

Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia

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Abstract. This article aims to find out the general concept of restorative justice for children and to analyze the concept of restorative justice through the diversion system in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System for the settlement of child criminal cases in Indonesia. In certain cases, children who are perpetrators of criminal acts are of particular concern to law enforcement officials. Therefore, various efforts to prevent and overcome children in conflict with the law need to be carried out immediately. Efforts to prevent and overcome children in conflict with the law today are through the implementation of a juvenile criminal justice system. To carry out guidance and provide protection for children, support is needed, both concerning institutions and more adequate legal instruments. One solution that can be taken in solving cases of juvenile crime is a diversion system. Diversion is not a peaceful effort but a form of punishment against children who are in conflict with the law in an informal way. Diversion is carried out to provide protection and rehabilitation to perpetrators in an effort to prevent children from becoming adult criminals. Diversion of child perpetrators of criminal acts is carried out by the three components of the criminal justice system in Indonesia, from the police, prosecutors to courts. Diversion is carried out to provide protection and rehabilitation to perpetrators in an effort to prevent children from becoming adult criminals. Diversion of child perpetrators of criminal acts is carried out by the three components of the criminal justice system in Indonesia, from the police, prosecutors to courts. Diversion is carried out to provide protection and rehabilitation to perpetrators in an effort to prevent children from becoming adult criminals. Diversion of child perpetrators of criminal acts is carried out by the three components of the criminal justice system in Indonesia, from the police, prosecutors to courts.

Keywords: Diversion; Restorative Justice; Child Crime .

1. Introduction

Children are an inseparable part of the sustainability of human life and the sustainability of a nation and state. In the Indonesian constitution, children have a strategic role which explicitly states that the state guarantees the right of every child to live, grow and develop as well as protection from violence and discrimination in accordance with Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Therefore, the best interests of children should be lived out as the best interests for the survival of mankind.¹

Every year children who are perpetrators of criminal acts have increased, in certain cases, children who are perpetrators are of special concern to law enforcement

¹ See the explanation of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System for children.

officials. Therefore, various efforts to prevent and overcome children in conflict with the law need to be carried out immediately. One of the efforts to prevent and overcome children in conflict with the law today is through the implementation of the juvenile criminal justice system. To carry out guidance and provide protection for children, support is needed, both in terms of institutions and legal instruments that are more solid and adequate. Therefore, the provisions regarding court administration for children need to be made specifically.² The aim of implementing the juvenile criminal justice system is not merely aimed at imposing criminal sanctions on the children of criminal offenders, but is more focused on the accountability of the perpetrators to victims of criminal acts, for the welfare of the children concerned, without reducing the attention of the public interest.

Children who violate the law or commit criminal acts are strongly influenced by several other factors outside of the child such as association, education, playmates and so on, because criminal acts committed by children are generally a process of imitating or being influenced by negative actions from adults or people surrounding. When the child is suspected of committing a criminal act, the existing formal justice system ultimately places the child in the status of a prisoner, of course, has considerable consequences in terms of child development. The process of punishing children through the formal criminal justice system by putting children in prison has not succeeded in deterring children and becoming better individuals to support their growth and development processes.³

A child who commits a crime is basically not eligible to be punished, let alone be put in prison. Children should not be punished like that but should be given guidance and guidance to themselves, so that they can grow and develop like normal children in general and are able to become better individuals. In addition, the guidance and guidance can have a deterrent effect on the criminal act he has committed, so that the child will not repeat his actions at a later date. One solution is to divert or place child offenders out of the criminal justice system or what we often call diversion efforts.

This means that not all problems in children's cases must be resolved through formal justice channels, and provide alternatives for solutions with a justice approach in the best interests of the child and by considering justice for victims which is called a restorative justice approach. The existence of Act No. 11 of 2012 concerning the Criminal Justice System for Children is the opening door for the handling of children in conflict with the law so that this law can be implemented properly for the benefit and protection of children. The basic substance stipulated in Act No. 11 of 2012 is strict regulation regarding restorative justice and diversion which is intended to avoid and keep children away from the judicial process.⁴

2. Research Methods

²Makaraao, Mohammad Taufik. et al, (2013), *Law of Child Protection and the Elimination of Domestic Violence*, Rineka Cipta, Jakarta, p. 1

³Ananda, Fiska. "The Application of Diversion as Efforts to Protect the Law Against Child Perpetrators of Crime", *Journal of Law Enforcement*, Vol. 1. No. 1 (March 2018), p. 78

⁴Kuat Puji Prayitno. 2012. "Restorative Justice dalam Sistem Peradilan di Indonesia", *Jurnal Dinamika Hukum*, Vol. 12 No. 3. p. 408

This research used normative approach which the concepts and theories of punishment continue to experience developments ranging from traditional justice theories such as retributive justice to modern theories of justice such as restorative justice. It is not easy to define restorative justice, because there are many variations in the models and forms that develop in its application. Therefore, many terminologies are used to describe the concept of restorative justice, such as communitarian justice, positive justice, relational justice, reparative justice, and community justice.⁵ Based on the background description described above, the following problems are formulated: 1) What is the concept of the restorative justice approach in a diversion system? 2) What is the settlement of child criminal cases in Indonesia like?

3. Result and Discussion

3.1. Restorative Justice Approach in Diversion System

According to Muladi, restorative justice is a theory that emphasizes restoring losses caused or incurred by criminal acts. Recovering these losses will be achieved by the existence of cooperative processes that include all interested parties.⁶ Based on the definition of restorative justice, it can be seen that restorative justice is a theory of justice that emphasizes restoration of losses caused by criminal acts. The solution is considered best by bringing the parties together cooperatively to decide how to solve the problem.

Some criminal law experts, psychologists, and child behavior experts view that restorative justice theory is appropriate and good to be applied in the juvenile criminal justice system. The involvement of the parties is the main prerequisite in the implementation of the child criminal justice system based on restorative justice.⁷

The concept of restorative justice has been translated into a variety of formulations as well as a variety of philosophical values, requirements, strategies, mechanisms, programs, types of criminal acts and anyone who can be involved in them. One variation of the restorative justice mechanism is a diversion system. According to Jack E. Bynum, what is meant by a diversion system is: "diversion is an attempt to divert, or channel out, youthful offenders from the juvenile justice system."⁸

The definition above explains that diversion is an attempt to divert or remove a child who is a criminal offender from the criminal justice system. Philosophically, the concept of diversion is based on the idea that the court will stigmatize children for their actions as if they are considered evil, so that it is better to avoid leaving the criminal justice system. Diversion is carried out because it is considered in accordance with the philosophy of the juvenile justice system to protect and rehabilitate children

⁵Yutirsa Yunus. 2013. "Analisis Konsep Restorative Justice melalui Sistem Diversi dalam Sistem Peradilan Pidana Anak di Indonesia", Jurnal Rechtsvinding. Vol. 2 No. 2. p. 233-234

⁶Muladi.(1995). *Kapita Selekta on Criminal Law*, Publisher Diponegoro University, Semarang, p. 125

⁷Yunus, Yutirsa. loc. cit.

⁸William E. Thompson and Jack E. Bynum. (2002). *Juvenile Delinquency a Sociological Approach*, Allyn and Bacon, Boston, p. 430

who are perpetrators of criminal acts. In addition, diversion is also carried out as an effort to prevent a child offender from becoming an adult criminal.⁹

According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), diversion has the following principles:

- Diversion is carried out after seeing proper considerations, namely law enforcers (police, prosecutors, judges, and other institutions) are given the authority to deal with young lawbreakers without using formal courts;
- The power to determine diversion is granted to law enforcement officials such as police, prosecutors, judges and other institutions that handle these juvenile cases, according to their policies, according to the criteria determined for that purpose in their respective legal systems and also in accordance with the principles contained in The Beijing Rules;
- The implementation of diversion must be with the consent of the child, or the parent or guardian, however the decision to carry out the diversion after there is a review by the competent official on the request for diversion;
- The implementation of diversion requires cooperation and the role of the community, in connection with the existence of diversion programs such as: supervision, temporary guidance, recovery and compensation to victims.¹⁰

The principle of diversion in The Beijing Rules is basically in accordance with the characteristics of restorative justice which uses a problem-solving approach by bringing together parties (child perpetrators, victims, and law enforcement officials) and the community. The relationship between the concept of restorative justice and the diversion system is also reflected in the objectives of implementing the diversion program, namely: towards the process of restorative justice or negotiation (balanced or restorative justice orientation), namely protecting the community, giving the perpetrator an opportunity to be directly responsible to the victim and the community, and making an together agreement between the victim and the community. The implementation of all related parties is brought together to reach an agreement on the action of the perpetrator.

The suitability of the diversion concept with the restorative justice paradigm can be seen based on the similarity of the diversion program with the form of sanctions in the restorative justice paradigm, namely: restitution, perpetrator and victim mediation, victim services, community restoration, direct services to victims, and restorative fines.¹¹

3.2. Settlement of Child Crime Cases in Indonesia

The settlement of child criminal cases in Indonesia is based on Act No. 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as UU SPPA). The SPPA Law which was effective from 31 July 2014 aims to protect the dignity of children with a restorative justice approach, a child has the right to special protection,

⁹Marlina. 2008. "Penerapan Konsep Diversi Terhadap Anak Pelaku Tindak Pidana dalam Sistem Peradilan Pidana Anak". Jurnal Equality. Vol. 13 No. 1. p. 97

¹⁰ See Rule 11, *United Nations Standard Minimum Rules For the Administration of Juvenile Justice*

¹¹Yunus, Yutirsa. op. cit., p. 237

especially legal protection in the criminal justice system. Therefore, the Juvenile Criminal Justice System is not only emphasized on the imposition of criminal sanctions for the children of the criminal offender, but also focuses on the idea that the imposition of sanctions is intended as a means of realizing the welfare of the offender's child. This is in line with the objectives of implementing the Juvenile Criminal Justice System that are desired by the international community.¹²

The SPPA Law also adopts a restorative justice approach in a diversion system. Article 1 point 6 of the SPPA Law clearly explains that restorative justice is the settlement of criminal cases by involving perpetrators, victims, families of perpetrators / victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation. It is further emphasized in Article 5 paragraph (1) that the juvenile criminal justice system must prioritize the restorative justice approach. This means that the settlement of child criminal cases in Indonesia is no longer oriented towards punishment or traditional justice (retributive justice), but has turned to modern justice (restorative justice). This is a step forward for the transformation of the juvenile justice system in Indonesia as stated by Prison Fellowship International as follows: "Restorative justice is best accomplished through cooperative processes that allow willing prisoners and victims to meet and explore topics such as personal responsibility and making amends. This can lead to the transformation of people, relationships, and communities."¹³ Based on this description, it is necessary to have a cooperative process by bringing together child offenders and victims as well as the community and related institutions in resolving cases of child crime in order to achieve the best interests of the child and victim and to realize transformation in social life.

Furthermore, to realize this, a means of diversion is formulated, in Article 1 point 7 of the SPPA Law it is explained that diversion is the transfer of settlement of juvenile cases from the criminal justice process to the process outside the criminal court. Meanwhile, according to Article 7, efforts must be made to ensure that diversion is carried out at every level of examination which includes the level of investigation, prosecution and examination in district courts. However, there are still limitations, namely diversion is carried out in the case of a criminal act that is committed: a. threatened with imprisonment of less than 7 (seven) years; and b. is not a repetition of a criminal act.

Based on the explanation above, if in every criminal case committed by a child applies restorative justice, it can indirectly reduce children being detained in remand centers or prisons, fewer cases go to court, reduce the number of prisoners in the institution and also reduce the state budget. If all the perpetrators of minor crimes committed by children, then put in a correctional facility has no use value because it only has a negative impact on the child himself.¹⁴

¹² Azwad Rachmat Hambali. 2019. "Penerapan Diversi Terhadap Anak yang Berhadapan dengan Hukum dalam Sistem Peradilan Pidana". Jurnal Ilmiah Kebijakan Hukum, Vol. 13 No. 1. p. 20

¹³ Prison Fellowship International, "Why Restorative Justice?", <https://pfi.org/engage/restorative-justice/>, accessed on 21 December 2020

¹⁴ Djamil, M. Nasir. (2013). *Children Are Not To be Punished*, Sinar Grafika, Jakarta, p. 174

Children who are supposed to get guidance, still really need knowledge such as school and love, then mingle with other prisoners who will only be contaminated from evil traits. It would be better if every criminal act committed by a child be resolved jointly between law enforcers, the community and the two parties in a case must consult to find the best way that benefits or fulfills a sense of justice for both parties so that the victim has high emotionality and reports to law enforcers and hopes for reprisals due to criminal acts that have occurred can resolve the problem with the right solution.

In addition, it should also be understood that imposing criminal sanctions on children who commit criminal acts is the last step or *maximum remedium* that can be taken by law enforcement officials (police, prosecutors, judges). However, before that, it must be attempted to diversify with the Restorative Justice approach in handling and resolving cases of child crime in Indonesia.

4. Closing

The concept of restorative justice for children in conflict with the law is considered good to be applied in the juvenile criminal justice system. Restorative justice aims to prevent children from being convicted and replaced by guidance. One variation of the restorative justice mechanism is the diversion system, which is an attempt to divert or remove a child who is a criminal offender from the criminal justice system. Where the involvement of the parties (perpetrators, victims, law enforcement officials, and the community) is the main prerequisite for the implementation of a restorative justice-based juvenile justice system. Meanwhile, Indonesia has just started to apply the concept of restorative justice through a diversion system in line with the enactment of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System. This provision is sufficient to accommodate the concept of restorative justice through a diversion system by regulating matters concerning (a) the obligation to prioritize the settlement of child criminal cases through a diversion process; (b) the obligation of every law enforcement officer to seek diversion at every level of examination; and (c) the presence and duties of professional social workers, social welfare workers, and social advisers. Through this quite revolutionary regulation, it is hoped that Indonesia can provide complete protection and justice for children

The community and parents should participate in efforts to provide protection for children by fulfilling children's rights, protecting the best possible interests of children, and increasing supervision of the environment and children's play areas so that they can keep children from being involved in a criminal act. And, it is hoped that the three components of the criminal justice system in Indonesia will be able to work in synergy in order to be able to resolve child criminal cases in Indonesia properly and correctly.

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