

Restorative Justice Concept for Children Conflicting Laws in Children Criminal Justice System

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ABSTRACT

The research with the theme "The Concept of Restorative Justice for Children in Conflict with the Law in the Criminal Justice System for Children" aims to understand, explain, and analyze how the concept of restorative justice is used as a basis in handling cases of children in conflict with the law.

This research is a normative legal and empirical research. This research method begins with a juridical study first by reviewing the legislation related to children, namely Law Number 11 of 2012 concerning the Criminal Justice System for Children; Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection; Law Number 4 of 1979 concerning Child Welfare, Law Number 10 of 2012 concerning the Convention on the Rights of the Child.

Empirical legal research was carried out with interviews in the field, which was conducted at the Women's and Children's Protection Unit (UPPA) of the East Java Regional Police.

Restorative Justice is a concept of thought that responds to the development of the criminal justice system by involving the community and victims with a mechanism that works in the existing criminal justice system. According to Article 1 number 6 of the SPPA Law, Restorative Justice is the settlement of a criminal offense by involving perpetrators, victims, the families of the perpetrators / victims, and other related parties to jointly seek a just solution by emphasizing recovery in its original state, and not retaliation. However, in practice, diversion with restorative justice cannot be carried out maximally because it requires an agreement with the victim or the victim's family.

Keywords: *Restorative Justice, Children in Conflict with Law, the Criminal Justice System for Children.*

1. INTRODUCTION

Children are the mandate and gift of God Almighty to have dignity and dignity as a whole human being. Talking about children is very important because children are the potential for human destiny in the future, it is he who plays a role in determining the history of the nation as well as a mirror of the nation's future life attitudes (Wagiati Soetodjo, 2005). Children as part of the younger generation are successors to the ideals of the nation's struggle and are human resources for future national development (Ediwarman, 2006). Therefore it is necessary to provide ongoing guidance for survival, growth and physical, mental and social development and protection from all possibilities that endanger or damage the child's future. Departing from this thought, the interest in the context of child development and development should receive top priority.

In an effort to build a child law regime that is in conflict with the law, there are 4 (four) foundations of the Convention on the Rights of the Child (CRC) that are relevant for implementing the practice of juvenile justice, namely:

1. The best interest of the child as the main consideration in every problem that affects the child (Article 3 CRC);

2. The principle of non-discrimination, regardless of race, color, sex, language, religion, political opinions or other opinions, citizenship, ethnicity or social origin, wealth, disability, birth or other status of the child or parents of children (Section 2);
3. The child's right to survival and growth and development (Article 6);
4. The right of the child to participation in every decision that affects the child, especially the opportunity to be heard in the court and administrative trials which affect the child (Article 12).

Article 13 paragraph (1) of the Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection states that every child in the care of a parent, guardian or any other party responsible for care is entitled to protection from treatment:

- a. Discrimination;
- b. Exploitation, both economic and sexual;
- c. Abandonment;
- d. Cruelty, violence, and persecution;
- e. Injustice; and
- f. Other wrong treatment.

In fact, not all children have the same opportunity to realize their hopes and aspirations. Many of them are at high risk to be able to grow and develop healthily, get the best education because of several factors, including poor

families, problematic parents, mistreated, left by parents, so they cannot enjoy a decent life (Ediwarman, 2006). Social situations and conditions also greatly affect a child's mental health and behavior. Especially now, modernization is happening very fast, expensive education, electronic media that are accessed without limits and minimal parental supervision because they are busy working have a very serious impact on children (Erny Herlin Setyorini, 2018).

In these abnormal situations and conditions, children often face legal cases because of their actions, which is committing a crime. They are suspected, charged even not a few of those found guilty of violating criminal law and sentenced to prison. Prison has given stigma and eternal labeling to a child so that the hope of returning the child's mental morale is difficult to achieve because the labeling will place the status of the child in the middle of society. This is in line with Lundman's opinion, that "... the act of arrest is the first step of the labeling process ..." (Richard J. Lundman, 1993).

Prison crimes harm the mental development of children in the future, this is as stated by Setya Wahyudi that: Criminal imprisonment for children shows a tendency that is detrimental to the child's mental development in the future. At present the majority of children who are in conflict with the law, especially those brought into the criminal justice system, the judge handed down a permanent criminal deprivation of independence. If children are in prison, many of their rights guaranteed by the Child Protection Act are not fulfilled. In addition, due to the limited number of detention centers and prisons, children are often combined with adult prisoners (Setya Wahyudi, 2011).

Since the child was arrested, examined by the police as an investigator at the investigation stage, he was given a name / label as a suspect, at the stage of the examination in court was named / labeled as a convict. This shows that since the arrest was the first step of the labeling process (Erny Herlin Setyorini, 2018).

On November 20, 1989, the United Nations adopted the Convention on the Rights of the Child (CRC) to provide protection for children and uphold the rights of children throughout the world and have force to force on September 2, 1990. Convention this has been ratified by all countries in the world, except Somalia and the United States. Through Presidential Decree of the Republic of Indonesia Number 36 of 1990 dated 25 August 1990, Indonesia ratified the CRC. As a country that has ratified the CRC, putting the CRC as one source of law in the formation of legislation related to children (Nonot Suryono, 2012).

On January 3, 1997 the government together with the House of Representatives passed the 1997 Law of the Republic of Indonesia concerning Juvenile Courts (Juvenile Court Law). However, the Juvenile Court Law has not been able to adopt the interests of society and has not provided special protection for children in conflict with the law. Many people state that the implementation of the juvenile criminal justice system in its implementation is still far from the desire to be able to support the

realization of child welfare goals and the best interests of children (Setya Wahyudi, 2011).

The description of problems faced by children can be seen as a reason for seeking reform of the juvenile criminal justice system, which aims to provide legal protection for children. Child justice reform aims to ensure that children who are in conflict with the law are not justified as children who are guilty and must be punished as befits an adult who commits a crime. The juvenile criminal justice system is intended to educate children for the better because psychologically it must be understood that the child's emotional and psychological state is still unstable or weak in the face of the influence of various surrounding environments. Based on this, it causes children to become frustrated, and result in the occurrence of deviations from the child's behavior which can result in destroying the child's future.

On July 30, 2012, the government passed Law No. 11 of 2012 concerning the Criminal Justice System for Children (SPPA Law), which came into force on July 30, 2014, whose formation was motivated that after seeing the reality in Indonesia the number of children in conflict with the law has increased .

According to data in the East Java Regional Police, several types of crimes committed by children are sexual intercourse, molestation, molestation, child flight, theft, exploitation, beatings, kidnapping, sharp weapons, pornography, vandalism, and others (Yashinta Ma ' u, 2019). Even though the SPP Law has regulated diversion based on restorative justice to handle child cases, but in practice it did not run optimally resulting in cases of children being processed through legal channels.

2.RESEARCH METHOD

Legal research methods by type can be divided into two, namely normative legal research and empirical legal research (Bambang Waluyo, 1991).

The research entitled "The Concept of Restorative Justice for Children in Legal Conflict in the Criminal Justice System for Children" is both normative legal research and empirical legal research. A normative research certainly must use a legislative approach because what is examined are various legal rules which are the focus and central theme of the study (Johny Ibrahim, 2005). For this reason law must be viewed as a closed system, meaning that regulations can be deducted from laws and regulations without the need to seek guidance from social, political and moral norms which have the following characteristics:

- a. Comprehensive, meaning that the legal norms contained therein are logically related to one another;
- b. All inclusive, that the collection of legal norms is quite capable of accommodating existing legal problems so that there is no lack of law;
- c. Systematic, that aside from being intertwined with one another, the legal norms are also arranged hierarchically (Johny Ibrahim, 2005).

The law approach is carried out by examining all laws and regulations relating to the legal issues being addressed

(Peter Mahmud Marzuki, 2007). This is done by analyzing the legal provisions in Law Number 11 of 2012 concerning the Criminal Justice System for Children; Law Number 23 of 2002 concerning Jo's Child Protection. Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2003 concerning Child Protection; Law Number 4 of 1979 concerning Child Welfare, Law Number 10 of 2012 concerning the Convention on the Rights of the Child.

Empirical legal research was carried out with interviews in the field, which was conducted at the Women's and Children's Protection Unit (UPPA) of the East Java Regional Police. The aim is to find out and obtain information from parties related to the research theme. It also studies cases of children in conflict with the law, which have been successfully resolved outside the legal channels through diversion with a restorative justice approach. The location of the research conducted in the East Java Regional Police was motivated by a reason that Surabaya is the second largest city in Indonesia, where the delinquency of children receives special attention, so that crime in the form of juvenile delinquency becomes nationally significant because crime is relatively increasing.

Research result

Article 1 number 1 of the SPPA Law states that the juvenile criminal justice system is the process of resolving cases of children dealing with the law, starting from the investigation stage to the guidance stage after undergoing a crime.

Considering that criminal sanctions have a negative impact on the development of children who are in conflict with the law, especially on the psychological aspects of children, it is necessary to handle cases of children that can prevent children from negative stigma which results in disrupting child development. The SPPA Law regulates diversion which is a way to handle child cases excluded from the legal process. According to Article 1 number 7 of the SPPA Law, the definition of diversion is to divert the settlement of a child case from a criminal justice process to a process outside of criminal justice (transferring the handling of a child case from the legal process out of the legal process). The handling of child cases through this diversion is carried out with a restorative justice approach.

According to the SPPA Law, Diversi aims to:

1. Achieve peace between victims and children;
2. Resolving cases of children outside the judicial process;
3. Avoiding children from deprivation of liberty;
4. Encouraging the community to participate;
5. Instill a sense of responsibility to the child.

Furthermore, according to Perma 4 of 2014, diversion deliberations are deliberations between parties involving children and parents / guardians, victims and / or parents / guardians, community counselors, social social workers, social professional workers, representatives and parties involved others to reach a diversion agreement through a restorative justice approach.

In handling child criminal cases with a restorative justice approach offering a different approach in understanding and handling a crime. In the view of restorative justice, the

meaning of a criminal act is basically the same as the view of criminal law in general, namely attacks on individuals and society and social relations. Restorative Justice is a model of approach that appears in efforts to resolve criminal cases. Unlike the approach used in the conventional criminal justice system, this approach emphasizes the direct participation of perpetrators, victims and the community in the process of resolving criminal cases. However, in the restorative justice approach, the main victim of a crime is not the state, as in the existing criminal justice system. Therefore, the crime that occurs creates an obligation for the perpetrators, victims, law enforcers as well as the community to fix the damaged relationship due to a crime. While justice in restorative justice is given meaning as a process of solving problems that occur on a criminal act in which the involvement of victims, the community and perpetrators becomes important in efforts to improve, reconcile, and guarantee the continuity of the improvement effort.

Legal protection for children through the application of restorative justice is an effort to protect the law against various freedoms and children's rights (fundamental rights and freedoms of children) as well as various interests related to children's welfare. With the limitation of the understanding of legal protection for children, it appears that the problem of legal protection for children covers a very large space (Barda Nawawi Arief, 1998). Restorative justice in the juvenile justice system not only provides protection for children who are victims of criminal acts, but also for children who are perpetrators of criminal acts. The relationship between the perpetrator and the victim is restored as before, as if there had never been a conflict. Therefore, restorative justice is a concept of thought that responds to the development of the existing criminal justice system. On the other hand, restorative justice is also a new framework of thinking that can be used in responding to a crime with a restorative approach and its consequences in the future (Ridwan Mansyur, 1998). However, the handling of cases of children with a restorative justice approach is not running optimally, meaning that more children are prosecuted and ultimately sentenced to prison.

Based on research conducted at the Women's and Children's Protection Unit of the East Java Regional Police on 9 September 2019, interview with the Office of the Protection of Women and Children, Yashinta Ma'U, the following results were obtained:

1. Not all cases of children can be resolved through diversion because cases of children which can be resolved through diversion must meet the requirements specified in Article 7 paragraph (2) of Law Number 11 Year 2012, namely (1) criminal acts committed by children threatened with imprisonment for under 7 (seven) years; and (2) it is not a repeat of a criminal offense.

Thus, the diversion is only for criminal offenses under penalty of 7 (seven) years. If a crime committed by a child threatens a sentence of 7 (seven) years up to the top, then there is no obligation for investigators, prosecutors, and judges to seek diversion. . Then

furthermore it is not a repetition of a crime, for example a child has been diversified and succeeded or the case of a child has received a court decision that has permanent legal force, meaning that when the child has been committed diversion then the child is found to have committed a crime again then the investigator has no longer the obligation to seek diversion even though the crime committed is a criminal threat under 7 (seven) years.

2. Diversion is not always successful, so there is a name for diversion and must seek diversion. When talking about seeking to do yes and no, because this diversion is successful when the victim / family is willing, if the victim / family is not willing to be diversified then the child case will proceed to the legal process. Thus, there must be an agreement from the victim and or his family so that the case of the child can be resolved with diversion. The password is in the victim and / or his family.
3. There is a name that must be diversified when a child is in conflict with this law under the age of 12 years, without seeing the threat of the law, the law must be diversified means without approval, because children under 12 years according to the law have not been able to account for their actions.
4. Regarding the discretion of children in conflict with the law does not exist, when talking about the diversion of prerogative rights there are victims not the police. Discretion cannot be applied to child cases. Because the police are not involved in the case.
5. The criminal offenses committed by children in the East Java Regional Police, between 2017 and 2019, are intercourse, sexual abuse, child abuse, carrying away children, stealing, exploitation, beatings, theft, thugs, sharp weapons, pornography, etc. . However, only a small proportion of cases have been successfully resolved with a diversion based on restorative justice, as follows:

In 2017, there were 1132 cases, which were successfully resolved with a diversion of 114. Then in 2018, a number of 1451 cases were successfully completed with a diversion of 80. In 2019 a total of 685 cases.

3.DISCUSSION

Restorative justice is a concept of thought that responds to the development of the criminal justice system by emphasizing the need for involving people and victims who are considered excluded from the mechanisms that work in the current criminal justice system. In the SPPA Law, restorative justice is known. Restorative justice is the settlement of criminal cases involving the perpetrators, victims, the families of the perpetrators / victims, and other related parties to jointly seek a just solution by emphasizing recovery in its original state, and not retaliation.

Restorative Justice is used as a means to resolve children's cases through diversion. According to Perma 4 of 2014,

diversion deliberations are deliberations between parties involving children and parents / guardians, victims and / or parents/guardians, community counselors, community social workers, professional social workers, representatives, and other parties involved to reach a diversion agreement through a restorative justice approach. The application of diversion with restorative justice is based on the premise that:

1. Child is an immature figure both physically and psychologically;
2. Children avoid further legal proceedings;
3. The child does not understand very well about the mistakes he made;
4. Children are more easily nurtured than adults;
5. Prison and punishment are criminal schools;
6. Prison and punishment are stigmas, lifelong labeling that can destroy the child's future;
7. Children are very dependent on others both economically and socially;
8. Children are the inheritors of our nation and our future successors;
9. The next generation of quality is not born behind bars;
10. Punishment is the last resort (Rizal Nizarli, 2009).

Restorative justice is a form of justice developed by Howard Zehr, a professor of Sociology and Restorative Justice, Conflict Transformation Program, Eastern Mennonite University, Harrisonburg. Howard Zehr argues that "Restorative justice is a process to involve to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as possible" (Howard Zeir, 2002).

Furthermore, Mark Umbreit stated that:

Restorative justice provides as very different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, rather than the simply a violation of abstract laws against the state. Those most directly affected by crime – victims, community members and offenders – are therefore encouraged to play an active role in the justice process. Rather than the current focus on offender punishment, restoration of the emotional and material losses resulting from crime is far more important (Mark Umbreit, 1999).

On Handbook on Restorative justice programmes called that "Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies an community (United Nations, 2006).

Restorative justice returning conflict to the parties most affected by the victims, perpetrators and the interests of their communities and giving priority to their interests. Restorative justice also emphasizes human rights and the need to recognize the effects of social injustice and in simple ways to repay them rather than simply giving formal or legal justice actors and victims not getting any justice. Then restorative justice also strives to restore victims' security, personal respect, dignity, and more importantly, sense of control.

The philosophical foundation of restorative justice is the improvement of the victim's condition, forgiving the

perpetrator's actions and the sincerity of the victim and returning the perpetrators to the community. This is as stated by Consedine as follows:

We need to discover a philosophy that moves from punishment to reconciliation, from vengeance against offender to healing for victims, from negativity and destructiveness to healing, forgiveness and mercy. That philosophical base is restorative justice. A positive philosophy that embraces a wide range of human emotions, including healing, forgiveness, mercy and reconciliation, as well as sanction where appropriate, has much to offer (Jim Consedine, 2003).

3. CONCLUSION

The concept of restorative justice is the settlement of cases outside the court, which is carried out by way of diversion, which is done by bringing together the parties, namely children in conflict with the law and their families, then the victims and victims' families, or can be replaced by the parties, namely their respective lawyers, religious leaders, community leaders, social services, social counselors, and as needed. For example the case of a child who is in conflict with the law that occurs at school could be the Principal or the party from the Ministry of National Education called to sit together to find a way that is equally agreed upon (win-win solution) is right and the best for the child (the best interest of the child). The aim is to improve the situation of the victim, forgive the perpetrators' actions and the sincerity of the victims and return the perpetrators to the community.

However, restorative justice cannot be applied maximally to deal with cases of children in conflict with the law because it requires an agreement with the victim or the victim's family.

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