

Reconstruction of diversion policy regulation in a child-suspect case investigation handling in Indonesia based on justice value

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Abstract

The main purpose of this study is to examine the weaknesses of the implementation of the resolution for cases of child-suspect case investigation and how to reconstruct the diversion policy regulation in the resolution of cases of child-suspect case investigations based on justice values. The theory used to analyze is Aristotelian justice theory, John Rawls and Islam, criminal policy theory, criminological theory and progressive legal theory. Research is a qualitative study by analytical descriptive nature. The approach used is the empirical approach method. The subjects of the study were Children, Purwokerto Penitentiary Officers, Police Officers (Banyumas, Cilacap, Purbalingga, Banjarnegara and Kebumen), supported with diversion document released by the authorities. Data were collected by interview technique and literature study, while data analysis was done by inductive qualitative analysis methods.

The results showed that the Reconstruction of the diversion regulation in the resolution of cases of child-suspect case investigation is to realize the implementation of diversion in order to meet the appropriate value of justice and promote the protection of children's interests. The article which is reconstructed is Article 5 paragraph (3) concerning the obligation to implement diversion, Article 7 paragraph (1) concerning the obligation to carry out diversion and Article 8 paragraph (3) concerning the interests of children which must be prioritized. The reconstruction of this regulation is expected to be an improvement to the Criminal Justice System Law for Children which will substantially better reflect the value of justice.

Keywords: reconstruction, diversion, *Children crime*, investigation, justice value

Introduction

According to data obtained from the Indonesian Child Protection Commission (KPAI), cases of children facing law (ABH), are the most frequently reported cases to KPAI. From 2011 to 2019, the number of ABH cases reported to KPAI reached 11,492 cases, far higher than reported cases of children who were caught in health and drug problems (2,820 cases), pornography and cyber crime (3,323 cases), and trafficking and exploitation (2,156 cases). If examined, the number of ABH who became perpetrators of sexual violence tends to jump sharply. In 2011, there were 123 cases of child sexual crimes. The number rose to 561 cases in 2014, then dropped to 157 cases in 2016, and in mid-January to May 2019, the number of ABH cases as perpetrators of sexual violence reached 102 cases. In addition to cases of sexual violence committed by children, cases of abuse such as physical and psychological abuse of children also take a lot of attention. According to KPAI data, reports of ABH for being perpetrators of physical and psychological violence reached 140 cases in 2018^[1].

The Central Java Provincial Government noted that cases where the children are suspect during 2017-2018 were still high, dominated by cases of theft, brawl, abuse, and sexual cases with children as victims and perpetrators. As stated by the Head of the Office of Women's Empowerment, Child Protection, Population Control, and Family Planning (DP3AP2KB) Central Java Retno Sudewi in Semarang, In

2017 children in conflict with the law (ABH) reached 684 children and in 2018 it fell even though it was still high at 634 children^[2]. However, there are still many cases of children dealing with / in conflict with the law (ABH), which are resolved using a general criminal approach. So, it is said, it can automatically potentially eliminate the rights of children. Based on data obtained from the Regional Office of Kemenkumham Central Java, as of March 2018 there were 106 children with criminal child status. Meanwhile, 1,412 other children go through a diversion process (transferring the settlement of a child case from the criminal justice process to a process outside of justice, ed), with various activities, such as skills training, counseling and education. On the other hand, according to the Indonesian Child Protection Commission (KPAI), nationally in Indonesia every year there are still around 7,000 children dealing with the judicial process. Of that amount, around 90 percent were processed and ended in formal law, with prison sentences. This means that only about 10 percent of ABH cases that might have been resolved so far according to the norms of protection of children who are in conflict with the law.

The facts mentioned above make the importance of efforts that need to be done in providing protection for children. The purpose of child protection is to ensure the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and

¹ http://www.gresnews.com/berita/isu_terkini/117602-kasus-anak-berhadapan-dengan-hukum-terbanyak-dilaporkan-ke-kpai/ accessed on December 2019.

² <https://radarsolo.jawapos.com/read/2019/11/20/166587/kasus-abh-masih-bayangi-hari-anak-persetubuhan-bawah-umur-mendominasi> accessed on December 2019.

dignity, and get protection from violence and discrimination^[3].

Reflecting on this, the author feels it is necessary to immediately carry out the reconstruction of Diversity Policy Regulations in the Resolution of Cases of Child-suspect case Investigation with the main issues as follows:

1. What are the Weaknesses or Obstacles in Implementing Diversion on Child-Suspect Case Investigation in Indonesia Currently?
2. How to Reconstruct the Regulation concerning Diversion on Child-Suspect Case Investigation in Indonesia Based on Justice Values?

Method of Research

The paradigm that is used in the research this is the paradigm of constructivism which is the antithesis of the understanding that lay observation and objectivity in finding a reality or science knowledge^[4]. Paradigm also looked at the science of social as an analysis of systematic against *Socially Meaningful Action* through observation directly and in detail to the problem analyzed.

The research in writing this dissertation is a qualitative research. Writing aims to provide a description of a society or a certain group of people or a description of a symptom or between two or more symptoms.

Approach (approach) the research is to use the approach of *Socio-Legal*^[5], which is based on the norms of law and the theory of the existing legal enforceability of a sociological viewpoint as interpretation or interpretation.

As for the source of research used in this study are:

1. Primary Data, is data obtained from information and information from respondents directly obtained through interviews and literature studies.
2. Secondary Data, is an indirect source that is able to provide additional and reinforcement of research data. Sources of secondary data in the form of: Primary Legal Material and Secondary Legal Materials and Tertiary Legal Material.

In this study, researchers used data collection techniques, namely literature study, interviews and documentation. In this study, the researcher is a key instrument that is the researcher himself who plans, collects, and interprets the data^[6]. Qualitative data analysis is the process of searching for, and systematically compiling data obtained from interviews, field notes and documentation by organizing data into categories, describing it into units, synthesizing, compiling into patterns, selecting important names and what will be studied and make conclusions.

Research Result and Discussion

1. Weaknesses or Obstacles in Implementing Diversion on Child-Suspect Case Investigation in Indonesia Currently

Regarding crime prevention, the outline can be done through two channels, namely: the "penal" pathway and the

"non-penalty" pathway. The concept of restorative justice or restorative justice is an alternative settlement of criminal acts committed by children where the case are directed to the settlement of non-criminal path, involving all parties that are involved in criminal acts that occur. The concept of restorative justice is related to the concept of discretion and diversion. Settlement of cases of children in conflict with the law is not merely solved by imprisonment. Criminological perspectives are needed to assist efforts to resolve cases of children in conflict with the law for the realization of Restorative Justice.

One of the fundamental substances of the objectives of Law No. 11 of 2012 concerning the Child Criminal Justice System that avoids and keeps children away from the justice process so as to avoid stigmatization of children in conflict with the law. Considering that the child is a potential and successor to the ideals of the nation and is a mandate and gift of God that must be given special protection, then the child should still have the potential to be nurtured so that the child is given a second chance to become a new person and free from evil. The author is of the opinion that the limitation of diversion to this category of serious criminal offenses is contrary to the purpose of the Act to prevent children from being punished.

Law no. 11 of 2012 was created to create a judiciary that truly guarantees the protection of children in conflict with the law. Diversify with the current restorative justice approach as a correction to Law No. 3 of 1997 concerning juvenile court which emphasizes retributive justice, so the emphasis is more on restoration to its original state, not emphasizing justice on retaliation. The biggest problem for children dealing with law is because of Law no. 3 of 1997 concerning Juvenile Court is no longer relevant, both in terms of juridical, philosophical and sociological aspects. This law does not provide the right solution for the protection of children in conflict with the law. Children who are in conflict with the law must be directed to be resolved to court, the result is that there will be mental and psychological pressure on children who are in conflict with the law, thus disrupting the development of the child. Thus, children who are in conflict with the law must be handled differently from the same retributive justice model as adult care, namely punishment as the first choice or retaliation for the action taken.

Cases that often get attention and are expected to be resolved through non-criminal channels or settlement of criminal cases outside the court are cases involving children. The path of punishment with the mechanism of the criminal justice system is considered as an unfavorable path for children, coupled with some law enforcement officials who do not understand the psychological condition of children increasingly makes the criminal justice system feel dehumanistic to children. The criminal justice system that offers win and lost for the parties involved in the case and provides criminal consequences (imprisonment) for them is considered as a practice that should not occur for cases involving children. Because prison is not a proper place for child development and imprisonment is the same as a violation of the basic rights of children. Therefore, restorative justice comes as an offer to settle criminal cases for children. Restorative justice was born as an effort to change the face of a dehumanistic criminal law to become a humanist.

Restorative justice is a relatively new thing in Indonesia.

³ Volz, Anna, (2009). *Advocacy Strategies Training Manual: General Comment No.10: Children's Rights in Juvenile Justice, Defence for Children International*

⁴ Faisal, (2010), *Menerobos Positivisme Hukum, Rangkang Education, Yogyakarta*.

⁵ Johnny Ibrahim, (2005), *Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia, Surabaya.

⁶ L. Moleong, (2002), *Metode Penelitian Kualitatif*, PT Remaja Rosdakarya, Bandung.

However, restorative justice has a different perspective according to Fruin J.A.^[7] that is to fulfill a sense of justice due to a crime. Paulus Hadisuprpto's view^[8], restorative juvenile justice departs from the assumption that responses or reactions to child delinquency will not be effective without the cooperation and involvement of victims, perpetrators and the community. The basic principle is that justice is fulfilled, if each party receives fair and balanced attention, is actively involved in the judicial process and benefits adequately from their interactions with the juvenile justice system.

Based on the description above, it can be seen several weaknesses of Law No. 11 of 2012, among others, namely:

a. Administrative Sanctions

Provisions in Article 18 of Law No. 11 of 2012 concerning the Child Criminal Justice System which requires that the investigation be carried out in a family-friendly atmosphere. Investigations with a family-friendly atmosphere reflect the legal protection of children if carried out by the investigator as appropriate, but in the event that the Investigator does not conduct an examination in a family atmosphere, the legal sanctions that may be imposed on the Officer are only administrative sanctions. Administrative sanctions imposed on Investigation officials when investigators neglect the obligation to examine suspects not in a family-friendly atmosphere are usually too easy to ignore.

b. Special Officers for Children

Completing the presence of special officials throughout Indonesia is still a long process of preparation to be carried out. The order of this law is very clear but the resources of law enforcement officers are often very lacking, so there is concern when this law is implemented, it cannot provide legal protection in accordance with the provisions of the legislation specified.

c. Legal Aid

Article 55 paragraph (1) of the Law on the Criminal Justice System for Children affirms that at every level of examination, children in conflict with the law must be given legal assistance and be accompanied by a Correctional Supervisor or other companion in accordance with statutory provisions. The existence of arrangements for granting Legal Aid from Advocates must be expanded, with specific reasons namely:

1. Advocates must also be qualified advocates in the field (for example, have experience dealing with children's problems, have a high interest and dedication to children, and had follows technical training). The requirements to become a legal advisor should be the same as those for child investigators, child prosecutors and juvenile judges, so that they can provide legal assistance more effectively;
2. Not many advocates are interested in providing legal assistance to children, and also when looking at the status of children suspected of dealing with the law does not have a clear social status, (at this time many children are unclear where they live, where their parents). Provisions on who should provide advocates are not explained in this law. Article 55 paragraph (2) of this law only requires that every

child in the examination level must be accompanied by an advocate, because this concerns the issue of costs and availability of advocates that do not yet exist at each remote police station level on the islands. The number of advocates is not scattered in all districts / cities throughout Indonesia and is only concentrated in a few large cities that are business centers.

d. Sanction for the Judges

The existence of the provisions of Article 96, Article 100 and Article 101 of Law Number 11 of 2012 which provides for the provision of sanctions against judges in particular is considered contrary to Article 24 paragraph (1) and Article 28 G paragraph (1) of the 1945 Constitution. Article 24 paragraph (1) The 1945 Constitution confirms that the authority of the Judiciary is an independent power to administer justice in order to enforce law and justice, but even a Judge as a human being, to fulfill his duties and responsibilities in accordance with the 1945 Constitution, requires protection from the threat of fear to do or not do something that is a human right. The human rights referred to in this provision must be interpreted as "the right of a judge, to examine and to decide an impartial case and be free from intervention or influence from anyone or under any circumstances".

The Law on the Juvenile Justice System by criminalizing a violation of the obligations of a Judge through a criminal procedure is a violation of the constitutional conceptual framework of the independence of a Judge which must be protected under Article 24 paragraph (1) of the 1945 Constitution. Placement of the threat of criminal sanctions against violations of an obligation that is ordered An Act can not only be seen as "overcriminalization" or "overpenalization" but also reflects the form of intervention or influences the integrity and credibility and capability of an independent judicial authority.

Based on the discussion above, the following conclusions can be drawn: The form of legal protection provided by Law No. 11 of 2012 concerning the Juvenile Criminal Justice System for children in conflict with the law starting from the investigation stage until finally the implementation of decisions in the child correctional institution has shown that there are special protections for children's rights. This can be seen with the requirement for the Special Child Officer to handle child cases at each stage of the examination and also detention of children will only be done as an *ultimum remedium* and as long as the detention needs of the child must be met. The examination must also be carried out in a family atmosphere so that the child is not disturbed psychologically or psychologically because he feels depressed and frustrated with the case being experienced. All examination processes in the juvenile justice system must be carried out with a restorative justice approach by pursuing a diversion process, so that criminalization of children is only a last resort (*ultimum remedium*) if there is no agreement of diversion between the parties to the conflict.

Weaknesses of Law No. 11 of 2012 concerning the Child Criminal Justice System in providing legal protection to children in conflict with the law looks both in substance and in the future implementation still raises concerns whether this law will be able to provide comprehensive legal protection to children or still have to wait until it is complete facilities and infrastructure specified in the articles of this

⁷ Fruin J.A., (2006), *Nederlandse Wetboken*, New York: United Nations, p.6.

⁸ Paulus Hadisuprpto, (2006), *Peradilan Restoratif: Model Peradilan Anak Indonesia Masa Datang*, Semarang: Diponegoro University Press. p.225.

law. For example in equipping special officials, special institutions for children, legal assistance in each region and also the implementation of diversion which is a new thing applied in child criminal law. This is considering that this law determines a transition period of 5 (five) years.

2. Reconstruction of The Regulation concerning Diversion on Child-Suspect Case Investigation in Indonesia Based on Justice Values

In order to realize an ideal criminal justice system for children in this case which has problems with the law, the mindset of the child criminal justice system itself must be changed. During this time the juvenile criminal justice seemed to be presented to prosecute children who have problems with the law as criminals or perpetrators of crime that must be jailed.

In fact, not a few are of the view that juvenile justice is an arena or a medium for vengeance. So that the expected criminal justice of children is ideal for children it must:

1. The juvenile justice system must be a separate justice system that is not incorporated or is part of the general justice system;
2. Considerations in juvenile criminal justice must also pay attention to social, cultural, moral aspects, etc.;
3. Increasing the knowledge and quality of law enforcers in order to guarantee the realization of protection for children;
4. Not seeking justification for the conviction but looking for alternative solutions to the case namely diversion and restorative justice;
5. Sentencing for children is directed as a learning process not for revenge and torture;
6. The conviction for children is done as a last resort (*ultimum remedium*) in all stages of the existing juvenile criminal justice system.

To realize this, the implementation of the diversion which is motivated by the desire to avoid negative effects on the Mind and development of children by their involvement with the criminal justice system is very necessary ^[9]. Implementation of diversion by law enforcement officers is based on the authority of law enforcement officials are called discretion. By applying the concept of diversion, the form of formal justice that has so far prioritized efforts to provide protection for children from imprisonment. In addition, it can be seen that protecting children with diversion policies can be carried out at all levels of the judiciary starting from the community before the occurrence of criminal acts by taking precautions. After that, if there are children who commit violations, then it does not need to be processed by the police.

Based on Law No. 11 of 2012 concerning the Child Criminal Justice System, the police should not directly come in contact with children in conflict with the law in the juvenile justice process. The concept of diversion which should be applied in Indonesia in the future, is not much different from the concept of diversion that is applied in Australia, namely Police Diversion. This is based on the consideration of the Police as the first gate to deal with children in conflict with the law to determine whether a

child will proceed to the judicial process or other informal actions.

Crime prevention by using procedural criminal law tools as explained above certainly starts from the police level, both as an investigator and as an investigator. This means that crime prevention by using criminal law facilities always starts at the police level.

Although technically there has been a circular from the National Police regarding the implementation of restorative Justice, it still raises doubts among the police officers in the field. The position of the Circular based on the Child Criminal Justice System Law is seen as still not providing legal certainty. Therefore, reconstruction of regulations related to Child Protection Law is needed.

The diversion model that can be used as a reference is the Family Group Conferencing Mode (FGC) ^[10]. This model is in accordance with the mission of the child protection law which is to avoid negative stigma / labeling of children because of the journey of the criminal justice process, by prioritizing the diversion mechanism as a first attempt. This alternative model is also in accordance with the culture and religious values adopted by the Indonesian people, namely deliberation and the involvement of parents. Even the role of mothers as a school for their children (*al ummu al madrosatun*) increasingly visible needs. From the description above it can be understood that the Family Group Conferencing Model that has conformity with the juvenile criminal justice system in Indonesia can be an alternative. The concept of diversion towards children is not only an alternative program for handling children who are in conflict with the law alone, but the diversion that actually takes the child out of the criminal justice process. The diversion concept is not much different from the diversion concept applied in Australia, namely Police Diversion. This is based on the consideration of the Police as the first gate to deal with children in conflict with the law to determine whether a child will proceed to the judicial process or other informal actions such as mediating penalties. Therefore, given that the legal aspects of diversion contained in the provisions of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, it is still found deficiencies in providing protection for children in conflict with the law, so as soon as possible to do a revision of the Act. The revision was made by taking into account the values that live in society and international provisions concerning the protection of children from the juvenile criminal justice process. At least a more technical rule is made about the diversion model chosen so that it can be a guide for stakeholders ^[11].

The rules as mentioned above by the author are outlined in the reconstruction namely: In Article 5 paragraph (3) of Law No. 11 of 2012: "In the Child Criminal Justice System as referred to in paragraph (2) letter a and letter b, a diversification must be carried out for the benefit of the child", in Article 7 of Law no. 11 of 2012 paragraph (1): "At the level of investigation, prosecution and examination of cases of children in the district court must be carried out Diversity for the benefit of children" and in Article 8 paragraph (3) of Law no. 11 of 2012: "The Diversion Process must pay attention to: a. children's interests; child

⁹ Widodo, (2015), *Diversi dan Keadilan Restoratif dalam Sistem Peradilan Pidana Anak di Indonesia: Urgensi dan Implikasinya*, *Rechtdee Jurnal Hukum*, Vol. 10. No. 2, Desember 2015

¹⁰ Arora, Ashna. (2018). *Juvenile Crime and Anticipated Punishment*. *SSRN Electronic Journal*. 10.2139/ssrn.3095312.

¹¹ Lane, Jodi. (2018). *Addressing Juvenile Crime*. *Criminology & Public Policy*. 10.1111/1745-9133.12362.

welfare and responsibility; c. avoidance of negative stigma; retribution avoidance; e. harmony of society; and f. compliance, justice, decency and public order".

Reconstruction which is none other than to realize diversion in juvenile criminal justice system is more effective because the Diversity of children in conflict with the law at the police level has the advantage when compared to the transfer that occurs at a stage after the police stage. Some of the advantages of diversion at the police level are as follows:

1. The police force is the only law enforcement agency in the criminal justice sub-system that has a network up to the sub-district level. Thus, structurally the police institution is the only institution that is the closest and most accessible to the community. With this institutional portrait, the police are the most likely law enforcement agencies to have networks up to the lowest level (village level).
2. Given the types of potential crimes that occur anywhere, both in urban and rural areas, it will be more effective tackling when the handling is handed over to institutions that have a structural network at the village level.
3. The quantity of police officers is also far more compared to other law enforcement officers, although it is also realized that not every police officer has the competence to handle child crime, but the availability of sufficient personnel will also greatly assist the process of resolving crimes committed by child.
4. Because the police institution is the first law enforcement apparatus that will move in the criminal justice process, the transfer of the judicial process at the police level also means providing guarantees to children to be avoided as soon as possible and in contact with the criminal justice process. Thus, the negative impact due to child contact with law enforcement officials can be minimized.
5. Because children who commit crimes must also be seen as victims, efforts to speed up the resolution process carried out by children also means accelerating the rehabilitation process needed by children.
6. By shifting the process and the judicial process to the non-judicial process at the police level, it also means that the child and the possibility of children becoming victims of violence at the level of investigation will also avoid the scourge in the judicial process.

Based on the description above, it is known that the transfer process and the judicial process towards a non-judicial process for children in conflict with the law are more effective if carried out at the police level (Police Diversion). The police must actively try to direct children in conflict with the law to settle their cases outside the court by directing them to alternative forms of settlement of the crime of children known as Family Group Conferencing (FGC).

Conclusion

1. The Weaknesses in the juvenile justice system in the implementation of diversion at the stage of investigation for cases of children in conflict with the law are substantially sourced from the rule of law regarding child crime in this case Article 7 of Law No. 11 of 2012 which has not yet regulated diversion in

child crime, this is compounded by structural inability in this case judicial staff as well as legal assistance or advocates who only have general competence, not competence in the field of children so that it can affect the psychological condition of children.

2. The Reconstruction of diversion regulations in the resolution of Child-Suspect case Investigation is by realizing the implementation of diversion in order to meet the appropriate values of justice and promote the protection of children's interests. The article which is reconstructed is Article 5 paragraph (3) concerning the obligation to implement diversion, Article 7 paragraph (1) concerning the obligation to carry out diversion and Article 8 paragraph (3) concerning the interests of children which must be prioritized. The reconstruction of this regulation is expected to be an improvement to the Criminal Justice System Law for Children which will substantially better reflect the value of justice.

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