



COMMUNITY PARTICIPATION IN THE SETTLEMENT OF CHILDREN IN CONFLICT WITH LAW THROUGH DIVERSION BASED ON JUSTICE VALUES

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Article History: Received: 25.02.2023

Revised: 10.04.2023

Accepted: 26.05.2023

Abstract

In Law Number 11 Year 2012 on the Criminal Justice System of Children, to settle crimes committed by children uses the restorative justice method. This restorative justice system is defined as a process to involve, to enable the involvement of the wider parties in its implementation, namely the parties has in the interest of a specific violation. In Law Number 11 Year 2012 on the Criminal Justice System of the Child, the community has been involved in the implementation of diversion and restorative justice in the settlement of a criminal case. This paper aims to analyze the role of the community in the settlement of children in conflict with the law through a diversion based on justice values. This research was based on constructivism paradigm. The nature of this research was analytical descriptive that in addition to describe or to expose the subject and object of research as well as analysis of problems that have been formulated. The method used was juridical sociological legal research, which put the law as a social phenomenon. In this research consists of data obtained directly and from library materials. This research used secondary and primary data obtained through data collection methods by studying literature and field studies done by conducting interviews. The result of the research show that the community participation is highly needed in the settlement of the children's case against the law, it is done to provide justice for the children. The word "may (dapat)" in Article 93 of Law Number 11 Year 2012 The Criminal Justice System of the Child shall be mandatory, so that the community shall be involved in the settlement of cases of children in a diversion in order to better provide legal protection for the rights of the child. The settlement of child cases without the involvement of the community may be considered sufficient by presenting the family of the perpetrator and the victim's family and the investigator, but not necessarily able to provide a sense of justice for the child.

Keywords: Community Participation, Diversion, Justice Values

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DOI: 10.31838/ecb/2023.12.s3.399

1. Introduction

Children have a strategic role and have special features and traits that ensure the continuity of the existence of nation and state in the future. It cannot be denied if the child is also not free from legal issues. Children who are in conflict with the law under Article 1 paragraph (2) of Law Number 11 Year 2012 on the Criminal Justice System are children in conflict with the law, children who are victims of crime, and children who witness crime are. All of these matters are known as 'children facing the law', whether as perpetrators, victims or witnesses of a crime. Essentially children cannot protect themselves from actions that cause mental, physical, and social harm in various areas of life and livelihood. Children should be assisted by others in protecting themselves, given the circumstances and conditions especially in the implementation of the criminal justice of children which is unfamiliar in child's activities.

Conceptually, the child facing the law (children in conflict with the law), is interpreted as a person under 18 years old who faces with the criminal justice system because the child is suspected or accused of a crime. Article 1 Paragraph (3) of Law Number 11 Year 2012 on the Criminal Justice System of the Child says a child who is in conflict with the law hereinafter referred to a child who is 12 (twelve) years old and is suspected of committing a crime. The child needs to be protected from misappropriation of the applicable legislation, which causes mental, physical and social harm. Child protection in this case is called legal protection. Child protection is an important work that must be done by all elements of our country. These forms of child protection are carried out from every aspect, ranging from family coaching, social control of the child's

interaction, and proper handling through good regulations made by a country.

The high number of crimes committed by children can have an impact on the growing number of children who enter the criminal justice process. In the criminal justice process, most of the perpetrators of criminal acts are subject to detention at the State Detention Center (RUTAN) and subsequently sentenced to prison in Penal Institution (LAPAS). The number of child's in jail is still very less when compared with the number of cases of children in conflict with the law, consequently the detained child or prisoner is forced to live in one area with adult prisoners. These conditions bring adverse implications for child development. In order to avoid the above issue and for the best interests of the child, law enforcers should make efforts to settle children in conflict with the law with the approach of diversion and restorative justice, as contained in the Convention on the Rights of the Child, The Beijing Rules, regulations related to the child.

Child criminal justice processes ranges from investigations, prosecutions, courts and in running court decisions, in child penitentiaries must be undertaken by specially educated officials or at least knowing the problem of misbehaving children. The treatment during the criminal justice process of the child must pay attention to the principles of child protection and still uphold the dignity of the child without ignoring the implementation of justice. Therefore, law enforcers are not only experts in the field of law but particularly honest and wise and have broad views about the weaknesses and strengths of people and society.

One solution that can be taken in handling child crime cases is the approach of restorative justice, which is implemented by diversion way. Restorative justice is a process whereby stakeholders in a

particular breach meet together to solve the problem jointly how to resolve the consequences of a violation for the sake of the future, while diversion is a transfer of the settlement of a child's case from the criminal justice process to proceedings outside the criminal justice. Restorative justice is considered a new way of thinking/paradigm in looking at a crime committed by a child. So the role of the Police is very important in handling the problem of children dealing with the law because the handling of criminal cases initially conducted investigation by the Police, so it is expected to do the concept of diversion in handling cases involving children as the culprit. However, if the Police is unable to implement the concept of diversion, the Attorney and Judge/Court will be expected to perform the concept of diversion.

The implementation of the diversion is motivated by the desire to avoid negative effects on the life and development of the child by his involvement with the criminal justice system. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officials called discretion. In terms of discretionary power in criminal proceedings, the word discretion is often linked to the authority of the Police alone while similar authorities are associated with prosecutors known as the right to call or divert a case known as an opportunity. Related to efforts to provide protection against children in conflict with the law, the child criminal justice system should be interpreted widely, it is not only interpreted just handling children who are dealing with the law alone. However, the child criminal justice system should also be interpreted to cover the root causes of why children commit crime and prevention efforts.

This problem can be resolved if the criminal justice system uses a humanistic approach, not only the penalty imposed on

the offender must be in accordance with civilized humanitarian values, but also to raise awareness of the offender of humanitarian values and societal values exist in society. In Law Number 11 Year 2012 on the Criminal Justice System of Children, to settle crimes committed by children uses the method of restorative justice. This restorative justice is defined as a process to involve, enabling the involvement of the wider parties in its implementation, namely the parties has in the interest of a specific offense. In Law Number 11 Year 2012 on the Criminal Justice System of the Child, the community has been involved in the implementation of diversion and restorative justice in the settlement of criminal cases of children. In accordance with Article 93.

Community participation is a must in settling crimes conducted by a child, it is done to provide the sense of justice for the children. Maybe the word "may" in Article 93 of Law Number 11 Year 2012 The Criminal Justice System of the Child ought to be mandatory, so that the community shall be involved in the settlement of cases of children in a diversion in order to better provide legal protection for the rights of the child. The settlement of child cases without the involvement of the community may be considered sufficient by presenting the family of the perpetrator and the victim's family and the investigator, but not necessarily giving a sense of justice for the child.

2. Research Methods

This research was based on a constructivism paradigm that sees the truth of a relative legal reality, acting in the specific context considered relevant by social actors. Based on the description, according to EG Guba and YS Lincoln, ontology is relativism, an understanding of

reality constructed based on individual social experience locally and specifically. Epistemologically is transactional/subjective to the invented findings or investigators and the object of investigation is interacted so that the findings are created or constructed together. The methodology used hermeneutics/dialectical constructs was traced through interaction between the investigator and the object of investigation with hermeneutics techniques and dialectical exchange 'construction' is interpreted. Approach method used juridical sociological law research that put law as a social phenomenon. In such case, the law is viewed from the outer side. Therefore, in the study of socio legal, the law is always associated with social problems. Such studies, is research which focuses on the behavior of individuals or communities in relation to the law. The data analysis used was descriptive qualitative. Qualitative analysis in this case is the work done by working with data, organizing the data, sorting it into manageable units, synthesizing it, searching and finding patterns, finding what is important and what is learned, and deciding what can be told to others. Researchers are expected to analyze it by combining every problem that exists.

3. Result and Discussion

A crime can be committed by anyone not knowing the age, sex and so forth, one of them is immature person/children either as perpetrator, witness or as a victim of a crime. Children as buds, potentials and young generation successors ideals of the struggle of the nation, has a strategic role and has special features and traits that guarantee the continuity of the existence of nation and state in the future. The child is part of the young generation, they are as one of the human resources which is the potential and successor of the ideals of the

nation's struggle. They have a strategic role and has special characteristics, requires guidance and protection in order to ensure the growth and development of physical, mental and social intact, harmonious and balanced. The child has specific characteristics compared to adults and is one of the most vulnerable groups whose rights are still neglected. Therefore, the right of the child becomes important to be prioritized.

In the 1945 Constitution, Article 28B paragraph (2) states that every child has the right to survival, growth and development and is entitled to protection from violence and discrimination. The strategic role of the child as the successor to the ideals of the nation's struggle has been realized by the international community. It is as the basic philosophy of a convention that essentially emphasizes the position of the child as a human being who must get protection for his rights. This is marked by the publication of the Convention on the Rights of the Child. The ratification of this Convention on the Rights of the Child is made through Presidential Decree No. 36/1990 on the ratification of the Convention on the Rights of the Child.

In Indonesia, rules have been made that basically uphold and pay attention to the rights of children. Legislation that has been made by the Government of Indonesia, among others, Law no. 39 of 1999 on Human Rights, Law No.23 of 2002 on Child Protection and Law No.35 of the Year 2014 on Amendment of Law no. 23 of 2002 on Child Protection, Law no. 11 of 2012 on Child Criminal Justice System, Law Number 13 Year 2006 concerning Protection of Witness and Victim, Law Number 21 Year 2007 concerning the Eradication of Crime of Trafficking in Persons, Law Number 16 Year 2004 regarding the Attorney of the Republic of Indonesia, Decision Letter together with the Chief Justice of the

Supreme Court, the Attorney General, Chief of Police, Ministry of Law and Human Right, Minister of Social Affairs and the State Minister for Women's Empowerment and Child Protection of the Republic of Indonesia on the handling of children in conflict with the law on December 22, 2009, and others.

In substance, the law regulates the rights of children in the form of the right to life, the right to education, the right to basic health, the right to worship according to their religion, the right to expression, to think, to play, to recreate, to socialize, to rest and to social security. Furthermore, in the framework of the implementation of the convention, the government initiated to issue several legislation for the protection of children, such as Law Number 11 Year 2012 on Child Criminal Justice System, Law Number 39 Year 1999 on Human Rights, and Law - Law Number 23 Year 2002 regarding Child Protection, Law Number 13 Year 2006 concerning Protection of Witness and Victim, Law Number 21 Year 2007 concerning the Eradication of Crime of Trafficking in Persons, Law Number 16 Year 2004 regarding the Attorney of the Republic of Indonesia, Letter A joint decision between the Chief Justice of the Supreme Court, the Attorney General, the Chief of Police, the Minister of Law and Human Resources, and the Minister of Women's Empowerment and Child Protection of the Republic of Indonesia on the handling of children against the law on December 22, 2009 and others.

Those legislations are expected to be the basis for the implementation of child protection, especially for children who are faced with the law. Based on the above rules, every child facing the law has the right to be protected, whether physical, mental, spiritual or social. The rules are very clear that the state is very concerned and protect the rights of children. The rights of the child must be upheld by

everyone, but in its application the law enforcement often encounters obstacles or constraints both caused by internal factors and external factors.

The punishment system until now sometimes still treats the children involved as perpetrators of crime such as perpetrators of criminal acts committed by adults. The child is placed in a position as a worthy criminal to obtain the same punishment as an adult. Criminalization itself is more oriented to individual perpetrators or commonly called individual responsibility in which the offender is viewed as an individual capable of taking full responsibility for the actions he/she performs. While the child is an individual who has not been able to fully realize the actions or actions he/she has done. This is because the child is an immature individual in thinking. Therefore, by treating the child as an adult, it is feared the child will quickly imitate the treatment of those who are nearby.

In carrying out their duties, law enforcement agencies and relevant agencies/institutions need to pay attention to the principles of the Convention on the Rights of the Child and the Law on Child Protection, namely the principle of non-discrimination, the best interests of the child, the right to life, survival and respect to the child. In addition, the child is the hope of the parents, the hope of the nation and the state that will continue the development of a nation. They have also a strategic role, has special characteristics or traits that will ensure the continuity of the existence of nation and state in the future. Therefore, every child should get coaching from an early age, the child needs to get the widest opportunity to be able to grow and develop optimally, in all physical, mental and social aspects. Moreover, childhood is the period of seed sowing, the establishment of piles, the making of the foundation, which can also be called the period of character formation, personality

and the character of a human self, so that they will have the strength and ability and stand upright in life.

The settlement of a child committed crimes, the diversion way is the transfer of the settlement of a child case from the criminal justice process to proceedings outside the criminal court. The aim is to achieve peace between the victim and the child, solve the child's case outside the judicial process, prevent the child from deprivation of liberty, encourage the community to participate, and instill a sense of responsibility to the child. Efforts to prevent children from deprivation of liberty may not be guaranteed if people who present in the diversion are only perpetrators/families and victims/families and investigators. Psychological stress is inevitable because it is not only the psychologically of the child but his/her family can also be attacked. As a result, anything decided in the diversion will be easily accepted by the perpetrator/his family even though there are still many right of the child have not been accommodated. These kinds of things often happen and experienced by the child especially those from families who have no power or position.

The purpose of diversion is to achieve restorative justice within the child criminal justice system. Restorative justice emphasizes the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other concerned parties to jointly seek a fair settlement by emphasizing restoration back to the original state, rather than retaliation. The settlement of criminal cases through non-formal mechanisms is often considered more satisfactory because it is more beneficial to both parties. Penal dissemination through Diversion as one of the mechanisms outside the judiciary is often practiced and responded well to the settlement through the judicial system. This is not out of the principle of settling

the case which is fundamental to the principle of musyawarah (discussion) in Customary Law and Islamic Law.

In Customary Law, the issues can be settled through Mediation, led by the customary leader. The customary law community uses a familial settlement. Mediation outside the court is a peaceful dispute resolution process that is used by everyday society to be mediated by a third party, namely customary leaders, religious leaders, or other community leaders. Indonesian customary law as a container of traditional justice institutions also has a concept that can be described as the root of restorative justice. In Indonesia, the characteristics of customary law in each region are generally very supportive of the application of restorative justice. This can be seen from the characteristics of Indonesian customary law, views on customary violations/customs offenses as well as the model and manner of settlement offered.

In the Bajo community more prioritizes to customary law in the settlement of children's cases. The morality difference is done by an officer of moral crime in Bajo customary law, as long as the bujang (single young man/woman) only involves the custom chairman as a mediator. If married adults have done sexual crime, then one of them will be punished, the customary sanction is in Bua (exiled) from the village. While in Islamic Law, Mediation occurs in the form of Jarimah Qisas Diyat, which is actually limited to certain matters. Mediation that is not known in Modern Criminal Law is fitting to be an alternative settlement of criminal cases. Diversion essentially focuses on the direct participation of the perpetrators and victims and their families, as well as the community in the process of settling criminal cases of children. As in the Petition of PUU-XIV/2016 Juvenile Justice System to the Constitutional Court of the Republic of Indonesia. There is one

case, the petitioner is Mr. Diyono, he is a father of a child who was designated as a suspect in the case of motorcycle theft accompanied by his legal team filed a review of Law No. 8 of 1981 on the Criminal Code and Law Number 11 Year 2012 on the Judicial System Child Crimes to the Constitutional Court of the Republic of Indonesia.

The petition for judicial review of legal norms in Law Number 8 Year 1981 regarding the Criminal Procedure Code and Law Number 11 Year 2012 regarding the Criminal Justice System against the 1945 Constitution. The Decision of the Constitutional Court Number 94 / PUU-XIV / 2016 grants the applicant's petition as a whole, that Article 20 paragraph (1) and paragraph (2) and Article 82 paragraph (1) sub-paragraph d of Law Number 8 Year 1981 regarding the Criminal Procedure Code and Article 7 paragraph (2) letter a and Article 32 paragraph (2) sub-paragraph b of Law Number 11 Year 2012 regarding the Criminal Justice System of Children are contradictory to the 1945 Constitution and have no binding legal force.

According to Law no. 11 Year 2012 on the Criminal Justice System of a Child, a child that can be punished shall be 12 (twelve) years old and under 18 (eighteen) years old but this is not a 12-year-old juvenile criminal may be penalized but only sanctioned action because in this law more emphasis on restorativejustice. It is emphasize on the guidance not to retributive justice, the retaliation with the intention of the different treatment and threats set in this law, it is intended to protect and nurture the child in order to face the long future. Diversion is applied in addition to avoid children from imprisonment, also seeking to prevent children from deprivation of liberty, avoidance of children from negative stigma, and avoidance of children from retaliation, to create harmony of society by

paying attention to the principle of propriety in the treatment, the establishment of decency, and the implementation of public order.

The substance set forth in Law Number 11 Year 2012 on the Criminal Justice System of the Child, among others, concerning the placement of children who undergo the judicial process may be placed in the Institute for Special Education of Children (LPKA). The most fundamental substance in this Law is strict regulation on Restorative Justice and Diversion, it is intended to avoid and keep children away from the judicial process so as to avoid stigmatization of children facing the law and hopefully the child can return to the social environment fairly. Therefore, it is necessary participation of all parties in order to realize these things. The process should aim at the creation of Restorative Justice, both for the child and for the victim.

Restorative Justice is a diversion process that all parties involved in a particular crime jointly solve problems and create an obligation to make things better by engaging victims, children and society in a solution to reconciliation, and reassurance that is not based on retaliation. In this regard, it should be noted that criminal sanctions can be imposed on children who commit criminal acts in morality, but it should also pay attention to the legal protection of children and children criminal court. Legal protection, in this case, contains a definition of child protection under the applicable law (which regulates the Child Criminal Court) either as a suspect, defendant, convicted/inmate. Child criminal justice contains the meaning of process of examination of criminal case of child, starting from stage of investigation, prosecution, trial and penitentiary.

The essence of diversion based on restorative justice theory involves all relevant elements and elements, so that the

goals are transparency, honesty, and responsibility of each side by way of community participation in monitoring and controlling progress of child facing the law case resolution by diversion mean. The unavailability of the community monitoring function against the settlement of child facing the law cases by diversion can add to the psychological pain and pressure for the child and his family. Law enforcement officers and other parties from child-care agencies may have settled cases against children diversion, but besides, it may also arise negative stigma or the rights of child facing the law are still not protected or deprived. Hence, the objective of requiring public participation is to perform a supervisory (control) function on diversionary execution and as a counterweight.

Article 93 The UUSPPA determines as follows: "The public may participate in the protection of children from prevention to the social reintegration of children by means of ... and so forth." The word "may" in Article 93 of UUSPPA is the dilemma in the practice of implementation of diversion, depending on the situation. This article does not specify the role of the community as a duty of diversion, so it is not uncommon to find many cases of child facing the law being resolved without the involvement of the community. The implication is simply to present the families of the perpetrators and the families of the victims and investigators. The word "may" should be reconstructed into mandatory formulas, because the potential child facing the law cases are resolved without the involvement of the community, simply by involving the families of the perpetrators and the families of the victims and with the investigators. The word "may" in Article 93 of the UUSPPA does not provide legal certainty (uncertainty) and a sense of justice that is restorative justice through a diversion.

4. Conclusion

Public monitoring function is not accommodated in the settlement of child facing the law cases by diversion mean, it can add to the psychological pain and pressure for the child and his family. Law enforcement officers and other parties from child-care organizations may have settled cases against children in a diversion, but in addition, it may also arise negative stigma or the rights of child facing the law. Because the purpose of requiring the participation of the community is to perform a supervisory (control) function on diversionary execution and as a counterweight. In Article 93 the UUSPPA determines as follows: "The public may participate in the protection of children from prevention to the social reintegration of children by means of ... and so on." The word "can" in Article 93 of UUSPPA is the dilemma in the practice of the implementation of diversion, depending on the situation. This article does not specify the role of the community as an obligation in diversion so that it is not uncommon to find many children facing the law cases that are resolved without the involvement of the community. The implication is simply by presenting the families of perpetrators and families of victims and investigators. The word "may" should be reconstructed into mandatory formulas, because the potential child facing the law cases are resolved without the involvement of the community, simply by involving the families of the perpetrators and the families of the victims and with the investigators in settling the crime conducted by the child. The word "may" in Article 93 of the UUSPPA does not provide legal certainty (uncertainty) and a sense of justice that is restorative justice through a diversion.

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