

The Existence Of The Application Of Diversion As A Criminal Settlement In The Criminal Justice System

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Abstract This research aims to analyze and examine the existence of the application of diversion in providing protection for children's rights. This research is normative juridical research, normative juridical is a statutory approach, because what will be studied are various rules of law that become the focus and central theme of a study. Legal analysis produced by a normative research using a statutory approach will produce more accurate research. Based on the results of the research obtained, the answer to the existing problem is that the application of diversion as a settlement of juvenile crimes is very important to protect children's rights and encourage restorative justice. Diversion not only avoids children from matters related to the formal legal process, but also provides an opportunity to improve social relations and restore the situation after a criminal offense. Despite challenges in its implementation, such as a lack of understanding among law enforcement and the community, successful diversion can improve children's welfare and achieve better justice goals. Therefore, further efforts are needed in socialization and education regarding diversion to ensure its effective implementation in the criminal justice system.

Keywords: Diversion, Juvenile Crime, Protection of Children's Rights, Criminal Justice System.

1. INTRODUCTION

Children are an integral part of human survival and the sustainability of a nation and state. In the Indonesian constitution, children have a strategic role, which explicitly states that the State guarantees the right of every child to survival, growth and development and to protection from violence and discrimination (Asmita Widimartha Nainggolan, 2023: 4). The best interests of the child should be realized as the best interests for the survival of humanity.

Children are legal subjects and assets of the nation, as part of the younger generation, children play a very strategic role as the next generation of a nation. In the context of Indonesia, children are the successors of a nation's struggle (Mita & Prameswari, 2023: 83). This strategic role has been realized by the international community to give birth to a convention which essentially emphasizes the position of children as human beings who must get protection for their rights. Therefore, every child must get guidance and protection from an early age, children need to have the widest possible opportunity to be able to grow and develop optimally, both physically, mentally and socially.

The position of children as the younger generation who will continue the ideals of the nation's ancestors. Prospective leaders of the nation in the future as a source of hope for previous generations and get the widest possible opportunity to grow and develop naturally both spiritually and physically and socially (Devi Sapitri Nusi, Fence M. Wantu, 2023: 1406). Child protection is the effort and activity of layers of society in various positions and roles who are well aware of the importance of children for the country and nation in the future, if they have matured in their growth both physically and mentally so that later the time comes to replace the previous generation.

Behavioral deviations or unlawful acts committed by children are caused by factors outside the child, among others due to technological advances and lack of control of children's activities, therefore, there are children who commit deviations that should not be done by a child. The development of criminal acts committed by children so far is felt to have disturbed all parties, especially parents. The phenomenon of deviant acts or crimes committed by children seems disproportionate to their age.

Basically, a child who commits a criminal act is not fully responsible for their actions because psychologically and their thinking abilities have not grown perfectly. Therefore, in dealing with Children in Conflict with the Law (ABH) a touch of policy and appropriate state handling is needed so that their human rights are protected without overriding the interests of victims and society as a whole.

Protection of children's rights is a form of realization of human rights protection. "Children's human rights are a set of rights inherent in the nature and existence of children as creatures of God Almighty that must be respected, upheld and protected by the state, law and government" (Ratomi, 2013: 396). Children's rights need to be protected, because every child has the right to survival, growth and development and the right to protection from violence and discrimination as mandated in the 1945 Constitution of the Republic of Indonesia.

Protection of children is important because children are the buds, potential, and young generation of successors to the ideals of the nation's struggle, have a strategic role and have special characteristics and characteristics that ensure the continued existence of the nation and state in the future. It is hoped that children will be able to bear this responsibility, so they need to have the widest possible opportunity to grow and develop optimally, both physically, mentally and socially.

In addition, protection efforts need to be made to realize the welfare of children by providing guarantees for the fulfillment of their rights and treatment without discrimination.

One of the current efforts to prevent and overcome juvenile delinquency is through the implementation of the juvenile justice system. The purpose of organizing a juvenile justice system is not solely aimed at imposing criminal sanctions on children who have committed criminal acts, but is more focused on the premise that the imposition of sanctions is a means of supporting the welfare of children who commit criminal acts.

Children in conflict with the law are entitled to protection from being subjected to persecution, torture, or inhumane punishment, are entitled to obtain freedom in accordance with the law, arrest, detention, or imprisonment of children is only carried out if in accordance with applicable law and can only be done as a last resort.

One of the efforts taken in handling juvenile criminal offenses is through diversion. Diversion was born with the aim of providing protection for children's rights (Ananda, 2018: 79). Diversion emerged with the aim of trying to avoid the evil stigma on children. With diversion, law enforcers in the police, prosecutors and courts are given the authority to divert the judicial process out of the existing formal judicial process.

According to Article 1 Paragraph (7) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside criminal justice. The process of imposing punishment is considered not the best solution in resolving criminal offenses committed by children. In connection with this, there are still many cases involving children that should be resolved through out-of-court channels, however, due to the normativity of our law enforcement officers, many cases involving children are still taken to court, and not a few of them have to be imprisoned. Whereas imprisonment for adults alone is the last resort or ultimum remedium then is it appropriate for imprisonment to be given as a result of a child's crime, let alone this delinquency is still within tolerable limits, not the intention of giving tolerance to all delinquent / criminal acts committed by children, but this tolerance we need to use after previously comparing the motive for the action, the involvement of the action and the consequences of the application of punishment.

In law number 11 of 2012 concerning the juvenile criminal justice system, children are a mandate and gift of God Almighty who has dignity and dignity as a whole human being, “Indonesia as a State party to the *Convention on the Rights of the Child* which regulates the principle of legal protection of children has an obligation to provide special protection for children in conflict with the law” (Nova & Afrizal, 2023: 482). Children still have to grow and develop into adults and be free as criminal children. In addition, it is still very doubtful that imprisonment is able to make a deterrent effect on children from delinquent acts or foster them so that they do not behave criminally.

This is in accordance with the purpose of criminal justice itself, which is to realize criminal justice that truly guarantees the protection of the best interests of children. Therefore, diversion is important to be considered in resolving criminal offenses involving children, because with diversion the protection of the rights of children in conflict with the law can be better guaranteed and can avoid children from negative things as “bad children” because criminal offenses involving children as perpetrators can be handled without the need to go through the existing formal legal process. The diversion approach can be applied to resolve cases of children in conflict with the law. The implementation of the diversion method is enforced in order to achieve the welfare of children based on the principle of the best interests of the child, in other words, diversion is based on child protection and the fulfillment of children's rights.

Some of the previous research examined focused more specifically on the application of diversity in the context of children in conflict with the law. The focus is on how diversity is applied to children, including procedures, effectiveness, and its impact on restorative justice. Meanwhile, this study focuses on the existence and application of diversion as a mechanism in resolving criminal cases. This includes an analysis of legal policies, procedures, and challenges faced in the application of diversion in the criminal justice system in general in protecting children's rights.

Hulsman wrote with Wonosutanto's translation that “it is almost impossible to provide a fair punishment according to the prevailing criminal law system, in terms of the way it works because in reality, the operation of the system is completely incompatible with the reasoning for its validity (Setiadi, 2021: 6). The system of child punishment in Indonesia has not been well realized, especially in providing protection for children's rights. “Children are not to be punished, but must be given guidance and guidance, so that they can grow and develop as

normal children who are fully healthy and intelligent” (Laia et al., 2023: 240). Children are the future generation of the nation who are still in a period of physical and mental development. Sometimes children experience difficult situations that make them commit unlawful acts, therefore children need special protection and care. Therefore, this study examines the *existence of the application of diversion as a settlement of criminal offenses in the criminal justice system*.

2. RESEARCH METHOD

This research is normative juridical research, normative juridical is a statutory approach, because what will be studied are various rules of law that are the focus as well as the central theme of a study (Irwansyah, 2020: 29). Legal analysis produced by a normative research using a statutory approach will produce more accurate research. The data required is secondary data relevant to this research problem. The approach that will be used in this research is to emphasize the statutory approach, case approach, conceptual approach. The technique of collecting normative legal materials is by literature study of legal materials, both primary, secondary and tertiary legal materials. In this research, first choose the method of searching for legal materials (secondary and primary). Secondary legal materials are legal materials that are taken based on information or knowledge that is indirectly obtained through library studies related to the problem under study.

3. RESULT AND DISCUSSION

The problem of solving the problem of children in conflict with the law is still interesting to study today. “The fact is that in Indonesia cases against children reach 33%. From this fact that the need for proper case resolution as regulated in the applicable legislation, namely the Law on the Justice System Protection of children's rights by the international community is contained in (1) 1959 UN General Assembly Declaration on the Rights of the Child; (2) 1966 International Covenant on Civil and Rights of the Child; (3) 1966 International Covenant on Economic, Social & Cultural Right; (4) 1989 UN Convention on the Rights of the Child” (Yasim et al., 2023: 73). The Convention on the Rights of the Child is the most comprehensive legal and human rights instrument to promote and criminalize children (Law No.11 of 2012), which is to protect the rights of children.

In terms of the law, the focus on the treatment of children is very prominent. This is particularly evident when they come into contact with the criminal justice system (Juniati & Karyoto, 2022: 163). Under no circumstances should children caught in the crosshairs of the law or children forced into victimization be the cause of any problems. There should be no reason to be victimized. Legal rights in the field of law are not necessarily deprived from children just because they have different cognitive awareness (*mensrea*) than adults. It is important to treat children and adults differently, as children have their own legal skills.

Protection of children is important because children are the buds, potential, and young generation of the successor to the ideals of the nation's struggle, have a strategic role and have special characteristics and characteristics that ensure the continued existence of the nation and state in the future. It is hoped that children will be able to bear this responsibility, so they need to have the widest possible opportunity to grow and develop optimally, both physically, mentally and socially. In addition, protection efforts need to be made to realize the welfare of children by providing guarantees for the fulfillment of their rights and treatment without discrimination.

Based on Article 1 number 2 of Indonesian Law Number 35 of 2014 concerning Child Protection, it is formulated that "Child Protection is all activities to ensure that children and their rights can live, grow, develop and participate optimally in accordance with the dignity of humanity and receive protection from violence and discrimination" (Setiadi, 2021: 3). Children are a group that is vulnerable to criminal acts in conflict with the law, both as perpetrators of criminal acts, as well as victims of criminal acts and children who are witnesses to criminal acts, as formulated in Article 1 numbers 2, 3, 4 and 5 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

The diversion of the settlement of children's cases outside the formal channels of justice through diversion regulated in international children's instruments has juridical implications for Indonesia to accommodate the provisions of diversion in children's legislation in Indonesia. In realizing the concept of Diversion as an instrument in restorative justice in the Juvenile Criminal Justice System based on Law Number 11 of 2012, namely the settlement of criminal cases by involving perpetrators, victims, families of perpetrators / families of victims and other related parties to jointly seek a fair solution by emphasizing recovery back to its original state and not retaliation.

The settlement of juvenile criminal offenses by means of diversion is clearly contrary to the principle of legality and legal certainty (*rechtzakerheid*) (Vernanda, 2024: 5). Diversion does not result in conviction or imprisonment, but restorative justice focuses on repairing and restoring the victim's condition after the occurrence of a criminal offense in exchange for legal sanctions, the perpetrator of the crime can compensate by paying compensation, social work, or actions that are still within reasonable limits ordered by law enforcement or the court. After the enactment of Law Number 11 of 2012, there is a clear legal basis for the implementation of Diversion.

Diversion in the juvenile criminal justice system Article 1 point 1 of the SPPA Law states that “The Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving the sentence” (Tarsono, 2022: 111). According to the Juvenile Justice aims to provide the best for the child, without compromising the interests of society and the establishment of justice. In the SPPA Law, a child who commits a criminal offense is called a child in conflict with the law, Article 1 point 3 of the SPPA Law explains that “Children in Conflict with the Law, hereinafter referred to as Children, are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal offense”. In the SPPA Law, criminal offenses committed by children can be resolved by diversion, or transferring the settlement of cases outside the court, this is as stipulated in Article 1 point 7 of the SPPA Law, which states that “Diversion is the transfer of the settlement of children's cases from the criminal justice process to the process outside the criminal justice”.

Legal protection for children can be carried out as an effort to protect the law against various freedoms and human rights of children. The protection of children also includes interests related to the welfare of children. The protection of children in conflict with the law (ABH) is the joint responsibility of law enforcement agencies. Not only children as perpetrators, but also children as victims and witnesses.

Law enforcement officials involved in handling ABH should not only refer to Law No. 11 of 2012 concerning the juvenile criminal justice system or other laws and regulations relating to the handling of ABH, but prioritize peace over the formal legal process which came into effect 2 years after the SPPA Law was enacted or August 1, 2014 (Article 108 of Law No. 11 of 2014).

Through the enactment of Article 3 of the Diversion Regulation, in principle, it is not in line with the objectives of diversion efforts stipulated in Article 6 of the SPPA Law. In point b, the purpose of diversion, as explained above, is to prevent children from the judicial process by resolving children's cases outside the judicial process (Firdaus et al., 2019: 158). The presence of the provisions of Article 3 Perma Diversion shows that the criminal justice process has been running and implemented by investigators and public prosecutors, as a result of actions committed by children in conflict with the law that are punishable by more than 7 years. If the implementing regulations of the SPPA Law only refer to the Perma Diversi, then the application of diversion to criminal offenses that carry a sentence of more than 7 years, such as narcotics crimes, not only creates legal uncertainty, but also contradicts the purpose of diversion mandated by the SPP Law.

Diversion is a process that all parties involved in a particular criminal offense together overcome the sitting of the case and build an obligation to make things better by involving victims, children, and the surrounding community to find solutions in repairing, reconciling, and reassuring hearts that are not in accordance with retaliation. The implementation of diversion is motivated by the hope to avoid negative influences, especially on the psyche and development of children that could potentially occur if the completion of the criminal process is carried out through the criminal justice system. The implementation of the provisions of diversion is important, because with diversion, the human rights of children can be better guaranteed, and avoid children in conflict with the law from being stigmatized as delinquents, because criminal acts allegedly involving perpetrators who are children can be handled without the need to go through the legal process.

Children are the hope of the nation and future leaders, however, children are often faced with legal proceedings that lead to years of imprisonment. Crimes committed by children are certainly caused by various factors, especially Indonesia's poor economic, educational and social conditions that encourage them to commit crimes.

Children in conflict with the law are motivated by the social environment in which they live, grow and develop (Ayu & Sukadana, 2022: 1). This social environment is where children carry out their daily activities, this social environment is always seen, heard in children's experiences. Coaching for children

is an effort to increase children's knowledge and abilities, so that changes in children's attitudes and behavior are expected. The reason is that it cannot be denied that the social environment can be a factor that allows children to commit acts of violence, which in many cases are often included in the category of criminal acts (delict).

Children in conflict with the law are forced to follow procedures commonly followed by adults. This situation allows children to be under duress where they must go through the examination process that has become a habit of the police in conducting investigations and investigations in handling criminal cases.

Legal protection efforts for children in conflict with the law need to be continuously pursued in order to maintain the welfare of children considering that children are one of the valuable assets for the progress of a nation in the future. Legal protection for children in conflict with the law can be interpreted as legal protection efforts against various freedoms and human rights of children. So the problem of legal protection for children covers a very broad scope.

Coaching for children is an effort to increase the knowledge and abilities of children, so that changes in the attitudes and behavior of children are expected. as stated in the explanation of the SPPA Law that coaching is an activity to improve the quality, devotion to God Almighty, intellectual, attitudes and behavior, skills training, professional and physical and spiritual health of children both inside and outside the juvenile criminal justice process (Sabaruddin et al., 2021: 107).

“The rights of children according to Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning child protection are contained in articles 4 (four) to 18 (eighteen)” (Lubis & Siregar, 2020: 9). Diversion agreements to resolve criminal acts in the form of violations, minor crimes, crimes without victims, or the value of victim losses is not more than the value of the local provincial minimum wage as referred to in article 9 paragraph (2) can be carried out by investigators together with the perpetrator and / or family, community advisors, and can involve community leaders.

The main principles of implementing the concept of diversion are persuasive action or a non-punitive approach and providing an opportunity for someone to correct mistakes. Officers in implementing diversion show the importance of obedience to laws and rules. Officers conduct diversion through a persuasive approach and avoid arrests that use violence and coercion.

The implementation of diversion by law enforcement officials is based on the authority of law enforcement officials called discretion or in Indonesian discretion (Badaru & Asriana, 2023: 11). Diversion is carried out on the grounds of providing an opportunity for law violators to become good people again through non-formal channels by involving community resources. Diversion seeks to provide justice to cases of children who have already committed criminal offenses to law enforcement officials as law enforcement parties. Both justice are presented through a study of the circumstances and situations to obtain appropriate sanctions or actions (appropriate treatment).

The police as the first gate to handle children in conflict with the law determines whether a child will proceed to the judicial process or other informal actions (Punyantari, Luh Putu Esty, 2019: 5). For serious criminal offenses such as murder, rape, theft with violence, the police proceed to court or detention. Children are differentiated from adult detention by the fulfillment of facilities that protect children's development, education, hobbies, access to family, protection of children's professional rights, protection from torture and physical and mental treatment and a short and fast judicial process.

Diversion is carried out with the aim of avoiding children from the negative implications of the existing criminal justice system, avoiding children from entering the juvenile criminal justice system and eliminating the criminal label against children who have already become victims of the system and the development of the existing social environment. The concept of diversion is developed in almost all countries, as it has shown success in saving and protecting children.

Special protection for children in conflict with the law is carried out through humane treatment by taking into account the needs according to their age; separation from adults, effective provision of legal and other assistance, implementation of recreational activities, freedom from torture, punishment, or other cruel, inhumane and degrading treatment. Avoidance of the imposition of the death penalty and/or life imprisonment, avoidance of arrest, detention or imprisonment, except as a last resort and within the shortest time. The provision of justice before a juvenile court that is objective, impartial, and in a hearing that is closed to the public, the avoidance of publication of his/her identity, the provision of assistance from parents/guardians and people trusted by the child.

A child in conflict with the law is a child who is involved with legal problems or as a perpetrator of a criminal offense, while the child is not yet considered capable of taking responsibility for his actions, given his immature age and is growing and developing, so he has the right to be protected in accordance with the law.

Children who are not yet 14 years old can only be subject to action. If the Diversion succeeds in reaching an agreement, the Investigator submits the Diversion minutes along with the Diversion Agreement to the head of the District Court to make a determination. Conversely, if the Diversion process fails, the Investigator must continue the investigation and submit the case to the Public Prosecutor by attaching the Diversion minutes and community research report.

Diversion cannot be carried out by law enforcement officials with the perpetrator alone, but the victim must participate in conducting diversion as a form of victim activeness so that restorative justice can be fulfilled. So that with the presence of both parties, diversion will produce an agreement. If the diversion cannot be implemented or the agreement cannot work, the juvenile criminal justice process continues in accordance with Article 13 of the SPPA Law. The existence of diversion among law enforcement officials is something that needs to be socialized so that the diversion process can be implemented in line with restorative justice.

The existence of the application of diversion as a criminal settlement in the juvenile criminal system is very important to provide protection for children's rights and encourage restorative justice. Although there are various challenges in its implementation, the main objective of diversion can help restore social relations and reduce the negative influence on children in conflict with the law. Therefore, increased socialization and understanding of diversion is necessary for the goal of justice to be achieved more effectively.

4. CONCLUSIONS AND SUGGESTIONS

A. Conclusion

Based on the discussion above, the following conclusions can be drawn:

This research emphasizes the importance of the application of diversion as a settlement of crimes involving children in the criminal justice system. Diversion aims to provide protection for children's rights and encourage restorative justice, so that children in conflict with the law do not experience negative behavior as "bad children". Furthermore, it shows that the existence of diversion should help restore social relations and reduce negative influences on children, although there are challenges in its

implementation. Therefore, socialization and a better understanding of diversion need to be improved so that the goals of justice can be achieved more effectively.

B. Suggestion

Based on these conclusions, the authors can provide several suggestions, namely:

- a. Increased socialization, increasing public understanding and law enforcement officials about the importance of diversion
- b. Legal culture reform, encouraging changes in legal culture that favor rehabilitation over imprisonment.

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