

CHILDREN'S RIGHTS TO JUSTICE AND RESTORATIVE DIVERSION IN TERMS OF EFFECTIVENESS

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Abstract

Children in the context of law in Indonesia have different age limits. The Convention on the Rights of the Child stipulates that people are under the age of 18, including those in the womb as well as those who are married. This research method is descriptive analytical, to find restorative justice and diversion processes carried out by law enforcement officers in cases of children dealing with law (ABH) and see the effectiveness of Law Number 11. Criminal liability for children as a reference, that the implementation of diversion is also held as a alternative liability for criminal liability that meets the requirements of a restorative justice value. Diversion efforts are indeed not carried out by older perpetrators who commit serious crimes, because in practice, accountability for children from the results of diversion is often carried out by parents of child perpetrators, for example in terms of providing compensation for victims and obligations for people who are considered capable of educating children get better. A child who commits a serious crime (with a threat of more than 7 years) should act above the law in a child-friendly atmosphere, but still in the concept that the child perpetrator is not necessarily guilty, until it is proven legitimate and convincing. In principle, the concept of a restorative justice system has the aim of making perpetrators feel ashamed to commit crimes again.

Keywords: Restorative Justice, Diversion, Effectiveness.

1. INTRODUCTION

The concept of restorative justice for Children in Conflict with the Law or commonly abbreviated as ABH is already quite popular in the academic world. The discourse on restorative justice for ABH has also become a hot topic of discussion among legal experts and practitioners at both the legislative and executive levels. Philosophically, restorative justice is a court that is friendly to children because it does not injure or deprive children of their rights when in conflict or in conflict with the law. Ironically, it is precisely at the level of the general public and especially among perpetrators and victims of ABH, the discourse on restorative justice is not widely known. Not only do they not know about the issue of restorative justice, but also most of them do not know their rights, both in the context of victims and perpetrators before the law. (Mukdin, 2021)

Children are the mandate of God Almighty, in which the dignity and worth as a whole human being is attached. As an individual, every child both born and still in the womb must get their rights without the child asking. This is in accordance with the provisions of the Convention on the Rights of the Child (Convention on the Rights of the Child, 1989, New York) which has been ratified by the Government of Indonesia through Presidential Decree Number 36 of 1990. The support of the

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Indonesian government has actually preceded the convention, because in 1979 in The state of Indonesia has promulgated Law Number 4 of 1979 concerning Child Welfare which was then followed by Law Number 23 of 2002 concerning Child Protection which has now been replaced by Law Number 35 of 2014 concerning Child Protection as an implementation that the Indonesian state has ratified the convention. all of which put forward the general principles of child protection, namely non-discrimination, the best interests of the child, the survival and development of the child, and respect for the participation of the child. The concept of restorative justice for Children in Conflict with the Law or commonly abbreviated as ABH is already quite popular in the academic world. The discourse on restorative justice for ABH has also become a hot topic of discussion among legal experts and practitioners at both the legislative and executive levels. Philosophically, restorative justice is a court that is friendly to children because it does not injure or deprive children of their rights when in conflict or in conflict with the law. Ironically, it is precisely at the level of the general public and especially among perpetrators and victims of ABH, the discourse on restorative justice is not widely known. Not only do they not know about the issue of restorative justice, but also most of them do not know their rights, both in the context of victims and perpetrators before the law.

Special attention to the restorative justice process among children is needed. A fundamental balance approach must also be taken, such as imposing sanctions on the basis of responsibility to recover victims' losses as a consequence of criminal acts, rehabilitating and reintegrating perpetrators as well as strengthening the safety system and securing the community. Adolescence requires guidance and attention and not isolation. Adolescents have an attachment to a special environment such as school, work, religious life and so on. Breaking the connection with the environment because of suspicion, concern or fear of juvenile criminals accompanied by a retributive approach to criminalizing and implementing actions, will actually trigger further criminal acts and violence. (SIREGAR, 2016) The perspective of criminal science, believes that the imposition of a crime against child offenders (delinquency) risks harming the mental development of children and affecting their future. This detrimental tendency is the result of the effect of imposing criminal penalties on children, especially imprisonment, after which a stigma (bad stamp) will be attached. The issue of the exclusion of a sense of justice in society, especially with regard to children, always comes to the surface with different types and actors. The road to a policy of decriminalizing children must be made and become a top priority. This can be done if we develop what is called a juvenile justice system, namely the concept of mental rehabilitation by laying down the principles of human rights, guaranteeing the survival and development of children, as well as community participation in seeking justice for children in conflict with the community. law. The principle of non-discrimination, which prioritizes the best interests of children, also encouraged the birth of the 2014 PERMA concerning diversion, because correctional institutions are considered not the way to solve children's problems, and it is even feared that prisons are prone to violations of children's rights. (Setyorini, 2020)

2. LITERATURE REVIEW

1. Children under Indonesian Law

Children in the context of legislation in Indonesia have different age limits. The United Nations in the Convention on the Right of the Child (CRC) or the Convention on the Rights of the Child (CRC) stipulates that a child is a person who is under the age of 18 years, including children in the womb as well as those who are married. In civil law, the provision is that minors are not yet 21 years of age and have never been married. According to Law No. 3 of 1997 concerning Juvenile Court, it is stated that a naughty child is one who has reached the age of 8 years but has not yet reached 18 years of age and has never been married. Law No. 3 of 1997 concerning Juvenile Court has also undergone reform into Law No. 11 of 2012 concerning the Juvenile Criminal Justice System. According to the Decision of the Constitutional Court (MK) the phrase 8 years in Article 1 point 1, Article 4 paragraph (1), and Article 5 paragraph (1) of the Juvenile Court Law and its explanation is contrary to the 1945 Constitution and does not have conditionally binding legal force. Thus, the Constitutional Court decided that the minimum age limit for children who could be held criminally responsible was 12 years. In its consideration, the Court stated that it is necessary to set an age limit for children to protect the constitutional rights of children, especially the right to protection and the right to grow and develop. The age of 12 has relatively stable emotional, mental, and intellectual intelligence according to child psychology and Indonesian culture. (Priamsari, 2018)

2. Definition and Position in Criminal Law.

In the last twenty-five years restorative justice has become a global and dynamic legal concept in criminal justice. More than 80 countries in the world use restorative justice in resolving a criminal case. The United Nations (UN) Juvenile Justice Working Group defines restorative justice as a process for all parties related to a particular crime and sitting together to solve problems and think about how to overcome the consequences in the future. Restorative justice is the re-establishment of justice through new consensus (agreement) values. Restorative justice requires the perpetrator to take personal responsibility for his actions and then actively work to repair the damage that has caused harm to the victim and society. According to Braithwaite, restorative justice is a concept of healing, not retaliation. The restorative concept uses traditional ideas such as recovery and prevention of a crime to make criminal penalties more democratic and humane. Howard Zehr argues that restorative justice is a process for identifying and addressing harm, as well as for healing and putting things right.

3. RESEARCH METHOD

This research method is descriptive analytical, to find the process of restorative justice and diversion carried out by law enforcement officers in cases of children in conflict with the law (ABH) and to see the effectiveness of Law Number 11 of 2012 and its effectiveness in resolving cases of children in conflict with the law (ABH). Secondary legal materials in the form of literature, books and journals that support or are related to this research. This writing aims to accurately describe the characteristics of an individual, situation, or to determine whether there is a relationship between symptoms and other symptoms in society, this study describes

the application and effectiveness of diversion as legal protection for children in conflict with the law.(Wibowo & Yunus, 2020)

4. RESULT AND DISCUSSION

1. Definition of Children and Children in Conflict with the Law

Children in the context of legislation in Indonesia have different age limits. The United Nations in the Convention on the Right of the Child (CRC) or the Convention on the Rights of the Child (CRC) stipulates that a child is a person who is under the age of 18 years, including children in the womb as well as those who are married. (Presidential Decree No. 36 of 1990).) In civil law, the provision is that minors are not yet 21 years of age and have never been married. According to Law No. 3 of 1997 concerning Juvenile Court, it is stated that a naughty child is one who has reached the age of 8 years but has not yet reached 18 years of age and has never been married. Law No. 3 of 1997 concerning Juvenile Court has also undergone reform into Law No. 11 of 2012 concerning the Juvenile Criminal Justice System.

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This Law also states that detention of children can only be carried out if the child is 14 years old or more and is suspected of committing a crime with a threat of imprisonment for 7 years or more. (Law No. 11 of 2012) In the Draft Criminal Code Law It also regulates the limitation of a child committing a crime, namely in article 113. In this article it is regulated that a child who has not reached the age of 12 years if he commits a crime cannot be held accountable. Criminal acts and actions for children only apply to people between the ages of 12 and 18 years who commit a crime. The term Children in Conflict with the Law (ABH) emerged from the Joint Decree (SKB) of the Chief Justice of the Supreme Court, the Attorney General, the Chief of Police, the Minister of Law and Human Rights, the Minister of Social Affairs, and the Minister of Women's Empowerment and Child Protection on Handling Children in Conflict with the Law, which was signed on December 22, 2009. The use of this term is in accordance with the spirit of implementing restorative justice that protects the rights and interests of children. The Access to Justice Working Group of Bappenas believes that access to justice can only be achieved if the legal empowerment initiative also includes children. Every child must be given knowledge and understanding of their rights that are protected by law. The

fulfillment of children's rights must also be obtained from their social environment. One fact is that barriers to access to justice for children often come from the community itself, which causes bureaucratic behavior and law enforcement officials to gain legitimacy in treating children in conflict with the law.

2. Can Perma 2014 Concerning Diversion Present Laws That Are Just For Children With Restorative Justice Values

Diversion according to the Beijing Rules is the granting of authority to law enforcement officials to take policy actions in dealing with or resolving the problem of child offenders by not taking formal steps, including stopping or discontinuing / releasing from the criminal justice process or returning or submitting to the community and other forms of diversion. other social service activities. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officers which is called discretion. Restorative justice is a process that involves all parties who have an interest in a particular violation problem to come together to resolve collectively how to respond and resolve the consequences of the violation and its implications for the masses. (John Braithwaite, 2002) The restorative justice process is a justice process that is fully implemented. and achieved by the community. The process must really be sensitive to the needs of the community and really be aimed at preventing the re-offending of the crime. This makes justice something that is full of considerations in responding to crime and avoiding stigmatization. So it is very aware that a monitoring mechanism in the community needs to be implemented on the implementation of the final results of the settlement of a crime, providing support, and opening up wide opportunities for key stakeholders.

The definition of diversion in Indonesia other than as stated in Article 1 number 7 of the SPPA Law and number 4 letter 1 attachment to the Regulation of the Attorney General of the Republic of Indonesia Number: PER006/A/JA/04/2015 concerning Guidelines for Implementing Diversion at the Prosecution Level, can also be found in the document training manual for the police, which states "diversion is the diversion of handling cases of children suspected of having committed criminal acts from the formal process with or without conditions. While in the Black Law Dictionary, the concept of diversion is known as a diversion programme, namely: "A program aimed at a suspect before the trial process is in the form of community programs such as job training, education and the like where if this program is considered successful it will allow him not to continue the criminal justice process further. (Priamsari, 2018)

Based on the provisions regarding diversion, not every criminal case where the perpetrator is a child goes directly to juvenile criminal justice, but it can be attempted to settle cases through mediation or deliberation as also regulated in Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Criminal Justice System. Child. As a further rule regarding diversion previously stated in the SPPA Law, PERMA 2014 which has been ratified since July 2014, contains material which in the future actually creates confusion in the implementation of diversion for children who are 12 years old but not yet 18 years old. or is 12 years old even though he has been married but is not yet 18 years old who is suspected of committing a crime. This ambiguous understanding arises when judges are required to seek diversion in the case of children who are

accused of committing a crime with the threat of imprisonment under 7 years and also to children who are accused of committing a crime with a threat of imprisonment of 7 years or more in the form of an indictment of subsidiary, alternative, accumulative, or combination (combined), see Article 3 PERMA 2014. This rule clearly creates legal loopholes and deviates from the rules in the SPPA Law which requires 2 (two) absolute conditions as mentioned above. PERMA 2014, provides opportunities for child perpetrators who have committed criminal acts with threats of more than 7 years or more provided that the indictment is prepared in a subsidiary, alternative, cumulative, or combination basis (where one of the articles contains an article with a threat of under 7 years).

Criminal responsibility for children as a reference, that the implementation of diversion is also held as an alternative to criminal liability which is required for restorative justice values. Where the child perpetrators still have to admit their actions, so they are actually still considered guilty, but the legal process is resolved in a restorative way. In fact, diversion efforts are not intended for child perpetrators who commit serious crimes, because in practice, accountability for children resulting from diversion is often carried out by parents of child perpetrators, for example in terms of providing compensation for victims and obligations for parents who are considered to be able to educate children to be better. A child who commits a serious crime (with a threat of more than 7 years) should still be processed legally in a child-friendly atmosphere, but still in the concept that the child perpetrator is not necessarily considered guilty, until proven valid and convincing (presumption of innocent). That is, in the framework of providing justice for victims of serious crimes by child perpetrators, if later the child's legal actions are proven, then the child must be punished which is not only imprisonment, while if it is not proven then the child will not be punished at all. (Priamsari, 2018)

3. Effectiveness of Restorative Justice Implementation in changing mental attitudes, behavior, and avoiding criminal acts against children

The concept of punishment based on restorative justice is a correctional concept that is associated with the legal concept of "protection". According to Sahardjo, criminal penalties should pay attention to educational goals and not only directed them to repent, especially crimes where the 'damage' caused by the crime can still be done. in restoration. According to the Chief Justice of the Supreme Court, M. Hatta Ali, the application of restorative justice must be carried out from the investigation stage to the implementation of court decisions so that the legal substance must be able to provide opportunities for the implementation of settlements containing restorative justice at the level of investigation, prosecution, trial and execution of decisions. Investigators and Community Counselors have a big role in reconciling both parties (perpetrators and victims) by taking a restorative justice approach so that the investigation process can be stopped and not proceed to trial. For children, the justice system is a frightening situation. The judicial process is an unfamiliar and unusual process for children so that the judicial process causes stress and trauma to children.

From the child's perspective (perpetrators), this restorative justice effort is considered more positive because they feel protected and valued. Through intensive and careful counseling and guidance from the Fathers, the children of these criminals realized and accepted themselves as guilty parties, so as not to repeat the crime in the

future. Of course, this is different when what is enforced is retributive justice efforts. This effort is considered by the perpetrator – who in certain cases also becomes the victim as a form of punishment. Even if they receive guidance in prison, the guidance is still within the scope of punishment. Fathers always try to guide children's clients by motivating and providing wise and good direction with a religious approach, character education, formal education or work skills education so that child perpetrators of criminal acts can change their bad behavior and habits for the better. This is intended so that children can re-establish their self-esteem and self-confidence and can be optimistic about their future and be able to integrate well in society. The restorative approach is seen as a valuable tool in helping children to think about and take responsibility for changing their behavior. Mental and behavioral changes experienced by children who are perpetrators of criminal acts can be seen from the absence of repetition of mistakes or criminal acts committed by children that have bad consequences for others and themselves. When the child is given a decision to be returned to the parent, the child remains under the supervision of the Fathers, although there are some children who have been diverted and repeated their mistakes, this is due to the lack of parental supervision and the return of the child to the wrong association.

4. the concept of a restorative justice system, there are two aspects of action that can be taken

repressive aspect: with the application of the concept of restorative justice system, the priority is the interests of the perpetrators, victims and the community. Repressive measures that can be taken in this case are providing facilities for perpetrators to be rehabilitated, providing compensation for victims as an apology from the perpetrators and guaranteeing security for the community itself; preventive aspect: in the implementation or practice of this restorative justice system concept, the perpetrator and the victim meet each other in front of other community members. Perpetrators are required to apologize to the victim and the local community. After the agreement of the community members, the punishment for the perpetrators can be determined according to their actions. The punishment for the perpetrator can be in the form of rehabilitation, or compensation, in which the perpetrator is required to pay for the loss of the victim, so that the balance of society is maintained. With the exposure of the perpetrator to the community, in principle the concept of a restorative justice system has the aim of making the perpetrator feel ashamed to commit another crime, and members of the community will automatically feel ashamed in committing a similar crime. In this case, the restorative justice approach brings participation between perpetrators, victims and the community in resolving a criminal case.(Wibowo & Yunus, 2020)

5. CONCLUSION

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