



Criminal Law Policy Towards Diversion in Narcotics Crimes by Children as Couriers

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Abstract. The increasing prevalence of narcotics crimes by children requires effective countermeasures. Diversion is one step to prevent children from the negative impacts of justice. However, diversion cannot be carried out for narcotics crimes by children as couriers because they do not meet the qualifications for criminal threats as regulated in Article 7 paragraph (2) of the SPPA Law. The aim of this research is to analyze contradictions and determine criminal law policies regarding diversion in narcotics crimes by children as couriers. The type of research that the author uses is normative juridical. The results of this research are that there is a contradiction in the regulation of the qualifications for criminal acts that can be diverted, namely that Judges are given the authority to seek diversion which carries a penalty of 7 (seven) years or more as regulated in Article 3 of Perma Number 4 of 2014 but not for Investigators and Public Prosecutors. So for narcotics crimes by children as couriers, diversion cannot be attempted. Meanwhile, the process of judicially resolving children's cases has many negative impacts on the child's soul and development. There needs to be a criminal law policy that in the future regulates the qualifications for carrying out diversion, no longer if the penalty is less than 7 (seven) years. Diversion is to realize restorative justice that better protects children's rights, because in the case of children as narcotics couriers, children are actually not only perpetrators but also victims.

Keywords: Criminal Law Policy, Children, Narcotics Courier, Diversion.

1. Introduction

Narcotics cases in Indonesia are currently at a very worrying level. Where the use of narcotics can damage the country's economy and also the younger generation. Apart from that, what is very worrying is that narcotics cases are never resolved, of the number of reported cases only 10% reach court, because according to the General Chairperson of Granat (National Anti-Drug Movement) that the distribution of narcotics in Indonesia, especially in big cities is carried out neatly and organized.[1] The problem of narcotics in Indonesia has increased, both in the context of users, the variety and amount used and the context of victims.

Narcotics abuse is a victimless crime. Where actually the victim is the perpetrator himself. Therefore, children who commit criminal acts of narcotics abuse should be resolved outside of court.[2] According to Natangsa Subakti, in the criminal case process, law enforcement functionaries, namely the police, prosecutors and judges, tend to work in a patterned manner by focusing on prohibited or criminal acts and the perpetrators, but ignoring the victims of criminal acts.[3]

Children who commit narcotics crimes, in this case, don't act as intermediaries on their own initiative, but are told by someone else to do so in return. This is done by children because of economic factors. This research focuses on intermediary (courier) narcotics crimes committed by children. The criminal threat as a narcotics courier is regulated in Article 114 of Law Number 35 of 2009, namely a minimum of 5 (five) years and a maximum of 20 (twenty) years. The juvenile criminal provisions in Article 81 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU SPPA) state that the prison sentence that can be imposed on a child is a maximum of $\frac{1}{2}$ of the maximum adult criminal threat. Which means $\frac{1}{2}$ of 20 (twenty) years is 10 (ten) years. Meanwhile, the diversion requirements in Article 7 paragraph (2) letter a of the SPPA Law state that criminal acts are punishable by imprisonment for less than 7 (seven) years.

Diversion at every level, starting from investigation, prosecution and trial in court, must be pursued. In practice, not all narcotics crimes committed by children can be diverted, such as the crime of children as narcotics couriers, diversion cannot be carried out because they do not meet the diversion requirements, namely the penalty is less than 7 (seven) years. In the implementation of diversion, there is a discrepancy in that Article 3 of Perma Number 4 of 2014 states that judges may seek diversion for criminal acts that carry a sentence of 7 (seven) years or more provided that the indictment is not a single one. This does not provide opportunities for investigators and public prosecutors. Meanwhile, in certain cases, namely children as narcotics couriers, diversion absolutely cannot be carried out because

they do not meet the requirements as regulated in the SPPA Law. If we are talking about couriers, then there is a third party. Likewise, when a child becomes a narcotics courier, it is not solely because of his own desires, but is ordered by a third person and there is motivation behind it. Based on this background, it is necessary to carry out research regarding Criminal Law Policy Towards Diversion in Narcotics Crimes by Children as Couriers.

2. Method

This research uses normative juridical research methods. The normative juridical research method is library legal research which is carried out by examining library materials.[4] The research approach used is a statutory approach by examining and analyzing all statutory regulations related to the legal issue being researched.[5]

3. Results and Discussion

I. Contradictions in The Implementation of Diversion in Narcotics Crimes by Children as Couriers

Diversion is an alternative to diverting the process from a judicial to a non-judicial process in dealing with narcotics crimes committed by children. This transfer is carried out to prevent children from applying criminal law. In general, in the Criminal Code there are three formulations of articles that regulate criminal sanctions against children, including Article 45 of the Criminal Code which regulates the maximum limit to which a child can be held responsible for a criminal act he or she commits. Article 46 of the Criminal Code regulates administrative rules relating to what the judge must do after giving an order that the guilty person be handed over to the government. Article 47 of the Criminal Code regulates criminal reductions in the event that a judge will impose a sentence on a child perpetrator.[6]

The principle of legal protection for children must be in accordance with the Convention on the Rights of the Child as ratified by the Government with Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child, which regulates the principle of legal protection for children, has an obligation to provide special protection for children. children in conflict with the law.[7]

The principle of restorative justice considers criminal acts as a disease that needs to be cured, not just an act of violating the law. Meanwhile, the theory of retributive justice is able to accommodate the understanding that criminal acts are only violations of the law. Meanwhile, if it is considered a disease that must be cured, then the treatment must be holistic, comprehensive, involving all elements touched by the criminal act.[8]

J.E. Sahetapy said that peace without justice is oppression and justice without peace is a new form of persecution. Criminal sanctions, which in principle aim to provide punishment in the form of exile, are not always the last resort for every perpetrator of a crime, especially children. Isolation is not the best solution in resolving crime problems involving children. Conditioning crime as an inevitability of always getting imprisoned is ironic.[9]

Diversion is a transfer of the resolution of cases of children suspected of committing certain criminal acts from the formal criminal process to a peaceful settlement between the suspect/defendant/perpetrator of the crime and the victim, facilitated by the family and/or community, Children's Community Counselors, Police, Prosecutors or Judges. Therefore, not all cases of children in conflict with the law must be resolved through formal justice channels, and provide an alternative for resolution using a restorative justice approach. Therefore, children who are in conflict with the law can be diverted in the best interests of the child and taking into account justice for the victim.[10]

In Article 6 of the SPPA Law, the objectives of diversion are stated, including the following:

- a) Achieve peace between victims and children;
- b) Resolving children's cases outside the judicial process;
- c) Prevent children from deprivation of liberty;
- d) Encourage the community to participate; and
- e) Instill a sense of responsibility in children.

The aim of diversion is the implementation of restorative justice which seeks to restore recovery to a problem, not retaliation. Diversion must be pursued at the level of investigation, prosecution and case examination in court. The words "must make efforts" imply that child law enforcers, namely Investigators, Prosecutors and

Judges, are required to make efforts so that the diversion process can be carried out. This is still being debated because of the diversion requirements regulated in Article 7 paragraph (2) of the SPPA Law, namely:

- a) Threatened with imprisonment for less than 7 (seven) years; and
- b) Not a repetition of a criminal act.

At the investigative level, diversion is not specifically regulated, but is implicitly regulated in Police Regulation (Perpol) Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice. The special requirements for handling drug crimes based on restorative justice are regulated in Article 9 paragraph (1) of Perpol Number 8 of 2021, including:

- a) Drug addicts and victims of drug abuse who apply for rehabilitation;
- b) When caught red-handed:
 - 1) Evidence of drugs used for 1 (one) day is found, classified as narcotics and psychotropics in accordance with statutory provisions; and
 - 2) No evidence of a drug crime was found, but the urine test results showed positive for drugs.
- c) Not involved in drug crime networks, dealers and/or dealers;
- d) An assessment has been carried out by an integrated assessment team; And
- e) The perpetrator is willing to cooperate with National Police investigators to carry out further investigations.

Diversion in the prosecution process is regulated in the Regulation of the Attorney General of the Republic of Indonesia Number: PER-006/A/J.A/04/2015 concerning Guidelines for Implementing Diversion at the Prosecution Level where in the attachment to CHAPTER II Diversion Obligations that "Public Prosecutors are obliged to seek diversion at the prosecution level with conditions : 1) criminal offenses are punishable by imprisonment for less than 7 (seven) years; and 2) is not a repetition of a criminal act."

Judges are also given the authority to seek diversion in children's cases as regulated in Perma Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System with the conditions as regulated in Article 3 that "Children's judges are obliged to seek diversion in cases where children commit criminal acts which are threatened with imprisonment for less than 7 (seven) years and also being charged with criminal offenses punishable by imprisonment for 7 (seven) years or more in the form of subsidiarity, alternative, cumulative or combined (combined) indictments."

As regulated in Article 7 paragraph (1) of the SPPA Law, diversion must be attempted at the level of investigation, prosecution and examination of cases at the District Court. In this sense, investigators, public prosecutors and judges are obliged to seek diversion rather than having to resolve children's cases through litigation. However, there are contradictions in all the legal bases that regulate the conditions carried out by law enforcement officials in implementing diversion. Where Investigators and Public Prosecutors are only given the opportunity to carry out diversion in criminal acts that carry a penalty of less than 7 (seven) years based on the SPPA Law and the special regulations that regulate it. Meanwhile, judges are allowed to seek diversion for criminal acts that carry a sentence of 7 (seven) years or more, provided that it is not a single charge.

This provision explains that not all criminal acts committed by children can seek diversion, because the threat of punishment is 7 (seven) years or more than 7 (seven) years. This is contrary to the restorative justice promoted by the SPPA Law itself. This distinction is not appropriate, the consequence is that ABH who commit criminal acts with the threat of imprisonment for 7 (seven) years or more do not receive diversion facilities and the same opportunity to be cured, because law enforcers are not obliged to do so. So, he is still at risk of being exposed to the negative stigma of punishment. That means, there is no social justice that wants balance between elements of society.

This research, which is the focus of discussion, is related to criminal acts of children as narcotics couriers. Where this is regulated in Article 114 paragraph (1) of Law Number 35 of 2009 concerning Narcotics which reads "Every person who without the right or against the law offers to sell, sells, buys, receives, becomes an intermediary in buying and selling, exchanges or delivers Class I narcotics, shall be punished with life imprisonment or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years and a fine of at least IDR 1,000,000,000.00 (one billion rupiah) and a maximum of IDR 10,000,000,000.00 (ten billion rupiah)". This is also regulated in Article 119 (class II) and Article 124 (class III).

Article 81 paragraph (2) of the SPPA Law explains that "The prison sentence that can be imposed on a child is a maximum of ½ of the maximum penalty of imprisonment for an adult." Based on the formulation of this article, we can see that children who commit crimes as narcotics couriers/middlemen are threatened with a maximum prison

sentence of 10 (ten) years because it is $\frac{1}{2}$ (one-half) of the maximum threat for adults, namely 20 (twenty) years. So this does not meet the requirements for diversion, namely the penalty is less than 7 (seven) years. This shows that the SPPA Law is not optimal in implementing diversion efforts. We can see that children who become narcotics couriers/middlemen cannot be separated from the participation of other parties who order children to do this.

Consideration is being given to diversion at every level of justice because of the many negative impacts it causes, as is the philosophy of the juvenile criminal justice system to protect and rehabilitate. Diversion is carried out as an effort to prevent children from becoming adult criminals. These prevention efforts lead law enforcement officials to take discretionary authority. The main principle of implementing diversion is persuasive action or a non-penal approach which gives someone the opportunity to correct their mistakes to become better through non-formal channels by involving community resources. Diversion seeks to provide justice to children. By implementing diversion, the handling of children in conflict with the law is oriented towards providing protection for children from acts of imprisonment which have many negative impacts on the child's soul and development.

II. Criminal Law Policy Towards Diversion in Narcotics Crimes by Children as Couriers

Children who violate the law or commit criminal acts are greatly influenced by several factors outside the child, such as relationships, education, environment and so on. Just like a child as a narcotics courier, in this case the child does not act on his own initiative, but is told by someone else with a reward that makes the child interested in doing this.

In connection with the development of the theory of punishment, there is a shift in the orientation of punishment from the principle of punishment which tends to ignore aspects of human rights towards ideas/ideas of development that better respect and uphold human rights in relation to the problem of the purpose of this punishment. This agrees with Muladi, who essentially states that in the Indonesian context, the theory of punishment that is suitable for use in the criminal law system is a combination of criminal objectives based on the sociological, ideological and juridical and philosophical aspects of Indonesian society itself. This theory of punishment is referred to as the theory of punishment that integrative (humanity in the Pancasila system) where this means how a punishment can contain retribution and the aim of reconstructing prisoners so that when prisoners leave the penitentiary they can easily adapt to society.[11]

Apart from that, punishment also aims for general prevention and special prevention. General prevention means that the existence of punishment will have an influence on the behavior of people other than the perpetrator, namely potential perpetrators and members of the community. The specific deterrence of punishment is the extent to which the punishment (prison) has an influence on the perpetrator. There are two aspects of punishing convicts, namely the initial prevention aspect and the remedial aspect. The initial prevention aspect is measured using recidivism indicators. Based on this indicator RM. Jackson said that a crime is said to be effective when the offender is not punished again within a certain period. It was further emphasized that the effectiveness of punishment is measured by comparing the number of offenders who are re-convicted and those who are not re-sentenced. Furthermore, the improvement aspect relates to the problem of changing the convict's attitude (to what extent a prison sentence can change the convict's attitude), which is still an unanswered problem.[12]

In resolving criminal acts committed by children, investigators can resolve the case without following the formal criminal justice system, but investigators use their authority as regulated in Law Number 2 of 2002 concerning the State Police of the Republic of Indonesia in Article 18 which is called discretion. In other words, according to the authority possessed by police officers in resolving cases involving children as perpetrators of criminal acts, they can resort to settlement outside of court, one of which is mandated by law is through diversion. This is also mandated in the Standard Minimum Rules for the Administration of Juvenile Justice (SMR-JJ) or Beijing Rule where it is important to ensure that law enforcement officials take policy actions in resolving cases involving children without taking formal steps such as stopping or not proceeding through the criminal justice process or handing it over to the community or parents and other forms of social activities.[13]

According to Natangsa Subakti, in criminal case processes law enforcement functionaries, namely Legal Advisors, Police, Prosecutors and Judges tend to work in a patterned manner by focusing attention on prohibited acts or criminal acts as well as perpetrators of criminal acts but ignoring victims of criminal acts. As stated by Muladi, this has a logical consequence, namely that justice produced through the criminal process reflects the interests of the state versus the interests of the perpetrator of the crime, but does not pay attention to the interests and sense of justice on the part of the victim.[14]

It needs to be emphasized that the treatment of perpetrators of criminal acts without victims is not the same. Thus, understanding the position of children involved in criminal acts is a measure to see the level of accuracy of the treatment given to them. In other words, confirmation of this issue is important for determining the drug that should be given. With accurate diagnosis, the medication that must be given to him will also be appropriate and effective. Handling children as narcotics couriers can use alternative punishments based on the principles of restorative justice. This principle positions the criminalization process against children as "The Last Resort" not "The First Resort", or in criminal law theory it is called the *Ultimum Remedium*.

There is a contradiction between one law and another as discussed in the first discussion, namely that Investigators and Public Prosecutors can only apply diversion to criminal acts that carry a sentence of less than 7 (seven) years. Meanwhile, judges can apply diversion to criminal acts that carry a sentence of 7 (seven) years or more, provided that it is not a single charge. Therefore, a criminal law policy is needed to allocate laws/regulations to a (general) goal that leads to efforts to realize the welfare and prosperity of society.

The concept of diversion that should be applied in Indonesia is not based on the criteria of criminal threats under 7 (seven) years, especially in narcotics crimes as couriers by children, because children are not only perpetrators but also victims. Law enforcement officials are obliged to dig into the background of why children do what they do. So the diversion process is not only implemented by Judges with the threat of a sentence of 7 (seven) years or more, but also by Investigators and Public Prosecutors.

The concept of diversion applied is not much different from that in Australia, namely Police Diversion. This is based on the consideration that the police are the main gateway for dealing with children in conflict with the law and are the determinants of whether to proceed to the judicial process or other informal actions. Crime prevention using criminal law means procedurally starting from the police level. As a sub-system of criminal justice, the Police is a legal institution that has very broad authority as the institution that initiates the operation of the criminal justice system, so that the performance of the Police determines the direction of law enforcement. Thus, the first experience in the criminal justice process of a criminal is contact with police officers.[15]

4. Conclusion

One of the contradictions in the laws and regulations which means that diversion should be implemented in Indonesia is that it is not based on the criteria of criminal threats under 7 (seven) years, especially in the crime of narcotics as couriers by children, because children are not only perpetrators but also victims. Please note that taking children as narcotics couriers is a victimless crime. Law enforcement officials are obliged to dig into the background of why children do what they do. So there needs to be a regulation that specifically regulates diversion for all law enforcement officials, starting from investigators, public prosecutors and judges.

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