

# THE ROLES OF INVESTIGATOR IN IMPLEMENTING DIVERSION ON CHILDREN CRIMINAL ACTION

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## ***Abstract***

This research is based on the increasingly widespread criminal cases committed by children that occurred in the jurisdiction of Polrestabes (Headquarter police resort) Semarang in particular and in various major cities in Indonesia in general. The purpose of this study is to find out how the role of investigators in the diversion implementation of child criminal cases in the jurisdiction of Polrestabes Semarang and the constraints faced by the investigators in the diversion implementation child criminal cases. This research employed sociological juridical approach method, i.e. an approach which is not only legally but also using social science. To find the problems in this study, the authors used a descriptive analytical research specification, which described a juridical review of the role of investigators in the diversion implementation of child criminal cases in the jurisdiction of Polrestabes Semarang. The findings were then analyzed by qualitative data analysis techniques using the theories of legal science, social sciences, the experts' opinions, and the rules contained in the legislation. The results of the research indicate that: (1) The role of the investigator in the diversion implementation of child crime cases, namely the internal roles among which are coordinating with the community and with various institutions or related parties, upholding the legal system and criminal justice system in accordance with the mandate of the Act, as well as involving police (Investigator) members in training or special education. While external roles include screening and deciding cases of crime, especially child crime in society, seeking the process of diversion in all crimes with child suspects, maintaining security and public order, providing protection, guidance and service to the community, becomes facilitator, a neutral party, as well as mediator in the settlement of child criminal cases. (2) The constraints faced by the investigators in the diversion implementation of child crime cases are internal constraints: lack of coordination among investigators, lack of legal understanding of witnesses, lack of socialization of the Criminal Justice System Law and Child Protection Law, lack of confidence of investigators; and external constraints: the passive law behavior of community members, closed family members of the suspect, lack of facilities and infrastructure, a different interpretation between the investigators and the correctional center about the term 'recidivist'. Some efforts were made to overcome internal obstacles: improving coordination among investigators, intensive approaches to witnesses, improving socialization of the Criminal Justice System Law and Child Protection Act. While the efforts to overcome the external obstacles: education, rigorous interrogation, improving facilities and infrastructure and bringing together an understanding of the meaning of recidivist.

***Keywords: Investigators' Roles; Diversion; Children.***

## **A. INTRODUCTION**

Indonesia is a constitutional country as stipulated in the Constitution of the Unitary State of the Republic of Indonesia Year 1945 especially in Article 1 paragraph

(3) which states: "The Country of Indonesia is a state of law". This means that all aspects of life in this country are governed by the rule of law. In order to realize the enforcement of the rules of law in Indonesia, legal products in this case the law that acts as a regulator of all the actions of the community as well as a forced tool to the public are needed.

The discussion on children and their protection will never stop throughout the history of life, because they are the next generation of nation and development, i.e. the generation prepared as the subject of the implementer of sustainable development and the control of the future of a country, including Indonesia. The protection of Indonesian children means protecting the potential of human resources and building a complete Indonesian human being, towards a just and prosperous society, spiritual material in line with Pancasila and the 1945 Constitution.<sup>1</sup>

The efforts of protecting children must be initiated as early as possible, in order to participate optimally for nation and country development. In Article 2 paragraph (3) and (4) of the Law of the Republic of Indonesia no. 4 Year 1979 on Child Welfare, states that: "Children are entitled to the maintenance and protection for the womb or after birth. Children are entitled to environmental protection which may endanger or impede growth and development in a natural way. "The two paragraphs provide a rationale that child protection intends to seek the right and just treatment, to achieve their welfare, in this phase of human being has prospered his life and has found the steam engine as a driving force.<sup>2</sup>

However, in the implementation of criminal justice system in Indonesia, it is still often found handling child crime cases which are not accompanied by legal protection, good guidance and guarantee on the implementation of the rights of children. The current issues include the length of the judicial process undertaken by children of suspected criminal perpetrators, since the process of investigation in the police until completing the sentence in prison is a picture of a their grief. Therefore, Law no. 11 Year 2012 on the Criminal Justice System of Children, has given special treatment to them who committed a criminal act, both in the procedural law and the judiciary. This is because the nature of children and their psychological state in some cases requires special treatment and special protection, especially on acts that can intrinsically harm their mental and physical development. This is realized by starting at a special treatment at the time of detention, i.e. placing them

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<sup>1</sup> Nashriana, 2011, *Protection of Criminal Law for Children in Indonesia*, PT Raja Grafindo Persada, Jakarta, page. 1.

<sup>2</sup> Anis Mashdurohatun, Redyanto Sidji, Gunarto and Mahmutarom, *Factors Causing Banking Cyber Crime in Indonesian*, *International Journal of Economic Research*, Volume 14 Number 15 2017, p.297

apart with the adult one. At each level of investigation, they shall be provided with legal assistance and accompanied by a community counselor or other assistant in accordance with the provisions of the law.<sup>3</sup>

However, up to now what are mandated in Law no. 11 Year 2012 on the Criminal Justice System of Children and Law no. 35 of 2014 amendment to Law no. 23 of 2002 on Child Protection are still constrained by the facilities and infrastructure provided by the Government, such as special prison for children who only exist in big cities. This, of course, leads to non-fulfillment of children's rights as mandated by the law and the Convention on their Rights. In addition, the lack of integrated and comprehensive socialization conducted by law enforcement officers including the police to the lower subordinates has resulted in ineffective legal protection of children.

Starting from the complexity of the problems related to the protection that must be given to a child facing the law, therefore, there must be efforts from various parties to save the nation's children. The polices as the front guard in law enforcement have a considerable responsibility to synergize their duties and authorities as regulated in Law no. 2 of 2002 on the Police of the Republic of Indonesia.

One solution that can be taken in handling child criminal cases is through restorative justice approach, which is implemented by diversion. Diversion is the transfer of settlement of child cases from criminal justice process to process outside of criminal justice.<sup>4</sup> While restorative justice is a process of settling criminal cases involving perpetrators, victims, families of perpetrators / victims, and other parties concerned to jointly seek a fair settlement by emphasizing restoration back to the initial condition, rather than retaliation. Restorative justice is considered as a way of thinking or new paradigm in looking at a crime committed by a person.

## **B. DISCUSSION**

### **1. The Roles of Investigators in Implementing Diversion on Child Criminal Action**

#### **a. Arrest**

An arrest shall be an investigative action in the form of temporary restraint of the freedoms of a suspect or defendant if there is sufficient evidence for the

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<sup>3</sup> Article 23 paragraph 1 of Law no. 11 Year 2012 on the Criminal Justice System of Children

<sup>4</sup> Article 1 point 7. Law no. 11 Year 2012 on the Criminal Justice System of Children.

purpose of investigation or prosecution and or judicial in accordance with the manner regulated in this law.

At the stage of arresting a suspected child, but not for being caught, it is important for the police to avoid children from the traumatic experiences that the child will bring to life. To avoid this, usually the police considers attention to the following matters:

1. Showing a legal arrest warrant to a suspected child, conducted in a friendly and responsible manner;
2. Using simple clothing and avoiding the use of vehicles marked or characterized by the Police;
3. Avoiding using harsh words and high notes that will attract the attention of those around the child;
4. Guiding the child by holding his hand, not holding a child's shirt collar or dragging;
5. Not ordering children to do things that embarrass him and degrade his dignity as human beings, for example, to order him to undress;
6. Avoiding the use of handcuffs;
7. Securing the child from mass media coverage, whether printed or electronic;
8. Taking the child to the nearest government health service to obtain a physical and psychological health examination as soon as possible after the arrest. The medical examination file and treatment will be part of the case records of children facing the law;
9. Informing immediately to the parent or guardian within no more than 24 hours, about arresting the child and requesting them to come to the police station immediately;
10. Informing immediately to the correctional hall in the area or the Social Worker about the alleged incident of children as a suspect in no more than 24 hours;
11. After making the arrest, prompt interviews are required in a suitable and special room for the child.

## **b. Detention**

Detention is the placement of a suspect or defendant in a certain place by an investigator, or a public prosecutor or judge by his or her determination, in the manner provided for in this law. The detention of a child shall not be done when

the child receives a guarantee from a parent / guardian and / or institution that the child will not escape, will not remove or damage the evidence, and / or will not repeat the offense. The detention can only be made on these conditions:

- a. The children are 14 (fourteen) years age or older, and
- b. It is alleged to have committed a crime with imprisonment of 7 (seven) years or more.

The terms of detention shall be expressly stated in the detention warrant. As long as the child is detained, the physical, spiritual, and social needs of the child must be fulfilled. To protect child safety, child can be placed in LPKS.<sup>5</sup>The detention of a child for the purpose of investigation shall be no later than 7 (seven) days. At the request of the investigators, it may be extended by the prosecutor at the latest 8 (eight) days. In the term that the time period has expired, the child shall be freed by law.

#### **c. Search**

The search is based on the results of an investigation report made by an investigator / co-investigator. Home searches can only be done for investigative purposes. In order to guarantee human rights for a person's home, the search must be with a letter from the Chairman of the District Court and a search warrant. In carrying out the search or every time entering the house, it shall be witnessed by the village head or the environmental chief together with 2 (two) witnesses, in the case of a suspect or inhabitant of the house is absent, refusing or not giving permission to be searched.<sup>6</sup>Anytime entering the house must be witnessed by 2 (two) witnesses in the case of the suspect or the occupant or the owner of the house approves it or gives permission to be searched. In the case of during the search it is found evidence, the evidence may be confiscated for the purpose of further investigation and the child who committed the offense may be detained for the purpose of investigation, if it is proven that the child may be presented as a defendant.

#### **d. Search**

It refers to a series of investigative actions to take over or save for the sake of proof in investigation, prosecution and judiciary. In case of being caught red-

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<sup>5</sup> Article 32 of Law no. 11 Year 2012 on Child Criminal Justice System

<sup>6</sup> Article 33 paragraph 4 of the Criminal Procedure Code

handed by police officers, immediate evidence may be confiscated, such as a tool used to commit a crime.

In the case of a home search, the seizure shall be made by the permission of the Chairman of the District Court. The subjects which may lead to foreclosure are as follows :<sup>7</sup>

- a) The objects or claims of suspects wholly or partly which are allegedly obtained from the proceeds of a crime;
- b) The objects that have been used directly to commit a crime or to prepare it;
- c) The objects which are used to prevent criminal investigations;
- d) The objects which are specially made or intended to commit a crime;
- e) Other objects that have a direct relationship to the crime committed;
- f) The objects in confiscation of civil cases or bankruptcies as long as they meet the provisions as referred to in letters a, b, c, d, e.

#### **e. Submission of Case Files**

After all investigation is done by the investigator, then filing case or file case is conducted. If it is correct and complete, then it will be attached with Police label, then it will be submitted to the general prosecutor. If it is considered as insufficient or incomplete by the prosecutor, the file is returned to the investigator for correction.

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<sup>7</sup> Article 39 of the Criminal Procedure Code

Figure 1: The Mechanism of Investigation Implementation from Police Report

Figure 1

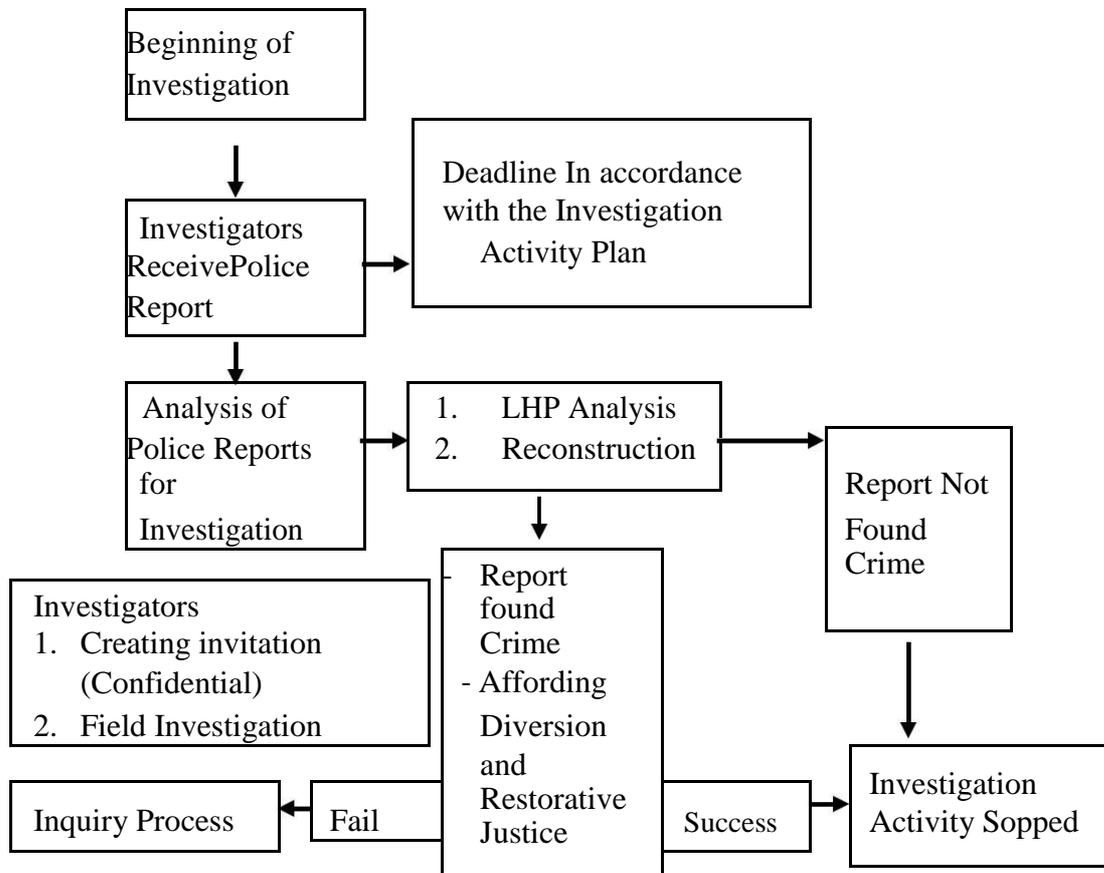
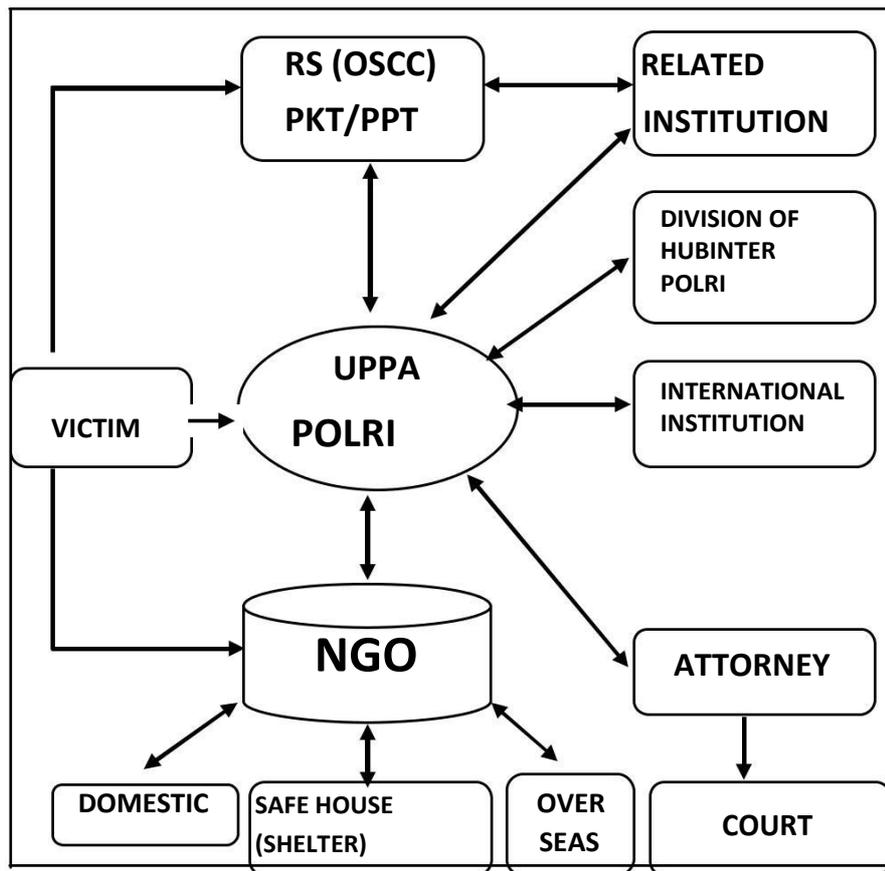


Figure 2: The Mechanism of Cooperation and Coordination



Source: Semarang Head Quarter Police Resort

From the above description, it can be concluded that the mechanism of investigating child criminal cases is the same as the handling of investigation on adult criminal case which is started from the existence of report, complaint, caught by hand or known directly by police officer of Republic of Indonesia.

Police as the front guard in reinforcing law has big enough responsibility to synergize tasks and authorities as regulated in the law no. 2 year 2002 on the Police of Republic of Indonesia i.e. the Police are occupied to:<sup>8</sup>

- a) Maintaining security and people order.
- b) Reinforcing law
- c) Giving protection, shelter, and community service.

The formulation of those authorities is based on the source from police general responsibilities (*plichtmatigheidsbeginse*), i.e. a principle which gives authorities to police to act or not act based on their self-evaluation in

<sup>8</sup> Article 13 of Law no. 2 of 2002 on the Police of the Unitary State of the Republic of Indonesia

accordance with their responsibility to keep, take care of order and public safety. The authority is then what so called Police Discretion, where the validity is based on considering their need to do their responsibilities and this depends on their subjective ability as an officer.

Investigation phase is considered as an important thing to be considered because it may affect not only the success of further trial process, but also child soul development. The provision as regulated in Paragraph 18 Law No. 11 Year 2012 on Children Criminal Justice System (UU SPPA) that investigators "must" investigate the defendant in "kinship atmosphere", along with the provisions regulated in *Beijing rules*.

Regarding the main tasks and authority of discretion the police have, it is not excessive if police officers are required to be able to make an effort i.e. restoration justice approach that can change or improve the judicial system. It means to restore or improve, so that it can lead to the appropriate approach to the concept of justice in the handling of criminal cases. Thus, the legal and judicial system can work well to change the situation or condition that has been not harmonious and certainly in accordance with the demands of today's society, namely the creation of cultural transformation condition in the Police of Republic of Indonesia (Polri).

The process of diversion execution holds the principle of restorative justice by taking into account: the interests of the victim; welfare and responsibilities of the child; avoidance of negative stigma; avoidance of retaliation; community harmony and propriety, decency, and public order.<sup>9</sup> Diversion shall be pursued at the level of investigation, prosecution and examination of the child case in the district court.<sup>10</sup> The term "must be afforded" implies that the child's law enforcers from investigators, prosecutors and judges are required to make efforts to make the diversion process workable.

Investigators, Public Prosecutors and Judges when considering whether to implement diversion or not, should pay attention: the category of crime committed by the child; age of the child; results of community research from Correctional Institution (BAPAS); the loss caused by the child's behavior; how

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<sup>9</sup> Article 8 paragraph 3 of Law no. 11 Year 2012 on Child Criminal Justice System

<sup>10</sup> Article 7 of paragraph 1 of Law no. 11 Year 2012 on Child Criminal Justice System.

the level of concern and public opinion on the case; and the support of family and community environments.<sup>11</sup> Not all child cases can be made for diversion, since the diversion must first obtain the agreement of the victim and his family as well as the willingness of the child and his family.<sup>12</sup>

Some forms of agreement result in the implementation of diversion among others are: peace with or without change the loss; handover back to parent / guardian; participation in education or training to educational institutions, social welfare institutions; society service.<sup>13</sup> Then, the results of the diversion agreement are set forth in a decision, and will be valid since the agreement is reached. However, in order for the decision to have legal force, the social advisor asks for the decision from the chairman of the district court by submitting the file of the diversion agreement to the district court in accordance with the jurisdiction. After the stipulation has been ratified by the court, the result of the determination shall be granted to the public counselor, investigator, prosecutor or judge handling the case within a maximum of 3 (three) days from the date of stipulation.<sup>14</sup>

Child investigating processes may only proceed to the child criminal justice process if the diversion process does not result in an agreement or if the agreement is not exercised by the parties.<sup>15</sup> The responsibility for supervision or monitoring of the result and the implementation of the diversion lies with the direct superior of the officer examining the child's case, and this is required at each level of examination. In addition, if the diversion is not reached, the social counselor who takes role as a supervisor during the diversion process, report it to the responsible official for follow-up within 7 (seven) days.<sup>16</sup>

Based on the above description, it can be concluded that the diversion process can be carried out at each level of examination that starts at the level of investigation, the level of prosecution and the level of examination in the juvenile court. While the social counselor has the task of making a report of community research for diversion purposes.

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<sup>11</sup> Article 9 paragraph 1 of Law no. 11 Year 2012 on Child Criminal Justice System.

<sup>12</sup> Article 9 paragraph 2 of Law no. 11 Year 2012 on Child Criminal Justice System.

<sup>13</sup> Article 11 of Law no. 11 Year 2012 on Child Criminal Justice System.

<sup>14</sup> Article 12 of Law no. 11 Year 2012 on Child Criminal Justice System.

<sup>15</sup> Article 13 of Law no. 11 Year 2012 on Child Criminal Justice System.

<sup>16</sup> Article 14 of Law no. 11 Year 2012 on Child Criminal Justice System.

## C. CONCLUSION

Before investigation process, Police (Investigators) are to: arrest, interview and investigation, detention, search, confiscation and case file submission, while the process of diversion can be done on each examination level i.e. investigation level, prosecution level, and investigation in juvenile court. The implementation of special trainings for investigators in implementing diversions should always be enhanced through special education focusing on the legal settlement of legal cases such as enhancement of investigator capacity in conducting investigations of child offenders and their typologies. For example, doing the handling of child's case facing the law. The government should maximize the functions of social institutions that are associated with the implementation of the diversion of children in conflict with the law and also strengthen the BAPAS position at the level of investigation, so that the results of the research are not merely as recommendations in accordance with the mandate of Law no. 11 Year 2012 on Child Criminal Justice System. The benchmark refers to it is a mild crime, the community is not rebellious, between the perpetrator and the victim has peace, the perpetrator's parent is able to guide, the environmental conditions can accept the child, and the child offender is not the recidivist. Government and related parties (Police, Prosecutors, Judges) are expected to improve facilities and infrastructure in the process of settling children's cases that deal with the law, especially in the City of Semarang, Central Java Province. For example by building a special prison for children in Semarang, which is the capital of Central Java Province.

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