

Solving Child Crimes Through Restorative Justice and Diversion from Legal Sociological Aspects

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Abstract

Since the 19th century, children have been objects of scientific study, yet legal responses to children in conflict with the law often prioritize punishment over protection. This research aims to analyze the application of restorative justice and diversion in resolving child crimes from the perspective of legal sociology. The study employed normative legal research using primary legal materials (laws and regulations) and secondary legal materials (legal literature, journal articles, and research reports), analyzed descriptively-analytically. The findings reveal that although Indonesian Law No. 11 of 2012 on the Child Criminal Justice System mandates diversion for children aged 12-18 years, its implementation faces obstacles due to a lack of understanding among law enforcement officials, societal pressure for retribution, and exceptions for serious crimes (punishable by over 7 years). Restorative justice, as developed by UNICEF, offers a recovery-oriented approach involving victims, perpetrators, and the community. The sociological perspective demonstrates that law is not merely a normative system but is embedded in social values, norms, and power relations. The practical implication is the need for capacity building for police, prosecutors, and judges, as well as community-based mediation programs to prioritize the best interests of the child.

INTRODUCTION

Criminal acts are the term for "evil acts" or "crimes" (*crime or Verbrechen or misdaad*). According to the law, positive (*strafbaar feit*) is an unlawful act committed by mistake and can be threatened with criminal charges. To impose a crime is not enough with a criminal act but must also be accompanied by a person who can be convicted as well (Doherty, 2015; Robinson & Darley, 2019). Legal provisions related to the subject of children who commit criminal acts are regulated in Law Number 3 of 1997 concerning Children's Court. There is a difference in treatment related to a child who has committed a criminal act as a means of protection and protection for the future. There is an age limit for a child who can be faced with trial, namely from the age of 8 years to 17 years old and unmarried (Soetedjo, 2013, p. 27).

The main purpose of the law is order where it is expected that the community will have an orderly/directed life, then the second legal goal is the achievement of justice. To achieve order in life in society, it is necessary to have certainty in society that must be guided by morality itself (Bell, 2017; Nisbet, 2023). The nature of prohibited acts (*mala in se*) is a despicable act that injures the moral values contained in society. The purpose of the formation of the law is to regulate the rights of the state in the provision of criminal sanctions which functions as an instrument so that the provisions in it are obeyed by the community. The

prohibited acts are *mala prohibita*, namely acts that are prohibited because the provisions have been regulated in the law. Criminal law does not only function to protect the values in morality but also as a means to increase the sense of responsibility (Amrani & Ali, 2015, p. 57).

The judge's decision to return a child to his parents/guardians certainly cannot be equated with a decision to criminalize or to take action against a child even though the law has regulated it. Penitentiary law has the nature of an action or as a means of a policy that is not directly related to the court's decision (Lamintang & Lamintang, 2012, p. 195). Children who are involved in minor cases and are processed by the law, become a debate, especially since the losses are small. Carrying out a minor criminal process against a child is considered to injure the sense of justice so that the concept of diversion appears (Anderson, 2022; Bao et al., 2018).

The urgency of this research arises from the persistent high rate of child imprisonment despite the legal mandate for diversion. UNICEF data from 2002 showed that 90% of children tried in Indonesian courts were sentenced to prison, and 88% received sentences of 12 months or more. Recent cases continue to demonstrate that law enforcement officials often default to detention rather than exploring restorative alternatives. Without a sociological understanding of why diversion fails, legal reforms will remain ineffective. Therefore, this research is critically needed to identify the social, political, and economic barriers to restorative justice implementation (Banwell-Moore, 2024; Sliva et al., 2020; Stewart & Ezell, 2024).

The novelty of this research lies in its interdisciplinary approach, combining normative legal analysis with legal sociology. Unlike previous studies that merely describe diversion procedures, this research applies sociological theories of law particularly the concepts of social contract, legal compliance, and the influence of community norms on legal behaviour. It also examines how factors such as gender, local culture, and power relations among legal actors affect diversion outcomes. This approach provides a more nuanced understanding of why restorative justice succeeds or fails in specific contexts.

The concept of diversion is to transfer a case from a formal to an in-formal process with the aim of providing protection for children who are in conflict with the law (Fatoni, 2015, p. 74). Diversion is a very important policy in protecting children from the formal judicial process, but a clear formulation is needed so that it does not cause legal problems in the future.

RESEARCH METHODS

The research used a type of normative legal research, which is a type of research obtained from a literature study by analyzing a legal problem sourced from 2 (two) legal materials, namely primary legal materials and secondary legal materials. According to Soerjono Soekanto, in legal research, secondary data includes primary legal materials, namely legal materials that are binding and consist of basic norms or rules, laws and regulations, uncodified legal materials, jurisprudence, treaties and legal materials from the colonial era that are still in force in Indonesia. Secondary legal materials that provide explanations of primary legal materials in the form of draft laws, research results, and works from the legal community (Soekanto, 2015, p. 33).

This research is descriptive and analytical, by describing or explaining completely and systematically the state of the object being researched. This research uses a legislative approach and a concept approach. The uses of this research are 2 (two) Theoretical, namely developing legal science and providing a thought, then practical uses which are obtained through information in terms of theory and practice.

RESULTS AND DISCUSSION

Criminal Law

The Criminal Law that applies in Indonesia is the result of codification, namely rules that have been compiled in a law book (*wetboek*) called the Criminal Code (Moeljatno, 2015, p. 17). In addition to the criminal law has been codified, the legal part has been unified, which is applicable to all groups of people. The main basis in imposing a crime is based on its responsibility (criminal responsibility or criminal liability) (Moeljatno, 2015, p. 17). Acts regulated by criminal law are declared as prohibited acts called "delicacies." Criminal acts are acts that are against the law and certainly harm the community in the sense that they contradict or hinder the implementation of a good social life (Saleh, 1983, p. 13).

Ontologically, criminal justice is only concerned with criminal law and *mala prohibita*. Ontologically, if *crimina extra ordinaria* occurs, the criminal justice does not provide any benefit value to the victim because there will be no prosecution because it is caused because it is not a *mala prohibita* act (Yuherawan, 2014, p. 66). The necessity of criminal law as a statute law has an impact on the characteristics of criminal law as follows:

- a. Criminal rules are formulated in an abstract and general manner;
- b. The judge thinks deductively which only includes the concrete facts he is facing;
- c. Legal techniques are in the form of an interpretation, namely giving certain meanings to words in criminal rules;
- d. The judge's decision is only binding on the case in question and does not have the power to bind other judges (Yuherawan, 2014, p. 66).

The classification of criminal acts in Indonesia that have consequences in the form of the classification of crimes (*misdrijf*) contained in book II of the Criminal Code and violations (*overtredingen*) of book III of the Criminal Code (Prodjodikoro, 2003, p. 32). The classification of criminal acts is 2 (two), namely material crimes (without formulating the form of the act) and formal criminal acts (without mentioning the consequences of the acts), as for example:

1. Murder (338 of the Penal Code) is formulated as an act that results in the death of another person without mentioning the form of the act;
2. Burning of a house (187 of the Criminal Code) is formulated as a result of intentional fire;
3. Theft (362 of the Criminal Code) is formulated as a tangible act, namely taking goods without specifying certain consequences of the Act;
4. Forging a letter (263 of the Criminal Code) is formulated as a tangible act without any mention of the consequences (Prodjodikoro, 2003, p. 32).

In the formulation of the offense there are two views related to this, according to Simons, formulating *strafbaar feit* is an act that can be threatened by a criminal offense that is unlawful and the person can be responsible. According to Jonkers and Utrecht, it includes an act that is punishable by law, contrary to the law, committed by a guilty person and the person who commits it is held responsible for his actions (Hamzah, 2017, p. 88).

The objectives of criminal law are as follows:

1. To scare people not to commit crimes, either by scaring the public (*generale preventie*) or scaring certain people who have committed crimes so that they do not repeat them again (*speciale preventive*);
2. To educate or improve people who have committed crimes so that they have good character so that they are beneficial to the community (Prodjodikoro, 2003, p. 19).

The Role of Sociology in Policy Formation Analysis and Law Enforcement Implementation

The role of legal sociology in terms of policy formation plays a very important role in the formation of social institutions and policy formation because of the norms in it and being able to understand what factors affect the process of forming legal policies, namely social factors, namely legal sociology can help observe the value of social factors such as national culture, community norms, gender, and others.

This social factor can be used as a source to create policies to design laws that are more structured with what is needed by the community. In social factors, the sociology of law can be used as an implementation in daily life, namely it can answer questions related to why some laws are well received and followed by the community (Saleh & Agusta, 2020). The impact of this social factor is:

- a. Acceptance and compliance with the law;
- b. Creating equality, i.e. gender, refers to how the law can be a good change, especially in gender equality
- c. Social Change, namely technology and communication that can affect the way a person interacts — globalization with what can be legal and unite the interaction between national and international law (Arliman S, 2024, p. 12).

Political Factors, sociology can help how groups identify those who have power and interest in the process of forming general policies that affect the direction and results of legal policies (Amanah et al., 2023, pp. 410–430).

Economic Factors, a sociology that can understand how society behaves well, such as making decisions about the consumption, production, and distribution of resources. In identifying sociological economic factors that can affect the success of economic policies such as social norms and social networks, it can foster a very important role in the community that responds to economic policies, and can facilitate community participation, such as providing necessary needs (Wulandari et al., n.d., pp. 130–139).

Child Crime from the Sociological Aspect of Law

The sociology of law according to history was first proposed by Anzilotti, which was born from the thoughts of experts in the fields of legal philosophy and sociology. Legal sociology looks at law from outside the law. In this case, the sociology of law tries to treat the legal system from the point of view of social science. Basically, in the sociology of law, law is only one of many social systems and that other social systems in society give meaning and influence to the law itself (Hukumonline, n.d.). Sociology of law is a theory about the relationship between legal rules and social reality. The legal relationship can be studied in 2 (two) ways, including:

1. Explain the rules of law from the point of view of social reality;
2. Explain the reality of society from the point of view of legal principles (Hukumonline, n.d.).

Legal Sociology aims to explain the practical workings of legal sociology. The study of the sociology of law does not only study law normatively, but is related to social phenomena that exist in society. This is related to the assumption that law is born from a social contract, which is an agreement made by members of society to maintain value. There is no law without society. Because the law is created and created by the community to be used as a guideline for the behaviour of members of the community in relation to their fellow citizens. In addition, of course, to maintain the integrity of the community itself. Furthermore, because people have

different characteristics and experiences, the law will also be different in each society. This is because people have different needs and values. The development of the community itself is further related to legal changes that are tailored to their needs (STAIN Madiun, 2024).

Indonesia has ratified the Convention on The Rights of the Child through Presidential Decree No. 36 of 1990 concerning the Convention on the Rights of the Child. According to UNICEF data, in 2002 there were 4,000 children on trial in court, 90% were sentenced to prison and 88% were sentenced to 12 months, 73% were tried for minor offences and 42% of children in prison were reunited with adults (STAIN Madiun, 2024). A real example of the problem of child criminal law enforcement is a 15-year-old child in a paralyzed state who was finally sentenced to 2 years in prison for being found to have class 1 narcotics, where his condition was affected by polio and dropped out of school and was forced to sell narcotics. Then the second case in 2003 a 14-year-old child was detained by the Sumber Jaya Police on charges of stealing cigarettes and ended up hanging himself on the first day of entering the detention cell and the case in 2011 there were 2 child prisoners found dead hanging in the bathroom in the detention room of the Sijunjung Police Station (STAIN Madiun, 2024).

From these records, child crime cases that have been handled by the Children's Rights Advocacy Institute (LAHA), it turns out that 95% of children have been detained and 100% have been sentenced to prison (STAIN Madiun, 2024).

The Concept of Restorative Justice

Child crimes do not only occur in Indonesia but also in various countries in the world, in connection with which UNICEF developed the concept of Restorative Justice to protect children who are caught in criminal cases. Liebmann simply defines restorative justice as a legal system that aims to restore the welfare of victims, perpetrators and communities damaged by crime, and to prevent further violations or criminal acts. Liebmann also gave a formulation of the basic principles of restorative justice as follows:

- Prioritizing victim support and healing;
- The offender is responsible for what they do;
- Dialogue between victims and perpetrators to achieve understanding;
- There is in order to correctly place the losses incurred;
- The offender must have an awareness of how to avoid future crimes;
- The community should participate in providing a helpful role in integrating the two parties, both victims and perpetrators (IAIN Kudus Repository, n.d.).

Arrangements related to restorative justice have been regulated in SE Kapolri No. SE/8/VII/2018 of 2018 about the Application of Restorative Justice in Criminal Case Resolution; Regulation of the National Police Chief No. 6 of 2019 about Criminal Investigation; Prosecutor's Regulation No. 15 of 2020 on the Termination of Prosecution Based on Restorative Justice; and the Decree of the Director General of the General Judiciary of the Supreme Court of the Republic of Indonesia No.1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice (Hukumonline, 2022). The concept of Restorative Justice from UNICEF focuses on justice that aims to recover the perpetrators of child crimes, the victims and the community who are disturbed as a result of the crime (Hukumonline, 2022).

The recovery process is through Diversion, according to M Nasir Djamil, what is meant by diversion is a transfer of the settlement of cases of children suspected of committing certain criminal acts from a formal criminal process to a peaceful settlement between the suspect/defendant/perpetrator of a criminal act and the victim facilitated by the family and/or community, children's community counsellors, the Police, Prosecutors, or Judges. Therefore,

not all children's cases in conflict with the law must be resolved through formal judicial channels, and provide alternatives to settlement with a restorative justice approach, therefore, for children's cases in conflict with the law, diversion can be carried out for the best interests of the child and by considering justice for the victim (Raden Fatah Repository, n.d.). However, there is an exception for the enactment of Diversion for Children based on the provisions of Article 9 Paragraph 1 letter a in the Indonesian Law No. 11 of 2012 concerning the Child Criminal Justice System which explains that the lower the criminal threat of children, the higher the priority of diversion, but for serious/serious criminal acts such as murder, rape, drug dealers, and terrorism that are criminally threatened with a sentence of more than 7 (seven) years (Undang-Undang RI No. 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak).

The recovery process according to Restorative Justice through Diversion by means of transfer or transfer from the judicial process to another alternative through deliberation or mediation to avoid children from the next legal process and prevent the negative influence of legal actions that can cause negative stigma (Raden Fatah Repository, n.d.). In the discovery of law, something new is found that can be done, either through interpretation, analogy, or refinement of the law. According to Sudikno Mertokusumo, legal discovery is the process of forming laws by judges or legal apparatus to apply general legal regulations to concrete events (Hiariej, 2009, p. 55).

If the perpetrator of the crime is a child who is 10 (ten) years old or older, the judge must investigate whether the perpetrator has committed *oordeel des onderscheids* or not, which can be interpreted by the perpetrator to assess whether his actions are justified or otherwise (Hiariej, 2009, p. 55). If the child cannot judge for his actions, he should not be punished. The criminal law of children regulated in the Criminal Code is contained in Article 39 paragraph 3, Article 40, Article 45-47 and Article 78 paragraph 2 of the Criminal Code. The judge can only impose a criminal with the following qualifications:

1. Imprisonment for 15 (fifteen) years;
2. Imprisonment;
3. Criminal fines;
4. Criminal Confiscation of certain objects.

Child protection aims to ensure the fulfilment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and dignity, as well as discrimination for the realization of quality, noble and prosperous Indonesian children (Undang-Undang RI No. 23 Tahun 2002 tentang Perlindungan Anak, Pasal 3).

CONCLUSION

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for serious/serious criminal acts such as murder, rape, drug dealers, and terrorism that are criminally threatened with a sentence of more than 7 (seven) years. The recovery process according to Restorative Justice through Diversion by means of transfer or transfer from the judicial process to another alternative through deliberation or mediation to avoid children from the next legal process and prevent the negative influence of legal actions that can cause negative stigma. In the discovery of law, something new is found that can be done, either through interpretation, analogy, or refinement of the law. According to Sudikno Mertokusumo, legal discovery is the process of forming laws by judges or legal apparatus to apply general legal regulations to concrete events. Legal Sociology aims to explain the practical workings of legal sociology. The study of the sociology of law does not only study law normatively, but is related to social phenomena that exist in society. This is related to the assumption that law is born from a social contract, which is an agreement made by members of society to maintain value. The role of legal sociology in terms of policy formation plays a very important role in the formation of social institutions and policy formation because of the norms in it and being able to understand what factors affect the process of forming legal policies, namely social factors, namely legal sociology can help observe the value of social factors such as national culture, community norms, gender, and others.

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