



Development of a Diversion Model for Optimizing Legal Protection for Children Who Are Facing the Law, Which Is Penalty for 7 (Seven) Years

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Abstract. The Juvenile Criminal Justice System Law must prioritize a restorative justice approach applied in the form of diversion, but only aimed at juvenile criminals who are threatened with imprisonment of under seven years. for child perpetrators who are threatened with a sentence of more than seven years. In practice, the application of the principles of restorative justice for juvenile criminals who are threatened with a sentence of more than seven years is partly implemented through discretion, but discretion can also give rise to problems of injustice, due to differences in treatment in the law enforcement process. The aim of this research is to find out how the principles of restorative justice are applied in the criminal laws and regulations in force in Indonesia and how diversion is applied for juvenile criminals who are threatened with imprisonment for more than seven years so that restorative justice can be realized. The type of research is normative legal research, to search for and find the data needed to answer problems. The research results reveal that Indonesian criminal law legislation does not yet regulate the principles of restorative justice for perpetrators of juvenile crimes who are threatened with imprisonment for more than seven years. Theoretically, historically, normatively and in procedural practice, diversion can also be applied to resolve criminal cases committed by children who are threatened with imprisonment for more than seven years.

Keywords: Diversion, Legal Protection, Children In Conflict With the Law.

1. Introduction

Children are a mandate and gift from Almighty God who have dignity and worth as complete human beings. To maintain their dignity, children have the right to special protection, especially legal protection in the justice system. Indonesia, as a country party to the Convention on the Rights of the Child, which regulates the principles of legal protection for children, has an obligation to provide special protection for children in conflict with the law. UNICEF refers to children in this group as *children in especially difficult circumstances* (CDEC), because their needs are not met, they are vulnerable to violence, they are outside the family environment (within the scope of authority of state institutions), they need protection in the form of special regulations and they need personal protection and security.[1] According to Wanjku Kaime-Atterhog, it is stated that from the perspective of the Convention on the Rights of the

Child, children who have problems with the law are categorized as children in situations.[2] or in other words, children are the term for those who are not yet adults and who become adults because of certain regulations even though they are still mentally and physically immature.[3]

Law Number 3 of 1997 concerning Children's Courts is intended to protect children who are in conflict with the law so that children can face a long future and provide opportunities for children so that through coaching they will obtain their identity to become independent, responsible, independent and useful human beings. for oneself, family, community, nation and state. However, in practice, children are positioned as objects and treatment of children in conflict with the law tends to be detrimental to children. Apart from that, the law is no longer in accordance with the legal needs of society and does not comprehensively provide special protection to children who are in conflict with the law. Thus, there is a need for a paradigm shift in handling children in conflict with the law, based, among other things, on the roles and duties of the community, government and other state institutions which are obliged and responsible for improving the welfare of children and providing special protection to children in conflict with the law.

The preparation of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is a replacement for Law Number 3 of 1997 concerning Juvenile Courts (State Gazette of the Republic of Indonesia of 1997 Number 3, Supplement to the State Gazette of the Republic of Indonesia Number 3668) which was carried out with the aim of realizing fair justice. truly guarantee the protection of the best interests of children who are in conflict with the law as the nation's successors by prioritizing the general principles of child protection, namely non-discrimination in the best interests of children, respecting the survival, growth and development of children. The presence of these regulations has formulated protection for children's rights, but in reality they have not received treatment that is beneficial to the best interests of children.

Children are specifically different from the rights of adults, this is because children are very vulnerable to problems. Various cases of criminal acts involving children having to deal with the law are actual and factual problems as social and criminal phenomena that have raised concerns among parents in particular and society in general as well as law enforcement, the forms of crime that are most often committed by children are children including theft and abuse.

In everyday life in society, children as social creatures often have problems that lead to criminal acts which are then reported to law enforcement officials. However, if the case process takes place in law enforcement, the parties in conflict or problem cannot be transferred because the crime committed is punishable by imprisonment for 7 (seven) years even though a peace agreement has been reached, by agreeing not to proceed to court or the legal realm, However, withdrawing or withdrawing the report is hampered by law enforcement officials who are of the opinion that this criminal act is not a complaint or reconciliation offense does not eliminate its unlawful nature so that the case process will continue to the investigation, prosecution and trial stages.

Children dealing with the law are regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, in the process mechanism they still have to go through an investigation and investigation process by the police, a prosecution process by the prosecutor's office and a trial in court. This long formal process gave rise to several thoughts from both scientists and law enforcement officials to find the best alternative for children by keeping children away from the formal justice system as much as possible, namely by prioritizing the Restorative Justice process. The term restorative justice was introduced by Albert Eglash in 1977 to classify the criminal justice system into three groups, namely *retributive justice*, *distributive justice* and *restorative justice*. [4]

In accordance with general provisions, the Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law, starting from the investigation stage to the coaching stage after serving the sentence. Meanwhile, children in conflict with the law are children who are victims of criminal acts, and children who are witnesses to criminal acts as well as children in conflict with the law, hereinafter referred to as children are children aged 12 (twelve) years but not yet 18 (eighteen).) the year the crime is alleged to have been committed. In positive legal discourse, children are defined as people who are not yet adults (*minor/person under age*), minors or minors (*minor/inferiority*) or also commonly referred to as children who are under the supervision of a guardian (*minor under forelimb*). [5]

Settlement of criminal cases through the principle of restorative justice in Indonesia has only been formally implemented legally in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA) which is carried out in the form of "diversion", but is only limited to child perpetrators who are threatened with imprisonment under 7 (seven) years, while child offenders who are threatened with 7 (seven) years cannot be diverted. This creates discrimination against criminal acts which are punishable by 7 (seven) years so that child protection is not optimal. [6] Restorative justice is a popular alternative for treating children in trouble with the law because it offers a comprehensive and effective solution. [7] Restorative justice is a process that involves all parties in a criminal act to find ways to recover from the impact of a criminal act and choose mechanisms to overcome the criminal act. [8] According to Eddy OS Hiariej, the aim of crime in the contemporary era refers to restorative justice to restore the justice needed by victims. [9]

Based on data from the Case Tracking Information System at the Bantul District Court from 2017 to 2021, there were 105 child cases handled, all of them were sentenced to prison and not one of the 105 children's cases was resolved through diversion because all of them were threatened with a prison sentence of 7 (seven) years. This shows that the restorative justice process cannot be carried out because there are no regulations and it turns out that there are still many Indonesian children in prison. Ideally, prison is the last resort for children in conflict with the law because in prison it is not a mental learning process that they receive, but rather learning about criminal acts from other prisoners.

This phenomenon shows that the handling of children in conflict with the law by law enforcement officers is carried out through a judicial process that has been taking place without paying attention to the child's future. This situation is not only

very worrying but also illustrates that the handling of children in conflict with the law does not actually reflect child protection. During the investigation process (from the police, prosecutor's office to the court) children feel that they are not being cared for enough.

The requirements for professionalism of law enforcement in the field of children are not met. Formal requirements take priority over substantial requirements in child-specific law enforcement. Their validity as law enforcers in the field of children is solely based on the Letter of Appointment as Special Children's Police, Special Children's Prosecutor, Special Children's Judge and not substantial requirements as mandated by Law Number 3 of 1997 concerning Children's Courts (UUPA), which has been replaced by Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU SPPA).

In Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA), the threat of a criminal offense of 7 (seven) years is not regulated by the principle of restorative justice through diversion efforts as an alternative solution for resolving juvenile crimes so that law enforcers cannot apply the concept of restorative justice. If it is not regulated by applicable regulations, then it is time for diversion as a way to achieve the goals of restorative justice, including in the regulations that apply to criminal acts committed by children who are threatened with imprisonment for 7 (seven) years so that the aim of law enforcement is not only to achieve legal certainty, but also to create order and tranquility in a harmonious and just society. Restorative Justice aims to empower victims, perpetrators, families and communities to correct unlawful acts by using awareness and belief as a basis for improving people's lives. [10]

Based on the background described above, the author conducted research and discussion of the problems raised, the results of which were outlined in a scientific work with the title Development of a Diversion Model for Optimizing Legal Protection for Children Who Are Facing the Law, Which Is Penalty for 7 (Seven) Years.

2. Problems

Based on the description of the background of the problem above, several problems that will be studied further in this dissertation can be identified as follows:

- a. What is the concept of diversion for child perpetrators who are threatened with seven years in prison in the juvenile criminal justice system in Indonesia?
- b. How is the development of the diversion model in optimizing legal protection for children in conflict with the law in the juvenile criminal justice system in Indonesia?

3. Method

The legal research method is basically a systematic and planned process for discovering legal rules, legal principles and legal doctrines in order to contextually answer legal issues faced. Legal research is carried out to produce rational arguments, new theories or concepts as prescriptions for solving the problems faced.[11]

This research is empirical research supported by normative legal research or better known as field study research enhanced by library law.

Normative or doctrinal legal research that is complemented or supported by empirical (sociological) research. Normative legal research is research carried out by examining library materials (secondary data) or library legal research. Meanwhile, empirical research is research obtained directly from the community or examining primary data. This research uses a statutory approach (*statute approach*), case approach (*case approach*), so that this research is not limited to research on applicable (normative) laws only, but more than that, namely how the laws should be applied.

In principle, research is a research approach *normative juridical*. The main source used is secondary data or library materials.[12] The secondary data referred to includes primary legal materials, secondary legal materials and tertiary legal materials. Thus, this research is also an attempt to discover the law *in concreto* which aims to find appropriate laws that will be applied in a particular problem,[13] especially those related to aspects of resolving diversion in the Juvenile Criminal Justice System in Indonesia, as well as applied legal research. According to Bagir Manan, applied legal research is research that aims to answer legal or law-related problems in a concrete situation. The field of applied research in the field of law chosen is normative research (i.e. research on positive legal rules and legal principles), in the form of legal evaluation research.[14] Evaluation research on positive law is carried out in accordance with other legal rules, or with legal principles recognized in the existing system. Furthermore, the analysis is carried out based on or guided by statutory regulations and expert opinions. Therefore, this research is closer to applied legal studies. as stated by Bagir Manan.

This research is descriptive analytical in nature,[15], [16] namely aiming to obtain a comprehensive and systematic description or general picture, as well as explaining the existing legal conditions or facts, namely regarding aspects of resolution through diversion in the juvenile criminal justice system in Indonesia. Then the general picture is analyzed based on statutory regulations and expert opinions with the aim of getting answers to the problems identified in this study.

Data collection is carried out by means of literature studies to obtain data in the form of documents or writings, through searching for statutory regulations, documents and scientific literature and research by experts and specialists that are appropriate to the objects and problems being researched. Collecting secondary data as main data, which includes:[16]

- a. Primary Legal Material, which consists of statutory regulations, especially those closely related to diversion issues, the juvenile criminal justice system, restorative justice issues; as well as other regulations related to the issue of protecting children who are facing legal problems;

- b. Secondary legal materials, in the form of scientific writings from experts, consisting of literature, papers, scientific journals and research results related to the subject matter being studied; and
- c. Tertiary Legal Materials, in the form of materials that support primary and secondary legal materials, such as legal dictionaries, language dictionaries, articles in newspapers, magazines and the internet.

Field study (*field research*) It is also carried out to obtain primary data as supporting data, where primary data collection is carried out by interviews, by first determining the groups of parties who are used as sources of information based on authority, knowledge, experience and understanding.

Regarding legal materials and comparison of the legal construction of several legal concepts relevant to this study. For primary legal materials, analysis is carried out by examining the basis *ontological and ratio legis* (*why is there this provision*) from statutory provisions to capture the philosophical content that animates the existence of the law.

Secondary data was analyzed using normative qualitative analysis methods, namely by interpreting, correlating and comparing legal materials and comparing the legal construction of several legal concepts relevant to this study.

Drawing conclusions from the research results that have been collected is carried out using the qualitative normative analysis method.[17] Normative because this research starts from existing laws and regulations as positive law. Qualitative because it is an analysis of data originating from information from interviews described by respondents, which is presented descriptively.

To obtain primary, secondary and tertiary legal materials, material collection is carried out in several ways, including:

- a. Yogyakarta Special Regional Library
- b. Bantul District Court;
- c. Bantul District Prosecutor's Office;
- d. Bantul Resort Police;
- e. Bantul Correctional Center.

Field research is carried out on data sources that will be obtained from respondents who are deemed to understand and comprehend the problems to be studied, namely:

- a. Chairman of the Bantul District Court;
- b. Head of the Bantul District Prosecutor's Office;
- c. Bantul Resort Police Chief;
- d. Head of Bantul Correctional Services;
- e. Children's Observer in Bantul.

4. Discussion

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA), which is the parent criminal procedural law for children that applies generally in handling juvenile criminal cases in Indonesia, replaces Law Number 3 of 1997 concerning Juvenile Courts which only regulates diversion. For criminal acts which are punishable by imprisonment under 7 (seven) years so that criminal acts which are punishable by 7 (seven) years do not regulate diversion.

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA) which is currently in effect is considered to be less effective in resolving juvenile criminal cases, because for juvenile offenders who are threatened with imprisonment for 7 (seven) years, transfer cannot be carried out. Even though there are children's cases which in the process of being examined can be resolved outside of court, because they are not regulated in the applicable juvenile criminal law regulations, they must be carried out through long procedures, namely through the process of investigation, prosecution, trial and execution, which of course will take a lot of time and money. So that the principles of simple, fast and cheap justice cannot be implemented. The juvenile criminal justice process often presents itself as a mechanism that is only oriented towards formal law enforcement and is not oriented towards the interests of children.

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which currently carries a sentence of 7 (seven) years is very identical to the concept of punishment so that the realization of restorative justice will be difficult to achieve if there is no room for diversion even though the concept of restorative justice is a juvenile criminal justice system that must support the creation of a peaceful and just society, the justice system must be aimed at creating peace, not punishing so that this can cause unrest in society because law enforcement officials will be considered unfair and selective in carrying out diversion because it is only carried out for criminal acts that are punishable by imprisonment less than 7 (seven) years.

Restorative justice in Indonesia began to be implemented with the promulgation of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA). The "restorative justice" clause is contained in article 1 point 6 which contains the definition of restorative justice in the law, which reads: "Restorative justice is the resolution of criminal cases involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to work together. "and seeking a just solution by emphasizing restoration to the original condition, and not retaliation," means that the concrete form of implementing the principles of restorative justice in the Juvenile Criminal Justice System Law (SPPA) is mandatory diversion. Article 6 of the Juvenile Criminal Justice System Law (SPPA) states that the aim of diversion is to achieve peace between the victim and the child, resolve children's cases outside the judicial process, prevent children from being deprived of liberty, encourage the community to participate and instill a sense of responsibility towards children. With restorative justice arrangements, the juvenile justice system no longer emphasizes the

retributive concept, so it shifts to a restorative one that involves various parties, such as perpetrators, victims, government and society. In the view of contemporary criminal law, restorative justice is one of the goals of punishment. Restorative justice is defined as a mechanism for overcoming criminal law problems by involving perpetrators, victims or their families and other related parties to seek appropriate justice with an emphasis on restoring the situation. Restorative Justice was established to create reconciliation between victims and perpetrators by involving the government as law enforcer.

Article 1 number 7 of the Juvenile Criminal Justice System Law (SPPA) which is called diversion is the transfer of the resolution of juvenile cases from the criminal justice process to a process outside the criminal justice system, meaning the position of diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System It is not only limited to the authority of law enforcement officers, which means whether they can use that authority or not, but also the obligations that must be carried out by law enforcement officers in handling cases of children charged by law. Contrary to the law as intended in article 7 paragraph (1) "At the level of investigation, prosecution and examination of children's cases in district courts, diversion must be attempted." Furthermore, paragraph (2) states that "Diversion as intended in paragraph (1) is carried out in the event that a criminal act is committed: a. threatened with imprisonment for less than 7 (seven) years; and b. is not a repetition of a criminal act".

This diversion is not only limited to the obligation to carry out formal legal procedures, but the Juvenile Criminal Justice System Law (SPPA) also provides imprisonment for law enforcement officers, namely investigators at the investigation stage, public prosecutors at the prosecution stage and judges at the investigation stage. Experimental stage. does not make diversion efforts, this criminal provision is regulated in Article 96 of the SPPA Law which reads "Investigators, Public Prosecutors and Judges who deliberately do not carry out their obligations as intended in Article 7 paragraph (1) will be punished. with a maximum imprisonment of 2 (two) years or a maximum fine of IDR 200,000,000.00 (two hundred million rupiah)" even though this article has been canceled by the Constitutional Court in its decision Number 110/PUU-X/2012, it is the obligation of law enforcers to carry out diversion must still be implemented.

The most basic substance in the Juvenile Criminal Justice System Law (SPPA) is a strict regulation of Restorative Justice and Diversion which is intended to avoid and distance children from the justice process so as to avoid stigmatization of children who are in conflict with the law. and it is hoped that the children will return. in a good social environment. Because the implementation of diversion for criminal acts that are punishable by a sentence of less than 7 (seven) years is an obligation for law enforcers to avoid injustice, the most ideal concept in implementing the principle of restorative justice can be applied to criminal acts that are punishable by 7 (seven) years in prison. carried out by children so it needs to be included as a standard procedure. in a legal state for several reasons, namely theoretical reasons which refer to the objectives of law, namely justice, certainty and usefulness", these three basic values must always exist and underlie legal life. Justice will be fulfilled because law enforcement officers

will be required to carry out diversion for all criminal acts committed by children, no longer relying on the good faith or professionalism of law enforcement officials and discretion, every perpetrator of the same particular criminal act will receive the same legal treatment (equality before the law). The basic value of legal certainty will be fulfilled because by including diversion as positive legal rules in legal regulations so that it will provide legal certainty to all parties, because the output of diversion which has succeeded in reaching an agreement to resolve the case outside the court is considered to have legal force, because it is ratified by the court through a provision.

The basic value of benefits will be fulfilled by including diversion in statutory regulations, because the implementation of diversion involves perpetrators, victims and the community whose output is in the form of improvements that lead to peace so it is hoped that the results of diversion will be beneficial for perpetrators, victims and society and can achieve legal protection because it can create justice in public. According to Andri, mediation in the restorative justice concept is a combination of a victim mediation program and reparation negotiations where justice is still carried out as in the criminal justice system, but law enforcement actively takes a position to reconcile the parties. Apart from that, the legal apparatus itself will also provide benefits by reducing the workload, because they do not have to process by filing or trying cases in court. The state itself will also feel the benefits in terms of reducing the state's financial burden to pay for food for prisoners and convicts in detention centers or correctional institutions. And for historical and juridical reasons, before the enactment of Dutch colonial law, the community resolved conflicts based on customary law through deliberation involving all parties involved in a criminal incident regardless of the type of crime committed, to find solutions to improve the original situation and create justice

For all parties, this is in line with the principles of restorative justice so that the application of the principles of restorative justice through diversionary deliberations in statutory regulations is the same as reviving the nation's noble values. Indonesian nation. With the revival of values in customary law as part of the positive law that applies in Indonesia. The Indonesian National Constitution recognizes and respects customary law community units and their traditional rights, as stated in Article 18B of the 1945 Constitution. Thus, Diversion Deliberation as a form of implementing the principles of restorative justice is also in line with the Basic State of the Republic of Indonesia, Pancasila, in the 4th principle "the people are led by wisdom in deliberation/representation".

Deliberation and consensus are the noble values of the Indonesian people in resolving every problem of the nation and society, including resolving conflicts related to crime that arise in society. Furthermore, the sociological reason is that by implementing diversion for all criminal acts committed by children in the laws and regulations in Indonesia, all parties involved in a criminal incident will receive justice, which leads to the creation of balance, peace and tranquility in society. According to Eva Achjani Zulfa in her paper entitled "Basic Concepts of Restorative Justice" defines restorative justice as a form of approach to resolving cases according to criminal law by involving the perpetrator of the crime, the victim, the family of the victim or perpetrator and other related parties to find a just solution by emphasizing

restoration. . return to the original state and not retaliation. Resolving cases of children who commit criminal acts which are threatened with a sentence of 7 (seven) years through diversion will also reduce the number of detainees and convicts in LPKA so that there needs to be a solution to overcome this problem, one of which is through resolving criminal cases through the concept of restorative justice, because the output of Restorative justice is peace, not punishment. And the reason for procedural practice is to include diversion in the criminal law regulations in force in Indonesia, ideally there will no longer be differences in treatment (disparities) of law enforcement officials in handling certain child criminal cases, and the principle of equality is up front. the law (equality before the law) will be fulfilled. so that the level of public trust in law enforcement in Indonesia will of course also increase.

5. Conclusion

Juvenile crimes are regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, however law enforcers can only apply the concept of diversion in the case of children under 7 (seven) years of age. The practice of exercising discretion is still problematic because it does not fulfill the three basic legal values, namely justice, certainty and benefit, and discretion can also give rise to problems of injustice, due to differences in treatment in the law enforcement process, so that the principle of "equality before the law" is not implemented.

The implementation of the concept of legal protection for children who are in conflict with the law in the juvenile criminal justice system has not been carried out optimally by law enforcers because a legal umbrella is still needed for the implementation of diversion in cases of children who are threatened with a sentence of 7 (seven) years.

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