

Implementation of Diversion in General Prosecutor Levels on Children as Criminal Offenders According to Law No. 11 of 2012 on Juvenile Justice System

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ABSTRACT

A child is a nation's next generation who has her/his own right. As good citizens, we have to take care of our children. This globalization era where information and technology are transparent, children will easily watch adult show in printed and electronic media and their minds are contaminated by adult materials, such as violence and amoral. This condition has lead children to be involved in legal problems. The research problem was how the implementation of diversion process in the level of prosecutors toward a child who was in conflict with the law at the attorney's office. This research aimed to examine the implementation of law enforcement toward a child who was in conflict with law in the attorney's office. The research applied normative judicial method. The results of the research showed that the imposition of Law No. 11/2012 on the Process of Diversion in Children who did criminal acts would protect children in the process of criminal cases and support general prosecutors to prioritize the process of diversion rather than the hearing process in the courts.

Keywords: *child, diversion, criminal*

1. INTRODUCTION

Children are a gift from God the Almighty that must be guarded, educated as the human resources for the next generation. Children are priceless assets that God has entrusted to be cared for and educated for benefiting the nation and the State.

The laws and regulations applied in Indonesia regulate about the understanding of children, including Law Number 35 of the Year 2014, concerning child protection. It states that a child is someone who is less than 18 years old and even the one in the womb, while law Number 11 of the Year 2012, concerning the juvenile justice system, states that children are people have reached the age of 8 years but less than 18 years and have never been married.

The law enforcement is closely related to three elements in the legal system popularized by Lawrence M. Friedman, namely law of substance (law of law), law enforcement (structure of law), and legal culture (legal culture). Concerning the three factors mentioned above, the law enforcement from the sociological side is seen from the process that involves humans in it, because in each of the three elements human beings are both as legislators and as implementers of legislation and culture or customs

within society [1].

Law enforcement functions as a protection of human interests,[2]. The community also has an active role in the law enforcement process and not only the law enforcement officials, namely: the police, prosecutors or judges stipulated in the legislation. The implementation of the law can take place normally, peacefully, but can also occur due to violations of the law. Three elements that must be considered in law enforcement are: legal certainty (*rechtssicherheit*), benefit (*zweckmassigkeit*) and justice (*gerechtigkeit*). Legal certainty (*rechtssicherheit*) means that the law must be carried out under any circumstances. Expediency (*zweckmassigkeit*) means that the law must provide benefits or uses for humans. Justice (*gerechtigkeit*) means that the law must be fair equally for everyone. The three elements must be balanced in its implementation and they are called the three legal objectives, namely: legal certainty (*rechtssicherheit*), justice (*zweckmassigkeit*) and expediency (*gerechtigkeit*).[3]

The implementation of criminal justice is a mechanism for the work of law enforcement officers (law enforcement), starting from the process of investigations, investigations, arrests, detention, prosecution, examination in court proceedings and the implementation of court decisions in prisons. Crime prevention efforts using criminal sanctions are the most common way to be

seen and found in the criminal justice system in Indonesia, and that crime prevention using criminal sanctions is the oldest, as old as human civilization itself.[4]

This research raises a case in the State Court Of Padang Sidempuan in Sibuhuan No: 31 / Pid.Sus.Anak / 2015 / PN.Psp concerning underage children committing a motorcycle theft in Padang Lawas Regency, North Sumatra. However, the initial investigations by Barumon police investigators found no obstacles in the application of the criminal justice system following Indonesian law because at the time of the investigation report the suspect confessed that he was 19 years old. Thus, the investigator arrested the suspect and delegated the file to the Public Prosecutor at the Padangsidempuan District Prosecutor's branch office in Sibuhuan. At the prosecution level, when Phase II was carried out in accordance with Article 8 paragraph (3) of the Criminal Procedure Code, the stage of submitting the suspect and evidence from the Police investigator to the Public Prosecutor run well, because the suspect admitted that he was 19 years. Later, the children's file was forwarded to the Padangsidempuan District Court, but during the suspect's examination, the family came and present a family card stating that he was 16 years, so the Padangsidempuan District Court stopped the examination and returned the file to the Prosecutor's Office.

Based on the case above, it is indicated that one of the obstacles in the application of the legal system for minors following the the juvenile justice system, namely Law No. 11 of 2012 as the amendment of Law Number 3 of 1997, that is many error in recording the personal data of the citizens. This is very worrying, because for the villagers, especially in my research area in Padang Sidempuan, more people do not have a family card. They feel they do not need the letter or card as the most important thing is working and meeting the economic needs. In addition, the law enforcement officers have a lack of knowledge about diversion of children so that children who are in conflict with the law can easily proceed to the trial process.

Wesley Cragg argued that the use of minimum legal power is an important principle in directing law enforcement efforts and reducing the use of legal force, this is because violence often shifts the original nature of the moral person who receives it.[5] Coercion can disrupt a person's moral and soul and stimulate him to lose his willingness to accept existing legal rules.

The implementation of the Republic of Indonesia as a prosecution institution in Indonesia also implies that the Prosecutor's office is in a central position with a strategic role in strengthening the nation's resilience. The prosecutor's office play a role as a filter between the investigation and examination process at the trial as well as the executor of court decisions.[6] The prosecutor's office is the controller of the case process (*Dominus Litis*), because only this office can determine whether a case can be submitted to the Court or not based on legal evidence following the Criminal Procedure Code.

Prosecutors, according to the provisions of the law, are public prosecutors who are authorized to implement or carry out policies in prosecuting competent judicial criminal cases. Furthermore, the other authorities of the

prosecutor's office in Law Number 15 of the Year 1961, concerning the Basic Provisions of the Prosecutor's Office of the Republic of

Indonesia, then was amended as Law Number 5 of the Year 1991 concerning the prosecutor's office of the Republic of Indonesia and the latest amendment in Law Number 16 of the Year 2004, concerning the prosecutor's office of the Republic of Indonesia. It is stated that the Attorney General has the duty and authority to override cases in the public interest, namely Article 35, letter c, and it explains that overruling the case is the implementation of the principle of opportunity which can only be carried out by the Attorney General after observing the advice and opinions of the relevant government bodies. This means that the authority to override cases is only with the Attorney General and not the prosecutor under the Attorney General.[7]

The circular letter from the Deputy Attorney General for the General Crimes turned out that there was no policy regarding the concept of diversion so there was no basis for prosecutors to divert the children dealing with the law as stipulated in the Beijing Rules. However, after the latest juvenile justice system was legislated - Law Number 11 of 2012 and special technical guidelines at the level of the public prosecutor with the issuance of the Attorney General's Regulation No. 006 / A / JA / 2015, concerning the Guidelines for Implementing Diversion at the Prosecution Level. There are rules regarding the Diversion in this regulation and in those rules is a hope for all the people who are waiting for justice. Especially, for the cases involved children who are dealing with the law as the consequence of the increasing number of criminal acts committed by underage children in the Indonesian Republic of Indonesia. This rule aims to control crime rates and protect discriminatory vulnerable children's rights. The concept of diversion is ideal for transferring judicial processes from the formal to the informal justicesystem.

Based on this background, the public prosecutor is one of the law enforcement officers who has a role in applying diversion for children facing the laws other than the police and courts. Hence, it needs the role of law enforcement officials, especially qualified public prosecutors. The central and regional governments should socialize the diversion system for children dealing with the law and fix the recording of citizens' identities.

2 . RESEARCH METHOD

A legislative approach is used in legislation and regulation. The method used in this study was normative juridical research, [8] [9] by analyzing legal materials[10] through a literature review. This research will bring detailed and systematic description solutions to the problems.

3. RESULT AND DISCUSSION

In this globalization era, Indonesia, as a state law has enforced the legal supremacy with the law as the leading law enforcement. Children are the successors of the

nation that should be protected and not discriminated. For legal protection efforts against children in conflict with the law, Indonesians have solved juvenile criminal problems through law or better known as deliberation between the perpetrator and the victim since before the independence in 1945.

Every child has the rights to live, grow, and develop. The government should protect the rights of the children, especially by providing space for children to play and study as well as protect them when they are conflict with the law to avoid

violence and discrimination. Children are the future leaders of the country; they have a strategic function in the national development plan.

The international community recognizes the importance of children by issuing the Convention on the Rights of the Child, which was ratified by Indonesia through the Presidential Decree Number 36 of the Year 1990, concerning the Ratification of the Convention on the Rights of the Child. Subsequently, Law Number 3 of the Year 1997 was issued, amended by Law Number 11 of the Year 2012 and Joint Decree of the Supreme Court, Attorney General, Chief of Police, Ministry of Law and Human Rights, Ministry of Social Affairs, and State Minister for Woman Empowerment and Child Protection of the Republic of Indonesia, regarding the treating children who are in conflict with the law, on December 22, 2009.

Before the establishment of Law Number 11 of the Year 2012, concerning the Juvenile Criminal Justice System which regulates a diversion system for children in conflict with the law, Indonesia has adopted the diversion system or better known as deliberation. Deliberation has been included in the fourth principle of Pancasila, namely: Democracy led by the wisdom of deliberation among representatives. The word deliberation is interpreted as an agreement between the two parties to achieve a common goal. Therefore, Pancasila as the ideology of Indonesia, had implemented the diversion concept long before the system was implemented in Indonesia, which was recorded in Law Number 11 of the Year 2012. Pancasila has been effective in filtering the legal system from other countries to be adopted into the Indonesian justice system. Therefore, law enforcement officials need to coordinate with other institutions to harmonize the legal rules in the "Criminal Justice System"[11].

In line with the establishment of regulations concerning the diversion in the laws of the Republic of Indonesia mentioned before, the Supreme Court has also established the Supreme Court Regulation Number 4 of the Year 2014, concerning the Guidelines for Implementing Diversion in the juvenile justice system. Article 3 of the regulation states that: "Judges handling underage cases are required to strive for Diversion in the event that a child is charged with a crime that is punishable by imprisonment under seven years and charged with a crime punishable by seven years or more, in the form of indictment, subsidiary, alternative, cumulative, and combination." This regulation is different from the Law Number 11 of the Year 2012, specifically in Article 7 paragraph 2, which states: "Diversion, as referred to in paragraph 1, is implemented in the event that a committed criminal act is threatened with imprisonment

under seven years; and not a repetition of a crime."

Law enforcement officers must synchronize such difference for not causing differences in applying diversion at every level of the process, whether it is the police, prosecutors, and courts. Per the regulations, it is expected every every child in conflict with the law can obtain his/her rights in the form of physical, mental, spiritual, and social protection.

Law enforcement officials and related agencies/institutions should pay attention to the principles of the convention of child rights. These principles include the principle of non-discrimination; the best interests of the child; the right to live, to grow, and to develop; and respect for the child's opinion. In line with the principles of the Convention on the Rights of Child, Indonesia has adopted

these principles in its laws and regulations, namely in the juvenile justice system with the establishment of Law No. 11 of the Year 2012.

Attorney-Level Processing

At the prosecution stage, the public prosecutor must seek a diversion no later than seven days after receiving the case file from the investigator. A Diversion process will take place for a maximum of 30 days. In the diversion process, deliberations will be held involving the children and their parents or guardians, the victims and their parents or guardians, the community counselors, and professional social workers.

Law No. 11 of 2012 concerning the Juvenile Criminal Justice System has regulated diversion to protect children in conflict with the law of being stigmatized due to the judicial process they must participate. The protection is by the mandate of Article 7, paragraph 1 and Law Number 11 of the Year 2012, concerning the Juvenile Criminal Justice System. Regarding the Juvenile Courts, there is also a child prosecutor who is authorized to prosecute a child criminal case. This guideline should become a reference for public prosecutors in resolving child cases at the prosecution level by conduct the obligation to solve legal problems outside criminal justice through a diversion based on the restorative justice approach [12]. Parents and employers should review when they hire children and the government should socialize the law related to criminal acts of child exploitation to the community [13].

The handling of child cases carried out by prosecutors before the establishment of Law Number 11 of the Year 2012, concerning the Child Criminal Justice System and the Attorney General's Regulation of the Republic of Indonesia, Number PER-006 / A / JA / 04/2015, concerning the Guidelines for Implementation of Diversion at the Public Prosecutor Level has not been justice, following the concept of diversion as stated in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The SMRJ) or The Beijing Rules (UN General Assembly Resolution 40/33 dated 29 November 1985), where diversion is listed in Rule 11, 1, 11.2 and Rule 17.4. However, after the establishment of the regulation, the public prosecutor has the right to diversify the child's case as a criminal offender.

The Republic of Indonesia Attorney General's Regulation Number PER-006/A/JA/04/2015, concerning

the Diversion Implementation Guidelines at the Public Prosecutor Level, mentions the stages of the Diversion Implementation Process, as stated in CHAPTER III, as follows:

1. Appointment of Public Prosecutors
2. Coordination
3. Diversion efforts
4. Discussion of Diversion
5. Diversion Agreement
6. Implementation of the Diversion Agreement
7. Supervision and Reporting of Diversion Agreements
8. Issuance of Decision Letter for Termination of Prosecution
9. Registration for Diversion

Law enforcers, specifically at this writing, at the level of the Public Prosecutor must also consider considerations in accordance with Article 9, Act Number 11 of the Year 2012, concerning the Juvenile Justice System, that states:

1. Investigators, Public Prosecutors and Judges must consider the following in conducting diversion, i.e: categories of criminal acts; child's age; results of community research; the support of family and community environment.
2. The diversion agreement must obtain the consent of the victim and / or family of the child of the victim and the willingness of the child and his family, except for the criminal acts in the form of violations, minor criminal acts, victimless crime, the value of the victim's loss is no more than the value of the minimum wage of the local province.

The criminal justice system will always experience interaction, interconnection and interface with its environment in ranks, society, economy, politics, education, and technology as well as subsystems of subsystem of criminal justice system. One indicator of the integration of the criminal justice system is "synchronization" of law enforcement. The criminal justice system must be seen as an open system because environmental influences often affect the success of the system to achieve its objectives. In this case, in solving a criminal case a child cannot be equated with an adult with ordinary criminal proceedings. Thus, it can be said that criminal law must consider the individualization of the criminal offenders.

4. CONCLUSION

The public prosecutor is one of the law enforcement officers who has a role in applying diversion to children in conflict with laws, other than the police and courts. Thus, the role of law enforcement officials is necessary, especially qualified public prosecutors. Besides, the central and regional governments should be encouraged to socialize the diversion system for children in conflict with the law and fix the the recording of citizens' personal data.

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