



Juridical Review of Restorative Justice in the Juvenile Justice System through Diversion

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Abstract

Children are the most valuable assets, so that they need to be protected and noticed from negative influences especially in the current era of globalization. This is because children at the age of 12-18 years are still easily affected by negative factors outside themselves so that children fall into juvenile delinquency and even lead to criminal acts which are then called children who conflict with the law. Children who have committed a crime will inevitably bring into the criminal justice process which causes children to be harmed because it will create a negative stigma on children, discrimination, loss of children's rights and so on. For this reason, there is a need for other ways of solving child cases through the diversion stage with a restorative justice approach. The research method used is a normative juridical legal research methods, the approach used in legal research is the statute approach. The results and discussion of diversion in the criminal justice system is the process of resolving child cases out of criminal justice. Diversion must be applied during the investigation phase, the prosecution stage, and the examination phase in the court. In Indonesia diversion embodied in Law No. 11 of 2012 concerning the Juvenile Justice System in the implementation of diversion is very suitable to be combined with a restorative justice approach which is the settlement of criminal cases involving the perpetrators, victims, families of perpetrators/victims, and other parties related parties to jointly seek a just solution by emphasizing recovery back to its original state, and not retaliation.

Keyword: Diversion, Restorative Justice, Juvenile Justice System

INTRODUCTION

Children are the most valuable assets, for families, communities and nations. They are parties where the family, society and nation depend on hope moreover the child is the party who will determine whether a country is led to prosperity or towards deterioration (Krisna, 20018). In the Indonesian constitution, children have a strategic role that is firmly stated that the state guarantees the right of every child for their

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survival, growth and development and protection from violence and discrimination. Therefore, the best interests of children should be lived out as the best interests for the survival of humanity (Pramukti & Primaharsya, 2014). This provision is in accordance with Law No. 35 of 2014 concerning Child Protection, all of which propose general principles of child protection, namely non-discrimination, the best interests of children, survival and growth, and respect for children's participation.

In the current era of globalization, the existence of children in our environment really needs attention because of the negative impacts that arise from the development of rapid development, the flow of globalization in the field of communication and information, the advancement of science and technology and changes in style and way of life as people old people who have brought fundamental social changes in people's lives that greatly influence the values and behavior of children, which of the above impacts causes an increase in the number of crimes and also the quality of crime (Purwati & Alam, 2015).

A concrete example of the absence of attention from parents and the public about children's behavior, namely the emergence of juvenile delinquency that leads to criminal acts committed by children. Children in the age of 12-18 years (teen) are still in a period that is easily affected by factors outside themselves, such as emulation, education, playmates and so on, making it easier for children to fall into the wrong friendship. This of course requires parents and the community to give extra attention to children at that time because children cannot fortify themselves from bad influences. Unmitigated, the criminal acts that children can commit in the current era of globalization are very diverse and concerning, such as murder, theft, rape, obscene deeds, sexual violence, and drug use and other actions.

In Indonesia itself, in 2018 the Commissioner of the Indonesian Child Protection Commission (KPAI) noted a drastic increase in the number of children cases throughout 2018. Total complaints were submitted and reported to KPAI, namely as many as 4,885 cases. According to KPAI chairman Susanto said, the incident was quite astonishing. Because, in 2017, the data on violations of child rights were recorded in 4,579 cases, so in 2018 there were over 300 (increase) data on violations of child rights, in which the children cases facing the law still ranked first, reaching 1,434 cases (Jawa Pos, 2019).

The child who commits a crime or then Law No. 11 of 2012 concerning the Child Criminal Justice System calls him as a troubled child does not rule out the possibility of bringing the child into a detention center. This condition is of course very alarming because many children have to deal with the justice system and they are placed in places of detention and imprisonment with adults so that they are prone to violence, which of course violates the principle of child protection especially regarding the principle of the best non-discrimination and sake of the children who are regulated in Presidential Decree No. 36 of 1990 on August 25, 1990, which is the United Nations ratification and convention on the Rights of the Child, Law No.4 of 1979 concerning Child Welfare, Law Number 23 of 2002 concerning Child Protection in conjunction with Law Number 35 Year 2014 concerning Child Protection, Law Number 39 of 1999 concerning Human Rights, Law Number 3 of 1997 concerning Juvenile Justice and the latter Act Law Number 11 of 2012 concerning Juvenile Justice System (Nashriana, 2011).

Moreover, the formal criminal justice system which ultimately places children in prison status certainly has considerable consequences in terms of child development. The process of punishment given to children through the formal criminal justice system by including children in prison did not succeed in making children deterrent and

becoming better individuals to support their growth and development processes. Prisons often make children more professional in committing crimes (Joni & Tanamas, 1999).

Reflecting on this, to protect children from the influence of the formal process of the criminal justice system that can harm children, then the thought of public or the experts in law and humanity arise to make formal rules of action to remove a child who commits a crime from a judicial process criminal by providing another alternative that is considered better for children, namely through diversion (Marliana, 2010). Restorative justice is the most recommended form of diversion when children are faced with the law. This is because the concept of restorative justice involves various parties, namely the perpetrators, victims, the families of the perpetrators, the families of the victims, the police, prosecutors, judges and NGOs related to the resolution of a problem related to the crime committed by young children (Asajania, Swardhana & Wirasila, 2018).

However diversion cannot run well if it is not supported by the model of restorative justice approach. After knowing and understanding the background above, a number of issues will be formulated to be discussed, namely:

- 1) How does the concept of diversion in the juvenile justice system?
- 2) How is the concept of restorative justice applied in the juvenile justice system through diversion?

RESEARCH METHOD

The research method used is a normative juridical legal research method, the approach used in legal research is the statute approach. Normative legal research is legal research conducted by examining the literature or mere secondary data (Soekanto & Mamudji, 2012). The technique of collecting data uses the literature study method. The method used in this study is a qualitative descriptive method (Anonym, 2015). This method provides a special description of data collected systematically. In normative legal research that examines this secondary data, the presentation of data is done simultaneously by analyzing it

FINDING AND DISCUSSION

The Concept of Diversion in the Juvenile Justice System

The word diversion comes from the English word Diversion, being a diversionary term. The term diversion is used in the formulation of the results of the national juvenile justice seminar held by the Faculty of Law, Padjadjaran University, Bandung on October 5, 1996 (Atmasasmita, 1997). The idea of diversion was announced in the United Nations Standard Minimum Rules for Juvenile Justice (SMRJJ) or The Beijing Rules (UN General Assembly Resolution 40/33 November 29, 1985), where diversion is listed in Rule 11.1, 11.2 and Rule 17.4.

The basic idea of diversion or transfer was to avoid the negative effects of conventional examination from juvenile justice against children, both the negative effects of the judicial process as well as the negative effects of stigma (evil tag) of judicial process, the examination is conventionally transferred, and the children were subject to programs versioned. Diversion actions can be carried out by the police, prosecutors, court and supervisors of correctional institutions where the application of diversion at all levels is expected to reduce the negative effects of children's involvement in the judicial process (Nawawi Arief, 2001). But it should be noted, the process of implementing

diversion in children cannot be immediately applied to children in conflict with the law. However, to be able to receive a diversion procedure in a child's case must meet the conditions, namely:

- 1) the young perpetrator who first committed the crime;
- 2) Age of the child is still relatively young;
- 3) Implementation of forms of diversion programs imposed on children get approval from parents /guardians, as well as children concerned;
- 4) Crimes committed can be minor or severe criminal offenses (in certain cases);
- 5) The child has pleaded guilty to a crime / crime;
- 6) The community supports and does not object to the transfer of this examination; and
- 7) If the implementation of the diversion program fails, the child offender is returned for formal examination.

While in Law Number 11 of 2012 concerning the Child Criminal Justice System, the conditions for conducting diversion are regulated in Article 7 paragraph 2, namely the criminal offense committed by the child is threatened with imprisonment of less than 7 years, and is not a repetition of a crime.

Practically, diversion can be implemented in several forms. Broadly speaking, there are three forms of diversion, namely:

- 1) Diversion in the form of a warning, this will be given to the police for minor violations. As part of the warning, the offender will apologize to the victim. A warning like this has often been done.
- 2) Informal diversion, which is applied to minor violations where it seems inappropriate if it is merely giving a warning to the perpetrators, and to the perpetrators a more comprehensive intervention plan is needed. Victims must be invited to ascertain their views on informal diversion and what they want in the plan. Informal diversion must have a positive impact on victims, families and children. That is, it is ensured that child offenders will be suitable given informal diversion. This informal diversion plan, children will be responsible, recognize the needs of victims and children, and if possible parents are held accountable for the incident.
- 3) Formal diversion, which is carried out if informal diversion cannot be done, but does not require court intervention. Some victims will find it important to tell the child how angry and hurt they are, or they want to hear it directly from the child. Because the problem arises from within the child's family, it is better for other family members to attend to discuss and develop a diversion plan that is good for all parties affected by the act. The formal diversion process in which perpetrators and victims face to face, internationally is referred to as "Restorative Justice" ([Ferli, 2013](#)).

In dealing with children in conflict with law, the Government of Indonesia uses Law Number 3 of 1997 concerning Juvenile Courts. The philosophy of the birth of Law No. 3 of 1997 concerning the Juvenile Court is solely for the best interests of the child, both physically and psychologically which is a codification of international law, namely The Beijing Rules. In its development, it turns out that Law Number 3 of 1997 feels that it is not appropriate, moreover there are some principles in The Beijing Regulations which are not contained in Law No. 3 of 1997, one of which is diversion.

As a positive response from the Government of Indonesia regarding to the efforts on legal protection for children so that their rights can still be fulfilled, avoidance of the form of discrimination and thus issuing Act No. 11 of 2012 concerning the Child

Criminal Justice System or called (SPPA) in lieu of the Law. Law No. 3 of 1997 concerning the Juvenile Court, which was legally approved on July 3, 2012. The Implementation of the Idea of Diversion in the Implementation of the Child Criminal Justice System as stipulated in Law No. 11 of 2012 concerning the Criminal Justice System of Children, The implementation of the juvenile justice system in Indonesia is gradually carried out by the process of investigating investigations, prosecution, the process of examinations in the courts and the process of implementing judges' decisions. The institutions that are related to the juvenile trial process are: Police; Correctional Center (Bapas); Attorney; Court; Legal Advisers and Child Correctional Institutions. In connection with the stages and institutions related to the juvenile criminal justice process, the description in this chapter is about the implementation of the idea of diversion in the implementation of the juvenile justice system in Indonesia, starting from the stage of investigation, prosecution and examination in court .

It is important to note that at each level of handling (police, prosecutors and courts), the welfare approach must be used as the basis for the philosophy of handling violations of the law of the age of children. In principle, this approach is based on 2 (two) factors, namely:

- 1) Children are considered to not understand what mistakes they have done, so it is appropriate to give a reduced sentence, as well as the distinction of punishing children with adults
- 2) When compared with adults, children are believed to be easier to be fostered and made aware of.

One example as the background of the importance of diversion policy is because of the high number of children who enter criminal justice and are terminated by prison and experience violence while undergoing a series of processes in the criminal justice system, ie the Philippines. In the Philippines the rate of involvement of children with criminal acts and undergoing justice until imprisonment is quite high and 94% are children of criminal offenders for the first time (first-time offender) (Marlina, 2008). The number of children undergoing imprisonment is not accompanied by diversion policies and formal child crime prevention programs. On the contrary, efforts to support returning children to their communities are very low. The university is conducted with the reason to provide an opportunity for law-breakers to become good people back on track non formal by involving community resources. Diversion seeks to provide justice to cases of children who have already committed criminal offenses to law enforcement officers as law enforcement authorities. Both justice is explained through a study of the situation and situation to get sanctions or appropriate actions. Three types of diversion programs are:

- 1) The implementation of social control orientation, ie law enforcement officers hand over the perpetrators in the responsibility of supervision or observation of the public, with adherence to the approval or warning given. The perpetrator accepts responsibility for his actions and is not expected to have a second chance for the perpetrators by the community.
- 2) Social services by the community towards the perpetrator (social service orientation), which is to carry out the function to supervise, interfere, improve and provide services to the perpetrators and their families. The community can interfere with the family of the offender to provide repair or service.
- 3) Towards the process of restorative justice (balanced or restorative justice orientation), namely protecting the community, giving the opportunity for the perpetrators to be directly responsible to the victims and the community and making collective agreements between the victims of the perpetrators and the

community (Marlina, 2008).

The implementation of all parties involved is brought together to reach an agreement on action for the perpetrators. The implementation of diversion is based on the desire to avoid negative effects on the soul and development of children by its involvement with the criminal justice system. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officials called discretion or in Indonesian discretion. With the application of the concept of diversion in the form of formal justice that has existed so far, it prioritizes efforts to provide protection for children from imprisonment. In addition, it can be seen that child protection with diversion policies can be carried out at all levels of justice starting from the community before the occurrence of a criminal act by carrying out prevention. After that, if a child commits a violation, it does not need to be processed by the police.

Application of the Concept of Restorative Justice in the Juvenile Justice System through Diversion

Settlement through deliberation is actually not new to Indonesia, even customary law in Indonesia does not distinguish between criminal and civil cases, all cases can be resolved by deliberation with the aim of obtaining balance or restoring the situation. By using the restorative method, the expected results are a reduction in the number of children arrested, detained and sentenced to prison, eliminating stigma and returning children to normal human beings so that they are expected to be useful later on. As a mediator in deliberations can be taken from trusted community leaders and if it happens at school, it can be done by the principal or teacher. The main requirement of the settlement through deliberation is the recognition of the perpetrators and the agreement of the perpetrators and their families and victims to settle the case through a recovery meeting, a new judicial process is underway. In the judicial process, the expected process is a process that can restore, meaning that the case is truly handled by law enforcement officers who have the intention, interest, dedication, understanding the problem of the child and having taken part in restorative justice and detention training as the last choice considering basic principles and conventions on the Rights of the Child which have been adopted into the child protection law.

The enactment—Law Number 11 of 2012 that carries the principle of restorative justice is of course a fresh breeze that blows new hope for the development of child law in Indonesia. It can be said that the application of restorative justice in the juvenile justice system in Indonesia even in the criminal justice system in general is a long-awaited moment for many people, considering law enforcement in a Criminal Procedure that prioritizes formal legal approaches and sanctions or criminal penalties.

Juvenile courts in Indonesia also still violate children's rights which are reflected in court actions including still being found with demands of death sentences on child cases, the fulfillment of children's rights to be accompanied by lawyers, parents and officers from the Correctional Center, and still depriving children of independence illegitimate because civil children are placed together with state children and criminal children, namely children placed in prisons because they are legally recognized as having committed a crime. Actions that can be taken by children who have been convicted for example, for example. granting conditional sentences such as social work / social services and parole. Thus, with the restorative justice model, the proportionality of punishment for children is highly prioritized. This model is very evident in the provisions of The Beijing Rules and in the UN regulation for the protection of children

which previously had to be taken seriously to prevent children from legal proceedings from failing, children who are faced with the judicial process must be protected from their rights as suspects and their rights as children. For example, the authority of the police to give discretion can be given to cases such as what or in cases like what the prosecutor can use his authority to issue children. Therefore, standard rules are needed regarding the conditions and implementation for the provision of non-formal treatment for cases of children facing the law so that negative practice practices in the justice system that harm children can be limited.

Based on the characteristics of restorative justice above, there are requirements that must be met to achieve restorative justice, namely:

- 1) There must be an acknowledgment or guilty statement from the perpetrator;
- 2) There must be an agreement from the victim to carry out a settlement outside the applicable juvenile justice system;
- 3) Approval from the police or from the prosecutor's office as an institution that has discretionary authority (Marlina, 2008).

In its implementation, restorative justice is based on several principles:

- 1) Establish joint participation between actors, victims and community groups in resolving an event or criminal act. Placing the perpetrators, victims and the community as stakeholders who work together and immediately try to find a solution that is seen as fair for all parties (win-win solution).
- 2) Encouraging perpetrators/children to be responsible for victims of events or criminal acts that have caused injury or loss to victims. Furthermore, it establishes the responsibility not to repeat the criminal acts he has committed.
- 3) Put the event or a criminal act primarily as a form of violation of the law among individuals, but as an offense by a person (group of persons) of the person (group of people). Therefore, the perpetrators should be directed at accountability for victims, not prioritizing legal responsibility (formal legal).
- 4) Encouraging the completion of an event or criminal act in a more informal and personal manner, rather than a solution by means of a formal procedure in court (rigid and impersonal)

Thus, restorative justice is a paradigm that aims to answer the dissatisfaction with the results of the work of the current criminal justice system. This approach is used as a frame of strategy for handling criminal cases involving the community, victims and perpetrators of crimes with the aim of achieving justice for all parties so that the same situation is expected as before the occurrence of crime and to prevent further crimes from occurring. Restorative justice is a way to respond to criminal behavior by balancing the needs of victims, perpetrators and the community. Nevertheless, restorative justice is a concept that continues to evolve and has led to diverse interpretations in different countries so that there is no perfect consensus on the formal definition of the concept.

CONCLUSION

The case of children in conflict with the law brought in the judicial process is a serious case, and even it must always prioritize the principle of the best interests of the child, and the process of punishment is the last resort while not ignoring children's rights. In addition, cases of child cases can be resolved through non-formal mechanisms based on standard guidelines. Forms of non-formal handling can be carried out with diversion or restorative justice that can be resolved by requiring children facing the law to take part in education or training at a particular institution, or if they are forced to punish children's rights not to be ignored. So that in the end non-formal handling can be carried out well if it is balanced with efforts to create a conducive justice system.

BIBLIOGRAPHY

- Arief, B. N. (2001). *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*. Bandung: Citra Aditya Bhakti.
- Atmasasmita, R. (1997). *Peradilan Anak di Indonesia*. Bandung: Mandar Maju.
- Anonym, 2015, *Online* <http://www.pengertianpakar.com/2015/05/teknik-pengumpulan-dan-analisis-data.html?m=1>, diakses tanggal 25 Maret 2019 pukul 14.59.
- Ferli (2013). "Diversi dalam Sistem Peradilan Pidana Anak di Indonesia", *Online*, retrieved from <https://ferli1982.wordpress.com/2013/03/05/diversi-dalam-sistem-peradilan-pidana-anak-di-indonesia/>, accessed on 27 March 2019, 20.18.
- Jawa Pos. (2019). "Pelanggaran Hak Sepanjang 2018 Naik Drastis Didominasi Kasus ABH", *Online*, retrieved from <https://www.jawapos.com/nasional/08/01/2019/pelanggaran-hak-anak-sepanjang-2018-naik-drastis-didominasi-kasus-abh>, accessed on 25 March 2019, 20.30.
- Joni, M & Tanamas, Z.Z. (1999). *Aspek Hukum Perlindungan Anak dalam Perspektif Konvensi Hak Anak*. Bandung: Citra Aditya Bhakti.
- Krisna, L.A. (2018). *Hukum Perlindungan Anak: Panduan Memahami Anak yang Berkonflik dengan Hukum*. Yogyakarta: Deepublish.
- Law No. 11 of 2012 concerning to Juvenile Criminal Justice System, Undang-Undang No. 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak.
- Law No. 35 of 2014 concerning to Child Protection, Undang-Undang Nomor 35 Tahun 2014 tentang Perlindungan Anak.
- Marlina. (2008). "Penerapan Konsep Diversi Terhadap Anak Pelaku Tindak Pidana dalam Sistem Peradilan Pidana Anak". *Jurnal Equality* 13(1): 83-102.
- Marlina. (2010). *Pengantar Konsep Diversi dan Restoratif Justice dalam Hukum Pidana*. Medan: USU Press.
- Nashriana. (2011). *Perlindungan Hukum bagi Anak di Indonesia*. Jakarta: Raja Grafindo Persada.
- Purwati, A. & Alam, A.S (2015). "Diversi Sebagai Wujud Kebijakan Pemidanaan dalam Sistem Peradilan Pidana Anak di Indonesia". *De Jure Jurnal Syariah dan Hukum*, 7(2): 177-188.
- Pramukti, A.S. & Primaharsya, F. (2014). *Sistem Peradilan Pidana Anak*. Yogyakarta: Medpress.
- Soerjono, S. & Mamudji, S. (2012). *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Jakarta: PT Raja Grafindo Persada.