

The Implementation of Restorative Justice to Children as Perpetrator in Criminal Investigation in Indonesia

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Abstract: Handling of children as perpetrators of criminal acts by law enforcement officers through the criminal justice process tends to harm the future of the children. Law enforcement is often formal and does not reflect child protection. In Indonesia Law No.12 Year 2011 on Child Juvenile Justice has been set about restorative justice, therefore this paper aims to analyze how the implementation of restorative justice by investigators against children as perpetrators of criminal acts in Indonesia. The approach method used was sociological juridical with data primer obtained through interviews with investigators in the Central Java Women's and Child Protection Unit (PPA). Data analysis method used is qualitative analysis. As a blade analysis, the researcher used the theory of restorative justice and discretion theory. The results showed that the implementation of restorative justice on children as perpetrators of criminal acts in Indonesia, especially in Central Java Regional Police in general has not been successful, because of the existing cases in 2016 and 2017 only about 28% that can be overcome by restorative justice, and 72% a formal settlement is made. Restorative justice efforts are exempted to children committing criminal offenses with imprisonment for more than 7 years and repeat offenses (recidivist). And against the perpetrators of criminal acts of murder and rape are not done diversion.

Keywords: Restorative Justice, Child, Crime.

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I. Introduction

Children are an integral part of human survival and the continuity of a nation and state. In the Indonesian Constitution, Article 28B of the 1945 Constitution of the State of the Republic of Indonesia, child is seen as having a strategic role which is expressly stated that the State guarantees the right of every child to survive, grow and develop and for the protection from violence and

discrimination. Therefore, the best interests of the child should be respected as the best interests for humanity's survival, so the government should create policies aimed at protecting children.

The strategic role of the child has been recognized by the international community by launching a convention 'The Beijing Rules' which in essence emphasizes the position of the child as a human being who must get protection for his/her rights (Riadi, 2016). The Republic of Indonesia has

ratified the Convention on the Rights of the Child through Presidential Decree No 36 of 1990. This ratification is a state effort to provide protection for children. Of the various issues that exist in the Convention on the Rights of the Child, one of them is in great need of special attention—the children, children who need special protection such as children in conflict with the law. In national law special protection of child crime has been regulated in Child Protection Act no. 23 of 2002 and regulated also in Law no. 11 Year 2012 on Child Criminal Justice System. It aims to better provide protection against children facing the law (ABH).

Handling of children as perpetrators of criminal acts by law enforcement officers through the judicial process so far tends to harm the future of children. The situation is very worrying because it illustrates that the handling of children suspected of committing a crime does not reflect the protection of children.

Law enforcement of children suspected of committing crimes is often repressive. The judicial process of the child loses its essential meaning, the mechanism that must end in an effort to protect the best interests of the child. UN Standard Minimum Rules for the Administration of Juvenile Justice stated that child criminal justice is often a process that is oriented towards formal law enforcement and is not oriented to the child's interests.

Child protection efforts in Law Number 11 of 2012 on the Child Criminal Justice System have used a restorative justice model centered on the diversion process as an attempt to solve the crime committed by the child. The application of restorative justice is expected to offer answers to important issues such as criticism of the criminal justice system that does not provide for victims in particular; eliminating conflicts especially between perpetrators and victims and the public; the fact that the feeling of powerlessness experienced as a result of a criminal offense must be overcome to achieve the recovery process (Afandi, 2016; Hafidra 2019). The new concept in the Child Criminal Justice System Law is considered to be a good concept of diversion that

prevents children from litigation, with some new institutions created, of course, this Child Criminal Justice System Act is expected to be implemented effectively in restorative justice concept. As a system, as defined in Article 1 of the Child Criminal Justice System Law, which includes institutions from the investigation stage to the guidance stage following the crime, the synergy between institutions supporting the criminal justice process is crucial and determines the successful implementation of this restorative justice model (Yunus, 2013; Hasan, 2013).

Police is as the first law enforcers in handling children in conflict with the law, so that one way that can be taken in handling child crime cases is through restorative justice approach, which is implemented by diversion way. Based on data in Regional Police of Central Java in 2016, children who deal with the law were as many as 183 cases. Of the total number of cases, 91 cases of diversion attempts were made. Furthermore, in the year 2017 up to August there were 66 cases of children who were faced with the law and done diversion as many as 11 cases.

This paper analyzes how the implementation of restorative justice on child as perpetrator in the investigation of criminal acts in Indonesia, and how the constraints faced by investigators in implementing restorative justice and solutions to these obstacles. This paper provides advice on the importance of law enforcement against anal that is oriented to the protection of children's rights.

II. MODEL OF RESTORATIVE JUSTICE APPROACH IN THE LAW ENFORCEMENT PROCESS OF CHILD AS PERPETRATOR

Restorative Justice or "reparative justice" is a justice approach that focuses on the needs of victims, perpetrators of crime, and also involves community participation, and does not merely comply with legal requirements or merely the imposition of criminal. In this case victims are also involved in the process, while criminals are also

encouraged to account for their actions by correcting the mistakes they have made by apologizing, returning money stolen or by doing community service.

A British criminologist, Tony F. Marshall (1999) stated that restorative Justice is a process whereby all the parties with a stake in offence and its implications for the future. According to UNODC, what is meant by restorative justice is an approach to solve problems, in various forms, involving victims, perpetrators, their social networks, judiciary and community. The restorative justice program is based on the basic principle that criminal behavior not only violates the law, but also injures victims and society. Any attempt to address the consequences of criminal behavior should, whenever possible, involve the offenders and the injured, in addition to providing the victims and actors with the necessary assistance and support (United Nations, 2006).

Clifford Dorne (2008) defined restorative justice as a philosophy of justice emphasizing the importance and relevance of perpetrators, victims, communities, and governments in cases of crime and juvenile delinquency (Hall, 2012). The Restorative Justice approach focuses on the needs of both victims and perpetrators of crime. In addition, the Restorative Justice approach helps criminals to avoid other crimes in the future. It is based on a theory of justice that considers crime and offense, in principle is a violation of the individual or society and not to the state. Restorative Justice fosters dialogue between the victim and the perpetrator will show the highest level of victim satisfaction and accountability of the perpetrator (Pradityo, 2016).

The concept of restorative justice is basically simple. The measure of justice is no longer based on the vicarious retribution of the victim to the offender (whether physical, psychic or punishable); but the painful act is healed by providing support to the victim and requiring the perpetrator to be accountable, with the help of family and community when necessary. In the Indonesian

concept, Restorative Justice itself means a fair settlement involving the perpetrator, the victim, the family and other parties involved in a crime and collectively seeking a settlement of the crime and its implications by emphasizing restoration of the original state. To achieve justice for victims and perpetrators, it is good when law enforcers think and act progressively ie not to apply textual rules but need to break rule because in the end the law is not text in order to achieve justice desirable by society.

Progressive law departs from the basic assumption that law is for man, not the other way around. The law is not an absolute and final institution, but as a moral institution, conscientious and therefore highly determined by its ability to serve people. Law is an institution that aims to bring people to a life of justice, prosperity and make people happy. Humanity and justice are the goal of everything in our law of life. This means that humanity and justice are above the law. The point is the emphasis on law enforcement justice in Indonesia is the creation of welfare of the community or often referred to as a just and prosperous society.

Bagir Manan explained that restorative justice is a concept of punishment, but it is not limited to criminal law provisions (formal and material) (Rizky, 2008). However, although Bagir Manan defines restorative justice as a punishment concept, he remains in line with the idea that the concept of punishment should be justice, affirmed by the term integrated justice that is justice for the perpetrator, justice for the victim and justice for society.

"Restorative justice" as one attempt to find peaceful settlement of conflict outside the court is still difficult to implement. In Indonesia many customary laws can become restorative justice, but their existence is not recognized by the state or it is not codified in national law. Customary law can resolve the emerging conflicts in the community and provide satisfaction to the conflicting parties. The emergence of the idea of restorative justice is as a critique of the application of criminal justice system with imprisonment that is considered

ineffective in resolving social conflicts. The cause, the parties involved in the conflict are not involved in the resolution of the conflict. The victim remains a victim, the imprisoned perpetrator also raises new issues for the family and so on.

Therefore, the government which has the duty of the state in making the law must really pay attention to the 2 (two) things that have been explained above, the law should make prosperous and happy society and the law created must side with the community and that is what is called "law for man".

According to Suteki, the problem that often arises is the non-fulfillment of the value of justice, especially the sense of justice that lives in society. The judge does not seriously dig into the living law as mandated by the Judicial Power Law on the grounds that the rules of formal law are rigid and often deviate from the sense of community justice. Here law enforcement has suffered a formal legal deadlock to bring about substantive justice. There is a need to be done to break the formal legality deadlock, namely by doing non-enforcement of law is the policy of not enforcing the law (Rocky Marbun, RestorativeJustice Sebagai alternatif Sistem Pemidanaan Masa Depan, (<https://forumduniahukumblogku.wordpress.com>, accessed on 12 December 2017).).

III. THE IMPLEMENTATION OF RESTORATIVE JUSTICE IN THE INVESTIGATION PROCESS OF CHILD AS PERPETRATOR IN INDONESIA

The pre-natal justice system of Law Number 11 Year 2012 on the Child Criminal Justice System emphasizes retributive justice (emphasizes justice on retaliation) and restitutes (emphasizes justice on the basis of indemnification) only authorizes State delegated to Law Enforcement Officials Police, Prosecutors, and Judges. After the birth of the law on the child criminal justice system, the concept of restorative justice has been formulated in norms in law. This is seen from the formulation of Article 1 number 6 of Law Number 11 Year 2012 on the

Criminal Justice System of Children stating that "restorative justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other parties concerned to equally looking for a fair settlement by emphasizing restoration back to its original state rather than retaliation.

In Indonesia, Restorative Justice refers to a just settlement involving perpetrators, victims, their families and other parties involved in a crime jointly seeking a resolution to the offense and its implications by emphasizing restoration of the original state.

Restorative justice is a concept of punishment, but it is not limited to the provisions of criminal law (formal and material). Restorative Justice should also be observed in terms of criminology and penal system. Based on the existing facts, the prevailing punishment system has not fully guaranteed integrated justice, namely justice for perpetrators, justice for victims, and justice for the community. Restorative justice encourages the completion of an event or crime in a more informal and personal manner, rather than a formal, rigid and impersonal settlement by using patterns before and after the proceedings. Before the judicial process, it is intended when the "case" is still in the hands of police or prosecutors. Whether on the initiative of the police, the prosecutor's office, a person or community group, efforts are made to resolve the criminal act, in the manner or principle of a restorative justice approach (Manan, 2008).

Restorative justice is a process of diversion, that is, all parties involved in a particular crime jointly solve problems and create an obligation to make things better by engaging victims, children and the community in finding solutions to improve, reconcile and reassuring the heart that is not based on retaliation.

Children as perpetrators of criminal acts will be involved in the criminal justice process. In this case, the Police are the spearhead in the criminal justice system, since the first examination was conducted at the police level ie the investigation

stage. The investigation is a series of investigative actions during the preliminary hearing, to seek evidence of a criminal offense. This involves calling and examining witnesses, seizure of evidence, searches, summons, suspects, arrest and detention.

Law No. 11 of 2012 on the Child Criminal Justice System provides preferential treatment to children in conflict with the law from the investigation process. Such special attention and treatment are aimed at ensuring that children are not victimized by the application of rigid and formal legal procedures that may cause mental, physical and social suffering to the child. Therefore, in relation to a child who is reportedly committing a criminal offense, the investigator must keep the identity of the child from the news either in print or in electronic media. This relates to the principle of the presumption of innocent and also to avoid the impact of the process of stigmatization of the society on the child.

Based on the provisions of Law Number 11 Year 2012, in general, the investigation of children as perpetrators of crime can only be done if the perpetrator of a crime has been 12 years old but he/she has not reached the age of 18 years old, while the child under age 12 years old when the child commits an investigative crime make the decision to return to the parent/guardian and engage in education, coaching and mentoring programs in government agencies.

The investigator who handles the child who is dealing with the law (suspect) in this case is the child investigator in the Protection of Women and Children unit. This unit is one of the police functions that specifically provide protection against children who are faced with the law, so that it has experienced and have interest and dedication to the problem of children.

Under the provisions of Article 7 paragraph (1) of the Child Criminal Justice System Law, the level of investigation, prosecution and examination of the case of a child in a district court shall be strived to be diverted. Giving authority to the police as

investigators to make diversions in the settlement of criminal cases perpetrated by the child is based more on the position of police as the first law enforcement agencies and directly intersects with the community, the police basically have such a great potential to change the culture of society. The authority and power of the police when packaged dynamically will be a means for the police in building the community (Adi, 2009).

If the child's investigation stage is not conducted by a diversion, then the investigator, public prosecutor, or judge can be given criminal sanction as regulated in Article 96 of Law no. 11 of 2012 on the Criminal System of Child Crimes stating that Investigators, Public Prosecutors and Judges intentionally not perform the obligations as referred to in Article 7 Paragraph (1) shall be punished with imprisonment for a maximum of 2 (two) years.

Article 8 of Law No. 11 of 2012 on Child Criminal System has determined the procedures and steps of the subversion, namely through consultation with the involvement of children and parents/guardians, victims and/or their parents/guardians, community counselors and Professional Social Workers based on restorative justice approach. Deliberations can involve social welfare workers, teachers, and community leaders. The diversion process can take account of the victim's interests, welfare and responsibilities avoid the negative stigma, avoid the retaliation, community harmony, and decisions, decency and public interest.

Moreover, the Law stated that the result of the diversion agreement pursuant to Article 12 of the Law shall be further set forth in the form of a diversion agreement. The result of the diversion agreement shall be submitted by the direct superior of the responsible official at each level of the court's examination in accordance with the jurisdiction within a maximum of three days since the agreement is reached to obtain the determination. The determination shall be made within three days from the receipt of the diversion agreement. The determination shall be submitted to the Counselor of the Community, the investigator,

the Prosecutor and Judge within a maximum of three days from the date of stipulation. Upon receipt of the determination of the Investigator issues the determination of the suspension of the investigation.

The process of diversion should also be supervised, as regulated in Article 14 which states that the oversight of the diversion process and the implementation of the resulting agreement lay with the direct superior of the responsible official at each level of examination. During the process of diversion lasting until the consensus of the university is implemented, the Counselor of the Community is obliged to provide assistance, guidance and supervision. In the event that a diversion deal is not executed at a given time, the Counselor immediately reports to the responsible official. The responsible official is required to follow up the report within a maximum of seven days.

According to Article 29 of Law no. 11 of 2012 on the Criminal System of Child Crimes, the investigator shall seek the diversion within a maximum of seven days after the investigation begins. The diversion process takes place at least thirty days after the commencement of the diversion. In the event that a diversion process reaches an agreement, the investigator submits the version of the diversified event with the diversion agreement to the head of the national agency for a determination. In the event of failure, the investigator shall continue the investigation and delegate the case to the Public Prosecutor by enclosing the report on diversion and community research reports. This is so that the examination at a later stage knows there is an act of diversion attempts and the reason for failure to be versioned.

IV. CONCLUSION

Implementation of restorative justice on children as perpetrators of criminal cases through restorative justice approach in Indonesia, especially in Central Java Regional Police in general has not been successful, because of the existing cases in 2016

and 2017 only about 28% that could be done in restorative justice, and 72 the other% were formally settled by delegating the case to the public prosecutor and court proceedings. Restorative justification efforts in Indonesia are conducted through deliberations involving victims, children, correctional institutions and the community. Restorative justice efforts are exempted from children committing criminal offenses with imprisonment for more than 7 years old and repeat offenses (recidivists). Moreover, the act against perpetrators of criminal acts of murder and rape is also not done diversion.

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