

Protection of Children in Conflict with Laws and Child Victims in the Diversion Implementation in Indonesia

Yunan Prasetyo Kurniawan^{1*}, Hartiwiningsih², Hari Purwadi³, Soehartono⁴

Abstract--- *Children today are at increased risk of becoming perpetrators or victims in the existence of crime. Too often, children are victims of theft, robbery, violence, sexual assault, harassment, intimidation and domestic violence, and an irony when they are also able to do so. Restorative justice through diversion is an alternative approach of justice that unites victims and perpetrators to find their own ways to recover damage, has much to offer young victims. But there are many risks in face-to-face meetings between child victims and older offenders. The human rights to child victims are those stated in the UN Convention on the Rights of the Child, the most consensual agreement ever received by the United Nations. The needs of child victims are based on many empirical studies and theories developed in the psycho-social literature. Children as perpetrators and victims have the right to remain protected and get good services and welfare in accordance with the mandate of the law, children as perpetrators of crime must get special services for children and welfare according to the children's field, including child victims. Child victims as a result of a crime often become neglected considering the difficulty of child victims to obtain the prescribed protection facilities stipulated in the positive law of children. The application of diversion in efforts to deal with children who are dealing with the law (children as perpetrators of crime) and children as victims (victims of criminal acts) is expected to be a novelty of child criminal problems. Thus, the state, society and individuals must make every effort to implement diversion in developing child protection efforts in various fields of life and livelihood in a country, community and family.*

Keywords--- *Child protection; Children in conflict with the Law; Child victims; Diversion; Restorative Justice; Criminal justice; juvenile justice.*

Yunan Prasetyo Kurniawan^{1*}, Hartiwiningsih², Hari Purwadi³, Soehartono⁴

^{1,2,3,4}Universitas Sebelas Maret, Indonesia

*yunan_maestro@yahoo.com

I. INTRODUCTION

Every child has dignity and worthy of high regard and every borned child must have his/her rights as a child without having to ask. This is in accordance with the provisions of the Convention on the Rights of the Child ratified by the Indonesian government through Presidential Decree Number 36 of 1990 which states the general principles of child protection: non-discrimination, the best interests of children, sustainability growth and development, and respect for children's participation; as well as the 1945 Constitution (UUD 1945), as the basic law which forms the basis of all national legal regulations as well as positive law on children, instructs every Indonesian citizen to take part in efforts to improve and be responsible for achieving a fair and prosperous society in spiritually and wealth as aspirations of the Indonesian people in accordance with their respective abilities.

After the implementation of Law Number 11 Year 2012 concerning the Juvenile Justice System (hereinafter referred to as the SPPA Law) with concept of diversion, it is still found that child victims do not get maximum protection and rights according to the law and the role of the state becomes less than optimal in the context of diversion. This also occurs in the case of child offenders as perpetrators of crime, which in this context can also be said to be victims. The concept of restorative justice through diversion makes it easy for child offenders to repeat their actions and the lack of a deterrent role for the children themselves and parents who should be the main gate in the aspect of protection and supervision of children who commit crimes.

The increasing number of perpetrators of crime in groups of children shows that there are indications of an increase in the number of children who commit crimes, which of course will also certainly have an impact on children who become victims in a crime. Children as perpetrators and children as victims shall continually obtain their rights according to the law, though in the implementation still oftenly found problems that tend to harm both the protection of children as victims and children as perpetrators in criminal acts, such as inappropriate forms of protection, inadequate compensation and restitution, court decisions and diversion approaches that are less in favour of the victims; in addition, the conditions and limitations on the number of special institutions for children that have not been evenly distributed in the territory of Indonesia. This shows that there are some of effectiveness problem in the implementation of restorative justice through diversion as an effort to protect children as perpetrators and victims.

Legal protection for children is an obligation for all of us, as we should bear in mind that children are the next generation of the nation who have a strategic role in realizing the ideals of the nation, therefore children shall be developed and protected to grow and develop properly. Children are a group that is vulnerable to a crime either as a victim, witness, or as a perpetrator of a crime.

Children are the budding, potential, the young generation hoped to succeed the ideals of the nation's struggle; they have a strategic role and special characteristics and traits which will guarantee the continuity of nation's sustainability and existence in the future.

II. LITERATURE REVIEW

A. Children Protection Law

Children who are victims of a crime, hereinafter referred to as Children Victim, are children under 18 (eighteen) years old who experiencing physical suffering, mental suffering, and/or economic loss caused by a crime. [1] Referring to Article 1 paragraph (2) of the SPPA Law, children in conflict with the law are: "Children who are victims of criminal acts, and children who are witnesses to a crime."

Child protection is all efforts to guarantee and protect children and their rights so that they can live, grow and develop and participate optimally, and protected from violence and discrimination. Child abuse and sexual violence shall have a serious attention due to its consequences; sexual violence against children may cause a prolonged trauma. Child protection efforts must start as early as possible.

Enactment of Law Number 35 of 2014 on amendments to Law Number 23 of 2002 concerning Child Protection, substantially prioritizing general principles of protection for children: non-discrimination, the best interests of children, sustainability and development, respect for children participation, and legal protection for child victims and child rights. Protection of child victims also includes some concerns related to the welfare of children. Entire concerns related to aspect of protection are the responsibility of all law enforcement officials.

B. Restorative Justice through Diversion

Indonesian Criminal Law at this moment began to enter the reforming, criminal law issues that often have a great impact on victims, especially on the implementation of the justice system at retributive justice concept. Reforming parts at juvenile justice system in Indonesia is at the regulation of criminal law in perspective and attainment of justice

for the improvement and restoration of circumstances after criminal justice events and processes, known as restorative justice; which is different from retributive justice (emphasizing justice in retaliation without looking at broader aspects on the side of the victim) and restitutive justice (emphasizing justice on compensation). As the development of criminal law and the nature of modern convictions perspective, it has introduced and developed what is called the "Doer-Victims" or perpetrator-victim relationship approach; a new approach that has replaced the action or perpetrators approach. [2]

According to the SPPA Law, diversion is the transfer of Child case settlement from a criminal justice process to "beyond" process of criminal justice, which aims to achieve a reconciliation between the victim and perpetrator; settling the Children case beyond of the judicial process; prevent children from deprivation of independence; encourage the community to participate; and cultivating a sense of responsibility to the child.

Refer to Supreme Court Regulation No. 4 of 2014, diversion deliberations are deliberations between parties involving children and parents/guardians, victims and/or parents/guardians, community guidance, professional social workers, representation and other parties involved to obtain a diversion consensus through a restorative justice approach. Whereas the Facilitator is a judge appointed by the Chief of the Court to handle the case of the child concerned. Diversion is the transfer of processes in a long and very rigid child case resolution system. Mediation or dialogue of deliberation are an inseparable part of diversion to achieve restorative justice. [3]

Further discuss and analysing, these 2 (two) grand theory can be used as main rationale. First, Restorative Justice theory by Howard Zehr, consider crime as: [4]

1. Violations of the people and relationships between citizens
2. Violations create obligations
3. Justice includes victims, violators, and community members in an effort to put things right
4. The central focus: victims need to recover their losses they suffered (physically, psychologically, and economically) which the perpetrators are responsible for recovering it.

Second, The Effectiveness of Laws by Anthony Allot, in his book titled "The Limit of Law", Butterworths, explained as follow :

1. The law has a limit in its effectiveness (degree of compliance)
2. There is a general tendency in various countries establishing laws and regulations without conducting a comprehensive research; whether the legal products can achieve their objectives.
3. It is felt difficult to measure the effectiveness of the law

Effective or ineffective the legal system is classified into 2 (two), as follows:

- a. The effectiveness of the legal system can be measured by how far the system can realize its objectives.
- b. The law becomes ineffective because there are a number of weaknesses attached to it, for example (Antony Allot, 1980: 32):
 1. Transmission losses
 2. Inappropriate of norms and institutions
 3. Implementation failure
 4. Monitoring failure

According to Anthony Allot, the law will be effective if the purpose of its existence and application can prevent undesirable actions and eliminate chaos. An effective law in general can make what is designed can be realized. If there is a darkness, then the possibility of easy rectification occurs if there is a necessity to implement or apply the law in a different new atmosphere, the law will be able to resolve. [5]

Both theories from the structure of legal science perspective, are at the level of legal theory, even at a certain point at the level of legal philosophy. Both of these theories in order to have operational capabilities in their application, at the dogmatic level of law requires more practical legal instruments.

Study of legal effectiveness is an activity that shows a general problem formulation strategy; a comparison between legal reality and the legal ideal, specifically showed at the level of law in action with law in theory, or in other words this activity will show the relationship between law in the book and law in action. [6]

The legal basis for restorative justice is found in Article 24 paragraph (1) of the Covenant on Civil and Political Rights, which stipulates that every child has the right to obtain protection measures, as their status as minors, should be used as a legal basis for judges to dismiss the child case. This kind of decision is valid due to a freedom given to the Judge in Article 28 paragraph (1) of Law Number 4 of 2004 to explore, follow and understand the legal values and sense of justice that lives in the community.

III. METHODOLOGY

The research method used by the author in writing is descriptive analysis; which according to Peter Mahmud is: a research method that tests the truth of the existence or absence of facts caused by a particular factor, legal research is conducted to birth arguments, theories or new concepts as perspectives in solving problems faced, that be able to analyse to obtain a maximum research results. [7]

A Socio-Legal approach is used in this study to answer the problems by looking at the problem with the social reality approach. Socio-Legal Approach is the "Umbrella Concept" by emphasizing the Empirical Juridical approach. It is a concept by covering all approaches to law, legal processes, and the legal system.[8] Where in dogmatic law science is essentially practical science whose products will be evaluated directly by the community and the community as an appraiser. Means, in the application of legal science could not ignore the community perspective each time supplying its products to the community.

While empirical science about law such as legal sociology, legal anthropology, legal semiotics, and many more, has a role to assist this dogmatic legal science by expressing the community's response to the existence and function

of law contextually in the community. According to Shidarta, the collaboration between dogmatic legal science and empirical knowledge of law will occur within the scope of the internal dynamics of socio-legal studies.[9]

The identification carried out in socio-legal studies is not limited to text, but also through deepening the context, which includes all processes, such as '*law making*' (law formation) to '*implementation of law*' (working of law). What has been said by Brian Tamanaha (2017), disciplines that apply social science perspective to the study of law is now known by the label study of socio-legal, in which the social sciences include therein such as sociology of law, legal anthropology, legal history, psychology and law, studies political science judiciary, and various other fields of comparative science.[10]

This paper uses primary and secondary data. Secondary data were obtained from literature studies, in the form of primary, secondary and tertiary legal materials. Primary legal materials were obtained from the main sources of research as well as the main legal materials that bind to this research such as Law Number 35 of 2014 concerning Child Protection and Law Number 11 of 2012 concerning the Criminal Justice System for Children. While secondary legal materials will be supplemented from supplementary sources such as book references, literacy, which are used in the research of this paper. Whereas tertiary legal material is supporting material for primary and secondary law such as encyclopaedias dictionaries and others.

IV. RESULTS

Based on the results of this study, restorative justice approach is very important to be applied in handling cases of child crime. Referring to the SPPA Law, restorative justice is the settlement of criminal cases involving the perpetrators, victims, the perpetrators/victims' families, and other related parties to jointly seek a fair resolution by emphasizing restoration back to its original state, and not retaliation.

Diversion is a transfer settlement of child cases from criminal justice processes to beyond of criminal justice processes. Through diversion, it is expected to minimize the adverse effects that can be experienced by children due to dealing with legal processes. Based on data from the Jakarta Metropolitan Police for the period 2013-2017 there were 229 cases of children dealing with the law, out of 229 cases only 32 cases were attempted diversion at the investigation stage and 158 cases were not diverted and 39 cases were unknown whether or not carried out diversion. In the pre-prosecution stage (file P-21) 13 cases were completed because the report was withdrawn, 41 cases were completed due to diversion, 20 cases stopped through SP3 (Warrant of Investigation), 113 was completed at trial and 30 cases were not given information regarding the continuation of the process. Based on the notes collected there are many challenges faced in seeking diversion for child criminal cases. One of them is the type of criminal offense involving children cannot be diversified because the threat is more than 7 (seven) years in prison. This is the most reason why diversion efforts cannot be achieved. [11]

The Jakarta Legal Aid Institute recommends the government to conduct a legislative review related to the terms of the implementation of diversion, especially criminal acts with threats of more than 7 (seven) years with no victims in the crime alleged to the child. The government should specify what types of criminal acts may be applied with diversion and may not be. There shall be more stringent supervision of the implementation of diversion at each stage start from the police officer, prosecutors, and courts to prevent abuse of authority regarding diversion. [12]

Commissioner of the Indonesian Child Protection Commission (KPAI), said that at year 2017 KPAI received 3,849 cases, of which the number of cases relating to children conflict with the law was more than any other field case of 1,209 cases. He believes the actual amount and not recorded is greater evenly. The number of cases handled by KPAI could be reduced if the regional government provided access for public complaints such as forming the Integrated Service Centre for Women's Empowerment and Child Protection (P2TP2A). In 2015 KPAI saw the

readiness to implement the SPPA Law, though the results were not satisfied due to many facilities and inadequate infrastructure and human resources. For example, women's and children's service units (UPPA) in the police regions are classified as minimal service, but there are also some regions that have made good efforts such as South Kalimantan due to aid from their regional government. [13]

Other data are occurred in Jayapura Regional police station. In 2015, the local authorities were eager to implement diversion to juvenile criminal case. Unfortunately the procedure they carried out to run the diversion was incorrectly, it did not go through a court ruling. In 2016 in Makassar, KPAI monitored many police investigators who had not received SPPA Law training. Even though there are officers who participated in the training, they were transferred to other units. Though untrained resources can hinder diversion efforts. The provisions stipulated in the SPPA Law are ideal but the implementation is difficult, although diversion has been carried out and proceed, it does not mean smoothly implemented, there are numbers of challenges shall be faced. For example, in a child criminal case in Papua, the victim's family agreed to be applied diversion by providing some conditions in form of 2 (two) speedboats and several buffaloes. Seeing a severe conditions for the perpetrator's family could not afford it. Therefore, diversion does not have to always be through the consent of the victim as it is also regulated in the SPPA Law.

V. DISCUSSION

Implementation of restorative justice (diversion) and government products in tackling child crime is still being carried out, prevention and treatment of child victims is still being maximally pursued. To overcome the problem of child crime, it is impossible to overcome it properly if each law enforcement officer, the relevant ministries and/or institutions are left to handle it alone without active participation from family, community and related institutions. The handling of children in conflict with the law needs to be done extensively and comprehensively both for children as victims and perpetrators. Justice for victims is the recognition of the loss they experienced, and victims get recovery from the criminal justice system that they went through, including through restitution. With the Government Regulation No. 43 of 2017 concerning the Implementation of Restitution for Children who are Victims of Crime, the police must strive to coordinate with the Witness and Victim Protection Agency (LPSK) to fulfil the victims' rights. The recovery of the victim can also be in line with the criminal sanctions that may be given to the perpetrators. The types of crimes given to children must affect the recovery of the perpetrators and victims, for example a criminal with special conditions to do or not do certain things as accommodated in Article 71 paragraph (1) jo. Article 73 paragraph (4) of the SPPA Law.

Tracing back to the state's commitment to ensuring child protection efforts as formulated in the 1945 Constitution of the Republic of Indonesia (1945) Article 28B paragraph (2) which explains that every Child has the right of life sustainability, growth and development, and entitled to protection from violence and discrimination. To guarantee the

commitment implementation of Law Number 35 of 2014 concerning Amendment to Law Number 23 of 2002 concerning Child Protection, which mandates: state, government, and local governments to guarantee the protection, care and welfare of children by taking into account the rights and obligations of parents, guardians or other people who are legally responsible for children; parents to care for, nurture, educate, and protect children and provide character education and instil the value of character in children; and the community to participate in reporting to the authorities if violations of children's rights occurred, play an active role in the process of Social Rehabilitation and Social Reintegration for children, conduct monitoring and supervision and play an active role by eliminating negative labelling of children in conflict with the law.

Obviously if we see the above paragraph is a guarantee that should be carried out by various stakeholders in Indonesia to provide protection both for children who commit criminal acts and children who are victims, but if we actually look at recent developments, child protection issues occurred are not a simple matter. Up to date, we still see various kinds of violations against children's rights ranging from neglect of children, handling children in conflict with the law, handling child victims of crime to court decisions that do not favour children's rights, but indeed the government is still continuing to make improvements in an effort to maximize child protection one of which is to implement the provisions of Article 73A paragraph (3) of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection, on September 6, 2019, Indonesian President Joko Widodo signed Government Regulation (PP) Number 50 Year 2019 concerning Implementation of Child Protection Coordination. According to this Government Regulation, the Implementation of Child Protection Coordination aims to increase efforts to fulfil the Rights of the Child and Special Protection for Children; and improve working relations that are

synergistic and harmonious in fulfilling the Rights of the Child and Special Protection of Children; and obtain data and information on the implementation of Child Protection.

In handling and protecting children who are conflicting with the law, it has a wide range of problems not only due to the actions of children resulting in victims, but it is far beyond the case "why children commit criminal acts" which ultimately harm themselves. The judicial process that must be taken by the child as a form of responsibility for his/her actions has an impact on their own development; the stages of each judicial process starting from the level of investigation, prosecution, court and coaching in a child penitentiary takes a long time and oftenly occur irregularities and the injustice of each of these processes. The rights of children which are inherent and protected by law are often ignored by the judicial process, which is felt to be still lacking in protecting the best interests of the child so that other efforts are needed in the settlement of cases of children in conflict with the law.

There are several approaches that can be taken for children in conflict with the law including decision making and diversion. The Child Criminal Justice System Law mandates that if children under 12 (twelve) years old commit or are suspected of committing criminal offenses, investigators, social advisers, and professional social workers make decisions to do a number of things, one of which is to hand the child back to parents / guardians. However, to make a decision or diversion, the police cannot act alone because the SPPA Law requires that the approach involve many parties. At the same time the police also need to pay attention to whether the approach taken will have an impact on security and order in society.

In practice, taking this approach takes a long time due to some of society do not understand the SPPA Law provisions. Especially if there are casualties, the process is increasingly difficult. In a child criminal case in Sukabumi the victim was killed, and the victim's family requested that the perpetrators be severely punished. Though referring to the SPPA Law, the perpetrators shall be returned to his parents. As a result, the perpetrators' families are under pressure from the local community and threatened with being expelled. Many things must be considered in the best interests of the child, but at the same time keep care to public safety and order. It can be concluded, that if in all sectors and fields, the role of family, community and the state in the efforts to tackle the problems of children conflicting with the law is carried out comprehensively, one of which is can be done through promotive, preventive, curative and rehabilitative approaches, it will produce effectiveness in the implementation of government products as instruments for handling children in conflict with the law. Considering that at this stage a number of such efforts were still being made by the Government, it can simply be concluded that the implementation had not been running optimally.

VI. CONCLUSION

Has restorative justice through diversion been effectively carried out in an effort to protect the rights of children as perpetrators and victims? if we look at the handling of child victims and children who are dealing with laws in various regions in Indonesia, then various efforts are needed to deal with the handling of these children. Efforts to deal with criminal acts are essentially part of criminal politics or criminal policy. This criminal policy can be interpreted in the narrow sense, broad meaning and broadest meaning. In a narrow sense, criminal policy is defined as the whole principles and methods that form the basis of reactions to criminal violations in the form of criminal law. In a broad sense, criminal policy is the overall function of law enforcement apparatuses, including the workings of the police and the judiciary by looking at approaches that strongly support victims and their impact. In the broadest sense, criminal policy is the entire policy carried out through legislation and official bodies and has the aim of enforcing central norms in society. The enforcement of these central norms can be interpreted as tackling crime by prioritizing the victim approach through restorative parameters.

The solution to this criminal problem is inseparable from broader policies, which are "social policy" which consists of "policies or efforts for social welfare" (social welfare policy) and "policies or efforts to protect the community" (social defence policy). Thus, if crime prevention policies (criminal politics) are carried out by means of "penal" (criminal law), then "criminal law policy" ("penal policy") especially at the stage of judicial/applicative policy (enforcement of criminal law *in concreto*) must pay attention and lead to the achievement of the objectives of social policy, in the form of "social welfare" and "social defence". It is very clear that the implementation of diversion with the aim of fulfilling the aspects of victims is not in accordance with the legal instruments, this is caused by a variety of problems in actual reality that become constraints, ranging from facilities and infrastructure, law enforcement apparatus as well as public awareness of the aim of the diversion and restorative justice itself. [15]

Some ways government can do:

1. The government may develop integrated child protection mechanisms and systems, so that child protection flows become more organized to avoid overlapping child protection regulation and implementation. This integrated mechanism may refer to the system developed in several developed countries, and the best one currently like what have been developed in Malaysia. Protection efforts must be carried out continuously by constantly oversee at aspects of its shortcomings, as well as inter-departments and inter-offices up to regional level.

2. Raising the minimum age limit for child criminal responsibility to an internationally acceptable level. Ensure that detained children are always separated from adults, that deprivation of liberty is only used as a last resort (imprisonment), for the shortest possible period and in the proper conditions. By continuing to socializing the best interests of children, the principles of child rights and children's rights to all children-matters stakeholders.
3. Continuous efforts to eliminate child labour (working children), especially by addressing the causes of economic exploitation of children through poverty alleviation and access to education and developing a comprehensive child labour monitoring system, for example by working with NGOs, law enforcement, labour inspectors and institutions international. Ensure that the National Action Plan for the Elimination of Trafficking in Persons and Sexual Exploitation of Children is given an adequate allocation of resources in its implementation and can be implemented effectively at the Provincial and District levels.

REFERENCES

- [1] Undang-Undang Nomor 11 Tahun 2012 tentang *Sistem Peradilan Pidana Anak*, Pasal 1 ayat 4.
- [2] Mahkamahagung.go.id, “*Keadilan Restoratif sebagai Tujuan Pelaksanaan Diversi Pada Sistem Peradilan Anak*”, <https://www.mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak>
- [3] Ibid
- [4] Achmad Ali, 2009, *Menguak Teori Hukum (Legal Theory) & Teori Peradilan (Judicialprudence), Termasuk Interpretasi Undang-Undang (Legisprudence)*, Kencana Prenada Media Group, Jakarta, Hlm.249
- [5] Salim, H.S. dan Erlis Septiana Nurbani, 2013, *Penerapan Teori Hukum Pada Tesis dan Disertasi*, Edisi Pertama, cetak Kesatu, Rajawali Press, Jakarta, Hlm.375
- [6] Soleman B Taneko, 1993, *Pokok-Pokok Studi Hukum dalam Masyarakat*, Rajawali Press , Jakarta, Hal 47-48.
- [7] Marzuki, Peter Mahmud, 2005, *Penelitian Hukum*, Jakarta: Kencana, Hal.29
- [8] Wiratraman, Herlambang P., *Penelitian Sosio-Legal dan Konsekuensi Metodologisnya*. Center of Human Rights Law Studies (HRLS).
<https://herlambangperdana.files.wordpress.com/2008/06/penelitian-sosio-legal-dalam-tun.pdf>
- [9] Sidharta, Dr. 2014. *Seminar : Pendekatan Sosio-Legal sebagai Kajian Interdisipliner Hukum*. Fakultas Hukum Universitas Brawijaya Malang.
- [10] Tamanaha, Brian Z., 2017, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law*. Oxford: Clarendon Press.
- [11] <https://www.hukumonline.com/berita/baca/lt5a8fed6d8bfe2/pelaksanaan-diversi-dalam-sistem-peradilan-pidana-anak-belum-maksimal?page=all/>
- [12] <https://www.hukumonline.com/berita/baca/lt5adeefc80f6ba/mengenal-konsep-diversi-dalam-pengadilan-pidana-anak?page=all>
- [13] Op.Cit
- [14] Ibid
- [15] digilib.unila.ac.id