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RESEARCH ARTICLE

MENS REA AS THE BASIS OF DIVERSION IN THE CHILD CRIMINAL JUSTICE SYSTEM BASED ON RESTORATIVE JUSTICE

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Abstract

Restorative justice or more precisely *keadilan restoratif* in the Indonesian context is based on the principle of building joint participation between perpetrators, victims, and community groups in resolving a criminal act. The problem has been that in the formulation of the laws and government regulations diversion (*diversi*) is carried out if a criminal act is committed by a child who is punishable by imprisonment under seven years; other than that if criminal acts that were committed by a child is not a repetition of criminal acts (recidive). A research using a normative legal research method found that through legal findings or *rechtsvinding* (*penemuan hukum*), judges can formulate criminal law policies through their decisions based on *mens rea*. It is a must for judges to settle criminal cases with a child of 12-years-old age perpetrator and/or the delinquent actor is a recidive via diversion. The provisions of Indonesian criminal procedure law dicates that judges are also obliged to seek diversion towards the settlement of all criminal cases whose actions were committed by children, both those with a criminal penalty over seven years and/or recidive or those who does not included in the two categories.

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Introduction:-

According to the Dignified Justice theory, the concept and meaning of the terminology of restorative justice or more precisely in the Indonesian term would be coined as *keadilan restoratif*, as a rule of positive law that applies in Indonesia must be sought and found in the spirit of the Indonesian nation (*Volksgeist*) itself. What is meant by the Indonesia *Volksgeist* is, among others, the existing laws and regulations. Based on the direction of the Dignified Justice theory, this study finds that both the concept and meaning of the concept of restorative justice as a rule of law are properly regulated in the prevailing laws and regulations in the Pancasila Legal System. The conceptual arrangement and meaning of the concept of restorative justice can be seen, for example, in the formulation of Article 1 Number (2) of the Government Regulation of the Republic of Indonesia Number 65 of 2015 concerning Guidelines for the Implementation of Diversion (*diversi*) and Handling of Children under Twelve Years Old of Age.

It is formulated in the law's article above, that what is meant by restorative justice is a system of settlement of criminal cases. In the settlement of the case, both the perpetrator, the victim, the family of the perpetrator, and the victim's family, as well as other parties which were designated in the prevailing laws and regulations must take part.

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The involvement of such parties in the completion of the criminal case, would mean that parties are jointly seeking a just settlement.

Such an epistemology of justice is carried out by emphasizing the axiology of restoration (*restitutum in integrum*), and not retaliation. The mechanism or means of settlement of criminal cases that have its determined meaning in the theory of Dignified Justice is based on concepts or terminology of restorative justice. One of these forms of restorative justice is generally known as the concept of diversion (*diversi*).

Taking into account the ontology or the nature of the concept of diversion, as a form of settling of criminal cases based on the aforementioned restorative justice, perceptions may arise. It is assumed that all settlement of criminal cases where the criminal offense is allegedly committed by children who are not yet twelve years old must undergo diversion.

The diversion must be carried out from the time the case is still at the level of investigation, until the case enters the prosecution level or when the case enters examination by the judge at the court of law. The formulation of these provisions also re-affirmed the principle, namely that there is a necessity if the diversion was based on the approaches that use the terminology of restorative justice.

The formulation of legal provisions (laws and government regulations) as stated above, was stipulated in the Article 3 of the Government Regulation. That diversion is not only done by the judge but in section (1) stated that an Investigator (*Penyidik*), Public Prosecutor (*Penuntut Umum*) in checking the Children alleged as perpetrators of a crime, shall endeavor diversion.

The problem is that in the subsequent formulation of the aforementioned Government Regulation, the Article 3 Section (2) is stated, that the diversion as referred to in Section (1) is carried out if the criminal act is committed by a child who: (a). Is threatened with imprisonment of less than seven years; and (b). if the criminal acts committed by children is not a repetition of criminal acts (recidive).

The provision of the Government Regulations as mentioned above were further elaborated in the Article 7 of the Act No. 11 of 2012 concerning the Criminal Justice System for Children. It has been formulated in the Article 7 of Section (1), that in the investigation, prosecution, and when the case arrive at the District Court, it settlement must firstly be pursued via diversion; as a form of restorative justice approach.

It would then be affirmed in the Article 7, Section (2), that diversion referred to in section (1) shall be implemented in terms of the Children's criminal acts which fulfill two juridical qualifications. The first qualification, namely if the criminal act committed by the child is punishable by imprisonment of under seven years. The second qualification, namely if the criminal act committed by the child is not a repetition of a criminal act.

It is stated in the elucidation of Article 7 Section (2) of the Above- mentioned Juvenile Justice System Law, that the criminal law is the juridical reason for allowing or obliging diversion in resolving criminal cases involving a child as a person suspected of being the perpetrator of the criminal act.

It is formulated more clearly in Part (a) that the provision "imprisonment under seven years" must be based on the law of criminal. While the reason for allowing a diversion or the obligation to seek a diversion for resolving the case were children suspected of committing a crime under letter (b) is not mentioned. Explanation of Article 7 Part (b) only contains meaning of the concept recidive. It is stated as a criminal offense recommitted by children, including criminal offenses which were resolved through diversion.

Legal Issues Identified; -

If traced further, the formulation of the provisions in Article 3 Section (2) as stated above actually contains a legal issue, namely the problem of contradiction between legal regulations in the legal system. There is the impression that there has been a conflict or conflict between one rule and another in a legal system (conflicts within the laws). Tracing from other sources of legal materials, this study has found that conflicts occurred between the Supreme Court Regulations (Perma) versus the Laws and Government Regulations as previously stated.

Interesting to note in this study, namely that the conflict that is mentioned above would occur between laws made by policymakers who are legitimate and authorized as mandated in the Legal System and Legislation in force in Indonesia, in the Pancasila Legal System. In the regulation in Perma, as stated above, appears that there is the possibility of "exceptions" to the formulation of the provisions of Article 3 Paragraph (2) of the Government Regulation. As has become common knowledge, it is also necessary to state here that the Government Regulations set out above are the Implementing Regulations of the Law (*delegated legislation*) concerning the Juvenile Criminal Justice System.

If on one side, the rules contained in Perma, for there is always the possibility that mainly judges should or should pursue the handling of cases involving alleged perpetrators of the Child through diversion. On the contrary on the other hand as already noted above Article 3 paragraph (2) of Government Regulation restricts the diversion (*diversi*).

Apart from the issue of conflicts between laws and regulations, there is still the impression that there are other problems. There is also issues of legal vacuum (*lacunae*). By legal vacuum is to mean that there is no rules stated pretty well that diversion should not be done if not found any *mens rea*, or guilt (*schuld*). It is a basic principle in criminal law, that criminal responsibility can only be requested from those who can be held responsible. This was stated because children who have not reached the age of 18 should not have the ability to be responsible legally under criminal law.

Apart from the two problems that have been stated above, there is still other problem. It is not clear (there is a problem of the vagueness of the meaning of the conception. It is not clear, for example, why the settlement over criminal cases involving children who have not reach the aged of twelve years old according to the formulation of the provisions of the legislation, especially to trace the formulation of law provisions in the government regulation, as noted above, shall be endeavored to do the diversion. Meanwhile, settlement of criminal cases allegedly committed by children over the age of twelve is not obliged to undergo diversion.

Mens Rea or the Principle of Gen Straf Zonder Schuld; -

The research using normative legal methods conducted by the authors has found that as a result of the various problems that have been pointed out above, speculations (assumptions) then emerge. Among other things, the assumption that the probability of a cause or matter which is the basis of the legislators or policy makers who formulated the criminal law provision that settlement of criminal cases involving Children as perpetrators of criminal acts in the legislation above is the issue of criminal responsibility. This principle is known in Indonesian criminal law in the expression of "no crime without criminal fault" (*gen straf zonder zchuld*) or *mens rea*.

The point is, probably, not applied immediate Criminal Procedural Law to the child who committed a criminal act punishable under seven years old and is not an act of repetition of crime (recidive). Since legally a child actor of criminal acts threatened with the punishable imprisonment of under seven years, can be said have no criminal responsibility, they cannot be held responsible under criminal law. In other words, the child who is suspected of having committed the criminal act does not have *mens rea*.

On the other hand, according to applicable law, a child who commits a criminal offense with a penalty of more than seven years and is a recidive crime is a child who can be said to have the ability to be responsible or have *mens rea*. Such child is criminally responsible. It is proper, as well as fair and legal if the child that is suspected of committing a criminal offense with a criminal penalty of over seven years and commits a repeated crime must be or as formulated in the statutory regulations above must be held responsible for the crime using normal criminal procedural law procedures. Assumptions and nuances like this need to be examined and assessed further to be true.

This research found that might be true, assuming that on the one hand, the child that conduct the crime is not a criminal who committed a criminal act by criminal's threats under seven years old and is not a repetitive criminal offense (recidive) does not have the *mens rea* as an important pillar of criminal accountability, therefore the settlement of the case needs to take a diversion route, as provided by the prevailing laws and regulations, described above.

Meanwhile, to the contrary on the other hand, to settle a criminal case in which the crime is carried out by child as criminals with a penalty of over seven years of age or a repeated child offender (recidive) must be treated as having

mens rea. Among other things, it means a child perpetrator of a criminal act can be held criminally responsible. Then the settlement of the criminal case is carried out using normal or normal criminal procedure procedures.

This research discovers that through judge made law (*rechtsvinding*) in the perspective of the Dignified Justice theory, the judge is making a criminal law policy formulation through its decisions. It turns out, that in the settlement of criminal acts committed by a 12 years child and is seen as an act of repetition, it is also possible to use diversion and even mandatory rule.

The research on the source of primary legal materials found that the negligence of the said child, who in his confession has committed the same criminal act, even though no criminal process has been carried out against him, is still subject to diversion. This means that the formulation of the provisions of Indonesian criminal procedure law, so that diversion is mandatory, in the findings obtained through this research, also applies to children who commit criminal offenses with a penalty of over seven years and constitute a recidive crime.

The facts found in the author's research above are in line with the formulation of legal provisions contained in the Regulation of the Supreme Court (Perma) of the Republic of Indonesia No. 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System (SPPA).

If it is formulated in the same term, then in the perspective of Perma as stated above, both children who are suspected of committing a criminal offense with a criminal penalty over seven years of age, or children who commit recidive crimes, are all are children who have the ability to be held responsible or have *mens rea*, the settlement of the criminal case is obliged to take diversion efforts.

This research found the ontology of all children, if suspected of committing criminal their criminal settlement was obliged endeavoring to take the diversion. If this rule is a rule of criminal law and *mens rea* is to mean as criminal law, then *mens rea* or criminal law is clearly the basis for the settlement of criminal cases against children suspected of committing a criminal act, whether it is a crime within the limit of seven years of punishment or the top penalty of seven years, and to the child to repeat the crime (recidive) as according to criminal law. *Mens rea*, or the instruments of legislation and laws to allow the obligation sought diversion in every settlement for suspected crime conducted by children.

Also, it found in this study that the judge, in a particular case, has demonstrated properly implementing the criminal law liability. Since the single judge obeyed in seeking diversion to settled a criminal case, even though the 12-year-old perpetrator was charged with a criminal offense.

It is clear from this research that judges follow the formulation of the provisions contained in the above regulation (Perma). Judges seem to have established a juridical understanding through judge made law (*rechtsvinding*), using their decisions to state the law that all types of cases involving children as perpetrators of criminal acts, whether the punishment is under seven years, or those punishable by more than seven years must be tried under the rule of diversion (*diversi*). The crime committed is consider as criminal offense, either is is recidive or not; is based on *mens rea*.

It is regulated in Article 1 Number (6) Government Regulation of the Republic of Indonesia Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Not Aged Twelve Years Old an ontology of diversion (*diversi*) that it is the reversion of settlement of cases of children from the criminal justice process to the process in outside of criminal justice. This understanding is what distinguishes the Juvenile Criminal Justice System when compared to the Criminal Procedure Code which is determined to apply generally to children and non-children or anyone.

The author believes that the formulation of the provisions of the Supreme Court Regulation as stated above provides a great opportunity for Indonesian judiciary to use their discretionary powers, while simultaneously making legal discoveries. This formulation also in line with what has been stated in the literature, that judges exercise discretion. According to H.L.A Hart, a judge has to exercise discretion because of the open-texture or vagueness of ordinary words in statutes.

According to Hart, a judge has an obligation because of his position or position to make public policy. In this case, this includes determining whether the child is suspected of committing a crime and *mens rea* can be found in the criminal act to always be sought by diversion. Discretion by judges or legal discoveries is based on a very simple reason, namely because the meaning that can be given to words in-laws and other statutory regulations is open ended and vaged, as well as the unclear meaning contained in the words.

Ontologically, these writers would argue that based on the philosophical expressions contained in the arguments or postulates put forward by Hart above, it is clear that judges, or in this case the judicial power, can make public policy.

In connection with the arguments or postulates put forward by Hart above, Otto Yudianto argues that formulative policies have an important and strategic role in criminal law reform. Attention to formulative criminal law policies, especially in this case, namely judges make formulative policies through legal discovery in the settlement of juvenile crimes is important in the framework of reforming criminal law. Since so far, what is believed to be formulative policies is generally formulative policies only carried out by the executive branc of power.

In line with that, according to Teguh Prasetyo, with laws that are reflected the spirit of the nation (*Volksgeist*), a legal system will become a dignified legal system. This thought, among other things, gave birth to the theory of Dignified Justice, which was concerned about the issue of legal development that was unique to Indonesia. The Dignified Justice Theory emphasizes the development of a legal system that gives self-identity, amid the very strong influence of the current world legal systems and very violently as if penetrating the manner and substance of the Indonesian nation's law, namely Pancasila.

The role of judges or the judiciary power body in making formulative policies is very important and for that it is necessary to understand which direction it is being carried out in Indonesia, especially judges make formulative policies through legal discovery in solving juvenile crimes. In connection with the above philosophical background, in the field of legislation, criminal law reform has been carried out about offenses/criminal acts committed by children.

Deliberation of Act No. 11 of 2012 about Child Criminal Justice System contains formulation that the child is a trust and the gift of God Almighty who has dignity as human beings. To maintain their dignity, children have the right to special protection, especially legal protection in the judicial system. It's just that the abstract nature of protection in formulative policies via legislation still has to be concretized through formulative policies carried out by judges in legal discovery.

In this regard, Article 5 Section (1) of Law no. 48 of 2009 contains a proper regulation that judges, in this case including judges who handle cases of children who have committed criminal acts, are obliged to explore, follow, and understand legal values and a sense of justice that lives in society. If interpreted by the word "diging" or unearh, it can be assumed that the law actually already exists, but is still hidden, so that to find it the judge must try to find it by exploring the legal values that live in the community, then follow it and then understand it so that the decision is appropriate with a sense of justice that lives in society.

In principle, Law No. 11 of 2012 has put forward the justice approach in the form of diversion as an effort to resolve crimes committed by children. In imposing sanctions against children, the judge shall consider the child's mistake who commits crimes; motive and evil purposes; the inner attitude of the child as the perpetrator of the crime; whether the crime committed intentionally; how to commit a crime; sand actions after committing a crime; the child's history as well as social, economic families of juvenile offenders; the effect of sanctions on the future of the child; the effect of the crime against the victim or his family; the society view against crimes committed; how lightly the deeds or personal circumstances or circumstances at the time of the crime or that occur later, can be used as a rationale for penalizing to consider in terms of justice and humanity.

Conclusion:-

Substantial restorative justice contains principles, among others, to build the joint participation between the offender, victim, and community groups in an event or a criminal act. Placing perpetrators, victims, and society as stake holders who work together and immediately try to find solutions that are considered fair for all parties (win-win solutions).

Concerning the criminal cases committed by children, the restorative justice (*keadilan restoratif*) at least aims to repair or restore the peace before the criminal acts is committed by children. This institution are beneficial to children, victims, and their environment, which involve them directly in the reintegration and rehabilitation with the society based on the law.

References:-

1. Teguh Prasetyo, *Sistem Hukum Pancasila (Sistem, Sistem Hukum) dalam Perspektif Teori Keadilan Bermartabat*, Cetakan Pertama, Nusa Media, Bandung, 2016.
2. _____, *Keadilan Bermartabat: Perspektif Teori Hukum*, (Bandung: Nusa Media, 2015).
3. Endang Prasetyawati, *Metode Penelitian Hukum*, Cetakan Pertama, Fakultas Hukum Universitas 17 Agustus 1945, Surabaya, Untag Press, Surabaya, 2010.
4. H. L. A. Hart, *The Concept of Law*, Second Printed, (Oxford University Press, London, 1961).
5. Otto Yudianto, *Kebijakan Formulatif terhadap Pidana Penjara Seumur Hidup dalam rangka Pembaharuan Hukum Pidana Indonesia*, (Surabaya: Brilliant, Menuju Isan Cemerlang, 2015).
6. Ahmad Rifai, *Penemuan Hukum Oleh Hakim dalam Perspektif Hukum Progresif*, Cetakan Keempat, Sinar Grafika, Jakarta, 2018.
7. D. S. Dewi, *Restorative Justice, Diversionary Schemes and Special Children Courts in Indonesia*, Artikel tidak diterbitkan.