

Legal Protection for Children in Conflict with the Law Through the Diversion as a Tool of Social Engineering

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Abstract. *The purpose of this study is to examine and analyze the principle of protection for children who commit crimes from the perspective of National law in Indonesia. Children based on physical, mental and social development have a weak position compared to adults, so that children who commit delinquency need to be handled specially. Therefore, the treatment of delinquent children should be different from the treatment of adults. Handling of children in conflict with the law must be based on the best interest of the child. The research method used is the normative legal research method using a legislative approach and a conceptual approach. Based on the results of the study, the principle of protection for children in conflict with the law in the juvenile criminal justice system concerns substantial, structural and cultural issues. The law must be seen or viewed as a social institution that functions to meet social needs, so that law enforcers must treat children in conflict with the law differently from adult perpetrators. The 2012 SPPA Law has accommodated the principle of the best interest of the child with the existence of diversion based on the principle of restorative justice that prioritizes recovery between perpetrators, victims, witnesses and the community. The form of protection provided is about community involvement in preventing violence against children, the obligation of legal assistance during the trial process, the child's non-obligation to be detained during the trial process, rehabilitation to the process of reintegration into society after undergoing the criminal process.*

Keywords: *Legal Protection, Children, Criminal Acts, Diversion.*

1. INTRODUCTION

Every citizen has the same position before the law without exception, which includes the right to be defended (*access to legal counsel*), treated equally before the law (*equality before the law*), justice for all (*justice for all*). One of the citizens in question is a child. Children are part of the citizens who must be protected because they are the generation of the nation who in the future will continue the leadership of the Indonesian nation (Satino, 2020).

Romli Atmasasmita argues that children are subjects and objects in Indonesia's national development, which are also part of the younger generation as one of the human resources that are potential and successors of the nation's struggle ideals, which have a special role, require guidance and protection in order to ensure physical, mental, and social growth and development in a complete, harmonious, harmonious and balanced manner (Krisnawati, 2020). The unlawful act he committed was merely a reaction to pressure/pressure from within and from the environment of the child concerned (Cahyasena, 2016). In this case, it should be noted that the status of children in general characteristics that group statuses is different from the legal state and adults.

Based on the report of *the United Congress on the prevention of Crime and Treatment of Offenders*, it states that there is an increase in juvenile delinquency in the context of the quality of crime and an increase in its ferocity and cruelty which is more often carried out in groups than individual crimes (Raihana, 2016). The behavior of juvenile delinquency is interpreted as a form of behavior that is not in accordance with the norms prevailing in society. Kartini and Kartono argue that children's behavior that is not in accordance with norms is considered a child with social disabilities, society considers these disabilities as abnormalities so that their behavior is considered delinquency (Husna, 2018).

There are 2 (two) categories of child behavior that can cause them to come into conflict with the law: (Laksana, 2017)

- a. Offender status is juvenile delinquent behavior that if carried out by adults would not be considered a crime, such as disobedience, playing truant from school or running away from home;
- b. Juvenile delinquency is juvenile delinquency which, if committed by adults, would be considered a crime or violation of the law.

The law that applies in society must be seen or viewed as a social institution that functions to fulfill social needs, and the task of legal science is to develop a framework by which social needs can be fulfilled optimally, so that the law is not limited to regulations alone but is seen as a tool for the functioning of society. This concept of thinking assumes that good law is law that is in accordance with the law that lives in society, which clearly separates positive law/law enforced by the state which is formalistic and law that lives in society (Saifullah, 2010). So that in dealing with every child who is in conflict with the law, guidance and protection are needed in order to guarantee physical, mental, and social growth and development in a complete, harmonious, balanced, and balanced manner.

This child development and protection does not exclude child criminals, often referred to as "naughty children" or children who commit crimes. In recent developments, it has often been in the spotlight in the mass media that contains juvenile delinquency or crimes committed by children (Hidayat, 2010). Handling of children in conflict with the law must be based on the best interests of the child. The definition of the phrase "best for the child" is related to the nature of the child, whether physical, psychological, or social so that the interests of one child with another do not have to be the same (Widodo, 2015).

Sifris argues that *A definition of the child's best interests cannot accommodate the diverse nature of the interests appropriate for a particular child, from a particular background and at a particular time of development.*

The process of sentencing and punishment is different between adults and children, for adults, among others, they are fully subject to the Criminal Procedure Code and its implementing regulations, while for minors it is regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law). The purpose of the criminal justice system in accordance with the PSPA Law is to maintain the dignity and honor of children, where children have the right to receive special protection, especially legal protection in the justice system, therefore the juvenile criminal justice system is not only emphasized on the imposition of criminal sanctions for children who commit crimes, but also focuses on the idea that the imposition of sanctions is intended as a means of realizing the welfare of children who commit crimes (Mulyadi, 2014).

It is often found that criminal cases are resolved out of court through various discretions of law enforcement officers or through deliberation or peace mechanisms or forgiveness institutions that exist in the community (family deliberations, village deliberations, deliberations and so on). The practice of resolving criminal cases out of court has so far had no formal legal basis, so that cases often occur that have been informally resolved peacefully (although through customary law mechanisms), but are still processed in court according to applicable law.

Diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system. Where diversion *is* stated in the international convention, namely *the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJJ)* or *The Beijing Rules* (UN General Assembly Resolution 40/33 dated November 29, 1985) . The basic idea of diversion is to avoid the negative effects of conventional examination of juvenile criminal justice on children, both the negative effects of the judicial process and the negative effects of the stigma (evil label) of the judicial process, so that conventional examinations are diverted, and the child is subject to diversion programs (Darmini, 2019).

Diversion involving removal from the criminal justice process and often, diversion to community support services is usually done formally and informally (Santi, 2023). This practice serves to prevent the negative effects of the subsequent process, namely the administration of juvenile justice (e.g. stigma of punishment and punishment). In many

cases, non-intervention will be the best response. Thus, it can be concluded that early diversion and beyond referral to alternative (social) services will be the best course of action. Diversion can be used at decision-making points by the police, prosecution or other agencies such as the courts.

Therefore, every child in the judicial process has the right to be treated humanely by paying attention to needs according to their age, separated from adults, receive legal assistance and other assistance effectively, engage in recreational activities, be free from torture, punishment or other cruel, inhumane, and degrading treatment and dignity, not be sentenced to death or life imprisonment, not be arrested, detained, or imprisoned, except as a last resort in the shortest possible time, receive justice in an objective, impartial juvenile court, and in a trial that is closed to the public, their identity is not published, receive assistance from parents/guardians and people trusted by the child, receive social advocacy, receive a private life, obtain accessibility, especially for children with disabilities, receive education, receive health services, and obtain other rights in accordance with the provisions of laws and regulations. So that the author in compiling this article emphasizes the implementation of complete and concrete diversion as a social engineering tool in an effort to provide legal protection for children who have problems with the law.

2. THEORETICAL STUDY

Law enforcement and justice must use the right line of thought with evidence and evidence to realize legal justice and the content of the law must be determined by ethical beliefs, whether a case is fair or not (Semarta, 2022). Law must be seen or viewed as a social institution that functions to meet social needs, and the task of legal science is to develop a framework by which social needs can be met optimally, so that law is not limited to regulations alone but is seen as a tool for the functioning of society. This concept actually describes the concept of future law which has a clear vision and mission to resolve conflicts of interest in community life. This is what is called a modern view of law which leads to the use of law as an instrument, namely law as a tool for social engineering (Orlando, 2023).

Law as a tool of social engineering is a theory put forward by Roscoe Pound, which means law as a tool of renewal/engineering in society, in this term law is expected to play a role in changing social values in society (Soekanto, 2009). Pound stated that law can not only be used to perpetuate power, but law can function as a tool of social engineering. The

function of law must be expanded to include aspects of reconciliation, harmonization and compromise for all interests in national and state life by prioritizing public interests over group or individual interests in resolving legal issues (Latipulhayat, 2014).

Legal issues become real if legal apparatuses implement them properly and fulfill and adhere to the rules that have been standardized so that there is no abuse of the rules and laws that have been carried out systematically, meaning using legal codification and unification in order to realize legal certainty and legal justice (Isaac, 2009). Law enforcement is carried out when someone is deemed to have violated the provisions of material criminal law or provisions in statutory regulations.

3. RESEARCH METHOD

This study uses a normative or doctrinal legal research method, by reviewing and examining legal norms in the SPPA Law and other laws and regulations related to the implementation of Diversion as an effort to protect children in conflict with the law as stated in the Convention on the Rights of the Child and The Beijing Rules. The object of research in writing this article is how diversion is implemented through Law Number 11 of 2012 concerning the Juvenile Criminal Justice System as a form of legal protection for children in conflict with the law. The source of legal information uses primary legal materials (regulations and relevant documents) to be further analyzed qualitatively. The approach used is legislation, conceptual, analysis. The data sources for this study consist of primary legal materials, secondary legal materials to be continued by analyzing as a whole, against laws and regulations, literature, data, and several related documents, as well as tertiary legal materials to explain and assist in analyzing primary and secondary legal materials.

4. RESULT AND DISCUSSION

The term criminal act comes from a term known in Dutch criminal law, namely *strafbaarfeit*. Although this term is found in the Dutch WvS and based on the principle of concordance, the term also applies to the Dutch East Indies WvS (KUHP). But there is no official explanation of what is meant by *strafbaarfeit* (Raflencho, 2023). Therefore, legal experts have tried to provide the meaning and term, but until now there has been no uniformity of opinion about what is meant by *strafbaarfeit*.

The perpetrator of a crime can be punished if he meets the requirements that the crime he committed meets the elements that have been determined in the Law. Viewed from the perspective of the occurrence of a prohibited act, a person will be held accountable be responsible for those actions, if those actions are against the law and there is no justification or elimination of the unlawful nature of the crime committed. And seen from the perspective of the ability to be responsible, then only someone who is able to be responsible can be held accountable answer for his actions (Nabilla, 2023). In terms of being punished for someone who commits an act against the law, it depends on whether he was at fault in committing the act and if the person who committed the act is indeed against the law, then he will be punished (Mulyawan, 2022).

Based on this, the maker (*dader*) must have an element of error and guilt which must fulfill the following elements: (Hamzah, 1997)

- a) The ability to be responsible or accountable by the maker.
- b) There is a psychic connection between the perpetrator and the act, namely the presence of intent or error in the narrow sense (*culpa*). The perpetrator has an awareness in which the perpetrator should be able to know the consequences arising from his actions.
- c) There is no basis for the elimination of criminal penalties that eliminates the ability to hold the perpetrator responsible for an act.

The legality principle of Indonesian criminal law as regulated in Article 1 paragraph (1) of the Criminal Code states that a person can only be said to have committed a criminal act if his/her act is in accordance with the formulation in the criminal law (Burhanuddin, 2024). Although the person may not necessarily be subject to criminal law, because his/her guilt must still be proven whether he/she can be held accountable for the responsibility. In order for a person to be sentenced to a criminal act, he/she must fulfill the elements of a criminal act and criminal responsibility.

A perpetrator in committing a crime in determining the existence of responsibility must have an unlawful nature of the crime which is the most important nature of the crime (Wahyuni, 2021). The unlawful nature is related to the psychological state (soul) of the perpetrator towards the crime he committed, which can be intentional (*opzet*) or due to negligence (*culpa*). A person is said to be capable of responsibility if they fulfill 3 (three) conditions, namely: (Saleh, 1999)

- 1) Can realize the meaning of his actions.
- 2) Can realize that his actions cannot be seen as appropriate in social interactions.
- 3) Able to determine the intention or will in carrying out an action

There are several reasons why a person cannot be held responsible for a crime they have committed, namely:

- 1) The perpetrator's soul is flawed.
- 2) Unbearable mental pressure.
- 3) Mental illness disorders

Pound's concept of thinking that good law is law that is in accordance with the law that lives in society, which clearly separates positive law/law enforced by the state which is formalistic in nature and law that lives in society. Studying law as a process, law in action which is distinguished from written law, *law in books*. This distinction can be applied to all areas of law, both substantive law and adjective law. Which is that justice can be implemented with or without law. Justice without law can be taken through decisions with broad discretion and is not bound by general rules. By adjusting to the situation and conditions in Indonesia, the concept of " *law as a tool of social engineering* " which is the core of the thinking of the *pragmatic legal realism school* , was then developed by Mochtar Kusumaatmadja in Indonesia.

Law is a tool to maintain order in society. Given its function, the nature of law is basically conservative, meaning that law is to maintain and defend what has been achieved. Such a function is needed in every society, including a developing society, because here too there are results that must be maintained, protected and secured (Kusumaatmadja, 1995). However, a developing society, which in our definition means a society that is changing rapidly, law is not sufficient to have such a function alone. It must also be able to assist the process of change in society. The old view of law that emphasizes the function of maintaining order in a static sense, and emphasizes the conservative nature of law, assumes that law does not can play a significant role in the renewal process (Saifullah, 2010).

According to him, the function of law in the Indonesian society which is developing is not enough to only guarantee certainty and order, besides this function, law is also expected to be a means of social renewal, or what he adopted from Roscoe Pound's theory about " *law as a tool of social engineering* " with several main ideas: (Kusumaatmadja, 1995) *First* , order and regularity in the context of renewal or development is something

that is desired, even considered absolute. *Second* , law in the sense of legal rules or regulations can function as a regulatory tool or means of development in the sense of channeling the direction of human activities that are desired in the direction of renewal. So that in the process of criminalizing crimes committed by children must have its own handling than the criminal law in force in Indonesia.

Children in conflict with the law are the actions of children that are contrary to and violate the provisions of applicable and valid laws in Indonesia, so it can be defined that children in conflict with the law mean children who are not yet adults according to the law and carry out actions that are contrary to the provisions of applicable and valid laws (Wahyuni, 2021). Generally, children in conflict with the law are defined as children who are suspected, accused or found guilty of violating the provisions of the law or a child who is suspected of having committed or who has been found to have committed a violation of the law (Farid, 2006).

The SPPA Law uses the term “Naughty Children” for children who commit crimes or other acts that violate written or unwritten regulations (customary law). Based on the provisions of positive law that regulate naughty children, children who have behavioral problems (children in conflict with the law) are called “Naughty Children”. Children's actions that deviate and violate the law are called “Juvenile Delinquency”. Juvenile Delinquency is an act committed by children, either alone or together, that violates the provisions of criminal law or non-criminal law or commits an act that is considered reprehensible by society (Sartika, 2019).

The term naughty child was then replaced by the term Children in conflict with the law or those called children who commit crimes as stated in Article 1 number 3 of the SPPA Law . The term naughty child was replaced because the term indirectly gives a negative stigma and labeling to the child. The term juvenile criminal justice system is a translation of the term *The Juvenile Justice System* , which is a term used to define a number of institutions that are part of the court, including the police, public prosecutors and legal advisors, supervisory institutions, juvenile detention centers, and juvenile development facilities (Wahyudi, 2011).

This Juvenile Criminal Justice System makes law enforcement officers actively involved in the process of resolving cases without having to go through a criminal process resulting in a criminal verdict (Novelin, 2023). Police investigators are one of the law enforcement officers referred to in this Juvenile Criminal Justice Law, in addition there are public prosecutors or prosecutors, and there are judges. This Juvenile Criminal Justice

Law also regulates institutions related to the process outside of juvenile justice, for example Bapas, Professional Social Workers, Special Child Development Institutions (LPKA), Temporary Child Placement Institutions (LPAS), Social Welfare Institutions (LPKS), Family or Guardians, and Advocates or other legal aid providers who play a role in it (Wibowo, 2020).

The criminal justice system has developed over time until 2012, namely with the birth of the SPPA Law . Before the birth of the Law, there was a legal product that specifically regulated the Juvenile Court, namely the SPPA Law of 1997. Before the SPPA Law of 1997, there were also various provisions or regulations governing the judicial process for children as contained in the Circular of the Supreme Court, the Instruction of the Supreme Court and the Regulation of the Minister of Justice. Before 2012, the formulation policy for the protection of children in conflict with the law in the juvenile criminal justice system had not accommodated the principle of the best interest of the child in the juvenile criminal justice system, so that normatively at the formulation level it did not reflect the basic idea of protecting children.

The paradigm of the retributive justice system is still an idea in the 1997 SPPA Law. This is evident from the handling at the investigation, prosecution and trial levels as well as in the coaching process in correctional institutions. Law enforcers still treat children who have problems with the law the same as adult perpetrators. Thus, normatively at the formulation level, it does not yet reflect the basic idea of legal protection for children. The Juvenile Justice System is used as a guideline for law enforcers to make wise decisions regarding whether imposing criminal sanctions on children is the right decision for the best interests of the child or vice versa (Andrikasmi, 2023). While criminal punishment is the result of a violation of the law in the form of a crime. Criminal punishment for children is generally different from criminal punishment for adults , criminal punishment for children prioritizes the best interests of the child.

The criminal threat to children is 1/2 (one half) of the criminal threat to adults except for crimes that are threatened with the death penalty or life imprisonment, then the punishment imposed is a maximum of 10 (ten) years in prison. This is one example of the difference in treatment of children and adults in general. Based on the International Instrument that regulates the problem of child delinquency behavior, it can be classified into *criminal offenses* (child delinquency behavior which is a crime if committed by adults) and *status offenses* (child delinquency behavior that is closely related to their status as children). Therefore, it is not appropriate if the purpose of child punishment is aligned with

adult punishment. In prioritizing a restorative justice approach both at the investigation, prosecution and trial levels (Lestari, 2020).

There are 3 (three) well-known paradigms of juvenile justice, namely: the individual treatment paradigm *which* emphasizes the problems faced by the perpetrator rather than the actions/losses caused; the retributive paradigm *where* the imposition of sanctions in the retributive paradigm is determined when the perpetrator is serving a sentence; the restorative paradigm, that in achieving the goal of imposing sanctions, the victim is included to have the right to be actively involved in the judicial process, the indicator of achieving the goal of imposing sanctions is achieved by seeing whether the victim has been restored, the victim's satisfaction and so on (Mulyati, 2022).

In the SPPA Law, there are several forms of legal protection that are certain, but not a few also give rise to problems from a normative and implementation perspective, including:

- **Diversion Obligation for Children**

Article 7 of the SPPA Law states that in the case of a criminal threat of less than 7 years and not a repetition of the crime committed, then there is an obligation to carry out a diversion process which means transferring the process of handling the crime outside the criminal justice process. Where in the diversion it must be carried out at every stage of the process, namely investigation, prosecution and trial.

- **Age Limitation of Liability**

In the SPPA Law, there is a limitation on the age of responsibility for children, namely 12-18 years, where children aged 12-14 years can be subject to criminal proceedings but are not allowed to be detained and the verdict must not be imprisonment but rather returned to their parents or given guidance at the Social Welfare Institution (LPKS). Meanwhile, children who are 14 and under 18 years old can be detained, up to a prison sentence, but the prison sentence is still the ultimum remedium in the Law.

- **Restrictions on Arrest and Detention**

Coercive measures including arrest, confiscation and detention are very important points stated in the SPPA Law for children who commit crimes. Arrests must not be made for more than 1 x 24 hours, and security until detention is carried out must be in a special room for children or placed in a Temporary Child Placement Institution (LPAS). The short detention period is also a concern, where 15 days of detention in the police, 10 days in the Prosecutor's Office and 20 days for court hearings.

- **Obligation to Provide Legal Aid**

Article 21 of the SPPA Law requires the obligation to provide legal aid for children who commit crimes from the beginning of the investigation process. The provision of legal aid refers to Law Number 16 of 2011 concerning Legal Aid, where advocates and paralegals are parties who can provide legal aid to children.

- **Obligation of Accompaniment**

Community Guidance (PK) from the Correctional Center is the party that is required to provide assistance to children who have committed crimes, assistance includes the stages of the investigation process, investigation, prosecution, trial, supervision of the sentence period until the process of the child returning to society after serving the sentence.

- **Special Handling of Law Enforcement Officers**

In the SPPA Law , Investigators, Public Prosecutors and Judges who handle child cases are required to have a certificate of integrated special training for 105 hours of training indicating that they are investigators, prosecutors and child judges. This obligation aims to ensure that law enforcers have a comprehensive perspective/understanding in the field of the child criminal justice system.

- **Limitation of Criminal Sentences**

As explained previously, there is an age limit for criminal responsibility of children and there are also limitations on the punishment imposed on children, such as children who are not yet 14 years old cannot be sentenced to prison and there is a new verdict in the criminal justice system, namely the criminal action verdict, namely returning to parents or handing over to LPKS for a maximum of 6 months of training/rehabilitation.

On that basis, in 2012 the SPPA Law was passed as a replacement for the 1997 SPPA Law as a renewal of the juvenile justice system in Indonesia. The formulation study on the protection of children in conflict with the law in the juvenile criminal justice system according to the SPPA Law has accommodated the principle of the best interest of the child, among others by emphasizing the handling of children in conflict with the law through diversion actions by prioritizing a restorative justice approach that prioritizes recovery between perpetrators, victims, witnesses and the community.

5. CONCLUSION AND SUGGESTION

The principle of protection for children in conflict with the law in the juvenile criminal justice system concerns substantial, structural and cultural issues. The law must be seen or viewed as a social institution that functions to meet social needs, so that law enforcers must treat children in conflict with the law differently from adult perpetrators. The SPPA Law has accommodated the principle *of the best interest of the child* with diversion based on the principle of restorative justice that prioritizes recovery between perpetrators, victims, witnesses and the community. The form of protection provided is about community involvement in preventing violence against children, the obligation of legal assistance during the trial process, the child's non-obligation to be detained during the trial process, rehabilitation to the process of reintegration into society after undergoing the criminal process.

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