

1075

by Norma Manuscript

Submission date: 15-Dec-2020 05:04PM (UTC+1030)

Submission ID: 1475564891

File name: 1075_Revisi_Koreksi_Editor_-_ENG.doc (128.5K)

Word count: 7604

Character count: 40516

DIVERSION EFFORTS FOR THE PROTECTION OF CHILDREN IN THE CHILD CRIMINAL JURISDICTION SYSTEM

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ABSTRACT

Diversion effort as a form of implementation of the Restorative Justice in the case of children in conflict with the law of The Child Criminal Justice System in Indonesia. Diversion Efforts currently can only be carried out in cases of Children in conflict with laws that threaten their crimes under 7 (seven) years and do not constitute a repeat of a criminal act, whereas in the juvenile justice system which currently requires the principle of deprivation of liberty and punishment related to the latest findings. This research uses the normative legal research method, using the law method, research method and comparative method. From this research we know that Diversion in the juvenile justice system cannot be done in every case of the child, it can only be done in the case of children who meet the requirements of a case protected under 7 (seven) and not a repeat of follow up. Not all cases of children's go through a process of diversion, children who have a conflict with the law are directly threatened with criminal punishment although there has been reconciliation between the perpetrators and the victims so that the principle of deprivation of liberty and criminalization is the latest result which is not successful. Therefore, diversification must be removed to protect children.

Keywords: Diversion, Children, Criminal Justice System

INTRODUCTION

Children are an inseparable part of the sustainability of human life and the sustainability of a nation and state. Children need to be protected from the negative impacts of rapid development, the flow of globalization in the field of communication and information, advances in science and technology, as well as changes in the style and way of life of some parents

that have brought about fundamental social changes in people's lives that greatly affect values and children's behavior; As a manifestation of the commitment of the State of Indonesia as stipulated in the 1945 Constitution of the Republic of Indonesia, formulated in Article 28 B paragraph (2), in terms of providing protection for children and upholding children's rights, the Government of the Republic of Indonesia has ratified the Convention on Rights. -The Rights of the Child (Convention on the Rights of the Child) by Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child (Convention on the Rights of the Child).

The term Naughty Child is no longer used after the enactment of Law Number 11 of 2012 concerning the Criminal Justice System for Children, so the term has changed from Naughty Children to Children Facing the Law (ABH). Currently Law Number 11 of 2012 concerning the Criminal Justice System for Children uses the term for a child who commits a criminal act as a child in conflict with the law. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System replaces Law Number 3 of 1997 concerning Juvenile Court which is no longer in accordance with the development and legal needs of society because it has not comprehensively provided protection for children who are in conflict with the law.

The most basic substance regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is firm regulation regarding Restorative Justice and Diversion. The recovery process according to the concept of Restorative Justice is through Diversion, namely the transfer or transfer of the judicial process into an alternative

process of solving criminal cases, namely through deliberation on recovery or mediation. The transfer step is made to prevent the child from further legal action and for community support, besides that the transfer aims to prevent the negative influence of the next legal action that can cause stigmatization.¹

Diversion is currently considered as a process that has been recognized internationally as the best and most effective way of resolving ⁵ cases of children in conflict with the law. This thought initially arose because children in conflict were influenced by several other factors outside of the child, such as relationships, education, family, playmates and so on. Diversion aims to achieve peace between victims and children, resolve ³⁷ cases of children outside the judicial process, prevent children from being deprived of liberty, encourage people to participate and instill a sense of responsibility in children. Diversion must be carried out at every stage ³⁰ from the level of investigation, prosecution and examination at the District Court. Diversion is said to be successful if there is an agreement, and the case can be stopped and restorative justice is achieved, whereas if the diversion is not successful then the case is continued until the child is convicted.

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 completely healthy and intelligent. Children are a gift from Allah Almighty as a candidate for the next generation of the nation who is still in a period of physical and mental development. Sometimes children experience difficult situations that make them commit illegal acts.

⁴⁹ Wagianti Soetedjo dan Melani, *Hukum Pidana Anak*, (Bandung, PT. Refika Aditama, 2017), hal. 135.

However, children who break the law are not eligible to be punished, let alone then be put in prison.²

In the imposition of punishment, although the punishment imposed on a child can be in the form of a warning or a criminal with conditions, stigmatization as a child who has served a sentence is inherent in the child who is in conflict with the law. For the sake of legal protection for children who are in conflict with the law, especially children who are in conflict with the law, by observing the principles in the Juvenile Criminal Justice System, all cases of children without exception can be carried out for diversion so that deprivation of freedom and punishment are really the last resort.

PROBLEM FORMULATION

Does the application of Diversion in the Juvenile Criminal Justice System to achieve Restorative Justice reflect the principle of deprivation of liberty and punishment as a last resort?

RESEARCH METHODS

The research method that will be used is the Normative Law Research method, with: The statute approach, which examines the diversion requirements contained in Article 7 of Law Number 11 of 2012 concerning the Child Criminal Justice System, the Case Approach Method. Approach), namely by analyzing cases related to the issues faced which have become the decision of the Lamongan District Court which has

³⁹ M. Nasir Djamil, 2015, *Anak Bukan Untuk Dihukum (Catatan Pembahasan UUU Sistem Peradilan Pidana Anak Republik Indonesia)*, PT.Sinar Grafika, Jakarta, hal.1

permanent legal force and the Comparative Approach, namely by comparing the SPPA Law with laws in other countries.

DISCUSSION

Juvenile Criminal Justice System

As ¹⁷ a manifestation of the commitment of the State of Indonesia as stipulated in the ¹⁷ 1945 Constitution of the Republic of Indonesia, formulated in Article 28 B paragraph (2), in terms of providing protection for children and upholding children's rights, the ²⁹ Government of the Republic of Indonesia has ratified the Convention on Rights. -The Rights of the Child ¹¹ (Convention on the Rights of the Child) by Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child (Convention on the Rights of the Child). The Indonesian state considers that children are a mandate and a gift from God Almighty who has the dignity and dignity of a whole human being, to protect their dignity and dignity, children have the right to special protection, especially legal protection in the judicial system.

²² order to fulfill the rights of children in conflict with the law, the government has attempted to provide legal protection for Indonesian children by issuing various laws and regulations that formulate ¹⁰ protection for children who are in conflict with the law, one of the implementations is the birth of a law. ⁶⁶ Law No. 3 of 1997 on Juvenile Court which imposes special examinations for children who have committed crimes. The law ²³ is intended to protect and nurture children who are faced with the law so that children can face their long future and provide opportunities for children ²⁵ so that through coaching their identity will be obtained to

become independent, responsible, and useful human beings. family, community, nation, and country. However, in the implementation of the Juvenile Court Law, the child is positioned as an object and the treatment of children in conflict with the law tends to harm the child. In the Juvenile Court Law only protects children as victims, while children as perpetrators are sometimes positioned the same as adult perpetrators. In addition, the Law is no longer in accordance with the legal needs in society and has not comprehensively provided special protection for children who are dealing with the law, thus there is a need for a paradigm shift.

To make a paradigm shift in the handling of children who are faced with the law based on the roles and duties of the community, government and other state institutions that are obliged and responsible for improving the welfare of the child and providing special protection to children who are in conflict with the law, so truly guarantees the protection of the best interests of children who are faced with the law as the successor of the nation so that the Indonesian government then established Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as UU SPPA) replacing Law Number 3 of 1997 concerning Children's Courts .

The SPPA Law is considered to be better than the previous law, because it provides more comprehensive protection for children who are in conflict with the law, namely protection not only for children who are criminals, but also for child victims and witnesses and children victims of criminal acts. The most basic substance in this law is strict regulation regarding Restorative Justice and Diversion which is intended to avoid

and keep children away from the judicial process so that they can avoid¹ stigmatization of children who are in conflict with the law and it is hoped that the children can return to the social environment properly. This is in accordance with the mandate that the child is a gift from Allah Almighty as a candidate for the next generation of the nation who is still in a period of physical and mental development. Sometimes children experience difficult situations that make them commit illegal acts. however, children who break the law are not eligible to be punished, let alone be put in prison.³

Thus, a paradigm shift in handling children in conflict with the law²⁷ needs to be done. Namely a paradigm shift from an emphasis on retributive justice and an emphasis on restitutive justice to an emphasis on restorative justice. The emphasis on restorative justice must be supported by the roles and duties of the community,²⁵ government and other state institutions that are obliged and responsible for improving the welfare of children and providing special protection¹⁰ to children who are in conflict with the law.

The purpose of the Juvenile Criminal Justice System is to establish a court that truly guarantees the protection of the best interests of children²¹ who are faced with the law as the successor of the nation, therefore, the participation of all parties is needed in order to make this happen. Since the judicial process in juvenile cases is arrested, detained, and tried, their guidance must be carried out by special officials who understand the problems of children. However, before entering the judicial process, law enforcers, families and the community are obliged to seek a settlement

³ M. Nasir Djamil. *Loc. Cit*, hal.1

process outside the court route, namely through Diversion based on the Restorative Justice approach.

Child protection and access to justice for children are part of the implementation of human rights values. The ⁸ principles of child protection include: non-discrimination, the best interests of children, survival, growth and development, and respect for children's opinions. Children should be seen as valuable assets of a nation and state in the future that must be protected and protected by their rights. This is because after all it is in the hands of the children that the progress of a nation will be determined. The more modern a nation should pay attention to in creating a conducive situation for the development of children in the framework of protection. The protection provided by the state for children covers various aspects of life, namely economic, socio-cultural, political, defense and legal aspects.

In accordance with the presumption of innocence, a child who is currently in the judicial process is still considered innocent until a court decision has permanent legal force, in addition to these principles there are still principles that must be implemented ⁴⁶ the Juvenile Criminal Justice System, including the ⁵ principle of the best interest for children and deprivation of liberty and punishment as a last resort.

Juvenile procedural law applies *lex specialis* from the general criminal procedural law (KUHP), so that according to Article 16, it is determined that the Criminal Procedure Code also applies in juvenile trial procedures, unless otherwise stipulated in the SPPA Law. In accordance with the presumption of innocence, a child who is currently in a judicial process is still considered innocent until a court decision has permanent

legal force. Procedure law is a formal criminal law that contains regulations governing how abstract criminal law must be enforced in a concrete manner.⁴

²⁰ In handling cases of Children, Child Victims, and/or Child Witnesses, Community Guides, Professional Social Workers and Social Welfare Workers, Investigators, Public Prosecutors, Judges, and Advocates or other legal aid providers are required to pay attention to the best interests of the Child and maintain a permanent family atmosphere. looked after. As a form of guaranteeing the protection of children's rights, investigators, public prosecutors and judges are obliged ²⁵ to provide special protection for children who are examined because of the crime they have committed in an emergency situation as well as special protection and implemented through imposition of sanctions without any weight.

In examining cases of children, ¹² child victims, and/or child witnesses ³¹ in the juvenile criminal justice process, investigators, public prosecutors, judges, community counselors, advocates or other legal aid providers and other officers are not allowed to wear a gown or official attributes. This treatment is intended so that the child does not feel afraid and scary in facing the Judge, Public Prosecutor, Investigator, Legal Counsel, Community Counselor and other officers, so as to express his feelings to the judge why he committed a crime. Besides that, it is also useful to create a family atmosphere so that it does not become a terrible event for children.⁵

⁴⁵ P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, Bandung, Sinar Baru, 1997, hal.11.

⁵ Wagianti Soetedjo dan Melani, *Loc.cit*, hal.32.

³⁶ At each level of examination, the child must be provided with legal assistance and accompanied by a social advisor or other companion in accordance with the provisions of the laws and regulations. Even at each level of examination, the victim's child or witness's child must be accompanied by parents and / or people trusted by the victim's child and / or witness's child, or social worker. In the case of parents as suspects or defendants in a case being examined, the provisions as intended above do not apply to the parents.

The special treatment of children in the SPPA Law can also be seen in the arrangement of connection cases, namely if the child commits a crime together with an adult or member of the Indonesian National Army, the child will be ⁶⁵ submitted to the Children's court, while the adult or member of the Indonesian National Army submitted to the competent court.

In maintaining the confidentiality of the identity of ⁴² children who are faced with the law, the SPPA Law mandates that the examination of cases of children is carried out in hearings that are declared closed to the public, except for reading the verdict. In every trial the Judge is obliged to order the parent/guardian or companion, advocate or other legal aid provider, and social adviser to accompany the child. if the parent/guardian and/or companion is not present, the trial will continue, but if the child is not accompanied by an advocate or other legal aid provider and/or social adviser, the trial of the child can be null and void, therefore every examination at trial must be accompanied by Advocates or other legal aid providers and/or Community Guides.

Community Guidance from the Correctional Center has the obligation to conduct research and guidance ¹ for Children in Conflict with the Law from the time they are on trial to undergoing punishment.

The Community Advisor has the obligation to make a social research report on children, because the social research report from the Community Advisor is a consideration in the Judge's decision. The judge's decision that does not consider the social research report can result in the verdict being null and void.

Before the verdict is pronounced, parents/guardians and/or assistants are given the opportunity to convey or say things that are beneficial to the child, as well as the child, the child is also given the opportunity to express his opinion. The reading of the verdict in the case of the Child is carried out in a trial which is open to the public, however, the confidentiality of the identity of the Child, Child Victim, and Child Witness must be kept secret by the mass media. The concrete form of maintaining the confidentiality of the child is like announcing the child's identity by only using initials without pictures.

As much as possible, children are protected from imprisonment, because the SPPA Law states that children cannot be deprived of their freedom, unless forced to solve the case, even though the SPPA Law also regulates the placement of children while serving imprisonment and is entitled to obtain guidance, guidance, supervision, assistance, education and training, and other rights.

⁹ Application of Diversion in the Juvenile Criminal Justice System

The Indonesian Criminal Law System has entered ⁸ a new chapter in its development. One form of reform that exists in Indonesian Criminal Law is the regulation of criminal law in the perspective of achieving justice for the improvement and recovery of conditions after criminal justice events and processes known as restorative justice ⁸ which is different from retributive justice (emphasizing justice in retaliation.) and restitutive justice (emphasizing justice in compensation). When viewed from the development of criminal law science and the nature of modern punishment, it has introduced and developed what is called the Doer-Victims Relationship approach. A new approach that has replaced the action or actor approach or "daad-dader straftecht". Legal experts have introduced a formula for justice, especially in upholding human rights, that there are 3 aspects of the approach to building a legal system in the context of modernization and legal reform, namely in terms of structure, substance and culture, all of which are feasible to run properly. integral, simultaneous and parallel.⁶

The SPPA Law was enacted and promulgated on July 30, 2012 and came into effect since 2 (two) years since it was promulgated (August 1, 2014). ¹ The most basic substance in the SPPA Law is strict regulation regarding Restorative Justice and Diversion with the aim of avoiding and keeping children away from the judicial process so that they can ¹ avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to the social environment properly.

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⁶ <https://www.mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak> diakses tanggal 16 Juni 2020;

Restorative Justice and Diversion are closely related. Restorative justice as the goal of ²⁷ the implementation of Diversion in the Juvenile Criminal Justice System. ¹⁹ Restorative Justice is a process of diversion, where all parties involved in a certain criminal act jointly solve problems and create an obligation to make things better by involving victims, children, and society in finding solutions to improve, reconcile, and reassuring that is not based on vengeance.

⁷ The concept of the restorative justice approach is an approach that focuses more on the conditions of creating justice and balance for the perpetrators of criminal acts and the victims themselves. The procedural and criminal justice mechanisms that focus on punishment are transformed into a dialogue and mediation ⁷ process to create an agreement on the settlement of criminal cases that is more just and balanced for the victim and the perpetrator.

The provisions regarding Diversion in the SPPA Law are regulated from Article 6 to Article 15. Article 15 stipulates that "the provisions regarding the guidelines for the implementation of the Diversion process, procedures, and coordination of the implementation of Diversion are regulated by a Government Regulation". However, the government regulation in question is the Government Regulation of the Republic of Indonesia Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Not Aged 12 (Twelve) Years Old and promulgated on 19 August 2015, approximately one year after the SPPA Law came into effect. Before the issuance of the ² Republic of Indonesia Government Regulation Number 65 of 2015, the Supreme Court of the Republic of Indonesia ¹⁸ issued a Supreme Court

Regulation (PERMA) Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System, to clearly regulate the procedures and stages of the diversion process set and promulgated on July 24, 2014.

Punishment for the perpetrator of the Child Crime does not then achieve justice for the victim, considering that from the other side, it still leaves its own problems that are not resolved⁹ even though the perpetrator has been punished. Seeing the principles of child protection, especially the principle of prioritizing the best interests of the child, it is necessary to process the settlement of children's cases⁹ outside the criminal mechanism or commonly known as diversion. Therefore, Diversion must be carried out at every level of examination by the Investigator, the Public Prosecutor. However, the case of the child must meet the requirements to be able to do diversion in accordance with Article 7 of the SPPA Law, namely: threatened with imprisonment of less than 7 (seven) years; and it is not a repetition of a criminal act if it does not meet the requirements, then the case for the Child cannot be carried out by Diversion.

³⁰ accordance with the SPPA Law, Diversion is carried out by deliberation by¹⁵ involving children and their parents / guardians, victims and / or their parents / guardians, community counselors, professional social workers, representatives and other involved parties to reach a diversion agreement through a justice approach restorative. The deliberation can also involve Social Welfare Workers and the Community. Mediation or dialogue or deliberation as an integral part of diversion to achieve restorative justice. Deliberations are held in a family atmosphere, sincere and there should be no coercion and must pay⁴⁰ attention to the

interests of the victims, the interests of victims are the rights of victims or child victims must be considered proportionally. The welfare of the child and the responsibility of the child must also be considered in a way that the child is still given his rights, but there is still guidance for his mistakes so that the child is not free from responsibility for implementing the Diversion agreement.

Diversion's success is expected because with the success of diversion restorative justice is realized. Diversion's success is marked by diversion deals. A diversion agreement can take the form of a settlement with or without compensation, return to the parent / guardian, participation in education or training at educational institutions or LPKS for a maximum of 3 (three) months or community service.

The Diversion Agreement can also be made without the consent of the victim and / or the victim's family, if the criminal act in the form of a violation, minor crime, crime without victim or the value of the victim's loss is not more than the local provincial minimum wage. This is done by the investigator together with the child and / or their family, and the social advisor and can involve community leaders.

Restorative justice is realized if the diversion is successful and the agreement has been fully implemented so that the case of the Child can be stopped. Termination of cases of children can be done at any level.

With the success of this diversion, children who are faced with the law will avoid stigmatization and children can return to the social environment naturally. The success factor of Diversion is the willingness to agree between the perpetrator and the victim and has implemented the agreement, while the factors that affect the success of Diversion depend on

the victim, if the victim does not agree to make peace. The victim or the victim's family does not agree to settle the case by means of Diversion, because they still think that punishment is retribution for the wrong that has been done.

In the SPPA Law, not all cases of children can be diversified. The SPPA Law still gives priority to the diversion of the children's case. the higher the priority of diversion towards the lower the threat of punishment and the younger the age of the child. Diversion is not intended to be carried out against perpetrators of serious criminal acts, for example murder, rape, drug trafficking, and terrorism, who are punishable by 7 (seven) years of punishment and children who have committed a second criminal offense.

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Restorative Justice in the Juvenile Criminal Justice System

In principle, criminal acts are the responsibility of the child himself, but as much as possible in providing protection to ¹⁴ children who are in conflict with the law, there are efforts to avoid the child from the judicial process and prevent the child from being punished and seek Diversion and Restorative Justice steps, because the child commits an offense. law there are many factors that influence it. The child's behavior deviations or illegal acts committed by the child are caused by, among others, factors outside of the child. To find out what factors encourage children to commit criminal acts, the motivation is necessary. According to the Big Indonesian Dictionary, what is meant by "motivation" is an impulse that arises in a person consciously or unconsciously to do a certain action. Motivation is also often defined as the efforts that cause a certain person

or group to be moved to do an action because they want to achieve the goal they want or get satisfaction with their actions.

Factors that can affect children's motivation include a tough social environment, a school environment that is formality, the attitudes of parents who are increasingly permissive of moral values, and the intensity of communication that individuals no longer pursue their skills and devote themselves totally to the world of work, loss of public space for children's expression, the extraordinary influence of mass media, especially television, into the private space and indoctrinating the teachings of violence through films, soap operas, reality shows, news broadcasts, and other shows, loss of role models for teenagers so that they look for role models who are most accessible, or even have no role models at all.

By understanding motivation in children, it becomes clear that the position of children, even though they are the offender of delinquency, is actually a victim. Victims of adult perpetrators, government and state policies, as well as the socio-cultural environment in schools and communities built by parents, because the perpetrator is a victim becomes unfair when he has to receive punishment from the judicial system that merely cornered him.⁷

From 2011 to 2019, the number of cases of children dealing with the law reported to KPAI reached 11,492 cases, much higher than the case reports of children entangled in health problems and narcotics (2,820 cases), pornography and cybercrime (3,323 cases), as well as trafficking and exploitation (2,156 cases). "Maybe if it's cyber because it's already like

this. So the children who are digital victims are very high. Children are exposed to pornography, online games are also quite high, so it's natural that the numbers have shot up," said KPAI Commissioner Retno Listyarti. When examined, the cases of children facing the law because they are perpetrators of sexual violence tend to jump sharply. In 2011, there were 123 child sexual offenders. This number rose to 561 cases in 2014, then dropped to 157 cases in 2016, and in mid-January to May 2019, the number of cases of children facing the law as perpetrators of sexual violence reached 102 cases. Apart from cases of sexual violence committed by children, cases of physical and psychological abuse committed by children have also quite a lot of attention. According to KPAI data, reports of cases of children facing the law for being perpetrators of physical and psychological violence reached 140 cases in 2018. "We believe that in 2020 it will still be the same," said KPAI Commissioner Retno Listyarti.⁸

The SPPA Law has brought changes in the regulation of child crime in Indonesia. As stated in Article 5 Paragraph (1) of the SPPA Law, it is explained that the juvenile criminal justice system must prioritize a restorative justice approach. The SPPA Law which prioritizes restorative justice has replaced retributive justice which is considered irrelevant.⁹

Diversion is an important thing regulated by the SPPA Law, because the goal is to achieve peace between victims and children, resolve child

⁸ ¹⁸ http://www.gresnews.com/berita/isu_terkini/117602-kasus-anak-berhadapan-dengan-hukum-terbanyak-dilaporkan-ke-kpai/, diakses tanggal 14 Juli 2020, jam 13.09 Wib.

⁹ ¹³ Ridwan Mansyur, "Keadilan Restoratif Sebagai Tujuan Pelaksanaan Diversi Pada Sistem Peradilan Pidana Anak", <https://www.mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak>, diakses pada tanggal 3 Juni pukul 15.50 WIB

cases outside the judicial process, prevent children from being deprived of freedom, encourage the community to participate, and instill a sense of responsibility in children.¹⁰

In the process of enforcing child criminal law, investigators, public prosecutors and judges in seeking diversion must consider the categories of criminal acts, the age of the child, the results of social research from Bapas, and support from the family and community environment. Moreover, a diversion agreement occurs when the consent of the victim and / or the victim's family and the willingness of the child and his family has been obtained, this shows that in the implementation of diversion there must be a friendly discussion between the child and the victim ³¹ with the aim of achieving the best interests of the child while still paying attention to justice. for the victim. However, if the diversion fails, the stages of solving children's cases will be continued in accordance with the criminal justice process. It can be said that this diversion provides an alternative for law enforcement officials in solving juvenile cases without having to go through a criminal justice process to realize restorative justice.

From the data on children's cases examined by the Lamongan District Court in 2018-2019 a total of 32 (thirty two) cases. Of these, there were 5 (five) cases of children that had been successfully resolved through diversion efforts, while the rest were resolved through the criminal justice process. Besides that, there were also several cases of children that were successfully carried out by diversion by investigators, public prosecutors

³⁵ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*, Jakarta: Kencana Prenada Media Group, 2008, Edisi Pertama, Cetakan ke-1, hal 23

and judges who were asked for their decisions at the Lamongan District Court in the period 2018 to 2019 totaling approximately 36 (thirty six) cases.¹¹ From these data it is known that investigators, public prosecutors and judges have implemented diversion well so that ²¹children in conflict with the law are not processed through criminal justice and prioritize the ¹²principle of the best interests of the child while still considering justice for victims and their families so that restorative justice can be realized, however Out of the 36 (thirty six) cases of children that were successfully attempted to be diversified, there were 32 (thirty two) cases of children that were resolved through the criminal justice process. This shows that not all children's cases are resolved through diversion because there are still children's cases that are resolved through criminal justice and end in convictions, so that restorative justice is not realized as the objective of the SPPA Law.

Deprivation of Independence and Criminalization as a Last Effort

Diversion is an effort of restorative justice, so it is hoped that all cases of children can go through Diversion efforts. From the data on the cases of Children in the Lamongan District Court above, there are several cases that Diversi cannot carry out on the grounds that the child's case does not meet the requirements as Article 7 of the SPPA Law. So the question arises if the child's case does not meet the requirements of Article 7 of the SPPA Law, but between the child and the victim or the victim's family there has been peace, because there are several cases in the Lamongan District Court that do not meet the requirements for Diversion,

¹¹ http://sipp.pn-lamongan.go.id/list_perkara ⁵⁸ (Diakses pada tanggal 29 Mei 2020 pukul 14.05 WIB)

but there has been peace between the perpetrator's children with the victim, namely case: Case Number: 1 / Pid.Sus-Anak / 2018 / PN Lmg¹², Case Number: 12/Pid.Sus-Anak/2019/PN Lmg.¹³

From the data on cases of children in the Lamongan District Court above, there were also cases of children who were without victims, such as drug cases. This case cannot be carried out by Diversi because the criminal threat is over 7 (seven) years, ⁶⁴ such as case number: 2 / Pid.Sus-Anak / 2020 / PN Lmg.¹⁴ Children like this are not only the perpetrators, but also the children as victims.

Based on the 3 (three) verdicts in the case of the child in the Lamongan District Court above, the researcher assessed that in essence the child did not commit deviant behavior. If the child turns out to be engaging in deviant behavior, including acts that are against the law, it means that the child's mental status needs to be evaluated. Especially if the child commits a criminal act which is punishable by imprisonment of more than 7 (seven) years and is considered a serious crime, then the child concerned needs to self-reflect and behave well in the community around the child.

Self-evaluation and introspection for such children is given in diversion. However, the opportunity for him to evaluate and introspect himself through diversion is limited by the limitation of the requirements for diversion in Article 7 Paragraph (2) of the SPPA Law and Article 9

¹² Putusan Perkara Pidana Anak Pengadilan Negeri Lamongan Nomor: 1/Pid.Sus-Anak/2018/PN Lmg, tanggal 5 Februari 2018

¹³ Putusan Perkara Pidana Anak Pengadilan Negeri Lamongan Nomor: 12/Pid.Sus-Anak/2019/PN Lmg, tanggal 16 Desember 2019

¹⁴ Putusan Perkara Pidana Anak Pengadilan Negeri Lamongan Nomor: 2/Pid.Sus-Anak/2020/PN Lm, tanggal 9 Maret 2020

Paragraph (2) of the SPPA Law. Including that diversion is mandatory if there is an agreement between the perpetrator and the victim, this shows that diversion will be carried out by law enforcement officials if the parties agree. However, if the parties do not agree to diversify, law enforcement officials will not carry out the diversion. The diversion arrangement in the SPPA Law is an optional effort, because the obligations of law enforcement officials are still the formal criminal justice process.¹⁵ It would be more appropriate if the SPPA Law stipulates that diversion must be implemented without exception, while the formal criminal justice process will be pursued if the implementation of diversion does not meet an agreement between the parties.

As a manifestation of the restorative justice echoed in the SPPA Law, efforts should first be made for all criminal acts committed by children outside of formal criminal justice, namely through diversion by way of deliberation involving parties who are victims and children as perpetrators of criminal acts accompanied by their respective families, and attended by other parties mandated by the SPPA Law, such as Community Advisors, Social Workers, and community leaders.

The implementation of diversion in Indonesia is different from other countries, such as the Philippines. In the Philippines, all cases of children are carried out by diversion.¹⁶ The Philippines in its legal regulations can balance the interests of children as perpetrators and children as victims in a balanced manner. This means that apart from thinking about the interests of the victims, the State of the Philippines also thinks about the

¹⁵ Rr. Putri A. Priamsari, "Mencari Hukum Yang Berkeadilan Bagi Anak Melalui Diversi", Jurnal Law Reform, Vol.14, No. 2, 2018, hal 228

¹⁶ Ni Putu Sri Utari, "Diskriminasi Penerapan Diversi Terhadap Anak Yang Melakukan Tindak Pidana". Fakultas Hukum Universitas Udayana, hal 9

interests of the perpetrators, because in whatever position they are still human beings who are categorized as children who have special characters who must be given protection. In Indonesia, diversion can only be attempted for criminal offenses with a threat of less than 7 (seven) years and are not recidivists.¹⁷

As explained above, the Philippines applies a diversion process to all types of criminal acts committed by children, meaning that in every settlement of ²cases of children in conflict with the law, it always involves the perpetrator, the victim, the family of the perpetrator and the victim and other interested parties. In this case, to collectively seek a settlement and agreement without being limited by the type or criminal threat being committed. The Philippines state truly provides protection that prioritizes welfare ⁶³for the best interests of the child, in fact it ⁶²is in line with the principles in the formation of the Juvenile Justice System in Article 2 of the SPPA Law which concerns: protection, justice, non-discrimination, the best interests of children, respect for children's opinions, survival and development of children, fostering and guiding children, proportional, ²²privatization of liberty and punishment as a last resort, and avoidance of retaliation, while the implementation of diversion in Indonesia is seen to only protect children who commit criminal acts in certain acts because it is true in the explanation of Article 9 Paragraph (1) The SPPA Law explains that diversion is not intended to be carried out against perpetrators of serious crimes, for example murder, rape, drug trafficking, and terrorism who are punishable by crimes over 7 (seven) years.

¹⁷ Ibid, hal.12

Considering that the diversion effort itself does not necessarily reach an agreement between the parties, because diversion can be successful and may fail, depending on the course of the deliberations carried out by the parties. If the diversion process is successful, then the case settlement process outside the criminal court has realized restorative justice, but when the diversion process fails, in the end the settlement of juvenile cases is continued through formal criminal justice. Researchers assess that diversion is the right of every child so it does not need to be limited. Children who have to be caught in cases of narcotics, terrorism, rape, and other serious crimes also have the right to get access to diversion. At the very least, all ¹² children in conflict with the law ⁴¹ are given the opportunity to improve themselves and take responsibility for their actions, so that restrictions on the requirements for implementing diversion as in Article 7 ⁵⁶ Paragraph (2) of the SPPA Law and Article 9 Paragraph (2) of the SPPA Law need to be made other arrangements as an alternative to carry out diversion in advance of all types of criminal acts committed by children. Currently, diversion is a process of solving children's cases that has been recognized internationally as the best and most effective way of resolving cases.¹⁸

Article 2 of the SPPA Law states 10 (ten) principles ⁴⁴ for the implementation of a juvenile criminal justice system, including the principle of non-discrimination, ⁵ the principle of best interest for children and the principle of deprivation of liberty and punishment as a last resort. Based on these three principles, in law enforcement there should be no different treatment for the legal status of children and all criminal acts

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¹⁸ Marlina, *Pengantar Konsep Diversi dan Restorative Justice dalam Hukum Pidana*, Medan: USU Press, 2010, hal 61

committed by children should be attempted to be resolved through diversion.

If you look at the implementation of the diversion process against ¹⁶ children who are in conflict with the law, there is still a categorization and inconsistency between Article 2 of the SPPA Law and Article 7 of the SPPA Law regarding diversion arrangements with the ² principle of non-discrimination, the principle of best interest for children and the principle of deprivation of liberty and punishment as a last resort, apart There is also a limitation on the implementation of diversion as in Article 9 Paragraph (2) of the SPPA Law which states, "A diversion agreement must obtain the consent of the victim and / or the victim's family and the willingness of the child and his / her family, except for: Criminal acts in the form of violations; Minor criminal offense; Crime without victims; or The value of the victim's loss is not more than the local provincial minimum wage."

This means that for criminal acts except those excluded in that article, the obligation to be diversified only extends to the endeavor by law enforcers at each level of examination. Diversion is a must to be pursued, but regarding the implementation whether diversion will be taken or not, it depends on the agreement of the perpetrator and the victim. In this case, it can be seen that diversion in principle is mandatory, but must be limited.

From the comparative data between the State of Indonesia and the State of the Philippines, supported by several legal instruments regulating the principle of deprivation of liberty and punishment as a last resort, what is done by the Philippines is that every child case is carried out by

the Diversion effort, reflecting the deprivation of freedom and punishment really as a last resort.

CLOSING

Conclusion

The SPPA Law explicitly regulates diversion, with the aim of avoiding and keeping children away from the judicial process so as ¹ to avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to the social environment naturally. The ⁹ application of Diversion in the Juvenile Criminal Justice System cannot be done in all cases of children. The application of Diversion can only be carried out in cases of children whose penalties are below 7 (seven years) or are not repetition of the crime. Restorative Justice is a diversion. If the Child's case meets the requirements for Diversion, the hope of restorative justice can be realized, namely by the success of a Diversion. Sometimes a child case does not meet the requirements for diversion in accordance with the SPPA Law, even though the child case leads to restorative justice because the child perpetrator and the victim have received a fair settlement by making peace and can recover to normal. By not passing the Diversion effort, the child is threatened with punishment so that it is not in accordance with the Principle of Deprivation of Independence and punishment as a last resort, because there are efforts that should be done or pursued, namely Diversion but not because there are restrictions on Diversion in ⁵ cases of Children in accordance with Article 7 of the Law SPPA. If the State of Indonesia does as has been done by the Philippines,

namely Diversion is applied to every child case, then deprivation of liberty and punishment are really the last resort..

Recommendation

It is recommended that the application of Diversion in the case of a Child can be done in every case of a Child, there is no priority for Diversion, does not look at the level of the criminal threat or the repetition of the criminal act of the Child is high or low. Diversion that is carried out still takes into account the interests of the victims, because there is no success without the consent or agreement with the victims. If the child's act is committed without a victim (such as a drug case), the government can form an integrated team to consider the child's actions, whether a restorative justice approach can be used, because the child who is a criminal offender is also a victim of his / her environment. Restorative Justice by means of Diversion so that it is applied to every child, so that the Principle of Deprivation of Independence and Criminalization as a last resort is really a last resort, because it has gone through Diversion. If the Diversion effort is not passed, then the deprivation of freedom and punishment will not be the last resort because there are still restrictions on Diversion. So, the Researcher proposes that the Diversion requirements in Article 7 of the SPPA Law be removed, so that Diversion can be carried out in every child case.

Bibliography

Books

- ³⁸ Arief, Barda Nawawi. 2008. *Bunga Rampai Kebijakan Hukum Pidana: (Perkembangan Penyusunan Konsep KUHP Baru)*. Jakarta: Kencana Prenada Media Group.
- ¹⁴ Djamil, M. Nasir. 2015. *Anak Bukan Untuk Dihukum (Catatan Pembahasan UU Sistem Peradilan Pidana Anak Republik Indonesia)*. Jakarta: PT. Sinar Grafika.
- ² Supeno, Hadi, 2010, *Kriminalisasi Anak, Tawaran Gagasan Radikal Peradilan Anak Tanpa Pemidanaan*, Jakarta, PT. Gramedia.
- ⁵¹ Harahap, Yahya. 2006. *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan*.²⁶ Jakarta: Sinar Grafika.
- Huda, Chairul. 2006. *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, Kencana, Jakarta.
- ⁵⁵ Lamintang, P.A.F. 1984. *Dasar-Dasar Hukum Pidana Indonesia*. Bandung: Sinar Baru.
- ²⁷ Marlina. 2010. *Pengantar Konsep Diversi dan Restorative Justice Dalam Hukum Pidana*. Medan: USU Press.
- ² Sianturi, S.R. 1986. *Asas-asas Hukum Pidana di Indonesia dan Penerapannya*, Alumni AHAEM-PTHAEM, Jakarta.
- ²⁸ Soetedjo, Wagianti dan Melani. 2017. *Hukum Pidana Anak*. Bandung: PT. Refika Aditama.
- Wahyudi, Setya. 2011. *Implementasi Ide Diversi Dalam Pembaruan Sistem Peradilan Pidana Anak di Indonesia*. Yogyakarta: Genta Publishing.

Regulation

- ¹³ Undang-Undang Nomor 1 Tahun 1946 Tentang Peraturan Hukum Pidana (Kitab Undang-Undang Hukum Pidana).
- ³ Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 tentang Hak Asasi Manusia. (Lembaran Negara Republik Indonesia Tahun 1999 Nomor 165).

Undang-Undang Republik Indonesia Nomor 35 Tahun 2009 Tentang Narkotika (Lembaran Negara Republik Indonesia Tahun 2009 Nomor 143).

Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak (Lembaran Negara Republik Indonesia Tahun 2012 Nomor 153).

Undang-Undang Nomor 35 Tahun 2014 Tentang ²Perubahan Atas Uu Nomor 23 Tahun 2002 Tentang Perlindungan Anak (Lembaran Negara Republik Indonesia Tahun 2014 Nomor 297)

Keputusan Presiden Republik Indonesia Nomor 36 Tahun 1990 Tentang ⁵⁰Pengesahan Konvensi Tentang Hak-Hak Anak (*Convention On The Rights Of The Child*)

Journal

Aprilianda, N. (2012). ⁶Implikasi Yuridis Dari Ketentuan Diversi Dalam Instrumen Internasional Anak Dalam Hukum Anak di Indonesia. *Arena Hukum, Vol 6-No 1*.

Fithri, B.S., et.al. (2013). ⁵Asas Ultimum Remedium Terhadap Anak Yang Berkonflik Dengan Hukum Dalam Rangka Perlindungan Anak. *USU Law Journal, Vol II-No 2*.

⁶Priamsari, Rr.P.A. (2018). Mencari Hukum Yang Berkeadilan Bagi Anak Melalui Diversi. *Jurnal Law Reform, Vol 14-No 2*.

Utari, N.P.S. (2018). Diskriminasi ⁵⁴Penerapan Diversi Terhadap Anak Yang Melakukan Tindak Pidana. *Jurnal Fakultas Hukum Universitas Udayana*.

Internet

<https://media.neliti.com/media/publications/210190-kajian-yuridis-sistem-pemidanaan-edukasi.pdf>

⁵³<https://icjr.or.id/anak-masih-berpotensi-masuk-rumah-tahanan/>

http://sipp.pn-lamongan.go.id/list_perkara

³⁴ <https://www.mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak>

<https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

⁶¹ <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

³³ https://www.unodc.org/pdf/criminal_justice/United_Nations_Rules_for_the_Protection_of_Juveniles_Deprived_of_their_Liberty.pdf

Court Decision

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Putusan Perkara Pidana Anak ⁴ Pengadilan Negeri Lamongan Nomor: 12/Pid.Sus-Anak/2019/PN Lmg, tanggal 16 Desember 2019.

Putusan Perkara Pidana Anak ⁴ Pengadilan Negeri Lamongan Nomor: 2/Pid.Sus-Anak/2020/PN Lm, tanggal 9 Maret 2020.

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