

Reconstruction of a Restorative Justice Policy on Juvenile Crime Based on Justice Value

Warijan^{1*}, Mahmutarom H. R.², Anis Mashdurohatun³

¹Doctorate Student of Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

²Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

³Faculty of Law Sultan Agung Islamic University Semarang, Indonesia

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*Corresponding author: Warijan

Abstract

In the Implementation of the principle of restorative justice in cases of criminal acts or violations involving children, the Government of Indonesia has issued Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. The problems in this study are what are the current weaknesses of restorative justice policies in criminal cases with juvenile perpetrators and how is the reconstruction is based on justice. The research method uses the constructivism paradigm, the approach method uses sociological juridical, descriptive-analytical research type, with primary and secondary data types and sources in the form of primary legal materials, secondary legal materials, and tertiary legal materials. Methods of data collection by observation, interviews, and literature study, and analyzed using a Qualitative analysis method. The results of this study are 1) The Weaknesses of restorative justice policies in cases of criminal acts with juvenile perpetrators are: a. Weaknesses of the Legal Substance are the unclear regulation of criminal acts under 7 years of age based on Article 7 paragraph 2 letter a, can only be carried out against criminal acts that are threatened with imprisonment for less than 7 years. The modus operandi which is increasingly widespread is also increasingly varied so that it becomes a challenge for law enforcement, especially if the crime is committed by a child. b. The weakness of the legal structure is that the peace between the victim and the child perpetrator is very different when it comes to the principle of the best interests of the child. If the diversion agreement is not reached, there will be great opportunities for imprisonment for the child. c. The weakness of the legal culture is the weakness of the principle of the best interests of the child, which must obtain the consent of the victim and or the victim's family as well as the willingness of the child and or his family. 2) The Reconstruction of restorative justice policies in cases of criminal acts with juvenile perpetrators based on justice are: Reconstruction in Article 10 by adding a sentence in the second paragraph letter d of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

Keywords: Policy, Restorative Justice, Crime, Child Offenders, Justice.

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INTRODUCTION

Cases of children in conflict with the law continue to occur from time to time. There are various forms of actions taken by children so that they have to deal with the law, both those categorized as criminal acts (crime), as acts of violation (offenses), or as acts of juvenile delinquency. Examples of criminal acts such as molestation, beating, theft, vandalism, fraud, gambling, rape, obscenity, embezzlement, murder, extortion, arson, distribution and use of narcotics, and so on. Meanwhile, the violation acts, for example, in the form of traffic violations such as riding a motorcycle and violating traffic signs. Meanwhile, as acts of child delinquency, for example, such as skipping school, running away from

home, fighting or disobeying parents and teachers, fighting, smoking, drinking or drinking alcoholic beverages, eating in the restaurant and not paying, and so on [1].

For children who are suspected of or charged with or even sentenced for committing a crime or violation or juvenile delinquency, in reality, it results in a worse impact for children in conflict with the law. In many cases, these children have to drop out of school. They were dismissed from school, because they were expelled and ostracized from their environment, or because they had to serve prison sentences. They also lose the right to get proper parenting from their parents and family, the right to play and recreation, the right to

be free from all forms of punishment, cruel treatment, and degrading actions [2]. The reports from the Commission for the Disappeared (*Kontras*) and Impartial even mention that the children experienced torture during the judicial process and in detention.

Indonesia as a country that has ratified the Convention on the Rights of the Child (Convention on the Rights of the Child) through Presidential Decree Number 36 of 1990 is bound by the obligation to provide protection for children, including providing special protection to children in conflict with the law. One form of protection is to implement a special criminal justice system for children in conflict with the law. Article 40 paragraph (1) of the CRC states that "*States Parties recognize the right of every child who is declared a suspect or is recognized as having violated criminal law to be treated in a manner that is in accordance with increasing the child's sense of respect and dignity, which strengthens the child's respect to the human rights and freedoms of others and which takes into account the age of the child and the desire to promote the reintegration of the child and the return of the child to a constructive role in society*" [3].

In the Handbook on Restorative justice Programs published by the United Nations, it is also stated that: "*Restorative justice is an approach to problem-solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies, and the community*" [4]. In relation to criminal law enforcement, restorative justice is an approach to solving criminal problems involving victims, perpetrators, and elements of society to create substantive justice.

The special criminal justice system for children certainly has a special purpose for the future interests of children and society which contains the principles of restorative justice, the definition of restorative justice itself is not uniform, because there are many variations of models and forms that develop in its application. Therefore, many terms are used to describe the concept of restorative justice, such as communitarian justice, positive justice, relational justice, reparative justice, and community justice [5].

In the case of criminal acts committed by children, the restorative justice system at least has the aim of repairing or restoring (to restore) criminal acts committed by children with actions that are beneficial to children, victims, and their environment by involving them directly (reintegration and rehabilitation) in problem-solving and is a different method from the way handle adults [6].

To ensure the implementation of the principle of restorative justice in cases of criminal acts or violations involving children, the Government of Indonesia has issued Law Number 11 of 2012 concerning the Juvenile

Criminal Justice System. Article 1 point (6) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System states Restorative justice is the settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a settlement by emphasizing restoration to its original state, and not retaliation [8].

Article 5 paragraphs (1), (2), and (3) states that the Juvenile Criminal Justice System must prioritize the Restorative Justice approach which includes:

- a. criminal investigation and prosecution of children carried out in accordance with the provisions of laws and regulations unless otherwise stipulated in this law;
- b. child trial conducted by the court in the general court environment; and
- c. development, guidance, supervision, and/or assistance during the process of carrying out a crime or action and after undergoing a crime or action.

Even in Article 1 paragraph (2) letters a and b, Law Number 11 of 2012, it is ordered that in certain cases it is mandatory to seek diversion, which is the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system.

Thus, the application of the principles of restorative justice and the diversion process as an effort to resolve crimes committed by children, in a formal juridical manner, has been clearly and firmly regulated in Law Number 11 of 2012 concerning the Juvenile Justice System and has been implemented by related institutions such as police, prosecutors, courts and the Bapas.

The implementation of Law Number 11 of 2012, cannot be separated from the Convention on the Rights of the Child (KHA) and Law Number 35 of 2014 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. Because the purpose of Law Number 11 of 2012 is to respect, protect and fulfill the rights of children, especially children who conflict with the law. Thus, the application of a special criminal justice system for children must be oriented and centered on respecting, protecting, and fulfilling children's rights, including children in conflict with the law.

Based on BPS data, cases of children in conflict with the law in Indonesia for 2018 are 33% of the total estimated population. Meanwhile, the number of children in conflict with the law is 10,186 cases [7]. Settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation can be seen in the following diagram.

In using the restorative justice and diversion approach in handling children, there are still quite several juvenile perpetrators of criminal acts who get a prison sentence (55.30%), but by using the diversion approach the percentage of handling cases of children is relatively small (22.80% returned to their parents and 1.32% to social institutions or others). This shows that the partisanship of the relevant law enforcement apparatus has not been optimal in dealing with children's cases, more as an effort to find a fair solution by emphasizing recovery back to its original state and not retaliation. This problem is what urges the author to study it further in a research with the main problem as follows:

1. What are the current weaknesses of restorative justice policies in criminal cases with child perpetrators?
2. How is the reconstruction of restorative justice policies in cases of criminal acts with juvenile perpetrators based on justice?

METHOD OF RESEARCH

The author in this study uses the constructivism paradigm, a paradigm that views that the science of law only deals with laws and regulations. The research approach used is sociological legal research or commonly called sociological juridical research. In this study, the law is conceptualized as an empirical phenomenon that can be observed in real life. While the type of research used in completing this study is a descriptive-analytical juridical research method, namely research conducted by examining library materials (secondary data) or library legal research [8], then described in the analysis and discussion.

RESEARCH RESULT AND DISCUSSION

1. The Current Weaknesses of Restorative Justice Policies in Criminal Cases with Child Perpetrators

Child protection activities have at least two aspects, the first is related to policies and laws, and regulations governing the protection of children's rights, and the second aspect concerns the implementation of these policies and regulations. Restorative justice Law no. 11 of 2012 as a regulation that regulates juvenile justice is the answer to the weakness of the previous law governing juvenile justice, namely Law no. 3 of 1997. The regulation of this Act also still has gaps that become weaknesses in protecting children, especially in this case in regulating restorative justice. The presence of legislation regarding children gives a new breath to the nation's attention to the next generation. One of them with the birth of Law no. 3 of 1997 concerning the Juvenile Court on January 3, 1997, as a better and adequate legal instrument in carrying out guidance and providing protection for children.

Along with the development of an increasingly modern era, the regulation of legal protection is regulated in Law no. 3 of 1997 concerning Juvenile Court is no longer following the development and legal needs of the community because it has not comprehensively provided

protection to children in conflict with the law. The criminal justice system that is carried out in this law begins the settlement of children's cases from the investigation level to the stage of completing the criminal procedure. The difference between these two laws and regulations, especially in implementing restorative justice, needs to be considered. As for the things as follows: Approach to Justice Restorative Justice Recovery is the main goal of this concept which is very contrary to retributive justice which has been embraced in the imposition of punishment for perpetrators of criminal acts, especially child crimes. This concept was born in Law no. 11 of 2012 to provide space in resolving children's cases by involving all interested parties such as the families of the perpetrators and victims, as well as other parties who emphasize recovery back to its original state. The Juvenile Criminal Justice System requires that all processes in the system, starting from the investigation to the stage of guiding after serving a criminal period, prioritize a restorative justice approach. Law No. 3 of 1997 concerning Juvenile Court does not apply the concept of restorative justice. The involvement of the parents of the perpetrators and victims as well as other parties such as the community has very little role to play in resolving the child's case. One of the participation of parents or guardians of the perpetrators and victims is seen in the trial of children's cases, but a restorative justice approach is only a form of fulfilling the child's right to remain accompanied during the juvenile justice process, that the retributive system is still very strong in this law, which is to retaliate against juvenile delinquency.

The unclear regulation of criminal acts under 7 years based on Article 7 paragraph 2 letter a, can only be carried out for criminal acts that are punishable by imprisonment for under seven years. Criminal acts under seven years should be listed by legislators so that there is clarity in their arrangements. Elucidation of Article 9 states that criminal acts that are threatened with imprisonment of more than seven years are classified as serious crimes such as premeditated murder, terrorism, rape, etc. Crimes committed by children are almost the same as crimes committed by adults, so it is necessary to clearly distinguish appropriate crimes. The *modus operandi*, which is increasingly widespread, is also increasingly varied so that it becomes a challenge for law enforcement, especially if the crime is committed by a child. If it is not stated clearly, it will be a challenge for law enforcement officials to carry out their resolution.

Investigators, public prosecutors, and judges who resolve child cases must meet the requirements stated in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System. If these conditions are not met, it will be carried out by investigators, public prosecutors, judges who carry out their duties against criminal acts committed by adults. These requirements are not easy because it is hard to get law enforcement officers who understand the reality of children, moreover the unequal

distribution of human resources and the ability of each region to carry out this technical training pattern. In addition to diversion which is required to use a restorative justice approach, other stages of criminal justice also apply this approach, which is in terms of guidance, supervision, assistance during the process of carrying out a crime or action and after undergoing a crime.

Peace between victims and children is very different when looking at the principle of the best interests of children. This means that the diversion agreement will never be reached if it sees the consent of the victim and or his family, regardless of the best interests of the child. The best interest of the child is one of the principles in the juvenile criminal justice system which is that all decision-making must always consider the survival and development of the child.

Children who violate the law or commit criminal acts are strongly influenced by several factors, with main factors from outside the child such as association, education, playmates, and the surrounding environment because the actions taken by children are generally a process of imitating or influenced by negative actions from other people that is around it. When a child commits a crime, the formal justice system will place the child in the status of a prisoner whose impact will bring considerable consequences in the child's growth and development. The process of punishing children who commit crimes through the formal criminal justice system by putting children in prison does not succeed in making children a deterrent and becoming better people to support their growth and development process, it could be that prison makes children more professional in committing criminal acts [9].

The purpose of the juvenile justice system is not solely aimed at imposing criminal sanctions on children as perpetrators of criminal acts, but rather focuses on the premise that the imposition of sanctions is a means of supporting the realization of the welfare of children as perpetrators of criminal acts [10].

To realize the welfare of children as perpetrators of criminal acts, as far as possible the involvement of children in the juvenile criminal justice process is avoided. To avoid the negative impact of the juvenile criminal justice process, law enforcement officers must be given the authority to divert the settlement of juvenile criminal cases from the criminal justice process to a process outside the criminal justice system.

Children who conflict with the law need to be protected from errors in the application of the laws and regulations imposed on them, which cause mental, physical, and social harm. Children by their nature do not have enough reasoning power to distinguish between good and bad things. Crimes committed by children, in general, are a process of imitating or being influenced by

other people or from the influence of the media that children see and read. The formal criminal justice system which ultimately places children in prison status will have a considerable impact or consequence on the growth and development of children. The process of giving punishment to children through the formal criminal justice system by placing children in prison did not succeed in deterring the child and becoming a better person to support the process of growth and development [11].

The weak principle of the best interest of the child must obtain the consent of the victim and or the victim's family as well as the willingness of the child and or his family, so that in this case the benchmark is the existence of peace between the victim and the child, not in the best interest of the child. In this case, the diversion process should prioritize the best interests of the child, not just peace between the victim and the child.

2. The Reconstruction of Restorative Justice Policies In Cases Of Criminal Acts With Juvenile Perpetrators Based On Justice

Reconstruction of restorative justice policies in criminal cases with child perpetrators, according to Erna Sofwan Syukri, provides an understanding of punishment which is interpreted as an effort to awaken criminals to regret their actions, and return them to be a good citizens, obey the law, uphold moral values, social and religious, to achieve a safe, orderly, and peaceful society [12]. Given the specificity of the child's behavior and actions, the punishment of children, especially the imposition of imprisonment, must be a final measure if other efforts are not successful. For this reason, it is better to look for alternatives to imprisonment, such as by imposing a fine or a conditional sentence. Provisions in Law no. 3 of 1997 concerning Juvenile Court regarding sanctions that can be imposed on children, it turns out that it is different from what was formulated by the drafting committee of the Criminal Procedure Code. Many types of criminal sanctions are determined by this Draft Criminal Procedure Code, but it is not yet known whether the provisions contained in this draft are good or not, because these provisions can still be changed to suit existing circumstances, situations, and conditions. The most important thing is that children in conflict with this law can immediately learn about the real relationship between their actions and the social reactions that arise as a result of their actions.

For a judge who will decide on criminal sanctions for children who are perpetrators of this act, it requires deep considerations. In addition to the judge's belief, the important determining factor here is the existence of community research reports made by litmas and correctional officers. This Litmas show child's personal data and other important factors because of that this report cannot be ignored and must be considered by the judge before deciding on a child case. So that the imposition of criminal sanctions became appropriate.

Sometimes judges in juvenile courts do not question the need for community research reports.

This happens because there is no perception among them. Besides there is no common perception among apparatus in the juvenile justice system, laws, and regulations related to the implementation of the juvenile justice system have not shown synchronization between each other where the tendency of judges in juvenile cases impose imprisonment instead of taking action against children in conflict with the law, which reflects the concept of retaliation in punishment rather than the concept of rehabilitation or resocialization.

Policy steps to minimize the imprisonment sentence for children do not only start when the child is placed in a correctional institution but also include even before the crime committed by the child occurred. This is put forward by the author to show that at the policy stage, the Government (policymakers) must start from:

- a. Policy determination at the formulation stage, the objectives of which are:
 - 1) Formulating a crime that can be categorized as a child crime;
 - 2) Provide the basis for the operation of components in the Criminal Justice System.
- b. Policy determination at the application stage. At this stage, the policies needed are policies that are oriented towards the creation of a Juvenile Criminal Justice System as a unified and integrated system [13], which will be able to minimize the use of imprisonment for children.
- c. Policy in the execution stage. At this stage, the policy that should be formulated is a policy that is oriented to the fulfillment of the rights of children who are sentenced to imprisonment as a realization of the judge's decision.

Referring to Article 39 of the Convention on the Rights of the Child which States parties must take appropriate steps to promote spiritual and physical recovery and reintegration into society. Recovery and reintegration as mentioned above must be carried out in an environment that fosters the health, self-respect, and dignity of the child. The cases of children conflict with the law, their family environment or place of residence still has not received attention. The family and the neighborhood where they live are involved only in the process of completing the data on the preparation of the Litmas by the Bapas officers. Ideally, it is necessary to carry out an intervention program for the child's environment to prepare for the integration of the child back into his family. An explanation of the rights and obligations of parents to protect their children must be socialized.

This is important because of how well the guidance is carried out in the institution, if the family and community environment refuses to accept the child back after that, it can be a trigger for children to repeat

violations of the law and prevent "recidivism" in the case of children, then as the intervention program implemented oriented to the provision of skills, training and especially the availability of employment opportunities for children who are out of the judicial process or sentencing institutions, have proven to be the most effective. This program will of course be successful if it is supported by the respect of the community and families who support these children, not the other way around, treating them as petty criminals or as outcasts, by placing a stigma on every step the child takes.

Freedom after completing guiding in institutions does not always bring happiness to children. Awkward children don't know where to go. Returning to parents' homes is not easy, apart from families who are not ready to accept them back, they also do not have transportation fees to return home for those who live far from the institution. They can go home without paying only if they show a letter of release in which case the child is faced with a difficult choice where his identity as an individual who has just finished undergoing guidance must be informed to other parties who are not interested in knowing it.

So the reconstruction of the value of Restorative Justice in cases of criminal acts with child perpetrators must be fair. The concept of a restorative justice approach is an approach that focuses more on the conditions for creating justice and balance for the perpetrators of crimes and the victims themselves. Procedures and criminal justice mechanisms that focus on punishment are transformed into a process of dialogue and mediation to create an agreement between the settlement of criminal cases that is more just and balanced for the victims and perpetrators. Conventional justice mechanisms recognize the existence of restitution or compensation to victims [14], while Restoration has a broader meaning. Restoration includes restoring the relationship between the victim and the perpetrator. Restoration of this relationship can be based on a mutual agreement between the victim and the perpetrator. The victim can convey about the loss suffered and the perpetrator is also given the opportunity to make up for it, through compensation mechanisms, peace, social work, or other agreements.

The concept of restorative justice is important when compared to the conventional criminal system because there are clear differences between them. The concept of conventional punishment provides little limitation or space for victims and perpetrators to play an active role in resolving their criminal cases, while in the concept of restorative justice, the active role of perpetrators and victims is the basis in resolving criminal cases themselves.

The Juvenile Criminal Justice System based on Law Number 11 of 2012 concerning the Juvenile Justice System must prioritize a restorative justice approach, and

diversion must be pursued to achieve peace between victims and children. In addition, resolving child cases outside the judicial process; preventing children from deprivation of liberty; encouraging people to participate, and instilling a sense of responsibility in children. Therefore, an approach with a restorative settlement model or called restorative justice is more appropriate to be applied in dealing with child offenders.

Therefore, based on the description above, the reconstruction as intended by the author is the reconstruction of Article 10 by adding a sentence in the second paragraph letter d of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. So Article 10 needs to be reconstructed into:

1. Paragraph 1:

“Diversion Agreements to settle criminal acts in the form of violations, minor crimes, crimes without victims, or the value of the victim's loss is not more than the value of the local provincial minimum wage as referred to in Article 9 paragraph (2) can be carried out by investigators together with the perpetrators and/or their families Community Advisors, and can involve community leaders.”

2. Paragraph 2:

“The Diversion Agreement as referred to in paragraph (1) is carried out by the Investigator on the recommendation of the Community Counselor in the form of:

- a. *reimbursement of losses in the event of a victim;*
- b. *medical, psychosocial and religious rehabilitation;*
- c. *handover to parents/guardians;*
- d. *participation in education or training is accompanied by parental participation in educational institutions or LPKS for a maximum of 3 (three) months; and must be followed by the parents of the child who commits a crime during the period during which the child is undergoing education and training or*
- e. *community service and social work for a maximum of 6 (six) months.”*

CONCLUSION

1. Weaknesses of restorative justice policies in criminal cases with juvenile perpetrators are:
 - a. The weakness of the legal substance is the unclear regulation of criminal acts under 7 years based on Article 7 paragraph 2 letter a, which can only be carried out for criminal acts that are punishable by imprisonment for under 7 years. Criminal acts under seven years should be listed by legislators so that there is clarity in their arrangements. Elucidation of Article 9 states that criminal acts that are threatened with imprisonment of more than seven years are classified as serious crimes such as premeditated murder, terrorism, rape, etc. Crimes committed by children are almost the same as crimes committed by adults, so it is necessary to clearly distinguish appropriate crimes. The modus operandi, which is increasingly widespread, is also increasingly varied

so that it becomes a challenge for law enforcement, especially if the crime is committed by a child. If it is not stated clearly, it will be a challenge for law enforcement officials to carry out a settlement.

- b. The weakness of the legal structure is that the peace between victims and perpetrators of children is very different when it comes to the principle of the best interests of children. This means that the diversion agreement will never be reached if it sees the consent of the victim and or his family, regardless of the best interests of the child. If a diversion agreement is not reached, there will be great opportunities for imprisonment for children. Article 3 paragraph 1 of the Convention on the Rights of the Child states that "in all actions involving children carried out by the government and private social welfare institutions, judicial institutions, government institutions or legislative bodies, the best interests of the child must be the main consideration." The best interest of the child is one of the principles in the juvenile criminal justice system which is that all decision-making must always consider the survival and development of the child.
- c. The weakness of legal culture is the weakness of the principle of the best interests of the child having to get the consent of the victim and or the victim's family as well as the willingness of the child and or his family so that in this case the benchmark is the existence of peace between the victim and the child, not the best interest for the child. The diversion process prioritizes the best interests of the child, not peace between the victim and the child.
2. Reconstruction of restorative justice policies in cases of criminal acts with juvenile perpetrators based on justice is by Reconstruction of Article 10 by adding a sentence in the second paragraph letter d of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

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