

The Nature of Diversity against Criminal Acts Conducted by Children: Study of Gorontalo Province

Robby Waluyo Amu¹, Mulyati Pawennei², Nasrullah Arsyad² & Satri Hasyim²
Doctor of Law, Post Graduate Universitas Muslim Indonesia
Faculty of Law, Universitas Muslim Indonesia

ABSTRACT

This study aims to find out in depth, analyze, explain and find the nature of the best diversion for children in criminal cases committed by children in the jurisdiction of Gorontalo. This type of research is empirical juridical research with an emphasis on juridical facts in the field. That is legal research based on the fact that researchers get in accordance with existing data in the field. Then the researcher manages the data by using a descriptive qualitative analysis approach that is describing the research findings data in the form of sentences in the form of statements or statements from respondents in accordance with the reality found in the field. The results showed that the nature of the implementation of diversion in criminal cases committed by children namely diversion emphasizes recovery as in the original situation, motivated by the desire to avoid the stigma of children as perpetrators of crime and avoid negative effects on the soul and development of the child in his involvement in the system criminal justice. Implementation of diversion in the jurisdiction of Gorontalo province has not been effective because there are still many cases of children, handled in formal procedures in other words failing or not implementing diversion. Factors that influence the implementation of diversion in the case of children in Gorontalo are: the substance of the law itself, the legal structure of the human resources of the apparatus, the factor of facilities and infrastructures, the factors of support and cooperation between institutions, the factors of victims / families of victims, and cultural factors law / legal awareness of the community.

KEYWORDS: Diversity, Criminal Act, Children

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I. INTRODUCTION

Children are gifts from God Almighty that must be properly guarded against the womb, then born into the earth, until they grow into adult humans. Children who are well cared for are expected to be the next generation of parents in the next life. As the Word of Allah Subhanahu Wa Ta'ala in the holy book Al-Qur'an Surat At-Tahriim verse 6 "O you who believe, protect yourself and your family from the fires of hell whose fuel is human and stone".

The fifth precept of Pancasila which reads "Social Justice for All Indonesian People" is a guideline for the Indonesian Nation. Especially the Government of the Republic of Indonesia in compiling every regulation and policy so that it always leads to the welfare of all its people. This includes the Government is obliged to make regulations and policies aimed at realizing Indonesian Children as the next generation of the nation that is reliable and independent and able to face competition in their lives.

In the constitution of the 1945 Constitution of the Republic of Indonesia (1945) 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 consequence of the provisions of Article 28B of the 1945 Constitution is that the Government needs to follow up with making policies aimed at protecting children. The government policy was then realized by making Law Number 11 of 2012 concerning the Juvenile Justice System[1]. This law is a substitute for Law Number 3 of 1997 concerning Juvenile Court, which is declared no longer valid. UU SPPA is made with the aim of establishing a judiciary that truly guarantees the best interests of protection of children who are dealing with the law, especially children who are in conflict with the law as the successor to the nation.

Internationally it is desired that the objective of the administration of the juvenile justice system is to prioritize the goals for the welfare of children. This is as confirmed in United Nations regulations, in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ)* or *The Beijing Rules*, that the purpose of juvenile justice (*Aims of Juvenile Justice*), the translation is as follows:

"Criminal justice system for children/adolescents will prioritize adolescent welfare and ensure that any reaction to juvenile offenders will always be commensurate with the conditions both for their offenders and violations of the law ".

Thus, the purpose of the juvenile justice system is to advance child welfare and pay attention to the principle of proportionality. The aim of advancing child welfare is a major focus, meaning avoiding the use of criminal sanctions that are merely punitive. The purpose of the principle is proportional because it curbs the use of sanctions, most of which are expressed in terms of retribution that is commensurate with the severity of violations of the law. But also pay attention to the consideration of his personal circumstances.

In dealing with children who are in conflict with the law, it must always pay attention to the conditions of children who are different from adults. The nature of the child as a person who is still unstable, the future of the child as an asset of the nation, and the position of the child in a society that still needs protection can be used as a basis for finding alternative solutions how to prevent children from a formal criminal justice system, placing children in prison, and stigmatization against the position of the child as a convict.

The purpose of the implementation of the juvenile justice system is not merely aimed at imposing criminal sanctions on children who commit crimes, but rather is focused on the responsibility of the perpetrators to victims of crime, for the welfare of the child concerned, without reducing the attention of the interests of the community.

One solution that can be taken in handling cases of child crime is the approach *restorative justice*, which is carried out by diversion. *Restorative justice* is a settlement process carried out outside the criminal justice system (*Criminal Justice System*) by involving victims, perpetrators, victims' families and perpetrators, the community and parties with an interest in a criminal act that occurs to reach agreement and settlement. *Restorative justice* is considered a new way of thinking/paradigm in viewing a crime committed by someone.

Restorative Justice is implemented in UU SPPA, which upholds the dignity of children. The application of *Restorative Justice* to criminal acts of theft by children is a very interesting theory to be studied and investigated because, in addition to discussing justice, *Restorative Justice* also makes a balanced justice system because it can provide protection and respect as well as interests between the victim and the conflicting perpetrators.

In *restorative justice*, the method used is a deliberation on recovery by involving victims and perpetrators along with their families, plus community representatives who are expected to be able to represent the environment where the criminal act with the child offender occurred. With the support of the local environment to solve problems outside the juvenile justice system, it is expected to produce decisions that are not punitive in nature, but still prioritize the interests and responsibilities of the child who committed the crime, victims and the community. Law enforcers in UU SPPA include Investigators, Public Prosecutors, Judges and Correctional Institutions.

In Article 5 UU SPPA regulates as follows: juvenile

- (1) The Justice system must prioritize the Restorative Justice approach.
- (2) The juvenile justice system as referred to in paragraph (1) includes:
 - a. the investigation and prosecution of criminal offences of children which are carried out in accordance with the provisions of the legislation, unless otherwise stipulated in this Law;
 - b. Child trials conducted by courts in the general court environment; and
 - c. guidance, guidance, supervision, and / or assistance during the criminal implementation process or action and after serving a criminal or action.
- (3) In the Child Criminal Justice System as referred to in paragraph (2) letter a and letter b, diversity must be sought.

There is no further explanation about Diversion in UU SPPA, but in the Academic Paper, the UU SPPA draft stated that Diversion is a diversion of the settlement of cases of children suspected of committing certain criminal acts from formal criminal processes to the peaceful settlement between suspects or defendants or criminal offenders with victims facilitated by family and/or community, child social counsellors, police, prosecutors, or judges.

Diversity in essence also has a goal so that children avoid the negative impact of punishment. Diversion also has the essence of ensuring that children grow and develop both physically and mentally. This it can be said that basically diversion has relevance to the purpose of child criminalization. UU SPPA prioritizes the settlement of children who are in conflict with the law handling resolutions in restorative justice, namely the settlement of cases involving the perpetrators, victims, the families of the perpetrators/victims, and other parties involved to jointly seek a fair solution by emphasizing recovery back to the original condition.

II. METHODOLOGY

type of research is empirical juridical research with an emphasis on juridical facts in the field. That is legal research based on the fact that researchers get in accordance with existing data in the field. Then the researcher manages the data by using a descriptive qualitative analysis approach that is describing the research findings data in the form of sentences in the form of information or statements from respondents in accordance with the reality found in the field.

Furthermore, this research is descriptive, usually also called *descriptive research or taxonomic research*. Descriptive research is research that describes the phenomenon of the object of research, in this study, data analysis is not out of the scope of the sample. Deductive, based on theories or concepts that are generally applied to explain a set of data, or show a comparison or relationship of a set of data with another set of data.[2]

III. DISCUSSION

A. The Nature of Diversity Against Criminal Cases committed by Children

Since it has always been recognized by various international circles that children also have a tendency to be involved in committing criminal acts like adults in general, this has led to a debate about the best way to deal with criminal problems that are done by children. Settling child cases through diversion is an internationally recognized process, believed to be the best and most effective way of dealing with children in conflict with the law, this is clearly regulated in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Standard Rules UN Minimum Regarding the Administration of Justice for Children) or known as the *Beijing Rules*. Interventions against children in conflict with the law are very broad and varied, but most places more emphasis on detention and punishment regardless of how mild the offence or crime has been committed or how young the child is.

Restorative Justice or often translated as restorative justice is a model of approach that appears in efforts to resolve criminal cases. Different from the approach used in the conventional criminal justice system in general, this approach emphasizes the direct participation of perpetrators, victims and the community in the process of resolving criminal cases.

Al Wisnubroto and G. Widiartana stated that restorative justice is characterized by several prepositions, as follows:[3]

- a. Crime is a conflict between individuals that results in harm to victims, the community and the perpetrators themselves.
- b. The objective to be achieved from the criminal justice process is to reconcile between the parties while repairing the losses caused by crime.
- c. The criminal justice process must be able to facilitate the active participation of victims, violators and the public. The criminal justice system should not be dominated by the state by putting aside the others. As a form of implementing restorative justice in handling criminal cases, the term mediation of penal or *Mediation in Criminal Cases* or *Mediation in Penal Matters* (English), *Star Bemiddeling* (Dutch) and *Der AubergerichlicheTatausgleich* (Germany). Mediation is a problem-solving negotiation process where an impartial external parties (*as impartial*) in cooperation with the parties to find common ground. Mediation itself is usually carried out in solving civil cases. Nevertheless, in its development mediation was also integrated in criminal cases.

In mediation Generally known by third parties, these third parties are referred to as mediators, the task of the Mediator is not authorized to decide disputes but only helps the parties to resolve the problems authorized by them.[4]

Penal mediation can be used to handle cases involving adults or children. This model can be applied in all criminal cases and is limited to certain cases such as crimes committed by children, minor crimes, beginners. Penal mediation is expected to reduce the accumulation of cases, reduce the burden of costs, is simple and the time required is relatively short. And provide broad access to the parties to obtain justice. Penal mediation can make perpetrators more responsible, avoid marginalization and negative public stigma. In addition, the victim can hear the perpetrator's reasons for taking his actions, help the offender whenever possible, communicate with the offender, ensure the offender does not repeat his actions.[5]

In Indonesia, the practice of penal mediation in criminal offences involving children is referred to as diversion. According to Henry Campbell Black, the diversion is *a disposition of criminal defendant either before to after adjudication of guilt in the court direct the defendant to participate in a work educate national program as part of probation*. Bynum and Thompson define diversion as *an attempt to divert or channel out, youthful offenders from the juvenile justice system*. The Child Criminal Justice System Law states that diversion is a diversion of the settlement of cases of children from criminal justice processes to processes outside of criminal justice. In the *United Nations Minimum Rules for the Administration of Juvenile Justice*, it is stated that diversion is a process of delegating children in conflict with the law from the criminal justice system to an informal system such as returning to social institutions, both government and private. This action is carried out

to face the negative effects on the soul and child development.[6] In the context of restorative justice, diversion is an alternative to the current criminal justice system. Even though the community must be based on law, there must be flexible to adjust to the complexity of the legal problems faced today.

According to Levine, the concept of diversion began with the establishment of 19th-century juvenile justice aimed at removing children from the adult justice process so that children are no longer treated the same as adults.[7] The main principle of implementing diversion is to take persuasive action or a non-penal approach and give the person an opportunity to correct mistakes (*Schuld*). With this approach, it is hoped that torture, coercion or acts of violence against children will no longer occur. This is the main purpose of implementing diversion. By diversion, the law can be enforced without non-violence and pain, by giving someone the opportunity to correct their mistakes without going through criminal penalties by a state that has full authority.

The diversion idea was originally announced in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* or better known as *The Beijing Rules*. The diversion principles according to *The Beijing Rules* are as follows[8]:

- a. Diversion is carried out after seeing reasonable considerations, namely that law enforcers are given the authority to handle young lawbreakers without using formal justice;
- b. The authority to determine diversion is given to law enforcement officials who handle cases of these children, according to their policies, according to the criteria specified for that purpose in their respective legal systems and also in accordance with the principles contained in *The Beijing Rules*;
- c. Implementation of the diversion must be with the consent of the child, or parent or guardian, however the decision to implement the diversion after a review by an authorized official on the application of the diversion;
- d. Implementation of diversion requires community cooperation and roles, temporary guidance, recovery, and compensation to victims.

Policy enforcement (*law enforcement policy*) is part of social policy (*social policy*) referred to therein legislative policy (*legislative policy*). Crime prevention policy (*criminal policy*) is part of the law enforcement policy (*Law enforcement policy*). Implementation of law enforcement policies (*law enforcement policy*) for combating crime involves all elements of the components contained in a legal system (*legal system*).[9]

Broadly speaking, efforts to deal with the crime are divided into two, namely the "criminal path (criminal law) and the criminal pathway "non-" (not / outside criminal law). Crime prevention through the "penalty" involves the functioning of the criminal justice system law enforcement apparatus consisting of the police, prosecutors, courts, lawyers and correctional institutions. Countermeasures through the "emphasize more on the nature of *penalty*" pathway *repressive*" (repression/eradication/suppression) after the crime occurs, while the pathway *"non-penal"* focuses more on nature *"preventive"* (prevention/deterrence/control) before the crime occurs. The *"non-familiar"* path is a way to overcome it by increasing religious values, counselling through community leaders or shops, and other activities. The problem of crime is not only directed at the settlement through the judicial process but can be through non-judicial.[10]

Crime prevention efforts with approach *non-penal* is a form of prevention in the form of prevention without the use of criminal law by influencing the public's view of crime and conviction through mass media. The concept of diversion and *restorative justice* is an alternative form of settlement of a criminal act directed at an informal settlement involving all parties involved in the criminal act that occurred. The settlement with the concept of diversion and *restorative justice* is a form of settlement of criminal acts that have developed in several countries in dealing with crime.

According to the *United Nations Standard Minimum Rules for the Administration of Justice (The Beijing Rules)* item, 11 specifying diversion is a process of delegating children in conflict with the law from the criminal justice system to an informal system such as returning to social institutions, both state and non-governmental governments. This action is done to avoid negative effects on the soul and child development. Diversion is carried out by officers by exercising authority called discretion.

Discretion is the authority of the police officer to take action to continue the case or stop the case in accordance with its policies. The process of discretion takes place spontaneously which arises in the person of a law enforcement officer without being planned in advance.

One act of discretion is a diversion. Diversity is a policy that is carried out to avoid perpetrators of the formal criminal justice system. Diversion is done to provide protection and rehabilitation (*protection and rehabilitation*) to offenders in an effort to prevent children from becoming criminals as adults.[11]

Diversion is the granting of authority to law enforcement officials to take policy actions in dealing with or resolving the problem of child offenders by not taking formal ways such as stopping or not continuing/releasing from the criminal justice process or returning / handing over to the public and forms other forms of social service activities. The implementation of this version can be applied at all levels of examination, intended to reduce the negative impact of children's involvement in the justice process.

One of the results of *restorative justice* is the perpetrator gives direct responsibility to the victim in the form of compensation or other liability other than criminal. After signing the agreement, the perpetrators must implement all these agreements with supervision from the community. Meanwhile, the victim is entitled to compensation and healing from the perpetrator for the pain, suffering or loss he has received. One important issue that must be considered from the results of diversion and *restorative justice* is that the results of this process have several impacts () the especially behaviour of the perpetrators after the accountability is over.[12]

From the few explanations above, the author can draw the conclusion of the relationship between the Concept of Diversi with the Concept of *Restorative Justice* in the juvenile justice system that is, Diversi itself is very closely related to the objectives of the concept of *restorative justice*, the concept of *restorative justice* itself emphasizes recovery such as under the original circumstances and not retaliation. This is very closely related to the concept of diversion where the concept of diversion is trying to divert all the process of settlement of criminal cases carried out by children out of formal court, as an effort to divert back to a child who committed a crime against the victim and the community and not with retaliation.

The implementation of the diversion is actually to provide a guarantee of legal protection for children in conflict with the law in the juvenile criminal justice system in Indonesia, by applying the diversion at each stage of the examination. Diversity and Restorative Justice approaches are intended to avoid children from the judicial process so as to avoid stigmatization of children who are in conflict with the law and it is expected that children can return to the social environment naturally.

Diversion is carried out in order to impose sanctions that are more educative, not to retaliate in order to create special deterrence, namely the goal to be achieved is to make a deterrent, improve the original situation and make the criminal himself unable to carry out the act. The implementation of diversion is motivated by the desire to avoid negative effects on the lives and development of children in their involvement in the criminal justice system, where the criminal justice system is more focused on *retributive justice* and justice emphasizes *restitutive justice*.

It is conceivable that if a child is involved in the criminal justice system, there is a high possibility that the human rights of the child will be violated so that it will be better if diversion is applied in dealing with children in conflict with the law. The fact is that criminal justice against children, perpetrators of criminal acts through the criminal justice system creates more harm than is beneficial for children. This is because the court will provide stigmatization of children for their actions, so it is better to avoid leaving the criminal justice system.

The philosophy contained in the diversion as part of *restorative justice*, namely:

1. The philosophy of *rehabilitation* (rehabilitation) is based on the concept of *parens patriae*, in which case the state gives attention and protection to children as parents are to their children. Based on this philosophy, the handling of children who commit crimes is done through efforts in the best interest of the child. This means that every child is considered to have the capacity to learn and especially to change his own behaviour. So those children are seen more like victims of the surrounding environment than as perpetrators of crime. Such rehabilitation aims to support and provide treatment within the scope of individuals. So that the justice structure that is carried out is also more informal and closed, this has been reflected in the UU SPPA as stated in the explanation, among others: the most fundamental in this law is the strict regulation of restorative justice and diversion, which is intended to avoid and distance children from the judicial process so as to avoid stigmatization or labelling of children in order to return to the social environment properly. As referred to in UU SPPA Article 1 paragraph (6) diversion is a transfer of the settlement of a child case from the criminal justice process to the non-criminal process.

2 The philosophy of *Non-Intervention* emphasizes efforts to avoid giving stigma or labelling bad children to children who are in conflict with the law, including efforts to intervene that do not give negative labels or *stereotypes* to children who are in conflict with the law, so that the intervention is directed towards providing *treatment* community-based, where children are placed in a community environment. As a result, the placement of children in a prison institution must be the final alternative. Programs advocated by the philosophy of *non-intervention*- are deinstitutionalized through diversion and *restorative justice*.

By using the concept of *Restorative Justice* as developed by UNICEF, presumably, the Criminal Justice for Children can be expected to produce the following things:

- a. Reduction in the number of children subject to temporary detention and sentenced to prison;
- b. Eliminating stigmatization and returning children to normal humans so that they are expected to be useful in the future;
- c. Children who commit a crime can realize their mistakes and take responsibility so that they can be expected not to repeat their actions;
- d. Reducing court workload;
- e. Save state finances;
- f. Increase parental support and community participation in overcoming child delinquency;
- g. The reintegration of children into society.[13]"

What are the benefits of implementing diversion for children, namely:

1. Avoiding stigmatization or labelling as criminals;
2. Children don't need to be detained;
3. Opportunities for children to be responsible for their actions;
4. Opportunities for children to improve life skills;
5. Likely not to repeat the crime;
6. Prevents children from following the justice system process by removing children from the influence and negative implications of the judicial process.

The nature of diversion in criminal cases committed by children is to provide a sense of justice and as a form of protection for children in conflict with the law without neglecting the criminal liability of children. Diversion is not a peaceful effort between children who are in conflict with the law with victims or their families but a form of punishment against children who are in conflict with the law in an informal way. A diversion is a form of punishment which has the educational perspective of children.

Based on the results of the above research, when connected with the theory of *restorative justice* with the diversion approach that has been presented in the literature review of Chapter II contained on pages 42 to 51, that diversion is a policy undertaken to avoid the perpetrators of the formal criminal justice system. Diversion is carried out to provide protection and rehabilitation to offenders, especially children as an effort to prevent children from becoming adult criminals.

IV. CONCLUSION

Nature of the implementation of diversion in criminal cases committed by children namely diversion emphasizes recovery as in the original condition, not retaliatory, where the implementation is motivated by the desire to avoid the stigma of children as criminals and avoid negative effects on the child's life and development in involvement in the criminal justice system.

REFERENCES

- [1]. Hereinafter referred to as UUSPPA
- [2]. Said Sampara, et al. 2017. *Legal Research Methods*. Makassar. Kretakupa Print. Thing. 30-31
- [3]. Al. Wisnubroto and G. Widiartana, 2005. *Criminal Procedure Law Reform*, Citra Aditya Bakti, Bandung, p. 42
- [4]. KhotibulUmam, 2010. *Settlement of Disputes Out of Court*. Yogyakarta; Yustisia Reader, p. 10
- [5]. Dewi, DS. and Fatahillah A. Syukur, 2011. *Penal Mediation: Implementation of Restorative Justice in Indonesian Juvenile Courts*. Depok: Indie Publishing p87..
- [6]. Marlina, *Criminal Justice ...Op. cit*, p. 19
- [7]. Marlina, *Introduction to the Concept ... Op.cit*. Thing. 70
- [8]. I bid, p. 78-79
- [9]. Marlina, *Child Criminal Justice ... Op.cit*, p. 13
- [10]. Sudarto, *KapitaSelekta..Op.cit*. Thing. 118
- [11]. Marliana, *Juvenile Criminal Justice ...Op. cit*, p. 15
- [12]. *Ibid*. Thing. 22
- [13]. Ghufron, *Diversity Implementation As a Form of Case Settlement Against Children of Criminal Actors*. Postgraduate Journal of Sarjana Islamic University of Malang. Vol. 7 Number 2. August 2018

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