

LEGAL PROTECTION FOR JUVENILE OFFENDERS THROUGH DIVERSION IN THE JUVENILE CRIMINAL JUSTICE SYSTEM IN INDONESIA

I. Made Sepud, S.H., M.H.

Lecturer, Faculty of Law of Warmadewa University, Denpasar, INDONESIA.

sepudmade@gmail.com

ABSTRACT

Children are the blessings of God Almighty, who have the dignity as individuals, so to maintain their dignity; children have the right to protection, especially to those juvenile offenders, particularly the protection of the law in the juvenile criminal justice system.

This study will be based on the law issue about legal protection of juvenile offender in the juvenile criminal justice system in Indonesia. This investigation will also examine how appropriate diversion applied to juvenile offender in the Juvenile Criminal Justice System in Indonesia is. The research method used normative legal research, with the statutory, conceptual, and comparative approaches. Sources of legal materials are primary, secondary, and tertiary legal materials as well as techniques of collecting legal material were conducted by means of recording and documentation, analysis of legal materials was conducted by descriptive interpretative, evaluative argumentative and systematic methods.

Legal protection for juvenile offenders in the Indonesian criminal justice system is done through a diversion. In the whole process of settlement of lawsuits of juvenile offenders from the investigation stage to the correction stage after the imprisonment. Appropriate diversion models applied to juvenile offenders within the juvenile criminal justice system in Indonesia are diversified through consultation with the involvement of children and parents / guardians, victims and / or parents / guardians, community counselors and professional social workers based on restorative justice approach.

Keywords: Juvenile Offenders, Diversion, Juvenile Criminal Justice System.

INTRODUCTION

Legal protection for children may be undertaken as legal protection against various fundamental rights and freedoms of children and various interests related to the welfare of children. Thus, the legal protection for children covers a very wide scope.⁴⁵

The scope of legal protection for children includes: (1) protection of children's freedom; (2) protection of human rights, and (3) legal protection of all welfare interests of the children.

Philosophically, children as part of the young generation, as one of human resources is the potential and successor of the ideals of the nation's struggle in the future have strategic roles and special characteristics, require special guidance and protection as well.⁴⁶

With the enactment of the Law of the Republic of Indonesia Number 11 of 2012 on Juvenile Criminal Justice System is a substitute to Law No. 3 of 1997 on Juvenile Court (State Gazette

⁴⁵ Barda Nawawi Arief, *Beberapa Aspek Kebijakan dan Pengembangan Hukum Pidana*, Some Aspects of Policy and Development of Criminal Law (Bandung: PT. Citra Aditya Bakti, 1998), page 153.

⁴⁶ Nashriana, *Perlindungan Hukum Pidana Bagi Anak di Indonesia*, (Jakarta, PT. Raja Grafindo Persada, 2011), p. 76.

of the Republic of Indonesia of 1997 Number 3, Supplement to State Gazette Number 3668) the objective is to realize a justice that truly guarantees the protection of the best interests of the juvenile offenders as the nation's next generations.

As a guideline for the implementation of the diversion with the enactment of Law Number 11 of 2012, the Government has stipulated Government Regulation Number 65 of 2015 on Guidelines for the Implementation of Diversion for the Juvenile Offenders and Supreme Court Regulation Number 4 of 2014 on Guidelines for Implementation of Diversion in the Juvenile Criminal Justice System.

Following the enactment of Law Number 11 of 2012 on the Juvenile Criminal Justice System there are some differences in the provisions on the handling of crimes committed by children, namely Special Treatment for juvenile offenders, among others:

1. Judges, Public Prosecutors, Investigators and Legal Advisors and other officials in the juvenile trial is not wearing judge's robes or uniforms.
2. The juvenile trial is done in private.
3. The juvenile court judge is a special judge.
4. Juvenile case is adjudicated by a single judge.
5. The role of correctional supervisor in the juvenile case.
6. Investigation of juvenile offender is performed by a special investigator.
7. Investigators must check in a family atmosphere and must be kept confidential.
8. Detention is done after seriously considering the interests of the child.
9. Placement of child custody in the child's special room.
10. During detention, the child's physical, spiritual, and social needs must be fulfilled.
11. Every juvenile offender from the time of arrest or detention is entitled to legal assistance.⁴⁷

International juvenile justice is guided by the Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), which contains the following principles:⁴⁸

1. Social policy promotes maximal youth welfare and minimizes the intervention of the criminal justice system.
2. Non-discrimination against juvenile offenders in the criminal justice process.
3. Determination of the age limit of criminal liability for juvenile offenders.
4. Imprisonment is a last resort.
5. A diversion action takes place with the consent of the child or parent / guardian.
6. Fulfillment of children's rights in the criminal justice process.
7. Protection of the privacy of the juvenile offenders.
8. Regulation of juvenile justice must not conflict with this regulation.

With the ratification of the Convention on the Rights of Children by Indonesia, Indonesia has applied the rights of children as stated in the international convention into Law Number 11 of 2012 on Juvenile Criminal Justice System.

⁴⁷ Law of the Republic of Indonesia Number 11 of 2012, concerning the Juvenile Criminal Justice System, (Bandung, Citra Umbara, 2012), p. 13

⁴⁸ *Ibid.*

The Law of the Republic of Indonesia Number 11 of 2012 on the Juvenile Criminal Justice System has adopted the legal protection of children in the International Convention through diversion.

RESEARCH METHOD

In accordance with the explanation above, this investigation will be based on the law issue about legal protection of juvenile offender in the juvenile criminal justice system in Indonesia. This investigation will also examine how appropriate diversion applied to juvenile offender in the Juvenile Criminal Justice System in Indonesia is.

DISCUSSION

Diversion in the Juvenile Criminal Justice System

Children are an integral part of the survival of human life and the continuity of a Nation and the State. With this important children's role, the right of the children have been expressly stated in the constitution, that the State guarantees every child the right to survival, growth and development and is entitled to protection from violence and discrimination.⁴⁹ The best interests for children should be considered, as the best interests for the survival of mankind. Therefore, we all always try to avoid children becoming victims of violence and children fall into action of evil deeds or other unrighteous deeds.

Juvenile offenders every year are increasing, therefore, various efforts to prevent and overcome juvenile offenders, need to be done immediately. One of the efforts of prevention of juvenile crimes (juvenile crime politics) nowadays through the implementation of the juvenile criminal justice system. The purpose of the juvenile justice system is not solely aimed at imposing criminal sanctions on juvenile crimes, but rather focusing on the premise that the imposition of sanctions as a means of supporting the well-being of juvenile offender. The rationale or starting point of this principle is a characteristic of the implementation of the juvenile criminal justice system.⁵⁰ Given the distinctive features of this juvenile criminal process, the inspection activities conducted by police, prosecutors, judges and other officials, leave no aspect of correctional and protection, and are based on principles for the benefit of the child or to consider the most appropriate criteria both for the well-being of the child concerned, without prejudice to the interest of the community.⁵¹

Internationally it is desirable that the purpose of organizing the juvenile criminal justice system, prioritizes the goals for the well-being of children. This is as defined in the United Nations regulations, within the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ) or The Beijing Rules, that the Aims of Juvenile Justice are as follows.⁵²

⁴⁹ Pasal 28 B ayat (2) Undang-Undang Dasar 1945 Hasil Amandemen, Article 28 B Paragraph (2) of the 1945 Amendment to the 1945 Constitution

⁵⁰ In relation to the purpose of organizing this juvenile criminal justice, Barda Nawawi Arief mentions that the implementation of juvenile justice requires special approach, special attention, special consideration, special service and treatment and special protection for children facing law and justice. With a special approach, the child who commits the crime is seen as a person who needs help, understanding and compassion. In addition, it prioritizes a persuasive-educative approach, rather than a juridical approach. To do so, to the extent possible avoid the purely punitive legal process, which is mental degradation and discouragement, as well as avoiding the stigmatization process that can hamper the process of maturity development and child self-reliance in a natural sense. Muladi and Barda Bawawi Arief, 1992, Reader's Criminal Law Policy, Bandung: Alumni, p. 114-115

⁵¹ Sudarto, 1981, *Op.cit*; p. 129-130

⁵² See United Nations Standard Minimum Rules for The Administration of Juvenile Justice ("The Beijing Rules"), Adopted by General Assembly resolution 40/33 of 29 November 1985, Human Rights A Compilation of International Instruments Volume I (First Part) Universal Instruments, United Nations, New York, 1993. In the UN General Assembly Resolution 40/33, dated November 29, 1985, Number 5 on the Purpose of the Juvenile Criminal Justice System.

“The juvenile justice system shall emphasize well –being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and offence”.

Thus, the aim of the criminal justice system is to promote the welfare of the child and to pay attention to the principle of proportionality. The purpose of promoting child welfare is the main focus, thus avoiding the use of merely punitive sanctions. The objective is to proportional principles, because it restricts the use of sanctions, most of which are expressed in terms of punishment appropriate to the gravity of the offense, but are also concerned with the consideration of personal circumstances.⁵³

Similarly, nationally it has been determined that the purpose of organizing the juvenile criminal justice system is inseparable from the individual child protection objectives. The application of the current juvenile criminal justice system in Indonesia is based on the provisions of the Juvenile Criminal Justice System Act (Law Number 11 of 2012). In the consideration of the Juvenile Justice Law, the objective of the implementation of the juvenile criminal justice system in Indonesia, for correctional and protection of children, is to ensure that children are fully assured their balanced growth and development of physical, mental and social development.⁵⁴

This adverse tendency as a result of the involvement of children in the juvenile criminal justice process and caused by the effects of criminal imposition of stigmatization. With the decision of punishment against children, the sustained stigma, the guilt on the child and up to the anger of the family.⁵⁵

To avoid the negative effects or adverse effects of this criminal justice process on these children, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") has provided guidance in an effort to avoid these negative effects. That is by granting authority to law enforcement officials to take policy actions in dealing with or resolving the issue of child offenses by not taking formal means, among others, stopping or not continuing / releasing from the court process or return them to the community in the forms of social service activities. These actions are called Diversions, as set out in Rules 11.1, 11.2 and 17.4 SMRJJ ("The Beijing Rules"). With the action of this diversion, it is expected to reduce the negative impact of the involvement of children in the court process.

Currently in Indonesia, the implementation of the juvenile criminal justice system is based on Juvenile Court (Law No. 11 of 2012) on the Juvenile Criminal Justice System as the implementation, it has been issued the Government Regulation Number 65 of 2015 on Guidelines for the Implementation of Diversion and Handling of Juvenile or Children under 12 (twelve) years old.

Gordon Bazemore states that the goals of the juvenile criminal justice system (SPP) vary, depending on the paradigm of the adopted juvenile criminal justice system. There are three well-known juvenile justice paradigms: Individual Treatment Paradigm; Retributive Paradigm; Restorative paradigm.⁵⁶ Each juvenile criminal justice paradigm has a different purpose or goal.

⁵³ Muladi dan Barda Nawawi Arief, 1992, *Perlindungan Hukum Terhadap Anak Dalam Proses Peradilan*, Bandung : Alumni, p. 113

⁵⁴ KONSIDERAN “Menimbang” dalam Undang-undang No. 3 Tahun 1997 tentang Pengadilan Anak.

⁵⁵ Apung Herlina, et.all., *Perlindungan Terhadap Anak Yang Berhadapan Dengan Hukum Manual Pelatihan Untuk POLISI*, (Jakarta : Polri dan UNICEF), p. 101-103

⁵⁶ As quoted by Paulus Hadisuprpto, *Op.cit*, p. 143

The objective of the Indonesian criminal justice system is: investigate the juvenile criminal case, decide cases of juvenile offenders, and settle the juvenile offenders' cases in the efforts of correction and protection of children.

In connection with the duties and authority of the juvenile court to resolve the juvenile case, Sudikno Mertokusumo put forward:

"The purpose of the judiciary (the juvenile court) is not merely to state whether or not a concrete event has been proved correct, but to settle the case. The verdict must solve the case, not to make the decision unenforceable or cause a new case or problem. Given that the child must be protected and therefore it is necessary to receive special attention and treatment as well so in this juvenile justice, should not be emphasized to the proven or not the acts or violations committed by the juvenile solely, but should be more attention and considered background and the causes and motivation of the offense or acts committed by the juvenile offender and what the likelihood of the decision for the child for the future of the juvenile offender ..."⁵⁷

The aim of the criminal justice system of children conducted by judging children by juvenile justice bodies is not to give priority to the criminal only, but the protection for the future of the juvenile is the target of the juvenile criminal justice.⁵⁸

Law Number 35 of 2014 on Amendment to Law Number 23 of 2002 regarding Child Protection sees the juvenile offenders as "Children of law offenders". Juvenile offenders under child protection legislation shall enjoy special protection.

One of the special protections for juvenile offender is "appropriate sanctions for the best interests of the child".⁵⁹ The imposition of appropriate sanctions for the best interests of the child, this is what the author deems to be the goal of the juvenile criminal justice system in the Child Protection Law. Appropriate sanctions for the best interests of the child, namely sanctions that can support for correction and protection of children. This Law has been amended by Law Number 35 of 2014 on Amendment to Law Number 23 of 2002 regarding Child Protection.

A person brought before a criminal court aims to prove whether the acts committed are justified and the imposition of appropriate criminal sanctions to such persons. A person can be accountable for his/her actions if he/she is guilty so that his/her actions should be prosecuted to that person. Someone is said to be guilty if:

- 1) The person has a responsible ability, because his/her mental state is normal;
- 2) The inner connection between the perpetrator and his/her deeds is deliberate (*dolus*) or negligence (*culpa*);
- 3) There is no excuse for forgiveness or no reason to exempt guilt.⁶⁰

Roeslan Saleh states that the guilt is the prosecution of the criminal offender, because the public considered that the perpetrator could do otherwise if he/she does not want to do such action.⁶¹

⁵⁷ Sudikno Mertokusumo, "Kedudukan dan Wewenang Peradilan anak dalam Sistem Peradilan di Indonesia", dalam Romli Atmasasmita (ed.), *Peradilan Anak di Indonesia*, (Bandung : Mandar Maju, 1997), p. 51

⁵⁸ Agung Wahyono dan Siti Rahayu, *Tinjauan tentang Peradilan Anak di Indonesia*, (Jakarta : Sinar Grafika, 1993), p. 38-39

⁵⁹ Article 64 paragraph (2) letter d.

⁶⁰ Sudarto, *Hukum Pidana I*, (Semarang : Yayasan Sudarto, Fakultas Hukum, Undip, 1990), p. 91

⁶¹ Roeslan Saleh, *Perbuatan Pidana dan Pertanggungjawaban Pidana : Dua Pengertian Dasar dalam Hukum Pidana*, (Jakarta : Aksara Baru, 1983), p. 77

Sentencing a person in criminal law does not only mean that it is legitimate to impose a penalty on the person, but it is considered that it is appropriate to hold accountable for the criminal offense. Alf Ross states that accountability does not only mean rightfully sentenced, but also rightfully accused.⁶²

A person who is held accountable in criminal law is referred to as the subject of a criminal offense. According to Muladi and Barda Nawawi Arief the definition of the subject of crime includes two things, namely a person who committed the criminal acts (the perpetrator) and the one who can be accounted for. In general, the perpetrator is accountable, but it is not always the case.⁶³

Thus, the discussion of juvenile justice does not relinquish the sanctions to the child's well-being aspect. In other words, the sanctions imposed on the juvenile consider the purpose of punishment in which the pedagogy element becomes the main element.⁶⁴

Alf Ross pointed out, that ⁶⁵ “*concept of punishment*” departing from the existence of two terms or objectives: (1) criminal aimed at the imposition of suffering to the person concerned. (2) the criminal is a statement of defamation against the act of the perpetrator.

Sudarto (1979) makes a distinction between punishment and treatment as follows.⁶⁶

“Punishment is retaliation against the guilt of the perpetrator, while treatment is for the protection of society and for guidance or correction of the perpetrator. So dogmatically, punishment is for a normal mental state, for a responsible person because the person who is not capable of being responsible has no guilts and the person who has no guilts can not be punished. Against that person may be subject to treatment.”

On the other hand Hulsman and Hoefnagels argue as follows.⁶⁷

"The nature of the punishment is pushing to order (tot de orde reopen); punishment essentially has two purposes namely to influence the behavior (gedragsbeïnvloeding) and conflict resolution (conflictosplossing). The resolution of this conflict may consist of the remedies of the losses suffered or the reconciliation of broken relationships or the restoration of trust between peoples.

CATEGORIES OF JUVENILE OFFENDERS TO BE CONSIDERED FOR DIVERSION

Application of diversion is done selectively after certain considerations. The juvenile offenders that can be considered can be seen from the categories of delinquency or crime. Crime can be distinguished into 3 (three) categories, namely mild, moderate and severe levels. In general, diversion should be applied to children who perform light mischief. For moderate crime / delinquency, there are consideration factors for diversion. For serious crimes then diversion is not an option.⁶⁸

⁶² Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, (Jakarta : Prenada Media, 2006), p. 64

⁶³ Muladi dan Barda Nawawi Arief, *Op.cit*; p. 136

⁶⁴ Hadisuprpto, *Op.cit*, hal. 350

⁶⁵ Muladi dan Barda Nawawi Arief, *Op.cit*, hal. 4-5

⁶⁶ Sudarto, *Suatu Dilemma dalam Pembaruan Sistem Pidana Indonesia*, (Semarang : Fakultas Hukum UNDIP, 1979), p. 30

⁶⁷ Muladi dan Barda Nawawi Arief, *Op.cit*, p. 9

⁶⁸ Santi Kusumaningrum, “Penggunaan Diversi untuk Anak yang Berhadapan dengan Hukum/ Diversion for juvenile offenders (developed from the report made by Chris Graveson)”, “<<http://ajrc-aceh.org/wp-content/uploads/2009/05/diversion-guidelines-adopted-from-chris-report.pdf>>

Some crimes are classified as petty crimes, such as some minor theft crimes, minor assaults without injury, or minor damage to property. Moderate mischief / crime is a type of crime, in which there is a combination of all conditions. All conditions are taken into consideration to determine the appropriateness for diversion or not. Serious crimes are those cases of sexual assault and physical assault that cause serious injuries.

The conditions of juvenile crimes vary. Therefore, the factors that can be considered for diversion need to be scrutinized. Some of the situational factors under consideration of a diversion application can be discussed as follows.⁶⁹

- 1) Nature and condition of deeds. The first consideration of a diversion is the level of crimes or offense. Background can be a consideration;
- 2) Previous violations made. If a child ever commits a minor offense, the diversion should remain a consideration. If a child often commits a violation of the law, it is difficult to apply diversion, but care should be taken in the best interest of the child, and should be referred to a competent professional service;
- 3) The degree of involvement of the child in the case;
- 4) The child's attitude toward the action. If the child confesses his/her actions and regrets, this becomes a positive consideration for diversion. The application of diversion can not be considered if the child does not admit his/her actions;
- 5) The reaction of parents and / or family of children to the action. Parent / family support is critical to successful diversion. If the family is covering up the child's offense, then an effective diversion plan will be difficult to implement;
- 6) Suggestions given to make improvements or apologize to the victim. Apology to the victim is a clear indication to the victim that the juvenile offender will be responsible for his/her actions. If the child denies to apologize for his/her actions, then the diversion is impossible;
- 7) The impact of the action on the victim. If the crime has a very serious impact on the victim, even if the child does not mean it, then diversion may not be an option;
- 8) The victim's view of the method of treatment offered. In order for the diversion to be properly planned, there must be input and / or agreement with the victim;
- 9) Impact of sanctions or penalties previously accepted against the child. If the child previously has ever violated the law, and the sanction was not effective for the juvenile offender, then the diversion is not an option, unless the violation was classified as mild or has long been occurred;
- 10) If in the public interest, then the legal process must be done. The police must consider the public interest in addition to the interests of the victim, and his/her family. In such cases, there is a high demand from the public to process the criminal, because the juvenile offender has made the community uneasy. In such condition there is no diversion.

The types of diversions generally consist of three types: diversion in the form of warning; informal and formal diversions.⁷⁰

i. Warning

Diversion in the form of a warning, this will be imposed by the Police for minor offenses. As part of the warning, the offender will apologize to the victim. The police recorded details of the incident and listed in the archives at the police station. These warnings have often been practiced.

⁶⁹ *Ibid*

⁷⁰ *Ibid*, p. 9-10

ii. Informal Diversion

Informal diversion is applied to minor offenses where it is perceived as inappropriate to simply warn the perpetrator, and to the perpetrator needs a comprehensive intervention plan. Victims should be invited (by phone) to ensure their views on informal diversion and what they want in the plan. Informal diversion should have a positive impact on victims, children and their families. It must be ensured that the child will be suitable for informal diversion. In this informal diversion plan, the juvenile will be responsible, acknowledging the needs of the victim and the perpetrator, and if parents may be held accountable for the incident.

iii. Formal Diversion

A formal diversion is conducted if informal diversion can not be done, but it does not require court intervention. Some victims will feel the need to tell the juvenile offender how angry and hurt they are, or they want to listen directly from the juvenile. Since the problem arises within the juvenile offender's family, it is helpful to have other family members present to discuss and develop a good diversion plan for all those impacted of the action. The formal diversion process by which victims and offenders meet face to face, internationally it is referred to as "Restorative Justice". Others called Restorative Justice as the Family Group Conference; Restorative Justice Conference; Community Conferencing.⁷¹

The process of conference on the implementation of diversion (especially the formal diversion), consists of the stages of the process, namely: 1) pre-conference stage; 2) conference stage of diversion planning ; 3) implementation stage of diversion, monitoring and follow up.⁷²

CONCLUSIONS

Based on the description in the analysis, it can be concluded as follows:

1. Legal protection of juvenile offenders through diversion in the juvenile criminal justice system is by establishing legislation regulating diversion in the juvenile criminal justice system.

With the enactment of Law of the Republic of Indonesia Number 11 of 2012 on Juvenile Criminal Justice System in the State Gazette of the Republic of Indonesia of 2012 Number 153, Supplement to State Gazette of the Republic of Indonesia Number 5332, the promulgation in Jakarta on July 30, 2012, the legal protection against juvenile offenders is legally set up through Diversion. Diversion is an adaptation and ratification of international conventions as stipulated in the United Nations Minimum Standard Rules for Non-Custodial Measures (The Tokyo Rules); United Delinquency (The Riyadh Guidelines); United Nations Minimum Standards Rules for Administration of Juvenile Justice (the Beijing Rules).

Application of Diversion aims to provide legal protection against juvenile offender in the Indonesian criminal justice system is by applying diversions in every stage of the criminal justice system, ranging from the stage of investigation, prosecution and examination before a juvenile court, of the Law of the Republic of Indonesia Number 11 of 2012 on the Juvenile Criminal Justice System. And the government regulation of the Republic of Indonesia Number 65 of 2016 on guidelines for the implementation of diversion and handling of juvenile or children under 12 (twelve) years old.

⁷¹ *Ibid*, p. 10

⁷² *Ibid*; p. 10-13

The application of diversion and restorative justice is intended to avoid and to punish the juveniles from the judicial process so as to avoid stigmatization of juvenile offenders and it is expected that the juvenile offenders can return to the social environment fairly.

2. Appropriate diversion applied to juvenile offenders in the juvenile criminal justice system is: peaceful solution between the victim and the juvenile offender with or without compensation, returning to the parents / guardians, participation in education or training at the Institution of Education or Social Welfare (LPKS), and Community Service.

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