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THE PRACTICE OF DIVIDING THEFT WITH THE PROSECUTION OF A CHILD FACING THE LAW IN THE PERSPECTIVE OF THE CHILD'S CIVIL JUSTICE SYSTEM

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ABSTRACT

The basic ideas contained in the birth of Act No. 11 of 2012 on the Child Criminal Justice System are focused on the Foundations, Values, and Purposes in which the law is implemented through Restorative Justice. This basic idea is a policy and at the same time a pillar in the conduct of the criminal justice system process of children, in particular concerning matters of diversity. Where different concepts give priority to the rights of the child because, first, the child is the successor generation and the future of the nation. Second, children are socially weak groups that must be protected and directed. The child's criminal justice system gives high priority to the best rights of the child. The purpose of this study is to study and analyze the follow-up of a child as a perpetrator of a crime of theft with notice as per article 363 of the CEDAW with a penalty of imprisonment of 7 (seven) years or more, and whether it can be carried out differently, and to learn and analyse how the different methods of execution are in accordance with the Fundamentals, Values, and Purposes of the Basic Ideas born of the Law No. 12 of 2012 on the Child Criminal Justice System when linked to the policy of diversion.

Keywords: Diversity Policy - Minors - Punishment of theft with extortion

INTRODUCTION

A child is a trust and a grace from the One God in whom is inherent the dignity and dignity of the whole human being. Two important reasons why children should be protected are first, children are the successor generation and the future of the nation. The State, as the holder of the authority to protect and protect every citizen without exception of children, is obliged to provide care and protection to children. One of the efforts that the state can make is to enact legislation that safeguards the rights of the child as a citizen and the civil rights of other children as well as protecting children from various acts of violence and discrimination, including children who are in trouble with the law.¹

The child's life and development became less controlled which resulted in the onset of childbirth in the middle of adolescence. The term child abuse is derived from the foreign term juvenile delinquency, where the abuse of a child is an act or act of violation of the norms of law or social norms committed by children at a young age.²

Nowadays there are many crimes involving children, both as perpetrators and as victims of crimes. A child who commits a criminal offence is also entitled to legal support and protection. According to Arif Gosita, the legal protection of children is an effort to support the exercise of rights and duties, a child who acquires and ins the right to grow and develop in life in a balanced and positive manner, to be treated fairly and avoided from harmful threats.³

The birth of Act No. 11 of 2012 is the decree of various institutions. In essence, the diversion institution is a representation of a restorative approach to justice in the child's criminal justice system. The restorative approach to justice has the power to restore the relationship between the perpetrators and the victims. Diversion also prevents deeper hostility between the two sides and encourages reconciliation between the perpetrators and victims by voluntary forgiveness and compensation.

However, before entering into the judicial process, law enforcement, families, and the community are obliged to pursue the process of settling the child's case

¹ Muchsin, *Child Protection in a Positive Law Perspective (Review of State Administrative Law, Personal Law, and Criminal Law)*, Court Varia Year XXVI, No. 308, IKAHI, Jakarta, 2011, pp. 23

² Setya Wahyudi, *Implementation of Diversi Ideas in Updating the Child Criminal Justice System in Indonesia*, Genta Publishing, Yogyakarta, 2011, pp. 30.

³ Moch. Faisal Salam, *Child Justice Act in Indonesia*, Print I, Mandar Maju, Bandung, 2005, pp. 11

outside the courts, that is, through different ways based on a restorative justice approach.⁴

Taking into account the realities and opinions related to the diversion of custody at the stage before the court then it should be questioned also the effectiveness of diversion implementation as the basic idea of the birth of the Law No. 11 of 2012 on the Child Criminal Justice System seen from the Fundamentals, Values and Purposes. The basic ideas contained in Law No. 11 of 2012 on the Child Criminal Justice System focus on the Fundamentals, Values, and Purposes embodied in Restorative Justice. The Act No. 11, of 2012, on the System of Penal Justice states that "a child in conflict with the law, hereinafter referred to as a child, is a child who is 12 (twelve) years old but not 18 (eighteen) years of age who is suspected of committing a criminal offence".⁵

When viewed from the conditions for doing so differ in article 7 paragraph (2) of the Law No. 11 of 2012 on the System of Criminal Justice applied in the case of a crime committed: first, threatened with a penalty of imprisonment under 7 (seven) years; and second is not a repetition of the crime.

The differential terms referred to in Article 7 (2) of Law No. 11 of 2012 on the Criminal Justice System are a bad formulation (bad formulation) if viewed within the scope of criminal law in Indonesia because they are contrary to the basic idea of the birth of the SPPA Act. At least some opinions can be submitted on this matter, first clearly the legal gap is shown between the norm of the different conditions of Article 7 paragraph (2) and the fundamental idea of birth of Act No. 11, of 2012 about the Child Penal Justice Systems in Article 1 paragraph (6), Article 2, Article 5 paragraph (1) and Article 6.⁶

Secondly, in the area of criminal law, where the different terms in article 7, paragraph 2, are not rational enough to be said to have a strong theoretical formulation in taking a policy on matters of children facing the law. Thus, it is necessary to study the policy and the existence of conditions for its implementation different, both the first requirement and the second requirement.⁷

The meaning of the diversion contained in the general provisions of article 1 para. (7) of the Law No. 11 of 2012 on the Child Criminal Justice System states that: "Diversion is the transfer of the settlement of a child's case from a criminal court process to a non-criminal court process".

⁴ Zulfa, Eva Achjani, *Paradigm Shift of Finance*, Lubuk Agung, Bandung, 2011, pp. 64-65

⁵ Faisal and Derita Rahayu Prapti, *Reformulations of the Conditions of Diversity of the Basic Studies of the Child Criminal Justice System*, Legal Issues, Vol. 50, No. 3, 2021, Semarang.

⁶ *Ibid.*, hlm. 331-338.

⁷ *Loc. Cit.*, hlm. 331-338.

Child criminal justice processes often present themselves as a mechanism that is only formally oriented towards law enforcement and not oriented to the best interests of the child.⁸

The concept of restorative justice as laid down in Law No. 11 of 2012 on the Child Criminal Justice System provides space for protection and respect for rights and interests between victims and perpetrators. In the settlement of a child's criminal case, the child court seeks the best of the child concerned, both physically and psychologically, as well as of the children's future.

Restorative justice, as described in article 1, paragraph 6, states that restorative justice is the settlement of a criminal case involving the perpetrator, the victim, the family of the offender/victim and other related parties to jointly seek a just settlement by emphasising the recovery to the original state and not revenge. There are some examples of children's cases resolved using differential processes at the court level, related to theft and child-reporting legal cases such as article 363 of the Code. This is implemented because of the role of various parties in trying to find the best solution for the child and the peace and apology of the victim to the perpetrator. Based on the background that has been outlined, so the authors tried to analyze his policy in this form of research.

METHOD

The legal research method used in this study is normative-empirical (applied law research), using the case study of normative -empiric law as a product of legal behavior. The object of the study is the implementation or implementation of a positive legal provision and its implementation in fact on every particular legal event that occurs in society in order to a determined goal.⁹

The method of approach used using the Statute Approach is the approach carried out by examining all the regulations and regulations that relate to the legal issue being studied. To study and analyse the rules of the laws in force in order to find the logical ratio and ontological basis of the birth of such laws.¹⁰

In academic terms, the approach is to reveal the philosophical content of the Law so that it can conclude whether there is a philosophy of conflict between the

⁸ Pradityo, Randy, Restorative Justice in Child Criminal Justice System, Journal of Law and Justice, Vol. 5, No. 3, Jakarta, 2016, pp. 319-330.

⁹ Muhammad, Abdulkadir, *Law and Law Research*, Aditya Bhakti, Bandung, 2004, pp. 52

¹⁰ Derita Prapti Rahayu dkk, *Bangka Belitung University Thesis Guidelines*, 2023, Hlm 20

law and the issues faced in particular related to the existence of different policies in the child criminal justice system.¹¹

The data collection technique is carried out by means of interviews, documentation and study of the library which is then conducted descriptive analytics of the problem. As for the research objects in Polsek Pangkalanbaru, the Prosecutor's Office of Koba Bangka Tengah, the State Court of Kaba Bangka Medium, Bapas Class IIA Pangkalpinang as well as Fauzan and Patner's law attorneys' offices.

RESULT & DISCUSSION

1. Diversified stages and procedures

The Child Criminal Justice system is the whole process of resolving children's cases facing the law, from the investigative stage to the post-criminal guidance stage. Child justice aims to provide the best for the child, without sacrificing the interests of the community and ensuring justice.¹²

In this case, the law enforcement system of child criminal justice cannot be separated from the basic idea of the birth of the Law, including regarding the conditions of execution differentiated. The basic concept of the criminal justice system of children is centered on 2 (two) main principles.

First, the foundations of the child criminal justice system are based on protection, justice, the best interests of children, survival and child growth, deprivation of liberty and mediation as a last resort, and the avoidance of reprisals. In the study of criminal law, the basics of the children's penal justice system include the substance of mediation for children as the last resort and the prevention of criminal reprisal for children, known as the term "ultimum remedium". Criminal law in Indonesia basically adopts the ultimum remedy mechanism which can be understood as the imposition of criminal sanctions positioned as the ultimate sanction.¹³ Somebody calls the ultimum remedium the ultimate weapon.¹⁴ It is not the opposite of making criminal law a preliminary means of resolving problems.

¹¹ Marzuki, Peter Mahmud, *Legal Research*, Kencana, Jakarta, 2011, pp.94

¹² Gultom, *Protection of Children in the Child Criminal Justice System in Indonesia*, Refika Aditama, Jakarta, 2008, pp. 7.

¹³ Rahmawati, N. A., *Hukum Pidana Indonesia: Ultimum Remedium Atau Primum Remedium*, In *Jurnal Hukum Pidana dan Penanggulangan Kejahatan*, Vol. 2, No. 1, Surakarta, 2013.

¹⁴ Santoso, T., *Criminal Law One Introduction*, Rajawali Press, Depok, 2020.

The principle of the rights of the child became the basic idea that vengeance and mediation were the last instruments of *ultimum remedium*.¹⁵

Secondly, the basic idea of the establishment of UPA No. 11 of 2012 on the Child Criminal Justice System, is based on the primary value of restorative justice as a legal ideal in the birth of the Law No.¹⁶

2. Diversity policy against children who commit theft offences when they are examined from basic ideas, foundations, values and purposes

Diversi is the authority and obligation of the law enforcement agencies both at the level of investigators, general prosecutors, and the process of examination in the court to seek diversion according to the terms and conditions as set out in Article 7 paragraph (1) of the Law No. 11 of 2012 on the Child Criminal Justice System. Whereas considering the conditions differentiated as in Article 7, paragraph (2) of the Act No. 11, 2012 on criminal justice system applied in the case of criminal offences committed: First, threatened with a penalty of imprisonment under 7 (seven) years; and second is not a repetition of criminal acts. To be a basis in the diversified implementation so that this article becomes rigid and does not reflect the basic ideas in the birth of the Law No. 11 of 2012 on the Child Criminal Justice System in particular relating to the Fundamentals, Values and Purposes.

Therefore, it requires a policy and procedure within the criminal justice system of children in Indonesia that can accommodate the settlement of child matters, one of which is by using a restorative justice approach, through a legal reform that not only changes the entire Law but also modifies the existing criminal justice systems, so that all the foundations, values and aims sought by the law in the formulation of the basic ideas of Law No. 11 of 2012 on the Child Criminal Justice System can be achieved. Differential policies for children in the case of theft with notice, as described in Article 363 of the Covenant, usually take into account various factors, such as the age of the perpetrator, the level of involvement, the losses incurred, as well as other relevant factors such as a child's psychological factors and the presence of the victim's regret for the perjury.

Then the application of differential enforcement in each district according to Article 7 paragraph (2) against the case of a child in theft with the notice of Article

¹⁵ Faisal and Derita Rahayu Prapti, *Reformulations of the Conditions of Diversity of the Basic Studies of the Child Criminal Justice System*, Legal Issues, Vol. 50, No. 3, 2021, Semarang, pp. 333-339.

¹⁶ *Ibid.*, hlm. 333-339.

363 of the Code of Criminal Procedure which threatens a sentence of more than 7 years or more different policies adopted remains implemented to the judicial process and some are doing different efforts outside the funding.

Because of this discrepancy, there is a need for a policy and procedure within the child criminal justice system that can accommodate the settlement of child matters using a restorative justice approach, through a legal reform that not only changes the entire Law but also modifies the criminal justice systems that exist in a policy, so that the basic idea of the birth of Law No. 11 of 2012 on the Child Criminal Justice System can be achieved.

CONCLUSION

A. Summary

Based on the conclusion, it can be suggested as follows :

1. Diversion is an alternative settlement of a case outside of criminal justice that is given to perpetrators of crimes, especially those who are still a child. In the context of theft with bribery committed by a child, differential giving can be a suitable option to avoid a child from heavy criminal justice proceedings and potentially destroy the child's future. Different policies for children in the case of theft with notice take into account various factors, such as: the age of the perpetrator, the level of involvement, the losses incurred, and other relevant factors. The diversion process usually involves stakeholders, such as parents, law enforcement agencies, child protection institutions, and society.
2. The settlement of a child in conflict with the law who is threatened with 7 (seven) years or more for theft with the exception of Article 363 of the Covenant should be resolved in a different way. The implementation of these differences is in accordance with the basic idea of the birth of the SPPA Act, such as the provisions of Article 1 paragraph (6) of restorative justice, Article 2 relating to the foundations of differences, Article 5 paragraph (1) of the Child Criminal Justice System must prioritize the approach of Restorative Justice, and Article 6 related to the purpose of Diversi.

B. Advice

Based on the conclusion, it can be suggested as follows:

1. Diversification in the child criminal justice system is the best alternative effort in resolving child criminal cases carried out outside formal criminal justice. The diversion process aims to educate, reconcile, and accompany

children involved in off-court crimes. The different stages and procedures of the policy for children in the case of theft with notification of Article 363 of the Covenant are usually different in each region due to the respective policies implemented taking into account various factors, such as the age of the perpetrator, the level of involvement, the losses incurred, and other relevant factors.

2. The Diversi may be applied to any child without any limitation as the provisions of Article 7 paragraph (2) which states that the first diversion is made only if threatened with a penalty of imprisonment of less than seven (seven) years; and the second is not a repeat of a criminal offence. Because of the guidelines in the provisions of article 7, paragraph (2) of the value researchers are irrelevant is the basis for the law enforcement in locking the different conditions and of course is not in line with the basic idea of the establishment of the Law No. 11 of 2012 concerning the Fundamentals, Values and Purposes. In article 7, paragraph (1), it is stated that diversion is both the authority and the duty of the law enforcement agency both at the level of investigator, the general prosecutor, and the process of examination in the court.

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