

Legal Protection of Children as Perpetrators of Criminal Acts through Diversion and Restorative Justice



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ABSTRACT: Differences in the handling of child offenders have specifically been regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which not only regulates children as perpetrators but also children as victims and children as witnesses, or can be called children in conflict with the law, and in Article 1 number 1 it is stated that the Juvenile Criminal Justice System is the entire process of completing cases for children in conflict with the law from the investigation stage to the guidance stage after the child has served the sentence. 2 Then, the Law basically regulates the implementation of the criminal justice system for children which prioritizes the special rights of a child to stay away and avoid the judicial process so that there is no bad stigmatization of children, especially children as perpetrators of a criminal act so that the child can return to socialize as usual reasonably in the environment where he lives.

KEYWORDS: Legal Protection, Criminal Justice System, Children.

INTRODUCTION

The development of society and the advancement of information technology at this time has been increasingly rapid and far ahead, it turns out that it encourages the emergence of a criminal act that occurs in society. These criminal acts today are not only committed by adults, but also by children who are underage. As a country that upholds the law, Indonesia has placed basic rights for children contained in its constitution, namely in Article 28B Paragraph (2) of the 1945 Constitution which states that every child has the right to survival, growth and development and the right to protection from violence and discrimination.¹ With this right, it means that the state in this case has explicitly guaranteed that a child deserves to be given special protection and treatment and is different from adults in general. Children are also the country's greatest asset, because children are the next generation who continue the struggle and ideals of the nation, therefore the state is obliged to provide guidance and protection to children. Children who commit crimes can be considered as an act of delinquency, because children in committing these acts cannot think logically about the impact of the actions they take.

Differences in the handling of child offenders have specifically been regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which not only regulates children as perpetrators but also children as victims and children as witnesses, or can be called children in conflict with the law, and in Article 1 number 1 it is stated that the Juvenile Criminal Justice System is the entire process of completing cases for children in conflict with the law from the investigation stage to the guidance stage after the child has served the sentence.² Then, the Law basically regulates the implementation of the criminal justice system for children which prioritizes the special rights of a child to stay away and avoid the judicial process so that there is no bad stigmatization of children, especially children as perpetrators of a criminal act so that the child can return to socialize as usual reasonably in the environment where he lives. The things that are specifically regulated and new in the Law on the Juvenile Criminal Justice System are the existence of Diversion and Restorative Justice that can be pursued and taken by law enforcement officials.

Thus the rights possessed by children even though they have committed an act that constitutes a criminal offense must still be protected and maintained by continuing to distinguish the handling of the case they are running. The difference in handling is carried out by the Diversion process for children which is a form of transferring the settlement of children's cases from the criminal justice process to a process outside of criminal justice. With the existence of Diversion and restorative justice, it is hoped that the process of handling the case can provide a positive side for children as perpetrators in order to avoid fear as a result of delinquency that forces children to deal with law and criminal justice, so that the psychology of the child can be saved considering the condition of children who are still minors is considered immature and very vulnerable mentally and physically. Therefore, based on the description of the background of the problem, problems arise related to how the form of legal protection of children as perpetrators

¹ Article 28B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia

² Article 1 Paragraph (1) of Law No. 11/2012 on Juvenile Justice System

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of criminal acts through diversion and restorative justice and what are the factors that hinder the implementation of diversion and restorative justice.

Based on the description of the background of the problem above, the following problem formulation can be made:

1. What is the form of legal protection for children as perpetrators of criminal acts through diversion and restorative justice?
2. What are the factors that hinder the implementation of diversion and restorative justice?

DISCUSSION

Forms of Legal Protection against children as perpetrators of criminal acts through Diversion and Restorative Justice

In avoiding children from the formal criminal justice system, which has adverse effects, the concept of diversion is recognized. Diversion in brief is the transfer of the settlement of juvenile criminal cases from formal criminal justice to non-formal justice. Diversion is based on restorative justice.³

Crimes that occur today in the life of today's society are not only adult perpetrators, there is even a tendency that the perpetrators are still classified as children. Therefore, various efforts to prevent and overcome juvenile delinquency need to be done immediately. One of the government's efforts in preventing and overcoming delinquency is by organizing a juvenile criminal justice system through Law No. 11 of 2012 concerning the Juvenile Criminal Justice System which replaces Law No. 3 of 1997 concerning Juvenile Courts which is carried out with the aim of realizing a judiciary that truly guarantees the protection of the best interests of children in conflict with the law as the nation's successor.

Article 1 paragraph (1) of Law No. 11/2012 on the Juvenile Criminal Justice System states that 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 stage of guidance after serving the sentence.⁴ Meanwhile, Article 1 paragraph (7) of Law No. 11/2012 on the Juvenile Criminal Justice System states that diversion is the transfer of the settlement of children's cases from the criminal justice process to the non-criminal justice process.⁵

Given the unique characteristics and characteristics of children and for the protection of children, cases of children in conflict with the law must be tried in a juvenile criminal court within the general judicial environment. However, before entering the judicial process, law enforcers, families, and communities are obliged to seek an out-of-court settlement process in the event that the criminal offense committed carries a threat of imprisonment of less than 7 years and is not a repetition of a criminal offense, namely through diversion based on a restorative justice approach. Article 1 paragraph (6) of Law No. 11/2012 on the Juvenile Criminal Justice System states that restorative justice is the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair settlement by emphasizing recovery back to its original state, and not retaliation.⁶

The concept of diversion and restorative justice is an alternative form of criminal settlement that is directed towards informal settlement by involving all parties involved in the crime that occurred. Settlement with the concept of diversion and restorative justice is a form of criminal settlement that has developed in several countries in tackling crime.⁷

The diversion process will result in a diversion agreement which must obtain the consent of the victim and/or the child victim's family as well as the willingness of the child and his/her family. The result of the diversion agreement can take the form of peace with or without loss, handover back to parents/guardians, participation in education or training at educational institutions or LPKS for a maximum of 3 months or community service. The juvenile criminal justice process will continue if the diversion process does not result in an agreement or the diversion agreement is not implemented.

Diversion is intended to avoid and keep children away from the judicial process so as to avoid stigmatization of children in conflict with the law and it is hoped that children can return to a reasonable social environment. Therefore, the participation of all parties is needed in order to realize this. The process must aim at the creation of restorative justice, both for the child and for the victim. Restorative justice is a diversion process in which all parties involved in a particular criminal offense jointly address the problem and create an obligation to make things better by involving victims, children, and the community in finding solutions to repair, reconcile, and reassure hearts that are not based on retaliation.

The application of the provisions of diversion is important, because with diversion the human rights of children can be better guaranteed, and prevent children in conflict with the law from being stigmatized as delinquent children, because criminal acts

³ Beniharmoni Harefa. "Lecture Material on Child Protection Law, Module 5: Diversion and Restorative Justice", Jakarta, 2020, pp. 1.

⁴ See Article 1 Paragraph (1) of Law No. 11/2012 on the Juvenile Justice System.

⁵ Ibid. Article 1 Paragraph (7)

⁶ See Article 1 Paragraph (6) of Law No. 11/2012 on the Juvenile Justice System.

⁷ Marlina, "Juvenile Justice in Indonesia Development of the Concept of Diversion and Restorative Justice", (Bandung: Refika Aditama, 2009), pp. 17.

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allegedly involving a child as a perpetrator can be handled without the need to go through the legal process of a child as a perpetrator can be handled without the need to go through the legal process.

The objectives of diversion as stated in Article 6 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System are:

- a. achieving peace between the victim and the child:⁸
- a. Achieve peace between the victim and the child.
- b. resolving children's cases outside the judicial process;
- c. prevent the child from being deprived of liberty;
- d. encourage the community to participate; and
- e. instill a sense of responsibility in children.

Thus the law can also provide space for children to continue to develop and be protected according to their growth capacity. For this reason, it is hoped that the younger generation in the future will be more able to obey the applicable law. The implementation of diversion in the juvenile criminal justice system can be used as a vehicle to educate children who have already committed crimes or violations of the law about the importance of obeying the law.

Inhibiting Factors in the Implementation of Diversion and Restorative Justice

The criminal justice process for children is the last resort taken by law enforcement officials. Children in conflict with the law, in this case especially children as perpetrators of criminal acts must be given different treatment than criminal offenders in general. Children as perpetrators of criminal acts are considered as a delinquent behavior and not a criminal behavior, because children who are underage are considered psychologically and physically incompetent. Thus, children as perpetrators of criminal acts must be given different treatment and handling to provide the best interests of the child. Because after all, children are considered to have a long future and can still change their way of life towards a better one.

Restorative justice can be pursued through five approaches, the first of which is court-based restitutive and reparative measures. This approach is advocated by proponents of the civilisation thesis in the UK, to remedy the harsh treatment of offenders, judicial reform is needed, as well as to address one of the main weaknesses of the conventional justice system, namely the failure to make adequate compensation to victims of crime. The second approach, victim-offender mediation programs, is the oldest restorative justice approach. This approach was first carried out in 1974 in Kitchener, Ontario, Canada which was influenced by the Christian Mennonite Movement which emphasized the value of personal reconciliation between victims and offenders. The third approach is the restorative conferencing initiatives, consisting of two principle models. First, family group conferencing originated in New Zealand. Second, police led community conferencing, which is a conference conducted by the police with the community that is affected by a crime or offense. Still on restorative conferencing initiatives, Mc Cold distinguishes into two forms, namely child welfare conferencing, which is conducted to respond to cases related to children and youth justice conferencing, which is applied to adult offenders. The fourth approach is community reparation boards and citizens' panels. Citizens' panels and community boards have a history that predates the restorative justice movement. These panels are made up of people from the local community and are tasked with deciding how to deal with juvenile offenders and those in need of care and protection as an alternative to court decision-making. The fifth approach is the healing and sentencing circle method. Philosophically, healing aims to restore those directly affected by a crime or offense. The aim is to uphold local community values to reintegrate those who have violated those values. Sentencing circles are community-initiated processes that work with the criminal justice system to reach consensus on a sentencing plan.⁹

The application of diversion and restorative justice for children as perpetrators who prioritize diversion in the implementation of the judicial process for children in the best interests of children still has many obstacles and challenges in practice and reality. In the case above, there was a significant difference where the victim's family strongly disagreed and rejected the implementation of diversion.

The factors that hinder the implementation of Restorative Justice are :¹⁰

1. There are differences in perceptions of the meaning of justice by diversion actors, both from the victim and or his family, the perpetrator and or his family, law enforcement officials, Bapas, social workers, community leaders, psychologists, educators and NGOs (Non-Governmental Organizations concerned with the implementation of diversion).
2. Legal substance that does not accommodate the implementation of restorative justice completely.
3. Law enforcers who have not optimally implemented existing regulations and are still rigid, and legal culture/community participation that has not been maximized.
4. The absence of regulations that accommodate all provisions regarding the handling of ABH through a restorative justice approach, socialization to all law enforcement officials and the community.

⁸ Article 6 of Law No. 11/2012 on the Juvenile Justice System

⁹ Beniharmoni Harefa, "Lecture Material on Child Protection Law, Module 5: Diversion and Restorative Justice", Jakarta, 2020, pp. 27-28.

¹⁰ Chandra Purnama, Krisnan, & Kurniaty. "Implementation of Diversion at the Court Level Based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System". *Varia Justicia*, 12(2), 2016, pp. 222-234.

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5. Coordination between law enforcement officers, and changing the paradigm of law enforcement officers from retributive and restitutive justice approaches to restorative justice has not been fully achieved.¹¹

CONCLUSION

A child deserves to be given special protection and treatment and is different from adults in general. Children are also the country's greatest asset, because children are the next generation who continue the struggle and ideals of the nation, therefore the state is obliged to provide guidance and protection to children. Children who commit crimes can be regarded as an act of delinquency, because children in committing these acts have not been able to think logically about the impact of the actions they take. In the criminal justice system for children who prioritize the special rights of a child to stay away and avoid the judicial process so that there is no bad stigmatization of children, especially children as perpetrators of a crime so that the child can return to socialize as usual reasonably in the environment where he lives. With the existence of Diversion and restorative justice, it is hoped that the case handling process can provide a positive side for children as perpetrators to avoid fear due to delinquency that forces children to deal with law and criminal justice, so that the psychology of these children can be saved considering the condition of children who are still minors is considered immature and very vulnerable mentally and physically.

Restorative justice is a diversion process in which all parties involved in a particular criminal offense jointly address the problem and create an obligation to make things better by involving victims, children, and the community in finding solutions to repair, reconciliation, and reassurance that are not based on retaliation. One of the factors that hinder the implementation of Restorative Justice is the different perceptions of the meaning of justice by the diversion actors, both from the victim and or his family, the perpetrator and or his family, law enforcement officials, Bapas, social workers, community leaders, psychologists, educators and NGOs (Non-Governmental Organizations concerned with the implementation of diversion).

ADVICE

Protection of children can be done directly or indirectly. Directly, meaning that the activities are directly aimed at the child who is the target of direct handling. Such activities can include, among others, protecting children from various threats both from outside and from within themselves, educating, fostering, assisting children in various ways, preventing hunger and seeking their health in various ways, and by providing self-development for children. Meanwhile, what is meant by indirect child protection is an activity that is not directly directed at the child, but other people who are involved or carry out activities in the protection of the child. Minors who commit crimes need to get diversion and rehabilitation to get social protection and real justice.

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