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Diversion policy against children in conflict with internal law serious crime based on justice value

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Abstract. This type of research in legal research is normative or doctrinal legal research. The diversion policy against children who are in conflict with the law in criminal cases punishable by 7 (seven) years based on the value of justice is limited by the existence of Article 7 paragraph 2 which states that diversion is carried out in the event that the offense committed is punishable by imprisonment under 7 (seven) years, so that the existence of Article 7 paragraph (2) has limited the implementation of diversion itself, and this is clearly contrary to the principles of the implementation of the child protection law, because this limitation isn't the best principle for children.

Keywords. diversion; justice value

Introduction

The problem of criminal acts committed by children is now increasing in society, both in developed and developing countries. The development of society that started from agrarian life to industrial life has had a significant impact on the life of the socio-cultural values in most societies. (Juliana & Arifin, 2019)

Children's delinquency always increases every year. If we look at the development of criminal acts committed by children so far, both in terms of quality and modus operandi, sometimes the violations committed by children are felt to have troubled all parties, especially parents. The phenomenon of increasing violent behavior by children doesn't seem to be proportional to the age of the perpetrator. Therefore, various efforts to prevent and overcome delinquency in children, need to be done immediately. (Khudaykulov, 2021)

In Indonesia, regulations have been made that basically uphold and pay attention to the rights of children, namely the ratification of the Convention on the Rights of the Child (CRC) with the Decree of the President of the Republic of Indonesia Number 36 of 1990 concerning Ratification of the Convention On The Rights of The Child. Other laws and regulations that have been made by the Indonesian government include, Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare, Law Number 3 of 1997 concerning Child Court which was later replaced by Law No. 11 of 2012 concerning the Criminal Justice System for Children, Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection. In substance, the Law regulates children's rights in the form of rights to life, rights to name, rights to education, rights basic health, the right to worship according to religion, the right to expression, think, play, create, rest, socialize and social security rights. (Darmi, 2017)

The making of these rules is very clear that the State is very concerned about and protects the rights of children. Everyone's rights must be upheld by everyone. However, unfortunately, in its application, law enforcement problems often experience obstacles and obstacles, both due to internal and external factors.

One of them is in the criminal system, which until now sometimes still treats children who are involved as perpetrators of such crimes as perpetrators of crimes committed by adults. Children are placed in a position as a criminal who deserves the same punishment as adults and is valid in Indonesia. (Chusniatun, 2018)

Children as perpetrators of criminal acts must be responsible for their actions. (Levin, 2013) To be able to realize the welfare of the child offenders of a criminal act, as far as possible, the involvement of children in the juvenile justice process should be avoided. The process of juvenile justice is actually the same as the criminal justice process for adults. Mardjono provides a limitation that what is meant by the criminal justice system is a crime control system consisting of police institutions, the prosecutor's office, the court and the correctional facilities for the convicted person. In the juvenile criminal justice system, every stage of the process from investigation to the stage of conviction must be preceded by a diversion process, namely the transfer of settlement of juvenile cases from the criminal justice process to processes outside the criminal justice process. Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Justice System and has been effective in July 2014, explicitly regulates Restorative and Diversion Justice which is intended to avoid stigmatization of children who are in conflict with the law and it's hoped that children can return to the social environment fairly.

In the perspective of the Convention The Rights of the Children, children in conflict with the law are categorized as children in special situations (Children in Need of Special Protection). UNICEF calls children in this group an children in especially difficult circumstances (CDEC), because their needs aren't met, are prone to violence, are outside the family environment (within the scope of state institutional authority), require protection in the form of special regulations, require protection and personal safety. These needs cannot be met because the child doesn't receive adequate protection and care from an adult who is in an environment where the child usually lives. (Ferragina, 2017)

Research Methods

This type of research in legal research is normative or doctrinal legal research. (Karina Sari Wijayanto Putri, Slamet Suhartono, 2021)

Discussion

The Rights and Position of the Child in the Juvenile Criminal Justice System

Children are an inseparable part of the continuity of human life and the sustainability of a nation and state. In the Indonesian constitution, children have a strategic role which explicitly states that the state guarantees the right of every child to live, grow and develop as well as protection from violence and discrimination. Therefore, the best interests of children should be lived out as the best interests for the survival of mankind.

Every child has a dignity that deserves to be upheld and every child who is born must get his rights without the child asking for it. (Gaffar, 2016) One form of discretion is to give investigators, prosecutors and judges the authority to diversify children who are in conflict with the law. The definition of restorative justice is a form of conflict resolution and sex to make it clear to the offender that the behavior isn't condoned, at the same time as being supportive and respectful of the individual. In the context of punishment, the restorative justice approach is in line with the balance of interests model. Therefore, the principle of daad-dader-slachtoffer-

Strafrecht should begin to be implemented in criminal law. Restorative justice can be applied to the entire criminal law enforcement process, not just one process. Restorative justice isn't a principle but a philosophy in the judicial process and also a philosophy of justice. (Nurusshobah, 2019) Restorative justice can be said to be a philosophy of justice, because it's the basis for the preparation of judicial institutions. Thus, it can be interpreted that restorative justice is a series of judicial processes which basically aim to recover losses suffered by victims of crime, society and related parties. The restorative justice approach is the latest development of the criminal justice paradigm, namely starting with Retributive Justice, followed by Rehabilitative Justice, then there is Alternative Justice, then improved again with Transitional Justice, and finally replaced by Restorative Justice. (Lloyd & Borrill, 2020)

The Position of the Child in the Juvenile Criminal Justice System

Children are part of citizens who must be protected because they are the generation of the nation who in the future will continue the leadership of the Indonesian nation. Every child, apart from being obliged to receive formal education such as school, is also obliged to receive moral education so that they can grow up to be useful figures for the nation and state. The 4th precept of Pancasila teaches us to make choices through deliberation. Prioritizing deliberation in making decisions for the common interest. Deliberation to reach consensus is filled with the spirit of kinship, so that if the breakdown philosophy of "deliberation" contains the first 5 (five) principles, (meeting to hear each other and expressing wishes) second, (finding a solution or common ground for the problem at hand); third, (to make peace with their respective responsibilities); fourth, (to fix all the results that arise); and fifth (supporting each other). (Kennedy et al., 2019)

The development of child criminal law cases from time to time and isn't balanced with the development of our own criminal law in the form of legislation that is currently in force. The modus operandi used by criminals is always evolving. Various problems that arise must be taken seriously with the intention of restoring the situation in society as it did when a criminal act had not yet occurred. Settlement of criminal cases should prioritize social balance in society. The balance referred to here is between the victim and the perpetrator.

Diversion in the Protection of Child Rights

Before discussing the concepts of diversion and restorative justice further, it's important to understand the juvenile justice system from an international human rights perspective as a comparison. Juvenile Justice System is all elements of the criminal justice system that are involved in the handling of juvenile delinquency cases. First, the police as a formal institution when delinquents first come into contact with the justice system, which will also determine whether the child will be released or processed further. Second, prosecutors and parole institutions will also determine whether the child will be released or processed in juvenile court. Third, Juvenile Court, the stage when the child will be placed in choices, starting from being released to being included in the institution of punishment. (Lokugamage & Pathberiya, 2017)

In this regard, Muladi stated that the criminal justice system has the objectives of: (i) resocialization and rehabilitation of perpetrators of criminal acts; (ii) crime eradication; (iii) and to achieve social welfare. Departing from this thought, the objective of an integrated juvenile justice system is more emphasized on the first (resocialization and rehabilitation) and third (social welfare) efforts. (Forsberg & de Souza, 2021) However, other efforts outside the criminal or judicial mechanisms can be carried out by several methods including the Diversion and Restorative Justice methods. (Gumilang et al., 2019)

A child who is committing a criminal act must be tried in a special court for children in the general court environment, with a special process and special officials who understand the problems of children, starting from arrest, detention, trial process and guidance. A child who is committing a crime must be tried in a special court for children in the general court environment, with a special process and special officials who understand the problems of children, starting from arrest, detention, trial and guidance.

Meanwhile, from the perspective of criminalization, it's believed that the imposition of crimes against delinquent children tends to be detrimental to the mental development of children in the future. This detrimental tendency results from the effect of imprisonment, especially imprisonment, which is in the form of a stigma (evil stamp). Barda Nawawi Arief also stated that social protection law requires the elimination of criminal liability (mistakes) and replaced by views of anti-social acts.(Maitland, 2019)

Based on the results of a comparative study of the criminal effectiveness of the Committee on the Rights of the Child, the ratio of the average number of people who have committed a crime is inversely (reconviction rate) proportional to the age of the perpetrator.

Conclusion

The diversion policy against children who are in conflict with the law in criminal cases punishable by 7 (seven) years based on the value of justice is limited by the existence of Article 7 paragraph 2 which states that diversion is carried out in the event that the offense committed is punishable by imprisonment under 7 (seven) years, so that the existence of Article 7 paragraph (2) has limited the implementation of diversion itself, and this is clearly contrary to the principles of the implementation of the child protection law, because this limitation isn't the best principle for children. The reason that can be stated is that the diversion is a diversion of the settlement process to avoid stigma against the child and doing the diversion isn't automatically acceptable to both parties, namely the victim and the perpetrator, so that even though the sanctions imposed under 7 years still have the possibility of unsuccessful diversion and vice versa even though the criminal sanction of more than 7 years doesn't rule out the possibility of successful diversion. The limitation stipulated in Article 7 paragraph (2) letter a means that the juvenile court law is still halfhearted in implementing the principle of diversion for children in conflict with the law.

References

- [1] Chusniatun. (2018). Sistem perlindungan hukum bagi anak di lembaga masyarakat dalam perspektif konvensi internasional hak-hak anak. *Suhuf*, 30(01), 103–132.
- [2] Darmi, R. (2017). IMPLEMENTASI KONVENSI HAK ANAK TERKAIT DENGAN PERLINDUNGAN ANAK YANG BERHADAPAN DENGAN PROSES HUKUM (Implementation of Children Rights Convention Related to Children Protection Against The Law). *Jurnal Penelitian Hukum De Jure*, 16(4), 439. <https://doi.org/10.30641/dejure.2016.v16.439-450>
- [3] Ferragina, E. (2017). The welfare state and social capital in Europe: Reassessing a complex relationship. *International Journal of Comparative Sociology*, 58(1). <https://doi.org/10.1177/0020715216688934>
- [4] Forsberg, M., & de Souza, C. B. (2021). Implementing regenerative standards in politically green nordic social welfare states: Can sweden adopt the living building challenge? *Sustainability (Switzerland)*, 13(2). <https://doi.org/10.3390/su13020738>
- [5] Gaffar, S. B. (2016). Reforming human quality through reshaping local values for national growth development: How families can help? *Man in India*, 96(12).

- [6] Gumilang, D., Yudianto, O., & Setyorini, E. H. (2019). LEGALITAS SURAT KUASA YANG DITERBITKAN SEORANG BURON. *Jurnal Hukum Magnum Opus*. <https://doi.org/10.30996/jhmo.v2i2.2497>
- [7] Juliana, R., & Arifin, R. (2019). Anak dan Kejahatan (Faktor Penyebab dan Perlindungan Hukum). *Jurnal Selat*, 6(2). <https://doi.org/10.31629/selat.v6i2.1019>
- [8] Karina Sari Wijayanto Putri, Slamet Suhartono, T. M. (2021). PENERAPAN SANKSI PIDANA KEPADA PELANGGAR PROTOKOL KESEHATAN DI TENGAH PANDEMI COVID-19. *Jurnal Akrab Juara*, 6(2), 214–231.
- [9] Kennedy, J. L. D., Tuliao, A. P., Flower, K. L. N., Tibbs, J. J., & McChargue, D. E. (2019). Long-Term Effectiveness of a Brief Restorative Justice Intervention. *International Journal of Offender Therapy and Comparative Criminology*, 63(1). <https://doi.org/10.1177/0306624X18779202>
- [10] Khudaykulov, F. K. (2021). Force And Threat Of Violence Are As The Ways Of Commission Of Rape: National And Foreign Experience. *Psychology and Education Journal*, 58(1). <https://doi.org/10.17762/pae.v58i1.862>
- [11] Levin, J. (2013). Representations of Victims, Suspects and Offenders: A Content Analysis of Four Television Crime Shows. *Undergraduate Honors Thesis*.
- [12] Lloyd, A., & Borrill, J. (2020). Examining the Effectiveness of Restorative Justice in Reducing Victims' Post-Traumatic Stress. In *Psychological Injury and Law* (Vol. 13, Issue 1). <https://doi.org/10.1007/s12207-019-09363-9>
- [13] Lokugamage, A. U., & Pathberiya, S. D. C. (2017). Human rights in childbirth, narratives and restorative justice: a review. *Reproductive Health*, 14(1). <https://doi.org/10.1186/s12978-016-0264-3>
- [14] Maitland, S. (2019). Does interpreting 'steal' conflict? A translational perspective on power and restorative justice. *Translation and Interpreting*, 11(1). <https://doi.org/10.12807/ti.111201.2019.a02>
- [15] Nursshobah, S. F. (2019). KONVENSI HAK ANAK DAN IMPLEMENTASINYA DI INDONESIA. *BIYAN: Jurnal Ilmiah Kebijakan Dan Pelayanan Pekerjaan Sosial*, 1(2), 118–140. <http://jurnal.poltekesos.ac.id/index.php/biyan/issue/view/23>