1999, it is stipulated that a child whom their mother brings into prison must only reach the age limit of 2 (two) years. This is inappropriate if it is linked to the principle of The best interests of the child and UURI mandate Number 4 of 1979 concerning Child Welfare. The presence of parents beside the child is not enough to only reach the age of two years. Above the age of two years, children still need a mother figure by their side. A special study is required regarding the age limit for a child to be in the care of their mother in prison. This is a consideration for lawmakers to formulate regulations in children's best interests so that they are separated from other prisoners.

A national policy is needed regarding women bringing their children into prison, based on standards and principles of children's best interests and special protection for women. This policy is critical to improving the conditions that occur in children whose mothers are brought into prison.

## REFERENCES

- Adistia, Dita. "Dampak Penempatan Anak Di Lembaga Pemasyarakatan Berkaitan Dengan Tujuan Pembinaan Dalam Sistem Pemasyarakatan (Studi Di Lembaga Pemasyarakatan Kelas I Malang)." *Brawijaya Law Student Journal*, March 5, 2015.
- Arief, Barda Nawawi. *Beberapa Aspek Kebijakan Penegakan Dan Pengembangan Hukum Pidana*. Bandung: Citra Aditya Bakti, 1996.
- Dea, Arinta, Astried Permata, and Naila Rizqi Zakiyah. *Yang Terabaikan: Potret Situasi Perempuan Yang Dipenjara Akibat Tindak Pidana Narkotika*. Jakarta Selatan: Lembaga Bantuan Hukum Masyarakat, 2019.
- Falsafia, Nuansa. "Analisis Penggunaan Laporan Penelitian Kemasyarakatan Dalam Penjatuhan Sanksi Pidana Anak Yang Berhadapan Dengan Hukum Di Pengadilan Negeri Sleman Tahun 2020." *Jurnal Restorasi Hukum* 5, no. 2 (December 26, 2022): 155-69. <https://doi.org/10.14421/JRH.V5I2.2386>.
- Freeman, Michael. *A Commentary on The United Nations Convention on The Rights of The Child Article 3: The Best Interests of The Child*. Leiden: Martinus Nijhoff Publishers, 2007.
- Gustiyani, Rininta. *PENERAPAN KEADILAN RESTORATIF Bagi Anak Yang Berhadapan Dengan Hukum Di Dunia Maya*. Edited by Zaid. CV. Strata Persada Academia. Cirebon: CV. Strata Persada Academia, 2023.
- Rinaldi, Kasmanto. "Efforts of Class IIA Pekanbaru Women's Penitentiary in Fulfilling the Rights of Inmates to Interact with Family in the Covid-19 Pandemic." *Mimbar Keadilan* 16, no. 2 (2023): 169-80. <https://doi.org/https://doi.org/10.30996/mk.v16i2.8476>.
- Siregar, Bismar, Abdul Hakim G. Nusantara, Suwanti Sisworahardjo, Arif Gosita, and Mulyana W. Kusumah. *Hukum Dan Hak-Hak Anak*. Jakarta: Rajawali Press, 1998.
- Sulaiman, Sulaiman. "The Urgency of Legal Protection of Children's Rights Post-Divorce in Caring for Mothers Who Undergoing Criminals in Correctional Institutions." In *Proceedings of the International Conference On Law, Economics, and Health*, 265-73. Atlantis Press, 2023. [https://doi.org/10.2991/978-2-38476-024-4\\_29](https://doi.org/10.2991/978-2-38476-024-4_29).
- Sutaiek, Sri. *Rekonstruksi Sistem Sanksi Dalam Hukum Pidana Anak Di Indonesia*. Jakarta: Aswaja Pressindo, 2012.
- Triano, Habibah Mutiara, Moch Zainal Hakim, and Enung Huripah. "Pemenuhan Hak

Pengasuhan Bayi Oleh Narapidana Perempuan Di Lembaga Pemasyarakatan Perempuan Kelas II A Tangerang." *PEKSOS: Jurnal Ilmiah Pekerjaan Sosial* 19, no. 1 (October 11, 2020): 99-112. <https://doi.org/10.31595/PEKSOS.V19I1.239>.