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The Application of Restorative Justice Toward Children as Criminal in Indonesia

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Abstract: This study aims to know the function of judge application of restorative justice in immoral behaviour, especially sex on children, which written on verdict number 49/Pid.Sus-Anak/2019/PN.Tng. Qualitative methodology is used as the research methodology with library research as the data collection technique. The data is taken from Law on Children Protection (No.35/2014), books, and related literature. The results showed that the conviction process given to children through formal criminal justice system, by putting them to the jail, cannot guarantee to give deterrent effect and make them a better person. Yet, prison will make them become smarter in doing criminal. Judge is supposed to put forward the children's necessary and future, even if, juridically, the behaviour can be categorized as the criminal act. However, it is hoped that there is another action, beside being prisoned, that can give deterrent effect for children who commit crime. Moreover, the set of legal process done on children's criminal is a disserve thing, either for the perpetrator or the victim.

Keywords: restorative justice; criminal justice system; child justice; children's criminal

1. Introduction

Children is the nation's next generation that have limitation in understanding and protecting theirself from things outside(Suharto, 2015). One of the problems that often appears in Indonesian society, along with the advancement era, is marked with the technology and culture development. This will trigger, not only the adults but also the children to infringe the values and norms in society, especially the legal norms. The high number of children case that faced with law is very

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concerned because children are supposed to be protected by the nation. The tendency on the increased of children criminal case have various motif and modus.

Children have specific characteristic compared to adults. The status of children has become one of the susceptible groups that their rights are often abandoned. Thus, children's right should be prioritized. Children who have conflict with the law (violating the law) must face the criminal justice procedure, that is, a series (continuum) of events starting with the investigation, arrest, detention, prosecution, until returned to the society (Gultom, 2013). The emerge of stigma is not only complicate the children to resocialise, but also delay the growth of the children.

Children violations against legal norms that have to deal with the justice system lead to the response that say there are law enforcers who have not given special attention to children as a suspects. This showed that the law in Indonesia is not yet stand for children, while most of the children's law subject must getting a protection or security. Because child is a God's deposit and next generation of the nation. Children security is an effort which done to create a condition where children can have their rights and do their duties (Gultom, 2013). The violation against the norms, either law or social norms, is called as juvenile delinquency. It tends to be called as child delinquency rather than child crime, because it is too harsh if a child who commits a crime is said to be a criminal. The immoral cases that done by children can describe the number of children with legal problem.

At their young age, these children must undergo the long and tiring legal process, start from the investigation process, prosecution, and court trial. The law enforcement has been given an authority by the law to arrest the perpetrator. This detention can give physical burden to children. The punishment process that given to children through formal criminal justice system, that is, putting children to the prison, cannot make the children deterrent. Prison, oppositely, often make the children become smarter in doing the crime. The sequence of legal process which done in the court is a harm for children. Being prisoned or sentenced is the last attempt to punish children who commit crime. The guidance of the implementation of diversion in children criminal justice system refers to the available law regulations. It makes the writer interested in doing legal studies with normative approach. The writer believes that every case or criminal act of children is required a legal protection by not seeing the total of the threat coming from the case. Therefore, this study aims to know the function of restorative justice in children's criminal case.

2. Literature Review

2.1. Sentencing Theory

According to Richard D. Schwartz and Jeime H. Skolnick (1970, cited in Pinangkaan, 2013), punishment is meant to prevent other people doing criminal action and providing network to grant revenge motif. John Kaplan (1983, cited in Pinangkaan, 2013) stated that the basic validation of punishment, beside for preventing revenge, is to educate and maintain justice. While Roger Hood, claimed that punishment is used to stop the criminal or person with criminal potential in doing criminal as well as strengthen back the social values and reassuring the fear of society of a crime (Sambas, 2010). There are two big concepts that developed, those are; a). the purpose of the punishment which focuses on providing retaliation for the perpetrator's mistakes and b). The purpose of the punishment that focuses on the advantage for the society and the perpetrator during the evaluation process in penitentiary.

2.2. Justice Theory

The concept of criminal justice views criminal action as a crime against society not the nation. It creates a duty for perpetrators, victims, and society to fix their action. This concept focuses on the effect of the crime rather than on the violated of a regulation. It also describes about the relation between victims and society on the infringement related to the punishment which applied by the nation. The restorative model gives exact, direct or indirect dialogue between the victims and the perpetrator in the form of mediation (Effendy, 2014). Howard Zehr (1990, cited in Effendi, 2014) stated that restorative justice is a process to involve, with all possibilities, the whole involved party in a specific offense and to collectively identify and address harms, needs, and obligation, in order to heal and put things as right as possible. Justice has put forward the right of legal utility (*zwech matigheid*) which mean that within the modern law, restoration and recovery for both victims and perpetrator are discussed. This can be seen from human who creates law with aim as social control not as human control.

2.3. Criminal Liability Theory

Crime is a form of behaviour that contrast with human moral, harm society, and violate the law. One of the elements that may cause someone or defendant getting prisoned is being able to be responsible, and the condition of someone to be able to be responsible is sense and will. Sense and will can differ between thing that allowed and forbidden. The concept of crime liability is not merely discussed about the law but also the moral values or basic norms of a society (Hanafi, 2015). Hence, law liability is created to reach for justice.

2.4. Wilstheorie

This theory is discussed about someone who act by knowing and wanting it or doing the something intentionally. Generally, crime is supposed to be imposed to those who commits a prohibited act by knowing and wanting it. Will theory or wilstheorie is proposed by Von Hippel in his book *Die Grenze Vorsatz und Fahrlässigkeit* in 1903, that stated a deliberality is a will which make an action and will that cause an effect of the action. To wish for something, someone must have the knowledge about the thing first. Therefore, it can be said that will is surmounted with knowledge.

2.5. Legal Certainty Theory

Certainty is a thing or condition that is definite, certain or permanent. Law in its essence is supposed to be certain and fair; certain as the behaviour guidance and fair because the guidance should support the structure in a reasonable way. With these two components; certain and fair, law can run its function. Rato (2010) stated that legal certainty defines as a statement that can only be answered in normative way. Legal certainty is a warranty for law to be implemented, that is those who are legally entitled can obtain their rights and the decisions can be enforced. Even though, legal certainty has strong relationship with justice, but not to law. Law is general, bond, and generalized while justice is subjective, individualistic, and ungeneralized.

3. Metodology

This study used normative or normative juridical as the research type and qualitative methodology as the research methodology. The data collection technique is using library research or by studying, examining, and analyzing the literature studies as the basic theory related to the observed problems. This research methodology is used as a guidance tool in doing the research analyses and knowledge development. It has aim to reveal the validity of the collected data. The data is taken from primary and secondary data. The primary data is Law on Children Protection (No. 35/2014) while the secondary data is taken from books and related literature.

4. Results and Discussion

4.1. Application of Restorative Justice in Children's Criminal Case

Children as a criminal perpetrator is often called as delinquent child or children who involved in juvenile delinquency. Romli Atmasasmita (1983) stated that juvenile delinquency is an act or behaviour of unmarried children with age under 18th who violate the norms. In handling this, police should pay attention to children's condition (Atmasasmita, 1983). Children are still needing a protection that can be the basic in looking for an alternative solution to avoid the formal criminal justice system, child's prisoning, and stigmatization of a child as a convict. One of the solutions is by redirecting or exclude them from criminal justice system. It means not all cases of children's criminal is resolved through formal justice system, but to give an alternative solution in justice approach for the sake of children and to consider the justice for the victims which called as restorative justice approach.

The restorative justice treatment is also done to give a second chance to the lawbreaker to be a better person by involving the community around. It also attempt to provide justice to the children case that already proceed til the law enforcement officers. Restorative justice can be the reference for judge to solve children criminal case. Beijing rules give maximum protection to the children's future because it contained with some basis, those are:

- a) Giving the children priority;
- b) Avoid the criminal justice system as much as possible;
- c) Minimalized all forms of intervention;
- d) Having a discretion or police in handling children criminal case;
- e) Children criminalization and punishment should be avoided unless there is serious damage to children or other people, and;
- f) Legal assistance must be provided immediately free of charge.

According to Saraswati(2009), restorative justice, in its principal, recognize three things in defining the settlement of children criminal case, that is; the victim, the perpetrator, and the community. In restorative justice, there is an attempt to meet the victim and perpetrator to seek recovery for victim. In other side, the perpetrator is burdened with responsibility of his action to the victim and the community around, and is responsible for admitting his crime.

The government as the holder and controller of policies on the protection of children's rights should immediately makes rule of the implementation instructions for law enforcers to carry out the process of resolving children cases outside of formal justice. The government must have a policy regarding the provision of experts (child psychologists and psychiatrists) to assist children with conflict. To

fulfill the rights of the children, it is needed an institution or volunteer to handle the advocacy on children with conflict. It is hoped that the settlement of children case can use the concept of diversion and restorative justice as an alternative of the sentencing.

The attempt for implementing restorative justice means that not every case should be done by returning the children to their parents, because there are some things that needed to be concerned, such as; a) it is child first offender, b) the child is still in school age, c) the crime is not a severe crime, d) the crime that result in loss of life, e) the crime with serious injury or lifelong disability, or f) the crime that disturb or interfere the public.

Meanwhile, immoral crimes can occur in any situation and environment by everyone, not only the adults but also the children. In religion, immoral action is known as a behavior that break Allah's command or is a sin. If we adhere to the opinion of legal experts who state that immorality is an understanding of customs regarding behavior in social life, including in things of dealing with sexual problems(Laden, 2008). In Indonesian Criminal Code, immoral act against children is called molestation. Molestation is a tendency to engage in sexual activity with helpless people such as children – both men and women, with violence or without violence.

According to Moeljetno(2003), all kind of acts that violate morals related to sexual desires is an act that violates morals and can be punished. Child delinquency increases every year, therefore, various efforts to prevent and overcome child delinquency need to be carried out immediately. One of the prevention and control of juvenile delinquency (child criminal politics) is currently through the implementation of the juvenile criminal justice system. The purpose of implementing the juvenile justice system is not solely aimed at imposing criminal sanctions on children, but is more focused on the premise that the imposition of sanctions is a means of supporting the realization of children's welfare (Bakhri, 2014).

The anticipation to avoid the negative effect of criminal justice system on children can be done with an act or policy that handle the case without going through criminal process. The judicial process can cause physiological effect for children. They will experience pressure and stigmatization during the process. Thus, any kind of activities done during the process should be based on a principal of children welfare and interest. The form of juvenile delinquency is divided in three criteria; accidental, occasionally, and habitually which showed the adjustment level that is high, medium and low. The other scientific classification is using tripartite classification, that is, historical, instinctual, and mental.

5. Legal Application and the Factors of Sex on Children

The nation uphold the human rights, including the children's rights which marked with the guarantee on the protection and fulfillment of the children's right within the 1945 Constitution of the Republic of Indonesia and some legal provisions either national or international. This guarantee is strengthen with international convention ratification on children's rights, that is, the Convention on the rights of the child (No. 36/1990). Everyone is responsible to give protection and guarantee the fulfillment of children's rights. The protection of children that has been carried out so far has not provided guarantees for children to get treatment and opportunities that are in accordance with their needs. Thus, in carrying out efforts to protect children's rights, it must be based on the principles of human rights, namely respect, fulfillment and protection of the children's rights.

Even if the legal instrument has been owned, in its progress, the Law on Children Protection (No. 23/2000) is not yet work effectively, because there is an overlapping between the sectorial regulations of children definition. On the other hand, the rise of crimes against children in the community, especially sexual crimes, requires commitment from the Government, Regional Government, and the community as well as all stakeholders related to the implementation of child protection. Related to the case number 49/Pid.Sus-Anak/2019/PN.Tng, it is mentioned that there are some factors that make children as the perpetrator, such as; a) the children did not get their parents' affection, b) caused by irresponsible parties, c) environment influence, d) freedom in friendship, and e) influenced by uncensored movie and books that can damage children's heart.

However, the result showed that the perpetrator and the victim are a couple, therefore there is no violence and force during the sexual crime. During the investigation, there is no evidence on physical abuse done by the perpetrator. The sexual intercourse is done several times without any resistance from the victim. After examining the results, the writer qualifies that molestation against children is referred to Article 82 of Law on Children Protection (No. 23/2002) which stated, "Every one who deliberately commits violence, or threat of violence, forces, does tricks, tells a series of lies, or persuades a child to do, or let obscene acts be done, is subject to penalty of 15 (fifteen) years at most and 3 (three) years at least and fine of Rp. 300.000.000 (three hundreds millions rupiah) at most and Rp. 60.000.000 (sixty hundreds millions rupiah) at least". Also in Government Regulation in Lieu of Law of the Republic of Indonesia Article 82 and 82A Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection.

Therefore, it can be argued that the legal structure is like a machine. In its implementation of handling children with crime, the factors of the legal structure are all law enforcement officers are expected to work together to obtain the legal goals of realizing justice and truth and can form an integrated criminal justice

system which in its movement will always experience interfaces (interaction, interconnection, and independence) with the environment, hence the efforts to protect children in conflict with the law can be realized.

5.1. Judge's Verdict on 49/Pid.Sus-Anak/2019/PN.Tng in Noticing Restorative Justice Function

In Indonesia, juvenile court was established since the birth of Law on Juvenile Court (No. 3/1997) which then called as juvenile court law. According to Soedarto (1981), juvenile court has been appeared in every countries since 1950. Some jugdes also sent aboard to learn about the juvenile court. Legal consideration is one of the most important aspects in determining the value of a legal verdict which contains justice and legal certainty. Moreover, legal consideration should be handled carefully, well, and thorough because it may affect the decision of High Supreme Court.

In examining the criminal case, judge is attempted to find out and proof for the truth based on the facts and adhere to the indictment formulated by the Public Prosecutor. The judge will consider the juridical things, such as the elements of the indicted article, witness information, defendant information, and evidence. While for non-juridical consideration, the judge will consider on the defendant's motif background, the consequences, and the defendant's social and economic condition. In children's case, the judge is really consider that children are the nation's generation that expected to be able to change their self in their journey during the penalty.

In the case of a criminal action in the Tangerang District Court No.49/Pid.Sus-Anak/2017/PnTng, the judge decided that the defendant was legally and convincingly proven guilty of committing a crime as stated in Article 81 paragraph (1) of Law Number 11 of 2012 concerning Juvenile Justice. Therefore he was sentenced to 2 (two) years and 3 (three) months in prison, deducted from the detention period for the defendant in the legal process, which reads in article 81:

(1) Every one who deliberately commits violence or threats for violence, forcing a child to commit sexual intercourse with him or with others, is subject to maximum penalty of 15 (fifteen) years of imprisonment and 3 (three) years at most and fine of Rp. 300.000.000 (three hundreds millions) at most and Rp. 60.000.000 (sixty) million at least.

(2) Provision of crimes as meant in verse (1) also applies for every man who deliberately plays tricks, tells a series of lies, or persuades a child to commit sexual intercourse with him or others.

(3) In the case that the criminal act as referred to in paragraph (1) is committed by a parent, guardian, child caretaker, educator, or education staff, the penalty shall be added to 1/3 (one third) of the criminal threat as referred to in paragraph (1).

From the explanation above, it can be seen that the judge has been applied the restorative justice system but not using it on case number 49/Pid.Sus-Anak/2019/PN.Tng because, based on the penitentiary assessment, the action is disturbing the community. Thus it did not meet the restorative justice requirements. Even though, the children decided their action based on their thought, feeling, and desire but the environment condition is also influenced.

Every children need training and protection in order to guarantee the growth and development of physical, mental, and social in a whole, harmony and balance. The purpose in giving legal protection to children as criminal is to honor the rights of the perpetrator. The legal certainty for the perpetrator is also done to avoid nonarbitrary and unfair treatment. Meanwhile, the concept of children protection is not only concerning on the protection of children's body and soul but also the protection on the whole rights and needs that can guarantee the natural growth.

Interventions for perpetrators do not need to go through a formal process so that children are avoided from the judicial system process. If the children is obliged to do the judicial process, then they need to be kept away from the negative influence and implication. The form of restorative justice will push children to be responsible for what they have done. Moreover, the children will get a chance to pay back their fault by doing good things to the victim and maintain the relationship with victims' family.

6. Conclusion

From the explanation above, judge's verdict, in deciding the criminal act number 49/Pid.Sus-Anak/2019/PN.Tng. has been noticed the function of restorative justice. However, this study find out that the judge cannot apply the restorative justice system through diversion mechanism since the requirements are not yet accomplished.

The judge does not consider the use of restorative justice in his verdict on case number 49/Pid.Sus-Anak/2019/PN.Tng with Police Letter (No.8/2018) on the application of restorative justice in handling criminal case. It explained the mechanism within restorative justice case to prevent various administration, diverse interpretation and distortion of the implementation. One of the solutions is not to cause society's fidgetiness and rejection. The availability statement from all of related party to be not indisposed and release the accused rights in front of the law. Therefore, judge did not consider the application of restorative justice because during the penitentiary assessment, the children's behaviour is categorized

as harm others, hence the requirements of restorative justice attempt cannot be fulfilled.

The writer suggests that in deciding the case, the judge is supposed to put the child's needs and future first, even if juridically, the child's behaviour has fulfill the material requirement of a criminal case. Another actions which given to children who commit crime besides being sentenced is expected to be able to give deterrent effect and change to be better. Thus, children will get a better future.

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