

Disharmony Restorative Justice In The Law Of The Child Criminal Justice System And Regulation Mahkamah Agung In The Implementation Of Diversion

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ABSTRACT

Children as the next generation of the nation should get special attention. It aims in the framework of fostering children to realize quality human resources. Therefore, legal facilities and infrastructure are also needed that anticipate all problems that arise. This legal facility aims to anticipate the stigma or evil stamp caused when the child faces the Law and restores and re-socializes the child. One solution is to divert or put child abusers out of the criminal justice system and provide an alternative to the settlement with a justice approach in the child's best interests, which came to be known as the restorative justice approach. Restorative justice, which is the implementation of Diversion, has been formulated in the child criminal justice system, but a sound system must be accompanied by an attitude imbued with the will to look at and believe that the world is always better. Besides, the principle of the children's best interest should always take precedence when dealing with children facing the Law.

Keywords: restorative justice, Diversion, criminal justice system, children

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A. Introduction

One of the problems that often occur in people's lives in Indonesia along with the progress of the era marked by technological and cultural developments, making not only adults who can violate the values and norms in society, especially legal norms.(Barda Nawawi, 2012). In general, it can be interpreted that a child is a person who is under a certain age and immature and unmarried. Every child is basically in the process of growing up and immature physically, psychically, and socially. The development that is being experienced by children is very vulnerable to being disturbed by internal and external factors, and the lousy environment makes the child become evil. (Dewi, D.S., 2011)

Violation of legal norms that make a child face the justice system gives rise to a response that says that there is law enforcement who have not paid particular attention to child suspects.(Saleh, 1983). It shows that the Law in Indonesia is still not enough to side with children. The protection of the child is all efforts made to create conditions so that each child can carry out his rights and obligations for the sake of the development and growth of the child in a reasonable physical, mental and social. Violation of norms, both legal norms and social norms carried out by children, is called juvenile delinquency; it tends to be said to be child

delinquency than child crime because it is too hard when a child who commits a crime is said to be a criminal. (Hartono, 1991)

In general, criminal policies that develop in the concept of community thinking today can be grouped into two, namely 2: 1. Criminal policy using criminal Law (*penal policy*); and 2. Criminal policy using means outside the criminal Law (*non-penal policy*). Penal and non-penal are a couple that can not be separated from each other; in fact, it can be said both complements each other in the efforts to combat crime in society. For a child who commits a criminal offense, then the child's process should put more emphasis on non-penal means. With the enactment of non-penal facilities, the need in the provision of juvenile delinquency is expected to be oriented to achieve conducive conditions by reviewing the causes of child delinquency, which will later be used to determine the application of policies in dealing with children who commit criminal acts. Non-penal facilities can be taken in the process of prosecuting a criminal act committed by a child, one of which is by the settlement of restorative justice.

Suppose observed the development of children's criminal acts so far that the child is perceived to have unsettled parents. The phenomenon of increasing criminal behavior committed by children seems not directly proportional to the perpetrator's age. Various

efforts to prevent and combat child delinquency need to be made immediately. One of the preventions of child delinquency is currently through the implementation of the child criminal justice system. (Mulyana W. Kusumah, 1986)

The formal judicial process that put children in prison was unsuccessful and did not make the child deterrent and did not make it a better person; prison made the child more professional in committing crimes. Indonesia itself has a regulation that regulates that children suspected of criminal acts are not tried with the formal justice system, namely Law no. 3 of 1997 on Children's Courts. However, in the Law, there are some disadvantages, namely, not fully adhere to the approach of restorative justice and Diversion. (Pradityo, 2016)

To overcome the weakness of Law No. 3 of 1997 on Children's Courts that do not have the concept of Diversion, a change was enacted in Law No. 11 of 2012 on the Juvenile Criminal Justice System that uses a restorative justice approach through the Diversion system. The primary substance of this Law is the strict regulation of Restorative Justice and Diversion, which is to prevent children from the judicial process to keep stigmatization of children facing the Law and expected the child to return to a suitable social environment. Based on the general explanation of Law No. 11 of 2012 stated: "Law No. 3 of 1997 on Child Justice is intended to protect and protect children who face the Law.

Nevertheless, in its implementation, the child is positioned as an object and treatment of children who face the Law that tends to harm the child. In addition, the Law is no longer in accordance with the legal needs in society and has not comprehensively provided special protection to children facing the law". Diversion's idea was proclaimed in SMRIJ (The Beijing Rules) as an international standard in the implementation of child justice. In Indonesia, Diversion's idea has become one of the recommendations in the National Seminar on Child Justice organized by the Faculty of Law, Pajajaran University Bandung, on October 5, 1996. (Atmasasmita, 1997)

Formally, Diversion's idea has not been included in Law No.3 of 1997 on Child Justice and has only been included in Law No. 11 of 2012 on the Child Criminal Justice System contained in Article 6 to Article 14. Then Article 15 of Law No.11 of 2012 states that Government Regulations regulate provisions on Diversion, procedures, and coordination, the implementation of diversions, and since the Law came into force in 2014, it turns out that the government regulation in question does not exist.

Procedures of Diversion before the existence of Government Regulation as referred to Article 15 of Law No. 11 of 2012, the Supreme Court issued The Supreme Court Regulation Number 4 the Year 2014 concerning Guidelines for the Implementation of Diversions in the Juvenile Criminal Justice System, while the Police and prosecutors have no guidelines on the implementation of Diversion and only on August 19, 2015, Government Regulation No. 65 of 2015 on Guidelines for the Implementation of Diversion and Handling of Children Who Are Not Yet 12 (twelve) years old is stipulated by the Government.

As for the preliminary background that has been described above,; "How is the Implementation of Diversion Against Perpetrators of Child Crimes Reviewed From the Regulation of the Supreme Court of the Republic of Indonesia Number 4 the Year 2012 on Guidelines for the Implementation of Diversions in the Child Criminal Justice System and Law No. 11 of 2012 on the Juvenile Criminal Justice System?

B. Discussion

The definition of Diversion, according to M. Nasir Jamil explains that Diversion is a transfer of settlement of cases of children suspected of committing certain crimes from formal criminal proceedings to a peaceful settlement between the suspect/defendant/perpetrator of a crime with the victim facilitated by the family and the community, Child Community Advisors, Police, Prosecutors or Judges. (Jamil, 2013)

However, Diversion is also not necessarily pursued against all Children facing the Law, because there are conditions that must be met in order to be able to make Diversion. (Sisworahardjo, 1986) The diversion requirement is regulated article 7 paragraph 1 and paragraph 2 of law SPPA jo Article 3 paragraph 1 and paragraph 2 of Government Regulation No. 65 of 2015 namely diversion must be made at the level of investigation, prosecution, and examination of child cases in the district court in the case of crimes committed: a) threatened with imprisonment under 7 (seven) years; and b) does not constitute a non-criminal repetition. (Law No. 11. 2012 On the Child Criminal Justice System)

In the explanation of Article 7 of the SPPA Law, it is stated that "imprisonment under 7 (seven) years" refers to criminal Law, while the meaning of "repetition of criminal acts" in this provision is a criminal act committed by the Child, both similar and non-similar crimes, including crimes resolved through Diversion..

However, different matters are determined by Article 3 of The Supreme Court Regulation Number 4 the year 2014 concerning Guidelines for the

Implementation of Diversion in the Juvenile Criminal Justice System, which states that:

"The Child Judge shall seek diversion in the case that the child is charged with a crime that is threatened with imprisonment of less than 7 (seven) years and also charged with a criminal offense that is threatened with imprisonment of 7 (seven) years or more in the form of a subsidiary, alternative, cumulative or combination (combined) indictment."

Diversion seeks to provide justice to cases of children who have already committed crimes to law enforcement officials. Diversion's implementation by law enforcement officers is based on law enforcement officials' authority called discretion or "discretion." Based on Article 6 of Law Number 11 the Year 2012 concerning the Juvenile Criminal Justice System determines that the purpose of Diversion consists of: (1) Achieving peace between victims and children; (2) Resolving a child's case outside the judicial process; (3) Preventing children from deprivation of liberty; (4) Encourage people to participate; and (5) Instill a sense of responsibility in the child.

This Diversion is made to provide more educational sanctions, not retaliate in order to create unique prevention that is the goal to be achieved is to make a deterrent, improve and make the criminals themselves unable to do that again. Diversion's implementation is motivated by a desire to avoid adverse effects on children's mental. In conducting Diversion efforts, there are several forms of agreement in the implementation of diversions, namely; (1) Peace with or without change; (2) Submission to the parent/guardian; (3) Participation in education or training of educational institutions, institutions for social welfare or social welfare institutions.

The child screening process can only proceed to the child criminal justice process if the diversion process does not result in an agreement or if the parties do not implement the agreement. The responsibility of monitoring or monitoring the results and implementation of the Diversion is with the direct superiors of the officers who are examining the child's case, and this is required at every level of examination. Besides, the role of community supervisors is also as supervision and guidance during the diversion process. If Diversion is not produced, then the community supervisor reports it to the officer responsible for follow-up.

With the diversion provisions stipulated in Mahamah Agung Regulation No. 4 of 2014, Mahamah Agung Regulation No. 4 of 2014 results from the development of the restorative justice system that began to be carried out in Indonesia. The purpose of Mahamah Agung Regulation No. 4

of 2014 is that there can be the efficiency of the judiciary in Indonesia, especially about children facing the Law who should get more attention and still consider their welfare. Besides, it can also see the state's responsibility in caring for children who have problems with the Law.

This Supreme Court rule aims to facilitate the judge in deciding a case, especially children. This regulations regulates and prioritizes Diversion's concept with restorative justice approach, which prioritizes the child's rights. At the same time, other law enforcement agencies such as prosecutors and Police do not have specific guidelines for resolving child cases, which in the end, prosecutors and Police only refer to Law No. 11 of 2012 on the Juvenile Criminal Justice System. However, this can lead to differences in law enforcement settlements, although the same prioritizes the Restorative Justice approach.

Restorative Justice itself, according to the Children's Criminal Justice System Law, is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing the restoration of the original state, not retaliation.

Closely related to restorative Justice, Muladi revealed in detail the characteristics of Restorative Justice as follows: (1) A crime is formulated as a violation of a person against another, (2) Focus on solving accountability and liability problems for the future, (3) Normative nature is built on the basis of dialogue and negotiation, (4) Restitution, reconciliation, and restoration is the primary goal, (5) Justice is formulated as a relationship between rights, (6) Reconciliation, (7) The community is a facilitator in the restorative process, (8) The role of victims and perpetrators is recognized, both in determining problems and the settlement of the rights and needs of victims, (9) The perpetrator's accountability is formulated as a result of understanding his actions, (10) Criminal are understood in a broad, moral, social, and economic context, (11) Stigma can be removed through restorative.

There are 2 (two) categories of child behavior that make him have to face the Law;

1. The status of offense is the Delinquency of a child, which, when committed by an adult, is not considered a crime, such as not obeying, ditching school, or running away from home.
2. Juvenile Delinquency is a juvenile delinquency behavior that, when committed by an adult, is considered a crime or legal offense.

In-Law No. 11 of 2012 concerning the Juvenile Criminal Justice System and Mahkamah Agung regulation No. 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Child Criminal Justice System, there are several understandings about the age limit of perpetrators and differences in the application of Diversion in child crimes prosecuted over 7 years. Article 1 Number 3 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System explains the age limit of children, namely:

"A child who conflicts with the Law in the future referred to as a Child is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years old who is suspected of committing a criminal offense."

Children who have considered minors according to Law No. 11 of 2012 on the Juvenile Criminal Justice System are children who are under 18 years old, and further reaffirmed in Article 2 Perma Number 4 the Year 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System states that:

"Diversion is applied to children who are 12 (twelve) years old but not yet 18 (eighteen) years old or have been 12 (twelve) years old despite having been married but not yet 18 (eighteen) years old, who are suspected of committing criminal acts."

Furthermore, the different provisions for the examination of child cases that must be diversionary as stated in Perma No. 4 of 2014 with the provisions stated in Article 7 Paragraph (2) of Law No. 11 of 2012 on the Juvenile Criminal Justice System Article 3 paragraph (2) PP No. 65 the Year 2015 on Guidelines for The Implementation of Diversion and Handling of Children Who Are Not Yet 12 Years Old, resulting in a vague understanding. The rule clearly creates legal loopholes and deviates from the SPPA Law rules, which has required two absolute conditions described above.

The articles that can be used to detain children are as follows:

1. Article 32 paragraph (2) of the SPPA Law
2. Article 35 paragraph (1) and paragraph (2)
3. Article 52 paragraph (3)

In fact, diversion efforts are not intended for child abuser who commits a severe crime, because in practice, accountability for children from diversionary results is often carried out by parents of a child abuser, for example, in terms of compensation for victims and obligations for parents who are considered able to educate the child to be better.

A child who commits a serious crime (with a threat of more than seven years) should still be processed legally in a child-friendly atmosphere (which is handled by child prosecutors and tried by a child judge through the process and procedures of a closed trial for children), but still in the concept of a child abuser is not necessarily considered guilty, until proven valid and convincing (presumption of innocent), such a way is more effective to provide Justice for the victim and prevent the child abuser from psychological trauma that will be experienced.

CONCLUSION

1. The implementation of Diversion for each stage of case handling began to be seen since the enactment of Law No. 11 of 2012 on the Child Criminal Justice System, so much commitment of law enforcement officials in organizing diversion efforts for children facing the Law.
2. Mahkamah Agung Regulation No. 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System raises confusion in Diversion's implementation because it reads Article 3 on the Perma as if Diversion only applies to Diversion in court only.

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