

Jurisdictional Analysis of Diversion for Children Accusing the Crime of Child Rape

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Jurisdictional Analysis of Diversion for Children Accusing the Crime of Child Rape

(Case Study Number 45/Pid.sus-Child/2022/PN Mdn)

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Abstract. Children are a valuable treasure for parents. This is proven when married couples or parents who do not or have not had offspring or children then they try to find or get them even though they spend a lot of possessions. Likewise with the country. Both developed and developing countries really need children as the nation's successors. As world civilization continues to develop, parents are increasingly unwilling to give birth or have children for various reasons. The research specifications used in this research are analytical descriptive, that is, trying to describe or describe events and occurrences without carrying out hypotheses and statistical calculations. The data obtained will be presented systematically, the data required in this research is secondary data and primary data. This research is descriptive analysis, descriptive analysis, namely research aims to describe in detail, systematically and comprehensively everything related to this research problem and also normative juridically, namely research based on Ministerial regulations, books, along with analyzing Decisi Number 45 /Pid.Sus-Anak/2022/Pn Mdn. Law Number 11 of 2012 concerning the Juvenile Justice System has the most basic substance in this law, namely the strict regulation of Restorative Justice and Diversion which is intended to keep children away from the justice process and avoid stigmatization of children who are in conflict with the law and are expected to can return to the social environment naturally. Factors that cause children to become perpetrators of criminal acts of sexual intercourse are due to causes in the form of environmental factors, faith factors, Social and Cultural Factors in the form of social and cultural factors can also influence children's views on sexuality and violence. Criminal acts committed by children must normatively seek diversion while still paying attention to the diversion requirements as regulated in Article 7 of the Juvenile Criminal Justice System Law. However, from the cases studied by the author, based on the District Court Decision, namely Decision Number 45/Pid.Sus-Anak/2022/Pn Mdn, the case does not meet the legal requirements for diversion even though the perpetrator is a child.

Keywords: Diversion, Perpetrators, Children, Sexual Intercourse.

INTRODUCTION

Children are a valuable treasure for parents. This is evident when couples or parents who are married if they do not or have not got offspring or children then they try to find or get them even by spending a lot of property. Likewise with the state. Both developed and developing countries really need children as the successor of the nation. Because of the development of world civilisation, parents are increasingly unwilling to give birth or have children for various reasons.¹

¹ Witanto, D.Y., 2014, Hak dan Kedudukan Anak Luar Kawin. Kencana, Jakarta, hal.87.

Thus children must continue to be concerned about a decent life. Optimal child protection must involve all elements of society, from the lower levels to the government level, including Government officials who are authorised to make laws and enforce the law, in order to ensure the physical, mental and social growth and development of children in a complete, harmonious and balanced manner. The number of these children, which is more than a third of Indonesia's population, requires serious guidance. If not, the country will be filled with weak, creativity-poor, and unproductive generations, who will become a burden to parents, families, and the state, and hamper national development. This is also in line with Article 28B Paragraph 2 of the 1945 Constitution which states that children are the future of a nation.

The concept of diversion was born based on the fact that the criminal justice process against children as perpetrators of criminal offences through the conventional criminal justice system causes more harm than good. This means that it will give children an understanding of their actions as children. The number of juvenile court decisions that tend to impose imprisonment rather than action against delinquent children is actually not in accordance with the philosophy of punishment in juvenile criminal law.²

In other words, this diversion effort is also carried out to find a solution that provides protection to children by prioritising the principle of the best interest of the child. However, in the legal aspect of sexual intercourse is a criminal offence that is very unnatural for children to commit. In the crime of sexual intercourse, the victim is basically a woman and is a weak person in protecting herself. Meanwhile, the perpetrators of the crime of sexual intercourse are men who essentially have strong physical strength that exceeds women.

Diversion and Restorative Justice are the basis of the reform of the criminal justice system in the implementation of the juvenile criminal justice system, which can be seen in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which aims to avoid juvenile offenders from punishment or punishment, both concepts are new to Indonesian society. Restorative justice and diversion are the basis of criminal justice system reform in the implementation of the juvenile criminal justice system, which can be seen in Law No. 11/2012 on the Juvenile Criminal Justice System, which aims to avoid juvenile offenders from punishment or conviction, both concepts are new to Indonesian society.³

² Lidya Rahmadani Hasibuan. Hak Restitusi Terhadap Korban Anak Berdasarkan Undang-Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang-Undang nomor 23 Tahun 2002 Tentang Perlindungan Anak Di Bawakan. *Jurnal Hukum Responsif*, Vol. 7 No. 2, Desember 2019.

³ Irma Fatmawati dan Lidya Rahmadani Hasibuan, Diversi Berdasarkan Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak (Studi pada Polres Stabat, Kejaksaan Negeri Stabat dan Pengadilan Negeri Stabat). *Jurnal Ilmiah Penegakan Hukum*, Vol 3, No 1, Juni 2016.

If the mentality of the next generation is tarnished or not fostered properly, it will cause many problems, especially regarding crime. The current criminality phenomenon shows that crime is not only dominated by adults, but also by children. The Directorate General of Corrections (Ditjenpas) of the Ministry of Law and Human Rights of the Republic of Indonesia (Kemenkumham) stated that at least 4,000 Indonesian children undergo legal proceedings each year. The Monthly Report on Detention Centre Occupants released by the Directorate General of Corrections as of June 2018 revealed 765 child detainees (742 boys and 23 girls) and 2,559 child prisoners (2,493 boys and 66 girls), spread across 33 Correctional Offices throughout Indonesia. The DGC also reported that 15,027 children were under the care of the DGC in 2017.

The handling of juvenile criminal cases is different from adult criminal cases. The rules are based on Law No. 11 of 2012 concerning the Juvenile Justice System and Law No. 3 of 1997 concerning Juvenile Justice, then Law No. 35 of 2014 concerning Amendments to Government Regulation in Lieu of Law (Perppu) No.1 of 2016 concerning the Second Amendment to Law No.23 Government Regulation (PP) No.65/2015 on Guidelines for the Implementation of Diversion and Handling of Children who are not yet 12 years old, Supreme Court Regulation No.4/2014 on the Implementation of Diversion in the Child Criminal Justice System and Attorney General Regulation No.06/A J.A/04/2015 on Guidelines for the Implementation of Diversion.

Children still have specialities in handling criminal cases because they still think about their physical and mental losses. Such is the case experienced by Firmansyah Alias Firman with Decision Number 45/Pid.Sus-Anak/2020/PN Mdn which occurred in the Medan District Court. A 17 year old child persuaded the victim witness to have sex by persuading the victim that he would be responsible if the victim witness became pregnant. The judge found the defendant guilty in accordance with Article 81 Paragraph (2) Jo Article 76 d of Law Number 23 Year 2022 on Child Protection and sentenced him to 3 (three) years imprisonment and a fine of Rp. 100,000,000 (One Hundred Million Rupiah). Even though the victim witness has stated that what they did was based on mutual consent. Because these acts had been committed 10 times in different places and the last one was carried out at the home of the victim's grandmother at 01.00 WIB.

Problem Formulation

Based on the background above, the problems raised in this journal include:

1. How is the Rule of Law against the Crime of Child Intercourse based on Indonesian Legislation?
2. How is Diversion Applied in Decision Number 45/Pid.Sus-Anak/2022/PN Mdn?

THEORETICAL REVIEW

The purpose of theory is very clear, which is to generalise knowledge and explain the relationship between social phenomena and the meaning of the observations made. A theory in addition to functioning to explain facts, must also be able to predict or prove facts. In addition to having a purpose, of course the theory also has several functions, among others:

- a. Theory provides patterns for data interpretation
- b. Theory connects one study with other studies
- c. Theory provides a framework in which concepts acquire special significance.⁴

The theory used in this journal is Legal Certainty Theory (Middle-Ranged Theory). The definition of Legal Certainty is Legal Certainty Theory contains 2 (two) meanings, namely first the existence of general rules that make individuals know what actions may or may not be done, and second in the form of legal security for individuals from government arbitrariness because with the existence of general legal rules that individuals can know what the State can impose or do to individuals. Legal certainty is not only in the form of articles in the law but also the consistency in the judge's decision between one judge's decision and another judge's decision for a similar case that has been decided.

Law and certainty are two things that are very difficult to separate. To realise certainty, the law must be created first before the acts regulated in the law are carried out, so that people know what they can and cannot do and know the consequences if they act contrary to or against the law.⁵

Certainty means "provision and determination" while if the word "certainty" is combined with the word "law" it becomes legal certainty, which is defined as a legal device of a country

⁴ ND, Mukti Fajar dan Yulianto, Achmad, 2015, *Dualisme Penelitian Hukum Normatif dan Empiris*, Pustaka Pelajar, Yogyakarta. Bemmelen,

⁵ Van, 2015, *Lerboek van Het Nederland Strafprocesrecht*, Herziene Druk, Gramedia, Jakarta.

⁵ Hera Susanti, *Diversi Dalam Sistem Peradilan Pidana Anak Di Indonesia dan Tinjauannya*, Menurut Hukum Islam. *Legitimasi*, Vol. VI No. 2, Juli-Desember 2017.

that is able to guarantee the rights and obligations of every citizen. Law contains certainty when the law can cause human behaviour, both individuals, groups, and organisations to be bound and within the corridors that have been outlined by the rule of law itself. This certainty value must be present in every law made so that it can provide a sense of justice and create order.

According to the opinion of Sudikno Mertokusumo, legal certainty is a guarantee that the law must be carried out in a good way. Legal certainty requires efforts to regulate the law in legislation made by the authorised and authoritative parties, so that these rules have a juridical aspect that can guarantee the certainty that the law functions as a rule that must be obeyed. Truth and justice cannot be separated from the nature and purpose of law.⁶

RESEARCH METHODS

Research includes a method so that it is necessary to know how to obtain data and information from an object under study. Methods are defined as the logic of scientific research, the study of research procedures and techniques. Research is a series of scientific activities and therefore uses scientific methods to explore and solve problems, or to break down the truth of existing facts.

The research specification used in this research is descriptive analysis, which is a method that aims to describe comprehensively or thoroughly the Juridical Analysis of Diversion of Child Perpetrators of Child Sexual Abuse (Case Study Number 45/Pid.sus-Anak/2022/PN Mdn), then systematically analysed to obtain the overall research results to the conclusion.⁷

The author uses normative juridical research using secondary data types, or data called legal materials that have existed before to be raised and developed by the author. The data obtained from normative research is primary legal material obtained from binding legal materials, consisting of the Basic Norms of Pancasila, the 1945 Constitution of the Republic of Indonesia, the Criminal Code, Law No. 11 of 2012 concerning the Juvenile Justice System and Law No. 3 of 1997 concerning Juvenile Justice. Law No.35 of 2014 on the Amendment of Government Regulation in Lieu of Law (Perppu) No.1 of 2016 on the Second Amendment to Law No.23 of 2002 on Child Protection into Law, Government Regulation (PP) No.65 of 2015 on Guidelines for the Implementation of Diversion and Handling of Children who are not yet

⁶ Hidayat, Bunadi, 2015, *Pemidanaan Anak di bawah Umur*. Alumni, Bandung. hal.90

⁷ Soekanto, Soerjono, 2014, *Pengantar Penelitian Hukum*, UI Press, Jakarta.hal.89

12 years old,² Supreme Court Regulation No. 4 of 2014 on the Implementation of Diversion in the Juvenile Criminal Justice System and Attorney General Regulation No.06/A J.A/04/2015 on Guidelines for the Implementation of Diversion as well as other laws and regulations related to this research in the form of Secondary Legal materials, which provide explanations of primary legal materials, such as draft laws, research results, and opinions of experts or experts in the field of law. Meanwhile, tertiary legal materials provide instructions and explanations regarding primary legal materials and tertiary legal materials.

There are two types of analysis, namely qualitative and quantitative analysis. In this research, the author uses a qualitative data analysis method, namely a method by analysing the data that has obtained a general and comprehensive description of the actual situation. Qualitative data is data collected in the form of numbers that can be measured.

RESULTS AND DISCUSSION

In law enforcement agencies, especially in handling criminal offences committed by children with the diversion process, it is felt that it is very helpful for children, especially for children's psychology so as not to experience trauma and maintain the confidentiality of children's data so as not to become public consumption. With the aim that children can organise and live a better life after undergoing the existing legal process.

The settlement of children's cases through diversion is one of the rights obtained by children who do not need restrictions that cause a distinction or discrimination against children who commit criminal offences. The settlement of the case should prioritise the psychological condition of the child offender, so that in the process of resolving the case it is hoped that the child will not experience trauma towards the judicial process. In addition to violating Article 28B Paragraph (2) of the 1945 Constitution on the principle of non-discrimination, this diversion requirement is also not¹⁰ in accordance with the best interests of the child, where everything taken in making decisions for children should be concerned with the best interests of the child. The limitation of the diversion requirement may result in juvenile offenders who commit criminal offences with a punishment of 7 (seven) years or more must resolve the case through the court, where prison sanctions may be given to the juvenile.

¹ Dispute resolution outside the formal judicial process has been practised long before the formation of the Indonesian state. This is because the majority of Indonesians are not from urban areas and are not secular, so social values tend to focus on personal relationships

characterised by tolerance, communal solidarity and avoidance of disputes. Affected parties are known as musyawarah.⁸

Indonesia as a state of law adheres to a dualistic understanding of the implementation of criminal responsibility that separates criminal acts from the implementation of criminal responsibility. The separation according to this dualistic understanding is carried out between the actions that make up the criminal offence and the characteristics of the person who committed it. Rules regarding criminal offences are rules that determine the acts that are prohibited.

The rules on criminal offences function as a differentiator between acts prohibited in criminal law and other acts outside the category, while the rules on criminal responsibility function as a determinant of the conditions that must exist in a person so that it is valid if he is sentenced to punishment. An act can only be said to be a criminal offence if the act, in addition to containing unlawful characteristics, also contains fault, which in a broad sense can be divided into intentionality (*dolus, opzet*) and negligence (*culpa, schuld*). In criminal law, intent can be divided into three types, namely intent with intent (*opzet als oogmerk*), intent with certainty (*opzet met bewustheid van zekerheid of noodzakelijkheid*) and intent with possibility (*opzet met waarschijnlijkheidsbewustzijn*).⁹

Resolving disputes peacefully to restore the disturbed balance of society. The principle is that usually when the community has a legal problem, a deliberation process will be carried out before the problem is reported to law enforcement officials. This can be seen as an effort to restore the balance of the cosmos in society. This is in line with the concept of restorative justice mechanisms contained in the Initial Draft of the Declaration Element of the Basic Principles for the Use of Restorative Justice Programmes in Criminal Matters. Where the application of restorative justice is a process of recovery or the goal of achieving results that return to the original state of affairs.¹⁰

A child can not only be a victim of a criminal offence but can also be a perpetrator and in fact this often happens and even takes victims who are also fellow children. In order to realise

⁸Anisa Rahman, Mengenal Diversi Dalam Penyelesaian Pidana Anak, <https://www.pn-pariaman.go.id/berita/artikel/570-mengenal-diversi-dalam-penyelesaian-pidana-anak.html>. Diakses Tgl 22 April 2024.

⁹ Andry Syafrizal Tanung, Pertanggungjawaban Pidana yang Mengakibatkan Meninggalnya Orang Dalam Lingkup Rumah Tagga, FH UNPAB Vol. 5No. 5, Oktober 2017

¹⁰ Andry Syafrizal Tanjung & Jafan Fifaldi Harahap, Restorative Justice Regulations in Reforming Criminal Procedure Law, *Daengku: Journal of Humanities and Social Sciences Innovation*, Vol. 4 No. 1 (2024) <https://doi.org/10.35877/454RI.daengku2359>

justice in accordance with the mandate of the 1945 Constitution of the Republic of Indonesia, the juvenile justice system and Law No. 23 of 2002 on Child Protection were created. the juvenile justice system in Indonesia has been built with the ratification of the Convention on the Rights of the Child (CRC). Law enforcement must fulfil the rights of children which greatly affect their growth and development and this can be done with special treatment and different from adult perpetrators and in carrying out their punishment children must receive special assistance so as not to damage their mental and physical growth and development.¹¹

When a child becomes a child sex offender, there are a number of factors that may influence their behaviour and decisions. Some of the factors that may influence a child offender in this context include:

1. Experience and Trauma The child offender may have experienced trauma or bad experiences in the past that affect their behaviour. For example, they may have been a victim of sexual abuse or violence in the past, which may affect the way they interact with others.
2. Environmental Influences i.e. The environment in which the child is raised and lives can also play an important role. Factors such as an unstable family environment, poor parenting, exposure to family violence, or negative peer influence can increase a child's risk of engaging in criminal behaviour, including sexual offences.
3. Psychological Factors i.e. Some children may have mental or emotional disorders that may affect their behaviour. For example, impulse control disorders, personality disorders, or other psychological disorders may increase the risk of engaging in harmful behaviour.
4. Cognitive and Developmental Factors i.e. Children may not fully understand the consequences of their actions, or may lack the ability to control their impulses. This could be the result of an unfinished stage of cognitive development or learning difficulties.
5. Exposure to Damaging Sexual Content i.e. Children are often exposed to damaging sexual content through media, the internet, or interactions with inappropriate adults. Exposure to such damaging material can affect a child's understanding of sexuality and influence their behaviour.

¹¹Andry Syafrizal Tanjung & ,hd. Azhali Siregar, Tinjauan Yuridis Terhadap Tindak Pidana Kekerasan Yang Dilakukan Oleh Anak 9Studi Kasus Putusan No.56/Pid.Sus-Anak/2021/PN/Mdn, <https://repository.pancabudi.ac.id>

6. Lack of Sexual Education the lack of appropriate and timely sexual education can leave children confused or not understanding appropriate boundaries in sexual interactions, as well as the importance of consent and concentration in relationships.
7. Social and Cultural Factors social and cultural factors can also influence children's views on sexuality and violence. Social norms that demean women or condone sexual violence, as well as pressure to express power or dominance, can influence children's behaviour as perpetrators.¹²

All of these factors, individually and collectively, can influence the behaviour of children as perpetrators of the crime of sexual intercourse with a child. It is important to understand and address these factors holistically in prevention and rehabilitation efforts. The condition of diversion is contrary to Article 28B Paragraph (2) of the 1945 Constitution, this is because it violates the principle of nondiscrimination. The principle of nondiscrimination, which has been explained in Article 2 of ¹⁷ Law Number 23 of 2002 jis Law Number 35 of 2014 and Law Number 17 of 2016 concerning Child Protection, namely does not discriminate ¹⁸ against treatment based on ethnicity, religion, race, class, gender, ethnicity, culture and language, legal status of children, order of birth of children, and physical and/or mental conditions. A child offender who is the next generation of the nation is still at a vulnerable age so that the psychological condition of the child needs to be considered, so the diversion requirement ¹⁷ in Article 7 Paragraph (2) of the SPPA Law should not provide discrimination against child offenders.

The restriction of discrimination regarding imprisonment of less than 7 (seven) years creates a distinction towards juvenile offenders. distinction towards children who commit criminal offences, where the existence of such distinction may cause children to process their cases through the this distinction can cause the child to conduct a case settlement process through the court. The process of resolving the case through the court will process through the court will give a negative stigma to the child as a child in conflict with the law, this is feared to be This is feared to ¹⁰ have a negative impact on the mental and psychological condition of the child. mental and psychiatric conditions of the child. The settlement of cases through diversion should not be differentiated according to the offence. cases through diversion should not be differentiated according to the criminal offence, where in Article 7 Paragraph (2) of the SPPA Law, only children who commit minor offences are eligible for diversion. children who commit

¹² Prinst, Darwan. 2014, Hukum Anak di Indonesia. Citra Aditya Bakti, Bandung, hal.70

minor criminal offences, should be in any category a child offender is entitled to a case settlement process through diversion.

Diversion also changes the context of criminal punishment by introducing elements of rehabilitation, education, or other interventions that aimed at changing the offender's behaviour in a positive direction. This approach considers the public interest by attempting to address the root causes of crime and reducing the likelihood of re-offending in the future.

In conclusion, diversion plays an important role in changing the paradigm of criminal punishment from an approach that only takes into account aspects of revenge to one that focuses more on social improvement and crime prevention. This ensures that the criminal justice system does not only focus on punishment as the ultimate goal, but also on efforts to change behaviour and prevent lawlessness in society.

Based on the author's opinion on Decision Number 45/Pid.Sus-Anak/2022/Pn Mdn, the judge ruled against the defendant, namely Firmansyah Alias Firman, acquitting the child from the primair charge. By convincing legally and convincingly guilty of committing a criminal offence by deliberately inducing a child who is his girlfriend to have sexual intercourse with as in the subsidiary indictment. Therefore, the court sentenced the child to 3 years imprisonment and a fine in the amount of Rp.100,000,000.00, - (One hundred million rupiah) with the provision that if the fine is not paid, it will be replaced by undergoing vocational training for 3 (three) months at the Tanjung Morawa Social Service Children and Youth Social Institution (PSAR). So as to determine the child to remain in custody. Based on the judge's decision, the author argues that because the perpetrator is 17 years old dating his partner, the perpetrator knows good and bad actions. The perpetrator was not subject to the primair penalty because of the willingness of the victim to have sexual intercourse, which was often carried out 10 times at the victim's grandmother's house and the victim's house.

There was no coercion from the perpetrator but the perpetrator persuaded the victim by promising to take responsibility if the victim became pregnant, so the perpetrator was charged with the crime of inducement so that the victim would have sexual intercourse. Regarding sexual-related cases, restorative justice or diversion should not be applied because sexual crimes must prioritise the victim, due to the psychological and physical impact on the victim. Therefore, the author agrees with the consideration of the judge's decision.¹³

¹³ Carla Octama Orami. Ternyata Ini 5 Alasan Ada Pasangan Menikah yang Tak Ingin Punya Anak. Ternyata Ini 5 Alasan Ada Pasangan Menikah yang Tak Ingin Punya Anak | Orami. Diakses Tgl 22 April 2024.

CONCLUSIONS And SUGGESTIONS

Conclusion

1. Diversion is an alternative approach to handling criminal cases that aims to avoid prosecution through the conventional criminal justice system, especially for young offenders or for minor crimes. It emphasises rehabilitation, recovery and prevention of re-offending, while taking into account justice for victims and society.
2. The factors that cause children to become perpetrators of the crime of sexual intercourse are environmental factors, faith factors, social and cultural factors in the form of social and cultural factors can also influence children's views on sexuality and violence.

Advice

1. Criminal offences committed by children must normatively be pursued for diversion while taking into account the conditions for diversion as stipulated in Article 7 of the Law on the Juvenile Criminal Justice System. However, from the cases studied by the author, namely ¹⁶ based on the District Court Decision, namely Decision Number 45/Pid.Sus-Anak/2022/Pn Mdn, that the case did not meet the legal requirements for diversion even though the perpetrator was a child.
2. It should be related to ¹⁹ the case of children as perpetrators of the crime of child sexual intercourse ¹⁹ is inseparable from the factors behind it, parents should be able to be an example for their children and parental supervision should be increased in relation to the association of children. As well as in relation to the imposition of sanctions for children, judges should consider juridical and non-juridical aspects, especially regarding ¹⁹ the factors that motivate children to commit the crime of sexual intercourse with children without leaving the role of victims in the occurrence of criminal acts. In order to achieve justice for all parties ¹⁰ based on the philosophy of the best interests of the child, the judge's consideration must be in accordance with the applicable rules as regulated in the Law on Juvenile Justice System.

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