RESTORATIVE JUSTICE FORMULATION POLICY IN THE CHILD CRIMINAL JUSTICE SYSTEM IN INDONESIA

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ABSTRACT

The discussion in this journal focuses on Restorative Justice Formulation Policy in the Juvenile Criminal Justice System. The aim of this research is to be able to properly analyze the basic ideas contained in restorative justice, its relation to children who are in conflict with the law and to be able to analyze the policy formulation regulated in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System to realize restorative justice for children in conflict with the law. Meanwhile, the type of research used in this scientific journal is normative legal research, because it is based on the assessment that there is a conflict of norms between Law no. 11 of 2012 concerning the Juvenile Criminal Justice System with norms contained in the Criminal Code (KUHP). In this case, for unlawful acts committed by children who are not yet 18 (eighteen years old), diversion efforts are carried out with the aim of creating a balanced focus of attention between the interests of the perpetrator and the victim and also paying attention to the impact of resolving criminal cases that occur in society to ensure and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with human dignity, as well as receive protection from violence and discrimination.

Keywords: Policy Formulation, Restorative Justice and Child Protection

A. INTRODUCTION

Indonesia is a country based on the law according to the provisions of the 1945 Constitution, the childhood period is a period when children are not yet independent, do not have full awareness of their actions, their personality is still unstable or a person who has not yet been fully formed and is very vulnerable in mental and psychological conditions. In other words, his psychological condition is still unstable, not independent, and easily influenced by the conditions around him. Under these conditions, the actions committed by children cannot be fully accounted for, because children as perpetrators are not pure perpetrators but can also be victims. This Convention is an international component which juridically binds the countries that have ratified it to make it a reality and these countries have an international legal obligation to implement it into the positive legal rules of each country, so that it is valid and has binding legal force. in. The Convention on the Rights of the Child, an explanation of the contents and spirit of the Convention on the Rights of the Child in criminal law in Indonesia, can be seen in Republic of Indonesia Law Number 23 of 2002 concerning Child Protection. In criminal law there is an opinion that a person cannot be punished for committing a mistake, if before he committed the mistake there was no law stating that the mistake he committed was punishable by punishment (Nullum Delictum, Nulla Poena Sine Praevia lege Poenali). This principle is contained in Article 1 paragraph (1) of the Criminal Code. The common application of punishment based on the Criminal Code (KUHP) does not educate children to be better, but can worsen conditions and increase the level of child crime. This is due to the paradigm of law enforcement officials who regard these children as naughty children and not as victims but merely as perpetrators of criminal acts. The story of a child named Muhammad Azwar or known as Raju, who was the perpetrator of the abuse and was tried at the Stabat Branch District Court, Pangkalan Brandan, Langkat Regency, North Sumatra. Raju's case received public attention, especially because Raju was detained in adult detention and during the trial,

the judge wore a uniform. Another case that also involved children was the appeal attempt carried out by the Public Prosecutor at the follow-up hearing to read the interim decision and acquit a junior high school student who was accused of stealing credit vouchers worth Rp. 10 thousand, the reason is that the Public Prosecutor still adheres to the principle of legality. Both cases are approached with a formal legalistic approach, thus ignoring psychological and sociological approaches, where the State through the Corrections Agency (BAPAS) should play a very important role in conducting social research and be the main consideration in deciding on legal sanctions so that a form of rehabilitation can be found for children who have problems or are in conflict with the law. Protection of children in conflict with the law is very necessary, considering that children in conflict with the law are in situations and conditions beyond their mental and psychological abilities and in the examination process at the investigation stage, investigators only look at the interests of the legal process without paying attention to the interests and welfare of the child. For this reason, they must receive legal protection, considering that they are very sensitive to various threats of mental, physical and social disorders. The justice that has been taking place in the criminal justice system in Indonesia is retributive justice, while what is expected is restorative justice, namely a process where all parties involved in a particular criminal act work together to solve the problem, how to deal with the consequences. in the future. In Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, adheres to the concept of restorative justice which is realized through diversion efforts. Restorative Justice is a model for resolving criminal cases that prioritizes the restoration of victims, perpetrators and society. The aim of restorative justice is the participation of victims and perpetrators, participation of citizens as facilitators in resolving cases, so that there is a guarantee that children or perpetrators will no longer disturb the harmony that has been created in society. Restorative justice can be realized through: mediation between the victim and the perpetrator, deliberation between the victim's family and the perpetrator's family, and services in the community that are restorative for both the victim and the perpetrator. Restorative justice is an alternative dispute resolution outside of court or known as Alternative Dispute Resolution/ADR. ADR is generally used in civil cases, not criminal cases. In the juvenile criminal justice process, what is expected is a process that can be restorative, meaning that cases are handled by law enforcers who have interest, attention, dedication and understand children's problems, and have attended training to realize restorative justice, as well as in the event of detention of children in conflict with the law. then it must pay attention to the basic principles of the convention on children's rights which have been adopted into the Child Protection Law. considering that they are very sensitive to various threats of mental, physical and social disorders. The justice that has been taking place in the criminal justice system in Indonesia is retributive justice, while what is expected is restorative justice, namely a process where all parties involved in a particular criminal act work together to solve the problem, how to deal with the consequences. in the future. In Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, adheres to the concept of restorative justice which is realized through diversion efforts. Restorative Justice is a model for resolving criminal cases that prioritizes the restoration of victims, perpetrators and society. The aim of restorative justice is the participation of victims and perpetrators, participation of citizens as facilitators in resolving cases, so that there is a guarantee that children or perpetrators will no longer disturb the harmony that has been created in society. Restorative justice can be realized through: mediation between the victim and the perpetrator, deliberation between the victim's family and the perpetrator's family, and services in the community that are restorative for both the victim and the perpetrator. Restorative justice is an alternative dispute resolution outside of court or known as Alternative Dispute Resolution/ADR. ADR is generally used in civil cases, not criminal cases. In the juvenile criminal justice process, what is expected is a process that can be restorative, meaning that cases are handled by law enforcers who have interest, attention, dedication and understand children's problems, and have attended training to realize

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B. FORMULATION OF THE PROBLEM

1. What is the basis of restorative justice in the juvenile criminal justice system?
2. What is the policy for formulating restorative justice in Law no. 11 of 2012 Concerning the Juvenile Criminal Justice System?

C. RESEARCH METHODS

In this writing method, a normative juridical approach to the problem is used, namely a statutory regulatory approach related to the problem being discussed. Legal materials using the library research method where legal materials are obtained from literature, books and documents relating to the issues discussed.

D. DISCUSSION

1. The Basis of Restorative Justice in the Juvenile Criminal Justice System

The concept of restorative justice has existed for approximately twenty years as an option in resolving juvenile criminal cases. The United Nations Juvenile Justice Organization (UN) defines restorative justice as a process that requires the involvement of all parties involved in a particular crime in order to find joint solutions to solve problems and think about how to overcome the consequences in the future. Restorative Justice is basically carried out through discretion (policy) and diversion, namely resolving it deliberatively by transferring cases from the formal criminal justice process to a non-formal process to be resolved deliberatively.

Before Indonesia implemented restorative justice, it turned out that several countries had implemented this concept. Not only in the rules contained in the country's Criminal Code, but also in more specific statutory regulations. For example, the origins of the contemporary restorative justice movement are traditionally traced to a Canadian experiment with victim-offender mediation in Elmira, Ontario in 1974. Historically, that experiment was conducted by officer Markus Yantzi (a member of a radical Christian sect). , Mennonities), who are frustrated in the process of dealing with young criminals, have a brilliant idea. Markus asked the judge, in the case of vandalism committed by two young men who pleaded guilty to destroying 22 properties, to order the perpetrators to meet their victims, in the company of Yantzi and Mennonite youth, Dave Worth. To their surprise, the judge agreed to order the offenders to go to Yantzi and Worth to meet the victims and bring back a report of the damage they had suffered. From this idealistic spontaneous experiment, restorative justice in the form of Victim-Offender Reconciliation Programs (VORPs) was born or rather re-emerged because history says that an important claim about restorative justice is that it is an ancient way of dealing with crime.

In VORPS, restorative justice takes the form of meetings between victims and perpetrators, facilitated by trained mediators, selected from community volunteers. The first official use of legal circles occurred in 1992 in the Yukon Territorial Court of Canada. Judge Barry Stuart, who handled the offense case, invited members of the community who were actually members of the offender's community to participate in the legal circle. In legal circles, a community of interested people takes part in discussions about what happened, why it happened, what to do about it and what to do to prevent further such incidents. The judge then decides the sentence by making orders and recommendations, based on what the judiciary proposed. Even though it is called a legal circle, it must be made clear that discussions and decisions go well beyond what is conventionally covered in the sentencing process. Specifically, the circle addresses issues such as the extent of a community's responsibility to take responsibility for a crime and to do something about it. In such cases, the offender community indicates that they do not want the offender to go to prison and that they are willing to help rehabilitate the offender. Judge Stuart, acting on the wishes of the community, ordered a two-year probation period and the offender accepted it by changing his life for the better. A form of 'genuine justice' that has spread more widely is Family Group Conferences (FGC). FGCs were introduced by law in New Zealand in 1989 as a new forum for dealing with youth crime as well as youth care and protection issues. FGCs are similar to VORPs which are said to have been introduced by Maori justice practitioners and philosophers.

However, in resolving legal violations and crimes that occur, the range of people involved in the mediation process in FGCs is wider, including family members of the perpetrator and sometimes other people who have a care relationship with them. Victims also include members of criminal justice agencies such as the police. An agreement aimed at restitution is not only involved (repressive) but is designed as an action plan to address the causes (preventive) underlying criminal behavior and thereby prevent the recurrence of

crime. In the early 1990s police in Wagga Wagga, a small town in New South Wales, Australia began an experiment that was heavily influenced not only by New Zealand FGCs, but also by Jhon Braithwaite's theory of reintegration shame. Braithwaite argues that family and societal shame directed at the offender in terms of respect for the offender and followed by efforts for their reintegration is a powerful form of social control. In the "Wagga Model" FGCs are conceptualized as a forum where offenders will be faced with the shame of reintegration. FGCs and with the Wagga model, experienced rapid and amazing development. It was introduced in England in the mid-1990s by a police officer named Thames Valley and It has since been adopted by many other British police forces. Although there had been small-scale experiments with victim-offender reconciliation in the UK in the early 1980s, and although Martin Wright had outlined the restorative ideas and principles of VORPS, it was only when police began experimenting with 'restorative justice' that the restorative justice movement really took off in the UK. One result of this is that, in the UK restorative justice has become closely identified with Braithwaite's 'reintegrative shame' theory and the Wagga conference model. Among some justice activists restorative justice in the UK, which began to explore opportunities created by the Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999, to introduce restorative justice within the youth justice system. In these efforts, the importance of developing or adhering to a broader conception of restorative justice is increasingly emphasized.

a. Criminal Law Policy

Efforts to reform law in Indonesia, which have started since the birth of the 1945 Constitution, cannot be separated from the foundation and at the same time the objectives to be achieved as also formulated in the preamble to the 1945 Constitution. The objectives outlined in the 1945 Constitution, in short, are "to protect the entire Indonesian nation." and to advance general welfare based on Pancasila". This is the general policy line which is the basis and also the goal of legal politics in Indonesia. This is also the basis and aim of every legal reform effort, including reforms in the field of criminal law and crime prevention policies. Handling children who are in conflict with the law is part of the policy or crime prevention effort because the main goal is child protection and the welfare of children where children are part of society. According to Barda Nawawi Arief, criminal law enforcement policy is a series of processes consisting of three policy stages, namely (1) legislative/formative policy stage; (2) judicial/applicative policy stage; and (3) the executive/administrative policy stage.4 It is further explained that in the three stages of criminal law enforcement policy, three powers/authorities are contained, namely legislative/formulative power in determining or formulating what acts can be punished 4Barda Nawawi Arief III, 1998, Several Aspects of Criminal Law Enforcement and Development Policy, PT. Citra Aditya Bakti, Bandung, p. 30, (hereinafter referred to as Arief Barda Nawawi III) and what sanctions can be imposed; judicial/applicative power in the application of criminal law; and executive/administrative power in implementing criminal law.

b. Integral Approach Between Penal and Non-Penal Policies

One effort to overcome crime that occurs in society is to use criminal law with sanctions in the form of criminal penalties. However, this business is still often questioned. These differences regarding the role of criminal law in dealing with crime problems have an important legal dimension in the context of protecting society and enforcing the law. The concept of an integral crime prevention policy contains the consequence that all rational efforts to overcome crime must form an integrated whole. This means that policies to tackle crime using criminal sanctions must also be combined with other non-penal efforts. The main aim of these non-penal efforts is to improve certain social conditions which indirectly have a preventive effect on crime. Thus, seen from the perspective of criminal politics, all

non-penal preventive activities actually have a very strategic position. In handling cases of children, child victims, and/or child witnesses, community counselors, professional social workers and social welfare workers, investigators, public prosecutors, judges, and advocates or other legal aid providers are still obliged to pay attention to the best interests of the child and try to ensure that they remain creating a family atmosphere at every stage of the examination process. Likewise, when imposing criminal sanctions on children who are in conflict with the law, efforts are made to always pay attention to the best interests of the child.

2. Restorative Justice Formulation Policy in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System

Criminal Law Formulation Policy in the Sanction Formulation System In legislative/formulation policies so far it appears that there are opportunities that increase the imposition of imprisonment. The main motivating factor for law enforcement officials, in this case the judge imposing a prison sentence, is the existence of a single formulation which contains only the threat of imprisonment. The cumulative formulation is essentially no different from the single formulation, because it contains the requirement to impose a prison sentence together with other types of criminal sanctions. The policy in determining criminal sanctions is essentially also a policy for implementing or operationalizing criminal sanctions. A criminal policy must be able to integrate and harmonize all non-penal preventive activities into an orderly and integrated state activity system. In connection with this, Radzinovicz stated: criminal policy must combine the various preventive activities and organize them in such a way as to form a single broad mechanism and finally coordinate the whole into an orderly system of State activities.

Legislative policy is essentially also an operational policy, which means that if the use or operationalization of imprisonment is to be carried out selectively or limitatively and have flexibility, then the policy outlined in the legislation must be of the same nature. With this single formulation system, it is clearly not in accordance with the basic ideas contained in the juvenile criminal justice system which prioritizes restorative justice. Apart from that, it is also not in accordance with the basic ideas developed in Indonesia regarding the correctional system. With this single formulation system still existing, it actually contains a contradiction in the idea of a correctional concept which departs from the idea of rehabilitation and resocialization which requires individualization and leniency in determining the appropriate punishment for the defendant. This leniency is not only in the sense of determining the size of the punishment (strafmaat) and the implementation of its guidance (Strafmodus), but also in determining the type of punishment (strafsoort).

Viewed from the perspective of the process of operationalizing prison sentences selectively and flexibly, the formulation of the threat of imprisonment which is imperative and absolute in nature, as well as the single and cumulative formulations, can only be justified if accompanied by the formulation of policies that can soften the implementation of policies which are imperative in nature. and that's absolute. Policy formulation that softens rigid policy formulation can be formulated as a preventive or repressive policy. Preventive policy is a policy given by law to law enforcement officials to prevent or not bring suspects to justice. So, to prevent the possibility that the defendant will be subject to imprisonment in connection with the existence of a system for formulating the threat of imprisonment which is imperative in nature. Regarding this preventive policy, it is also implemented in several countries other than Indonesia, namely: Japan and Poland.

In the criminal justice system in Japan. Not all cases in Japan are handed over or forwarded by the police to prosecutors for prosecution. Likewise, the prosecutor has the authority to postpone the prosecution even though the evidence is sufficient to carry out the prosecution, the consideration is if the suspect shows genuine remorse and shows good signs of being a citizen who obeys the law, as well as committing a criminal offense

against the morals of the community. generally. According to Hiroshi Ishikawa, director of UNAFEI in Tokyo, Japan, the factors included in the first group (a) relate to the personal characteristics of the offenders; the second group (b) relates to the general deterrence effect of punishment ("general deterrence" effect of the punishment). And the third group (c) relates to the special deterrence effect of punishment ("special deterrence" effect of the punishment). Based on the three factors above, according to Ishikawa, public prosecutors in Japan have the authority to examine criminal cases not only from a legal perspective, but also from a criminal political perspective.

Preventive policies can also be seen in the formulation of chapter IV articles 27-29 of the Polish Criminal Code, with the title conditional Discontinuance of the Proceedings. Termination or conditional postponement (conditional dismissal or conditional discontinuance) of the criminal process. In certain cases, seen from the perspective of the interests of the offender and even from the perspective of rational criminal politics, it is not simple enough to postpone the criminal execution. Conviction by the court requires the criminal record or history of the offender to be kept in a file, and this can cause irreparable harm to the person concerned. Meanwhile, it is beneficial for court administration if non-essential procedural steps can be avoided. This conditional postponement of prosecution is a tool to realize the objectives of conditional punishment but at the initial stage of the criminal process. Postponement of prosecution occupies an intermediate position between absolute withdrawal of prosecution and conditional punishment. From the two examples of preventive policies presented above, it is clear that they are not specifically designed to deal with the rigidity of the imperative criminal threat formulation system, especially single formulations. Therefore, such policies need to be balanced by formulating repressive policies. By repressive policy, we mean a policy established by law to soften the application of the prison sentence formulation system which is imperative and absolute. This includes the formulation of repressive policies, for example the formulation of conditional sentences and the formulation of guidelines for judges in determining prison sentences which are formulated imperatively, either in the form of a single formulation or a cumulative formulation.

Thus, this provision can be seen as a "safety valve" (Veiligheidsklep) which is needed in every system, including the criminal system, especially in dealing with a rigid criminal system. Based on the description above, it can be emphasized that seen from the perspective of the operational policy of prison sentences, the provisions on conditional sentences so far need to be reviewed in order to soften or balance the system of formulating prison sentences which are imperative and absolute in nature, so there must be provisions that allow conditional sentences to be imposed imperatively in cases -certain things, especially towards children. In Law no. 11 of 2012 concerning the juvenile criminal justice system is more directed towards preventive policies, this can be seen in the imposition of crimes and actions regulated in the following articles, including: Criminal actions contained in articles 69, article 70, article 71 and article 72 of Law No.11 2012 concerning the Juvenile Criminal Justice System.

E. CLOSING

1. The basic idea of restorative justice in the juvenile criminal justice system is viewed from a philosophical aspect, namely: Children are a trust and gift from Almighty God who have dignity and honor as complete human beings and to provide legal protection and for the welfare of children who are in conflict with the law. The juridical aspect of the basic idea of restorative justice is contained in the preamble to the 1945 Constitution which briefly states: "to protect the entire Indonesian nation and to promote general welfare based on Pancasila" and remembering that the Indonesian nation has ratified the UN's Convention on the Rights of the Child in dated 20 November 1989 which is an international instrument that is legally binding on ratifying countries and also has an international legal obligation to implement it into legal norms. Meanwhile, viewed from a sociological aspect, the basic

idea of restorative justice is that it requires a balanced focus of attention between the interests of the perpetrator and the victim and also takes into account the impact of resolving the criminal case on society.

2. Restorative justice formulation policy in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System is a preventive policy, namely a policy given by law to law enforcement officials to prevent or not bring suspects to court. In accordance with the philosophical basis contained in this Law, namely to provide legal protection for children who are in conflict with the law, in an effort to realize restorative justice (restoration) through diversion efforts from the process of receiving reports by the police to the examination process at court hearings. This is done to prevent the high possibility of the defendant being subject to imprisonment due to the existence of an imperative system of formulating the threat of imprisonment. This policy can be pursued by giving law enforcement officials the authority to select suspects who will be brought to court even though the person has clearly committed a criminal act.

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