



A HUMANE APPROACH IN DEALING WITH CHILDREN IN CONFLICT WITH THE LAW

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Abstract

Children are the future of the nation, therefore, they need care, education and guidance from their parents, guardians or foster parents. Their life, however, sometimes doesn't go as expected. Some of them even have to deal with the law because of their unexpected behavior. The future of the children of criminals deserves attention, especially if they have to be responsible for their actions. A humane approach in resolving the cases of children in conflict with the law considers that the children's rights are human rights. They who are in conflict with the law are still given the opportunity to improve themselves and obtain their rights as children. This paper aims to analyze a humane approach as a consideration in implementing diversion. It uses socio-legal method and qualitative analysis based on primary and secondary data. The humane approach views children as human beings who need protection in the form of adults' intervention because a criminal imposition on children does not always have a positive impact on law enforcement itself. This is because the children's futures can still be improved and their rights are human rights. The best interests of the children should be the main consideration.

Kata kunci:

anak, pendekatan humanis, anak yang berhadapan dengan hukum

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Abstrak

Anak merupakan masa depan bangsa, oleh karena itu ia memerlukan pengasuhan, pendidikan dan bimbingan dari orang tua, wali atau orang tua asuhnya. Namun kehidupan mereka terkadang tidak berjalan sesuai harapan. Bahkan ada di antara mereka yang harus berurusan dengan hukum karena kelakuannya yang tidak disangka-sangka. Masa depan anak-anak pelaku kejahatan patut mendapat perhatian, apalagi jika mereka harus mempertanggungjawabkan perbuatannya. Pendekatan humanis dalam menyelesaikan kasus anak yang berkonflik dengan hukum memandang bahwa hak anak adalah hak asasi manusia. Mereka yang berkonflik dengan hukum tetap diberikan kesempatan untuk memperbaiki diri dan memperoleh hak-haknya sebagai anak. Tulisan ini bertujuan untuk menganalisis pendekatan humanis sebagai pertimbangan dalam penerapan diversifikasi. Penelitian ini menggunakan metode sosio-legal dan analisis kualitatif berdasarkan data primer dan sekunder. Pendekatan humanis memandang anak sebagai manusia yang memerlukan perlindungan berupa campur tangan orang dewasa karena penjatuhan pidana terhadap anak tidak selalu berdampak positif terhadap penegakan hukum itu sendiri. Sebab, masa depan anak masih bisa ditingkatkan dan haknya adalah hak asasi manusia. Kepentingan terbaik bagi anak harus menjadi pertimbangan utama.

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INTRODUCTION

Children are a trust and a gift from God Almighty and this make them have inherent dignity and rights as human beings which must be upheld. Therefore, they need full support to receive education and care in achieving perfect maturity. In their course of life, however, any thing can possibly happen. A neglectful family and bad social environment will possibly lead them to face legal problems.

Based on the description above, there are at least three possible forms of conflict between children and the law:

1. children as perpetrators of criminal acts,
2. children as victims of criminal acts, and
3. children as witnesses.

Act number 11 of 2012 on Juvenile Criminal Justice System opens up the possibility of resolving cases with juvenile (children) offenders by diversion. The aim of diversion resolution is that the children in conflict with the law will still possibly have good future. They remain having opportunities to survive, the rights to grow and develop, and the rights to improve themselves even after they acted against the law. The children's interests remain the best interests that must be fulfilled.

Responsibility for a criminal act is an inevitable part of the criminal law system. Quoting Andi Hamzah, criminal objectives can be shortened to three R's and one D, namely: Reformation, Restraint and Retribution, while the D is Deterrence which consists of individual deterrence and general deterrence (specific prevention and general prevention). Reformation means improving or rehabilitating criminals (read: perpetrators) to become good and trustworthy for society. The society will get benefits and no one will lose if they becomes good and trustworthy. Reformation needs to be combined with other goals such as prevention. Restraint means isolating the perpetrators from society because by isolating them the society is expected to be safe. Retribution is retaliation against the offenders committing crimes.

Based on the description above we are interested to study the balance principles of restorative justice in the cases of children in conflict with the law. The novelty of this paper is a study of the rationale regarding the balance principles of restorative justice implementation in cases of children in conflict with the law.

METHOD

The method used in this study was qualitative having a normative juridical approach based on secondary data. The secondary data was obtained by using literature study techniques covering primary legal materials in the form of statutory regulations, writings from experts and supporting legal materials such as legal dictionaries and encyclopedias. The specifications of this study was analytical descriptive. The data analysis was content analysis of the research elements by using a deductive-hypothetical and inductive-empirical approaches.

RESULTS AND DISCUSSION

Understanding Children

In a general sense children are those who have not yet reached adulthood. Different laws, however, define children differently.

The Civil Code (*Burgerlijk Wetboek/BW*) does not provide a definition of children. *Burgerlijk Wetboek* in Article 330 states that: "Immatures are those who have not yet reached twenty-one years of age and have not previously married." Based on this provision a child is someone who has not reached the age of twenty-one years or has not previously married. Those who have married before the age of 21 years are categorized as adults. Even if the marriage breaks up before reaching the age of 21 years, the breakup of the marriage does not then cause them to return to the status of adolescent .

How does the Act number 1 of 1974 on Marriage (Marriage Law) interpret children? Article 47 paragraph (1) of Marriage Law provides a limitation that children are those who have not reached 18 years old or have not married, still under their parents' authority as long as their authority as parents is not revoked. If

children are not under their parents' authority they will be placed under the authority of their guardians.

These two laws basically provide criteria regarding who a child is, namely he or she who has not yet reached a certain age limit. Another criterion is about marriage stating that a marriage carried out before children reach adult age limit will make them considered adults. The consequence of the child and adult age limits is that those who are still in the child age group (not yet adults) must remain under the authority of parents or guardians. They are considered incompetent to carry out legal actions themselves.

The Convention on the Rights of the Child which has been ratified in Indonesia by Presidential Decree number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child, provides a definition of children in Article 1 which states: "For use in the current Convention, a child means every human being aged under eighteen years unless, under the laws applicable to children, adulthood has been reached sooner." The views used in the Convention on the Rights of the Child were then used in Act number 23 of 2002 on Child Protection. This Law on Child Protection is a form of Indonesia's commitment to ratifying the Convention on the Rights of the Child.

Children in conflict with the law

Act number 11 of 2012 on The Juvenile Criminal Justice System provides a definition of children in conflict with the law in Article 1 number 2 stating: "Children in conflict with the law are children who are in conflict with the law, children who are victims of criminal acts, and children who are witnesses to criminal acts."

The children who are being forced to face the law (ABH) includes three possibilities, namely:

- a) children in conflict with the law (children as perpetrators of criminal acts);
- b) children as victims of criminal acts; and
- c) children as witnesses to criminal acts.

Further, these three categories can be explained as follows:

- a) **Children in Conflict with the Law**

Nurul Farida (Farida, 2021) states that the term of child in conflict with the law refers to anyone under the age of 18 who comes into contact with the justice system because he or she is suspected or accused of committing an offence. However, this definition does not provide a lower age limit for a child to be held criminally responsible. The criminal responsibility of a child in criminal acts begins when the child is 12 (twelve) years old but has not reached 18 (eighteen) years old. After the age of 18 a person will be held responsible as an adult and will not longer be categorized as a child. Thus, children in conflict with the law (ABH) are those who are perpetrators of criminal acts.

- b) **Children as victims of criminal acts**

Referring to Article 1 point 4 of Act number 11 of 2012 on The Juvenile Criminal Justice System (SPPA Law), children as victims of criminal acts, hereinafter referred to as child victims, are those who are not yet 18 (eighteen) years old and are experiencing physical, mental suffering and/or economic loss caused by criminal acts. Referring to this provisions there is

no minimum age limit for children as victims. This is because no matter how old a child is he or she can be victims of criminal acts conducted by both adults or children.

c) Children as witnesses to criminal acts

Referring to Article 1 point 5 of the SPPA Law a child who acting as a witness to a criminal act, hereinafter referred to as a child witness, is a child who is not yet 18 (eighteen) years of age and who can provide information for the purposes of investigation, prosecution and examination in court on a criminal case that he heard, saw and/or experienced himself.

By considering the child's age factor in which he still needs protection, especially from parents, guardians, or people closest to him, whatever his position - whether as a perpetrator, a child victim, or child witness - he still needs protection. The Convention on the Rights of the Child prioritizes the best interests of children. In any matter, whether public or private, the best children's interests are to be the primary consideration.

The principle of the best interests of the children requires freedom deprivation as a last resort. Therefore, the principle of the best interests of the children must be taken into consideration in resolving the cases of children in conflict with the law.

Humane Approach in Restorative Justice in Indonesia

a. Philosophical Foundations in the Legal System in Indonesia

The word "humanity" in Big Indonesian Dictionary (2024) brings a meaning of a nature that underlies human relationships.

Hembing says that humanity is a system of thoughts and actions that pay attention, based on values and interests by devoting one's life, only to the human welfare. Humanity performs tenderness, compassion and a loving attitude towards others, the environment, and animals even in suffering and misery situations. The definition of humanity includes all the characteristics, views, ways of thinking and actions that, because of their nature, humans must have. Humanity is therefore an inner impulse that brings up humane attitude or actions (Nafsiah, 2000).

Majda El-Muhtaj is true when he says that humanity is recognized as a universal consensus which in fact remains inherent as the owner of absolute human rights on the basis of humanity, regardless the differences of gender, skin color, economic status, nationality, religion, and so on. This understanding then gives rise to the concept of human rights. In other words, human rights are the peak conceptualization of human thinking about the nature of themselves, as a universal and eternal developer of human nature (El-Muhtaj, 2009). Thus, humanity is a universal consensus that aims to maintain human dignity. This is the basic concept of human rights which is the peak conceptualization of human thinking about the nature of themselves. Humanity, therefore, contains elements of justice, respect to human rights, love to others, and respect to the nature of human being.

In Indonesia, hitherto, *Pancasila* is still recognized as the highest source of the concept of respect to humanity. It is stated in the second principle of *Pancasila* stating "just and civilized humanity". This principle bring consequences that as Indonesians we are obliged implement "just and civilized humanity" as a way of life. We are required to be humane towards ourselves and others, both as individuals or

members of a nation, and to act fairly and civilized. The thing that is emphasized is "humanity" as a word that conveys all characteristics and features by which humans differentiate themselves from animals. What is included here is, among other things, the use of reason, will, control of feelings, existence, and justice (Djebarus, 1994). As the source of all legal sources Pancasila, mainly the second principle, is a good basis for implementing a humane approach in resolving cases of children in conflict with the law.

The humanity element in diversion is visible in the purpose of diversion itself. The principles contained in the juvenile criminal justice system (SPAA Law) embody humanity itself. The principles brought in Article 2 of the SPPA Law state that:

The juvenile criminal justice system is implemented based on the principles:

1. protection;
2. justice;
3. on-discrimination;
4. best interests of the child;
5. respect to children's opinions;
6. survival and growth and development of children;
7. coaching and mentoring children;
8. proportional;
9. deprivation of liberty and punishment as last resort; and
10. avoidance of retaliation.

Specifically, Article 3 letter a states: "Every child in the criminal justice process has the rights to be treated humanely by taking into account their needs according to their age."

How does international law support diversion system? In 1985, the United Nations declared Standard Minimum Rules for the Administrator of Juveniles (The Beijing Rules) which provide guidelines as an effort to avoid these negative effects, namely by giving authority to law enforcement officials to take policy actions in handling or resolving the problem of juvenile offenders by not taking formal steps, including stopping or not continuing or releasing from court proceedings or returning or handing over to the community and other forms of social service activities. (General Assembly Resolution 40/33 of 29 November 1985, 1985) This action is known as diversion as stated in Rule 11.1, 11.2, and 11.7 of The Beijing Rules. It is expected that this diversion action will reduce the negative impacts of the children's involvement in the court process (Wiyono, 2019).

It is realized that the criminal law resolution process for the children in conflict with the law is not always the best way for their problem resolution. Not a few children who have been punished with imprisonment, recidivists, repeat the actions again either in the form of similar acts or other criminal acts. Jatnika says that based on primary data obtained from the Daily Journal of the Class III Bandung Children's Penitentiary, in March 2015, 42.8% of the residents of the children penitentiary, for one case, namely theft, were recidivists. Therefore, a humane approach is one of the "*ninja* paths" in providing welfare to children, especially the children in conflict with the law (Jatnika, DC., Mulyana, N., & Raharjo, n.d.).

b. Child Criminal Law Enforcement in the Indonesian Legal System

The juvenile criminal justice system has changed since the promulgation of Act number 11 of 2012 on The Juvenile Criminal Justice System (SPPA) which replaced Act number 3 of 1997 on Juvenile Courts. New things in this Act include:

- 1) Age limit of criminal responsibility for children as perpetrators; in Act number 3 of 1997 is 8 years while in Act number 11 of 2012 is 12 years.
- 2) Act number 3 of 1997 does not regulate diversion while Act number 11 of 2012 regulates diversion.
- 3) Act number 3 of 1997 has an objective that children's court is to be the exercise of judicial power within the general courts while Act number 11 of 2012 emphasizes the aim of child protection and welfare.

This difference brings about very significant changes in the resolution of children's cases in conflict with the law. The implementation of diversion in case settlement involving children in conflict with the law will open up opportunities for softer solutions by considering the children's future and their best interests. Based on this perspective a humane approach becomes a philosophical basis of diversion implementation.

What is meant by diversion? Referring to Article 1 number 7 of the SPPA Law, diversion is a process of transferring children's case resolution from criminal justice process to an outside criminal justice process. M. Nasir Djamil further stated that the academic text of the Draft Bill (RUU) on Juvenile Criminal Justice System mentioned that diversion is a transfer of case resolution of children suspected of committing certain criminal acts from the formal criminal process to a peaceful settlement between the suspect or defendant or perpetrator of a criminal act and the victim which is facilitated by the family and/or community, children's community counselors, police, prosecutors, or judges (Djamil, 2013).

Referring to the provisions of the SPPA Law the process of changing formal criminal case to outside the formal criminal process can be carried out either when the act has not been reported, at the investigation and inquiry stages (has been reported to the Police), the prosecution stage (has been handled by the Prosecutor's Office), and the court stage (the case has been transferred to the District Court). Thus, the application of diversion is really very flexible, can be applied at any stage during the formal process of the case resolution. A diversion failure at one stage is possibly tried at a later stage. If the diversion process does not make an agreement and/or the diversion agreement is not implemented, juvenile criminal proceedings can be carried out.

The objectives of diversion regulated in Article 6 of the SPPA Law are:

- 1) to achieve peace between the victim and the child (perpetrator);
- 2) to resolve children's cases outside the judicial process;
- 3) to prevent children from deprivation of liberty;
- 4) to encourage the public to participate; and
- 5) to instill a sense of responsibility to children

Diversion must be mutually understood by every law enforcement apparatus, from the reporting stage up to the handing down of the first court punishment. The opportunity of diversion is closed when the case has entered the appeal and cassation levels.

The Staff of PPA Unit of Semarang Polrestabes said, if not all cases involving child perpetrators can be resolved through the diversion process. There are restrictions on cases that can be resolved by diversion. Cases that are punishable by imprisonment for more than 7 (seven) years or repeat crimes (2021). Imprisonment for 7 (seven) years or more is a serious criminal offense. As a note, the criminal punishment for children is reduced by 1/3 (one third) of the punishment imposed for adults, namely the criminal threat for adults over 10 years. Meanwhile, the criminal act is categorized into a repeat act (recidivism) if the child committed a similar criminal act before, either it was resolved by diversion or by serving a sentence. Quoting M. Nasir Djamil, repetition of criminal acts by children is a proof that the goal of diversion has not been achieved, namely instilling responsibility to children not to repeat the acts that constitute criminal. Therefore, diversion efforts against it are not mandatory (Djamil, 2013).

The concept of diversion is directly related to restorative justice. Restorative justice is the resolution of criminal cases involving the perpetrator, victim, family of the perpetrator/victim, and others related to jointly seek a fair resolution by emphasizing restoration to the previous condition, not retaliation.

In cases of children in conflict with the law *Semarang Polrestabes* carry out diversion process by referring to the provisions of the SPPA Law. In cases involving children as perpetrators the idea of resolving the case outside the judicial process is generally proposed by the perpetrator or the perpetrator's family (primary data, 2021). This is understandable considering that the perpetrator is threatened by criminal sanctions if the case is processed legally. The Women and Children Protection (PPA) Unit of *Semarang Polrestabes* supports this process by facilitating the perpetrator, the perpetrator's family, the victim, the victim's family, the school, local community, and sometimes also by involving non-governmental organizations working in the field of child protection. However, the PPA Unit never helped negotiate the offer given to maintain the image of the police so that it would not be misunderstood that the police were protecting the perpetrators by encouraging to reach an agreement.

c. A Humane Approach in Restorative Justice Practices

Mr Roeslan Saleh in his book entitled *Mengadili sebagai Pergulatan Kemanusiaan* (Judging as a Human Struggle) conveys an advice that judging is not doing things that are outside the defendant. Judging is a process that painstakingly occurs between man and man. Judging is a human struggle to realize the law. Judging without a human relationship is essentially impossible. Therefore, judging without a human relationship between the judge and the defendant is often felt as treating injustice. A punishment that is imposed after making a settlement without paying attention to the litigant person will destroy the future. Such methods of justice are not only detrimental to the perpetrator but are also detrimental to general welfare. Judging in this way is not in accordance with the true meaning of judging but it is merely judging in outward form (Saleh, 1979).

In cases of children in conflict with the law the approach as stated by Roeslan Saleh is not implemented only at the trial stage but from the time they are reported to the police until they are brought before the court. Every law enforcement actor who handles cases of children in conflict with the law needs to

realize that handling the children's cases requires an approach that is more than just handling ordinary criminal cases. "Educating children" understanding, especially the children as perpetrators, must remain the main concern so that the children as perpetrators will be able to return to society.

The humane approach in the practice of diversion in resolving cases of children in conflict with the law at the *Semarang Polrestabes* is carried out by encouraging diversion implementation for criminal cases committed by children. This approach has proven successful in reducing the number of cases resolved through courts. This proves that efforts to resolve cases of children in conflict with the law have been carried out well, by taking a humane approach in resolving cases of children in conflict with the law.

Punishment of children is not always the best choice to create a deterrent effect. Diversion intends to instill efforts to make the children realize that their actions have caused troubles to the victims and their family. It is expected then that awareness to be responsible will arise within the children so that they will not repeat their actions in the future. Seeing the children, both as perpetrators and as victims, as humans whose rights must be respected is a real manifestation of respect for children as human beings.

Based on Roeslan Saleh's views, it is appropriate to apply a humane perspective in applying punishment to the children in conflict with the law. Children must be seen as children who are not degraded from "humans" to just "events" of children committing criminal acts. The criminal incident has factually occurred but destroying the children's future because they committed crimes is not commensurate with what they have done and the loss of their future.

CLOSING

Conclusion

Based on the description above the conclusion are as follows:

1. Diversion and restorative justice systems established by the SPPA Law provides a new approach in resolving cases of children in conflict with the law. Diversion is carried out by bringing the resolution out of ordinary criminal justice system. A diversified settlement is intended to make the children, perpetrators of criminal acts, take responsibility for what they have done and understand better about the victims' condition and not repeat the acts in the future.
2. The implementation of diversion contains a humane approach which means that the children's rights as rights inherent within them are recognized and respected. The settlement of juvenile cases through diversion has got a full support from the UN as can be seen from the issue of the declaration of Standard Minimum Rules for the Administrator of Juveniles (The Beijing Rules) providing guidelines of efforts to avoid the negative effects of punishment on children.

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