

Developing Diversion Negotiation Model for Reconstructing Restorative Justice for Children Committing Criminal Acts, based on Local Culture at the Polrestabes, Medan

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Keywords: Diversion Negotiation, Children Committing Criminal Acts

Abstract: Diversion is the process of diverting the settlement of legal case in children from litigation to non-litigation to achieve restorative justice. This concept is a local culture which is known as penal mediation which is basically a complete settlement in any criminal case of non-litigation. Today, negotiation is put aside and changed to western law and judicial administration which effectiveness in settling criminal cases in children is still doubtful so it needs to be reconstructed to get justice to restore the disadvantages suffered by the victims of criminal acts and society. Law No. 12/2011 gives opportunity for children who commit criminal acts to settle their cases through non-litigation. Substantially, this law is frail in giving an opportunity for multiple interpretations toward its norms. An investigator plays an important role in the process of diversion. A public figure also plays his role in the process of diversion in investigating a child who commits a criminal act about his background, history of his education, his family's economic condition, and his family's background. The process of diversion negotiation at the Polrestabes (City Sub-regional Police), Medan is carried out by conducting negotiation by giving an opportunity for each party to convey information and responses.

1 INTRODUCTION

Restorative justice stipulated in Article 1, figure 6 of Law No. 12/2011 is a settlement of criminal act cases by involving the perpetrators, the victims, their families, and other parties who are, collectively, searching for a fair settlement by emphasizing on restoring to the original condition and not revenge (Yohanes Bakti, et al., 2016). Diversion is the diverting of settlement in cases in children from the concept of litigation to the concept of non-litigation. If the two concepts are combined, restorative justice will be achieved, while diversion is one of the processes of achieving restorative justice (Desiandri, Yati Sharfina & Madiasa Ablisar, 2017)

Actually, restorative justice is not a new culture for the Indonesian people. However, since the adat (customary) law was neglected and changed to the western law during the colonial period, restorative justice was put aside (Imran Adiguna, 2013). After the western provisions and laws were considered ineffective and inefficient anymore in settling criminal cases righteously, many people introduced and carried out restorative justice. In Indonesia, there

are penal mediation and adat reconciliation which, basically, are the attempt to settle any criminal case thoroughly (Ali Abubakar, 2014). In the system of the adat law in Indonesia, a mediation forum is usually established from the people's own treasure; if there is a dispute, the community will submit it to this forum to be settled (Hooker, 1979).

The success in law enforcement found in Law No. 11/2012 is determined by some elements in the legal system itself such as legal structure, legal substance, and legal culture. These three elements are able to explain why a regulation does not run well as what is expected by the law makers (D.S. Dewi & Fatahillah A. Syukur, 2011), especially about Law No. 12/2012.

The research problems are as follows: whether Law No. 12/2011 on the Judicial System of Children, along with its implementing regulation, is effective enough to encourage the success in diversion, how about the role of an investigator and community leader in the process of diversion in the level of investigation on children committing criminal acts, and how about the model of the implementation of negotiation in the process of diversion in the level of investigation on children committing criminal acts.

2 RESEARCH METHODOLOGY

The research used the combination of normative and empirical research method. The normative research studied the norms which were found in Law No. 12/2012 and any legal provision embodied in it. Meanwhile, the empirical research used qualitative study by digging up deeply diversion negotiation to reconstruct restorative justice in children committing criminal acts based on local culture at the Polrestabes (City Sub-regional Police), Medan.

3 RESULT AND DISCUSSION

The substance of Law No. 12/2012 contains norms which have multiple interpretations. Article 8 (1) states that the process of diversion is carried out through negotiation by involving children, their parents or guardians, victims, and/or the victims' parents/guardians, public figures, and professional social workers, based on restorative justice approach. Article 8 (2), in the case of negotiation as it is stipulated in paragraph (1), can also involve professional social workers, and/or public figures. The research problems are whether diversion negotiation cannot be held if some of them do not appear in the negotiation, and whether the result of diversion negotiation will be revoked if public figures of professional social workers do not come to the negotiation.

Article 10 of Law No. 12/2012 states that public figures can be involved in diversion process. This Article does not mention who the public figures are, whether they are present at the place where the criminal act occurs or they have the same neighborhood as the perpetrators, or they have the same neighborhood as the victims, or they are considered as the persons who understand the perpetrators' characteristics. The result of diversion negotiation can be the following types: a) reconciliation with or without compensation, b) the perpetrators are returned to their parents/guardians, c) the perpetrators are sent to any educational institutions or LPKS no longer than 3 (three) months, or d) the perpetrators are punished as social workers (Article 11). The result of diversion negotiation is not limited since it also gives an opportunity for the other alternatives besides the Article 11.

After a child is convicted as having committed criminal act, the investigator (Polrestabes, Medan) immediately makes a preparation for diversion which has to be done no longer than 7 (seven) days after the

child has been convicted as the suspect. Detention will be done for a child who commits criminal act with criminal penalty of 7 (seven) years. When an investigation begins, no longer than 1 x 24 hours, the investigator will ask a public figure to be present to accompany the perpetrator and to do social research. A professional social worker is also asked to make social report of the child victim and/or the child witness. Prior to the diversion, the investigator is required to make some consideration as follows: a) the category of the criminal act, b) the perpetrator's age, c) the result of the social research from Bapas, and d) the support from families and community.

The role of a public figure in the process of diversion is doing a research on the case, the reason for committing the criminal act, history of the client's life, family background, client's educational development, family's economic condition. He is also required to make a report on the social research for the interest of diversion, to do accompaniment, guidance, and supervision toward the perpetrator during the process of diversion, and to carry out the implementation of negotiation, including his report to the Court if diversion is not implemented.

The opening session of diversion negotiation is opened by a facilitator by introducing the persons appearing and conveying the objective of the diversion negotiation. He conveys the rules of order to be agreed by the participants in the negotiation and explains his tasks. All of the participants give information in the discussion forum and keep order. They must not attack or interfere with one to another. All of them are expected to maintain favorable atmosphere of the negotiation. If it is necessary, caucus (special meeting) between the facilitator and the perpetrator/victim/public figure is held.

Table 1: The children who got diversion in PPA Satreskrim Poltabes Unit Medan from 2016 until 2018.

| Year | Amount | Successful Diversion | Unsuccessful Diversion |
|------|--------|----------------------|------------------------|
| 2016 | 4 | 1 | 3 |
| 2017 | 3 | - | 3 |
| 2018 | - | - | - |

Based on the data above, the success of diversion from 2016 to April 2017 is only one case of children in conflict with the law from 7 cases of children who are in conflict with the law. The lack of success in the diversion of children in conflict with the law is caused by victims of criminal acts not wanting to settle through diversion but choosing the resolution of their case through the court. Of the 4 children who are in conflict with the law of 2016 and 3 children who are

in conflict with the law of 2017 both undergo the diversion process but at the decision-making stage the victim's child or the victim's parents do not accept the diversion agreement.

The process of diversion in the investigation at the Polrestabes, Medan, is facilitated by an investigating facilitator who conveys the summary of indictment, telling the child (perpetrator/parents/family) anything related to the perpetrator's criminal act, his testimony, his apology, his regret, and his hope. The facilitator gives an opportunity to the victim/parents/family to give their response and the expected reconciliation. The facilitator also gives an opportunity to the public figure to give information about the social condition of the victim and is expected to give some suggestions for diversion reconciliation. When there is an agreement in the process of diversion, the facilitator makes a draft of agreement to be signed by the participants in the diversion negotiation.

In organizing diversion reconciliation, facilitator has to be aware that the reconciliation is not contrary to laws, religion, local wisdom, and ethics or containing anything which cannot be carried out by a child or containing bad manners. After the diversion negotiation is agreed, the investigator presents the minutes of diversion and diversion reconciliation to the Head of District Court to hand down a verdict. If there is no agreement in the diversion negotiation, the case will be turned over to the Criminal Judicial System. In this case, the investigator is required to carry on the investigation and to turn it over to Public Prosecutor by attaching the minutes of Diversion and the report of Public Figures.

4 CONCLUSIONS

Substantially, the norms found in Law No. 12/2012, especially which is related to Diversion, contain some Articles have multiple interpretations. The role of public figures in conducting researches on children committing criminal acts and doing accompaniment, guidance, and supervision is very dominant for the success in the process of diversion negotiation in the level of investigation. The implementation of the process of diversion is done in the level of investigation on children who commit criminal acts with criminal penalty under 7 (seven) years and not the handling of criminal act which involves children and their parents/guardians, victims and/or their parents/guardians, public figures, and professional social workers.

ACKNOWLEDGEMENTS

We would like to express our gratitude to the Rector of the University of Sumatera Utara who has bestowed Telenta fund research of the University of Sumatera Utara of Professorial Research Scheme in the fiscal year of 2018 Number: 452/UN5.2.3.1/PPM/KP-TELENTA USU/2018.

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