

Implementation Of Restorative Justice Against Criminal Action By Children With 7 (Seven) Years Or More Criminal Threat Striving For The Best Interest Of The Child

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Abstract. Children must be provided with guidance and control during their development by their relatives, especially parents. In addition, whenever the children are involved in a crime, any training or coaching must be contemplated to take them back to a good environment suitable for their age. The orientation should be on coaching (restorative), not punishing children. Therefore, the objective of study is to determine whether the concept of Restorative Justice can tackle criminal acts by children who have threatened seven-year imprisonment and pay less attention to the child's best interest. The research was conducted using normative juridical research methods, so it can be concluded that the concept of Restorative Justice can be a settlement for children who conflict with the law, especially those who have threatened seven-year imprisonment or more; since Restorative Justice is potentially able to fight for children's rights fundamentally. The application of the diversion process with Restorative Justice is known as the mediation process, negotiations between perpetrators of crimes, victims, families of perpetrators and/or victims, communities, and law enforcers to identify the most effective remedy for the issues of children as perpetrators of crime.

Keywords: Restorative Justice, Child Crime, Criminal Threat of 7 years or more.

1. Introduction

Children who are involved in crime at a very young age undergo a long and exhausting legal process; police investigation, prosecution by prosecutors, trial by judges, and execution of court orders. Following the investigative phase, the legal apparatus has power to make detentions. Such situations possibly cause multiple mental burdens and psychological disorder while sitting in court as a prisoner. The punishment imposed to children through formal criminal justice system by placing children in detention has not yet succeed teaching children to be better individual to support their growth and development. Imprisonment often causes children learning to commit crimes. It could be because the child mingles with other lawbreakers or adult inmates in the detention house.[1]

One of the prevention and control efforts for children who break the law is the implementation of the Juvenile Criminal Justice System (JCJS). Indonesia Law Number 11 of 2012 concerning the System of Juvenile Justice , in which Articles 6 to 15 contain diversion

convention as a reformation of juvenile criminal justice system. Diversion is an act or treatment of diverting a case from a formal to an informal process, or taking the perpetrators/child out of the Juvenile Criminal Justice System (JCJS), especially for specific case.[2] It means that not all cases with children perpetrator must be resolved through formal justice, yet alternatively apply restorative justice approach for the sake of children by considering justice for victims and community.

A diversion strategy protects and rehabilitates offenders in order to keep them from breaking the law as adults by keeping them out of the official criminal justice system.. The persuasive concept for this diversion is to provide opportunities for perpetrators to change their behavior. According to SetyaWahyudi, diversion is a form of waiver of tackling juvenile delinquency from the conventional juvenile justice process towards community service approach which is conducted to prevent them from negative impacts of conventional juvenile justice practices.[3]

During diversion implementation, a restorative justice approach is applied, LilikMulyadi calls it justice or deliberation-based justice.[4] It is diversion process with a restorative justice approach that efforts are made to present all class of societies who are involved; starting from representatives of the victim (if there are victims), representatives of the perpetrators, representatives of district officials or related agencies, and law enforcement officers as diversion mediators.

In Indonesia, most of law enforcement officers who are seeking justice for children as lawbreakers has not lived up to the philosophy of child protection and the concept of implementing diversion, as in some cases occurred without any victim involved. An alternative settlement through diversion with a restorative justice approach is possible for processing cases without a victim, because the victim's consent is no longer needed for diversion process, law enforcement as a mediator should be able to focus on how actions and efforts to foster lawbreaker child to experience how to be a better person in the future. The process in seeing justice for lawbreaker child tend to be direct without being preceded by in-depth study related to the specification where the perpetrators are children. The majority of law enforcement officers use *an sich* a solemn regulatory point of view, which is in the requirements of Law No. 11 of 2012's Article 7 relating to the Juvenile Criminal Justice System (hereinafter referred to as the " JCJS Law") when it is interpreted in positivism way provides very limitative requirements for lawbreaker children which can be diversified. This practice, according to the author, is not deal with the soul of the Juvenile Criminal Justice System Act, which upholds the principle of the best interests of children and the principle of restorative justice.

2. Method

In legal research, there are several types of approaches, including in normative and empirical legal research.[5] Study dealing with (secondary data) is called normative legal research. This is necessarily conducted due to seeing law as whole of the principles and rules that govern human relations. Legal concepts, legal systems, vertical and horizontal synchronization levels, comparative law, and legal history are all included in normative legal studies.

The researcher applies normative legal research methods by conducting legal principles, legal systematics and legal comparisons. This is library research that requires a lot of document review. The data collections are document studies and field data.

3. Result And Discussion

3.1 Diversion and Restorative Justice Definition of Authentic and Scope of Diversion

The Beijing Rules, also known as the Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ), which were enacted by the General Assembly resolution 40/33 in November 1985, contain the principles of philosophical diversion in Rules 11 and 17.

Furthermore, Regarding diversion, see Commentary Rule 11, it is explained that diversion substance is specifically intended for the offense of non-serious nature. However, it is further maintained that it need not only apply to minor incidents, making diversion a crucial tool.

Additionally, Rule 17.4 specifies that "The Competent authority shall have the power to terminate the procedures at any moment," which establishes that each legal representative has the jurisdiction to end the proceedings at any time. It is based on a characteristic that distinguishes the treatment of juvenile offenders from that of adult criminals.

Legal authorities may at any time be aware of certain conditions, in which case they can decide that ceasing all intervention would be the best course of action.

Therefore, in accordance with United Nations Minimum Standards for the Administration of Juvenile Justice (The Beijing Rules), Diversion is when law enforcement is given the go-ahead to dismiss formal procedures in order to deal with or resolve a child lawbreaker. This involves stopping or discontinuing the criminal justice system and releasing the offender to return to/deliver to the community or engage in other types of social service activities. To lessen the detrimental effects of involving children in the legal system, diversion can be applied at all levels of examination.

The specific goals of diversion are focused on building harmony between victims and children, protecting kids from being deprived of their independence, and motivating the neighborhood to help raise responsible kids [6].

Definition and Purpose of Restorative Justice

The term "Restorative Justice" refers to a model strategy that was developed in the 1960s as a means of resolving criminal cases. Although this strategy is still conceptually debatable, it emphasizes the direct involvement of perpetrators, victims, and the community in the process of resolving criminal cases in contrast to the technique utilized in the conventional criminal system. But in reality, this viewpoint has changed and influenced legal doctrine and practice in many nations. [7].

A restorative justice approach to criminal situations offers several perspectives and methods for comprehending and resolving crimes. In restorative justice, criminal behavior is viewed as a norm, which implies assaulting people, society, and interpersonal relationships. However, in the restorative justice approach, the main victim of criminal act is not the state, as in general judicial system that crime eventually creates an obligation to repair broken relation due to the occurrence of a crime. Meanwhile, Restorative justice is described as a procedure for resolving issues that arise in criminal cases when the participation of victims, the community, and offenders is necessary to make amends, ensure the continuity of the repairmen, and facilitate repair.

Approach of Restorative justice regarded to be the most recent change in the criminal justice system's models and processes for handling contemporary criminal cases. The United Nations basic principles regard that the restorative justice approach is applied in an efficient criminal justice system. This supports G.P. Hoefnagels' assertion that criminal politics must be reasonable (a rational total of the responses to crime) [8]. In order to alleviate

unhappiness with the current criminal justice system, the restorative justice concept can be employed as a framework for crime settlement plan.[7].

Restorative justice is a notion of principles that focuses on victim inclusion and community participation in response to the evolution of the criminal justice system. However, law enforcement officials can also respond to a crime using a new mindset called restorative justice. [7].

1.2 Implementation diversion formulation policy with a restorative justice approach in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (JCJS) which is oriented to the best interests of children.

The Child Criminal Law System in Indonesia has entered a new phase in its development. The most recent law pertaining to the objectives and accomplishment of justice toward the improvement and restoration of circumstances after criminal justice-related events and processes, or restorative justice, is one of the reformations of Indonesian child criminal law. A new paradigm is the restorative justice method. In responding to the occurrence of criminal acts. In the perspective of a restorative justice approach, a crime is understood as a dispute or conflict that has damaged the relationship between individuals and society (not just a violation of the law that is directly dealing with the state).[9] The "Doer-Victims" Relationship Approach is a novel idea that has superseded the "daad-dader strafrecht" approach to actions or actors when it comes to the evolution of criminal law and the nature of contemporary punishment.[10]

The Perpetrator-Victim relationship approach was then implemented through means of diversion by 2012's Law No. 11 pertaining to the Juvenile Criminal Justice System (JCJS). Diversion is the transfer of a child's case settlement from the criminal judicial system to mechanisms outside of the system.

Diversion must take place at the level of investigation, prosecution, and review of child-related issues in the District Court under the following restrictions:

I The crime carries a sentence of less than seven (seven) years in jail; (ii) the perpetrator is not a repeat of the crime; and (iii) diversion efforts obtain the consent of the victim and/or the victim's family. This provision explains that a child who commits a crime whose threat is more than 7 (seven) years and/or is a repetition, diversion is not required. Regarding the repetition of a crime, it means that the child as the perpetrator has committed a crime of the same kind or not, including a crime that has been resolved through diversion. Regarding criminal acts phenomenon, repetition by children is proven that the previous diversion goal was not achieved, namely the goal to instill a sense of responsibility in children not to repeat criminal acts. Therefore, diversion can be pursued. However, it is not an obligation for law enforcers.

The debate about the mandatory and non-compulsory diversion has become a polemic among academics and law enforcement, therefore the author tries to find the true meaning of the diversion concept in SPPA law. based on the discovery theory and search for existing laws, the author chooses to apply teleological interpretation techniques as the main interpretive knife, with the hope of placing the diversion meaning in its essential place in accordance with *historia legis*. By using a teleological interpretation, ideally, law enforcers are required to interpret the law deal with the purpose of legislator, where law enforcers will be able to see the dynamics of the thoughts and theories of the legislators as contained and recorded in academic texts, minutes of meetings and a problem inventory list (PIM).

Included in the discussion in the Problem Inventory List, firstly the discussion at the Panja level regarding the concept of diversion, both the government and the factions agreed with the idea of diversion which was fully adapted from the International convention of *The Beijing Rules*. Then after entering into the technical discussion of the diversion implementation, there began to be differences of opinion between the government and the factions in the Parliament about how the diversion concept would be implemented. In the debate, the main problem appears in the form of determining what guidelines should be used in qualifying child offenders who can be sought for diversion. As directed by the head of the working committee for this bill, M. Nasir Djamil through the F-PKS is of the view that the criminal act of diversion is a case whose value can be ruled out for reasons of restorative justice, for example the case of Raju that once surfaced, and the case of children stealing Rp10.000,- but sentenced to 7 (seven) years, this does not reflect restorative justice. This proposal emphasizes that F-PKS views that Children who have broken the law, especially children as perpetrators, must be tried for diversion regardless of the threat of punishment or also a repetition of a crime. [11]

It seems that the F-PKS proposal cannot be accepted by most factions and also the government, because in a regulatory system that contains punishment, the deterrent effect must still exist, so there must be clear limits as a limitative measure against child offenders who are given diversion.[11] The author's perspective is that the reason for the majority of the factions and the government is not based on the philosophical understanding of handling children in conflict with the law, especially as children who are perpetrators of criminal acts. In looking at the philosophy of children, the author refers to the fundamental international convention on children, namely, Children's rights are protected under the Convention on the Rights of the Child ("CRC"), which is the most comprehensive piece of international human rights law. The CRC is the first treaty that fully ensures the protection of children's rights and expressly recognizes children as active owners of their own rights.[12] This convention regulates the standards of treatment, care and protection for all children, in which the CRC has been adopted by the *United Nation* and ratified by 196 countries, one of which is Indonesia through the Presidential of Republic Indonesia Decree Number 36 of 1990 concerning the ratification of the CRC. Based on the preamble of the CRC Convention, there is a very important substance, namely "Children need special protection and care, including proper legal protection, before and after birth because of their physical and mental immaturity." According to the author, this is the main basis in child case handling dealing with law, especially children as perpetrators.

Law enforcers should see child offenders as legal subjects who have physical and mental immaturity so that the point of view in viewing children's problems must be holistic and does not only focus on their actions. From a humanist point of view, police officer must take into account the child's full life, with the possibility that the perpetrator's child is seen as a victim, either because of their environment or improper parental upbringing. To avoid children receiving a negative reputation from the criminal justice system, which serves only to promote children's future growth and development, the resolution of crimes involving children as perpetrators should take a specific approach through diversion and restorative justice..

In line with the views of Prof. Barda Nawawi Arief who stated that the implementation of juvenile criminal justice requires a special approach, in the form of protection, and special attention for children who relate to justice and justice. Children who commit crimes are treated differently, being recognized as persons who require support, compassion, and love.[13] From the viewpoint of the horse, it must also prioritize an educational-persuasive strategy rather than a legal one. Therefore, law enforcers must avoid legal processes that are only punishing,

mentally degraded and demoralized, and avoid stigmatization processes that can hinder the children development maturity and independence in natural sense.[13] In the end, the matters stated above are in line with the views of F-PKS in the DIM regarding the value of crimes committed by children, which can be ruled out for reasons of restorative justice and the view is not a wrong thing.

What the author wants to convey is that the essence of the meaning of the Juvenile Criminal Justice System has not yet received a proper stage. The understanding of the diversion system that has been socialized is too narrow, both academically and technically. To overcome this, of course, requires mastery of the theory of legal interpretation and also a willingness to seek resources to support the perfection of the interpretation. In an open society as it is today, civilization has forced law enforcers to be able to apply a regulation in accordance with its essential purpose to achieve substantive justice in law enforcement, and can no longer use the positivism of horse points of view that place themselves as legal robots (*la bouche de la loi*).

4. Conclusion

The essence of the meaning of the Juvenile Criminal Justice System has not yet received a proper stage. The understanding of the diversion system that has been socialized is too narrow, both academically and technically. To overcome this, of course, requires mastery of the theory of legal interpretation and also a willingness to seek resources to support the perfection of the interpretation. In an open society as it is today, civilization has forced law enforcers to be able to apply a regulation in accordance with its essential purpose to achieve substantive justice in law enforcement, and can no longer use the positivism of horse point of view that place themselves as legal robots (*la bouche de la loi*). Thus, according to the author, literally, the diversion provision can be interpreted that for a child who commits a crime with a threat of 7 (seven) years or more and/or is a repetition, it is not an obligation for law enforcement to seek it, and the implication of diversion in such a situation can still be pursued with a basic consideration in the child's best interests.

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