

## The Application Of Criminal Acts Diversion Conducted By Child In Progressive Law Perspective

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### Abstract

*The purpose of this study is to find out and analyze the implementation of progressive legal theory on children who commit crimes and to find out and analyze the role of Grobogan Police investigators in the application of diversion to children who commit crimes in the concept of legal certainty. In this study using a sociological juridical approach. The results of this study indicate that the implementation of progressive legal theory for children who commit criminal acts is manifested in the form of diversion. The basis for implementing diversion against children who commit criminal acts is the fulfillment of children's rights, providing protection and providing legal protection to children. The special juvenile court has provided space for the implementation of diversion in a wider scope providing legal protection for children. The application of the concept of diversion in the form of formal justice that has so far prioritized efforts to provide protection for children from imprisonment. In addition, it can be seen that child protection with a diversion policy can be carried out at all levels of justice, starting from the community before the occurrence of a crime by taking preventive measures. And the role of Grobogan Police investigators in diversion enforcement against children who commit criminal acts on the concept of legal certainty seeing the age of the child as the perpetrator of a crime.*

*Keywords: Diversion; Legal; Certainty; Thievery.*

### 1. Introduction

Every child who is in conflict with the law requires guidance and protection in order to ensure complete, harmonious, harmonious and balanced physical, mental and social growth and development. This guidance and protection of children does not exclude perpetrators of child crimes, often referred to as "bad children" or children who commit criminal acts. In recent developments, it is often in the spotlight in the mass media that contains juvenile delinquency or crimes committed by children.<sup>1</sup>

According to Rahmatyar, Ana and Setiyono, Joko (2020) said that "judges in deciding cases of children who commit criminal acts of decency are oriented to Act No. 11 of 2012 concerning the juvenile criminal justice system, namely by stipulating criminal penalties for children who commit decency crimes of adult crimes. The purpose of the criminal justice system in accordance with the Juvenile Justice System Act is to maintain the dignity of the child, where the child is entitled to special

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<sup>1</sup>Bunayi Hidayat, 2010, *Pemidanaan Anak Di Bawah Umur*, Bandung : PT. Alumni, p. 2

protection, especially legal protection in the judicial system. Therefore, the juvenile criminal justice system is not only focused on imposing criminal sanctions for children who are perpetrators of criminal acts, but also focuses on the idea that the imposition of sanctions is intended as a means to realize the welfare of children who are perpetrators of crimes.<sup>2</sup>

It is often found that criminal cases are resolved out of court through various discretion of law enforcement officers or through deliberation or peace mechanisms or forgiveness institutions that exist in the community (family deliberations, village deliberations, customary deliberations and so on). The practice of resolving criminal cases outside the court so far has no formal legal basis, so there are often cases where there is an informal settlement of peace (albeit through customary law mechanisms), but is still processed in court according to applicable law.<sup>3</sup>

Diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside of criminal justice.<sup>4</sup> Where diversion is stated in international conventions, namely the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJ) or The Beijing Rules (UN General Assembly Resolution 40/33 dated November 29, 1985).<sup>5</sup>

According to Rosna Wati, Emy (2017) said that "Diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside of criminal justice". One of the criminal cases that was resolved through diversion efforts was the immoral criminal case with the case number LP/B//88/X/2020/CENTRALIA/Resgrob. The chronology of the case in the case number is that the perpetrator and the victim made a videocall via Facebook Messenger, on June 8, 2020 the perpetrator and the victim made a videocall again, and at that time the perpetrator asked the victim to take off her clothes which was then taken by the perpetrator to take a screenshot and spread it on the Facebook social network. . According to Rachmat Hambali, Azwad (2019) said that "Diversion is not a peaceful effort between children in conflict with the law and the victim or their family, but a form of punishment for children in conflict with the law in an informal way". So that the sentence is very appropriate to be handed down to the defendant so that there is a sense of justice in society.<sup>6</sup>

## 2. Research Methods

This study uses an empirical juridical approach, the focal point in empirical legal research is the legal behavior of individuals or communities.<sup>7</sup> As a form of method, the approach used is to find out the reality in the field based on the principles of law or

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<sup>2</sup> Lilik Mulyadi, 2014, *Wajah Sistem Peradilan Anak Indonesia*, Bandung : Alumni, p. 6

<sup>3</sup>Yudistira, Proses Penyelesaian Perkara Pidana di Luar Peadilan pada Tahapan Penyidikan di Polresta Palembang, *Justicia Saing : Jurnal Ilmu Hukum*, 4 (2), 2019, p.151

<sup>4</sup> Article 1 point 7 of Act No. 11 of 2012 concerning the Juvenile Justice System

<sup>5</sup>Darmini, Pelaksanaan Diversi Pada Sistem Peradilan Anak, *Qowwam* 13 (1), 2019, p. 53

<sup>6</sup> Nanda Setya Laksana and Achmad Sulchan, "The Law Enforcement On Pornographic Cases" *Law Development Journal Vol 3, No 3 (2021)*, <http://jurnal.unissula.ac.id/index.php/ldj/article/view/16098>

<sup>7</sup>Bachtiar, *Metode Penelitian Hukum*, Tangerang Selatan : Unpam Press, 2019, p. 61

legislation in force and the tone of its relation to the object under study. Then this study uses analytical descriptive, which is a study that describes and describes the situation and facts in detail. The types of data used in this study are primary data and secondary data, primary data obtained through interviews with the PPA Head of the Grobogan Police, primary legal materials are laws and regulations that are directly related to the title of this research.

### 3. Result and Discussion

#### 3.1. Implementation of Progressive Legal Theory Against Children Who Commit Crimes

The concept of progressive human law is above the law, the law is only a means to guarantee and maintain various human needs. Law is only a means to guarantee and maintain various human needs. Law is no longer seen as an absolute and independent document. The adoption of progressive legal theory has consequences for the importance of creativity to overcome legal lagging, as well as to make legal breakthroughs (rule breaking). Such a legal breakthrough is expected to be able to realize the goals of humanity through the operation of the law, namely the law of happiness.<sup>8</sup> Furthermore, Binsar emphasized that progressive law does not want to make law a technology without conscience, but as a moral institution, following the times, so that law can access various human interests. The main goal is to prosper and make people happy through the judge's decision.<sup>9</sup>

The law must work with legal formulations in legislation, which have narrowed or reduced the unique human actions to a certain scheme or standard. Satjipto Rahardjo explained that the characteristics of progressive law enforcement are: progressive law refuses to maintain the status quo in law. Maintaining the status quo has the same effect, as when people argue, that the law is the measure of all, and people are for the law.<sup>10</sup>

The purpose of this study is to formulate government policies in detaining children from committing crimes through the juvenile criminal justice system<sup>11</sup>. An important legal way to overcome stagnation is to free oneself from the domination that blinds the text of the law. This way can be done, if we involve the human element or human actions in the law. In accordance with Holmes's view, which explains that the life of law is not logic, but experience (the life of law has not been logic, but

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<sup>8</sup>Amanda Dea Lestari dan Bustanuddin, Putusan Ultra Petita Mahkamah Konstitusi : Memahami Fenomena Holistik Penemuan Hukum (*Rechtsvinding*) yang Progersif, *Limabgo : Journal of Constitutional Law*, 1 (1), 2021, p. 13

<sup>9</sup>Binsar M. Gulton, *Pandangan Kritis Seorang Hakim dalam Penegakan Hukum di Indonesia*, Jakarta : Gramedia, 2012, p. 64

<sup>10</sup>Edi Setiadi dan Kristian, *Sistem Peradilan Pidana Terpadu dan Sistem Penegakan Hukum di Indonesia*, Jakarta : Kencana, 2017, p. 258

<sup>11</sup>Cucuk Kristiono, Rakhmat Bowo Suharto, "Child Position Analysis As A Criminal Actor Of Homosexual In Juvenile Criminal Justice System", *Law Development Journal*, Vol 3, No 3 (2021) <http://jurnal.unissula.ac.id/index.php/ldj/article/view/16239>

experience).<sup>12</sup> In simple terms it can be said that the criminal justice system is a crime prevention tool in which there are interrelated sub-systems. In other words, the criminal justice system can be described briefly as a system that aims to "tackling crime", one of the community's efforts to control the occurrence of crime so that it is within the limits of tolerance it can accept.

Starting from the view of a progressive legal approach, then in implementing the framework of law enforcement in the juvenile criminal justice system. Assumptions in the enforcement of the juvenile criminal justice system, law enforcement for juvenile criminal justice holds the view that law enforcement for juvenile criminal justice emphasizes the interests of children, not solely for the interests of juvenile justice law. The legislation on the juvenile criminal justice system is not an absolute and final law, but is always in the process of becoming (law as a process, law in the making).

Assumptions in the enforcement of the juvenile criminal justice system. The Juvenile Criminal Justice System is the entire process of resolving cases of children who are in conflict with the law, starting from the investigation stage to the stage of mentoring after serving a criminal Act No. 11 of 2012 concerning the Juvenile Criminal Justice System article (1) number 1, Act No. 3 of 1997 concerning Juvenile Court. The Law on Juvenile Court was replaced because it did not pay attention to and guarantee the interests of the child, both the child of the perpetrator, the child of the witness, and the child of the victim. The Child Protection Act only protects children as victims, while children as perpetrators are sometimes positioned the same as adult perpetrators. This SPPA Law emphasizes the diversion process where in this judicial process it is very concerned about the interests of the child, and the welfare of the child. At each stage, namely investigations in the police, prosecution at the prosecutor's office, and examination of cases in court, it is obligatory to seek diversion based on Article 7 paragraph (1) of the SPPA Law. 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 incorporated in the courts, which include the police, public prosecutors and legal advisors, supervisory agencies, child detention centers, and health facilities.

Law enforcement for children's tuition fees is carried out with the hope of releasing the types, ways of thinking, principles and theories that have been used (dominant) in the implementation and application of the Juvenile Court Law so far. Thus, in the enforcement of children's tuition fees, there is a spirit to be able to do creativity or liberate the culture of law enforcement (administration of justice) in solving children's cases with a starting point on the goals of children's welfare and happiness. Progressive enforcement of child tuition fees in the form of looking at the legislation on child tuition fees is always in the process of becoming law in the making, towards the goal of human/child welfare and happiness.

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<sup>12</sup>Agus Brotosusilo, *Philosophy of Law*, Jakarta : Universitas Indonesia, 2018, p. 656

Restorative justice in handling children in conflict with the law can be aimed at law enforcement through diversion efforts.<sup>13</sup>The special juvenile court has provided space for the implementation of diversion in a wider scope. Changes in the general court towards a court that prioritizes child protection. With the application of the concept of diversion, the existing form of formal justice has prioritized efforts to provide protection for children from imprisonment.

The obstacles encountered in the application of diversion in handling child crimes in the Grobogan jurisdiction are, the first is the threat of a criminal offense with a sanction of 7 years and above, the second problem arises if the parents are community leaders, the third is intervention on the part of the victim, the fourth the ability of investigators to carry out diversion policies is not optimal, and the fifth is that there is no similarity and agreement between victims and perpetrators<sup>14</sup>. In addition, it can be seen that child protection with a diversion policy can be carried out at all levels of justice, starting from the community before the occurrence of a crime by taking preventive measures. After that, if a child commits a violation, there is no need to proceed to the police. Furthermore, if the child who committed the violation has already been arrested by the police, the police can diversion without forwarding the case to the prosecutor. Then if the child's case has reached the court, the judge can conduct the trial according to the procedure and prioritize the child can be released from prison. Finally, if the child is already in prison, the prison officer can make a diversion policy for the child so that the child can be transferred to a social institution.

Unlike the case with Act No. 11 of 2012, the implementation of diversion is not only in the context of the level of investigation but more broadly where at every level of the judiciary (from the police to the prison level) the implementation of diversion is still possible. Implementation of diversion as part of the realization of progressive legal theory, in handling criminal acts committed by children starting from the level of investigation, prosecution, trial, to the implementation of handling crimes committed by children by the Penitentiary. According to Hutahaeen, Bilher (2013) said that "In giving the threat of punishment to children who are perpetrators of criminal acts, apart from the severity of the threat of sanctions, another thing that is no less important to consider is the treatment in handling children,

### **3.2. The Role of Grobogan Police Investigators in Implementing Diversion Against Children Who Commit Crimes in the Concept of Legal Certainty**

The diversion process with restorative justice is sometimes involved and the investigator is not involved. However, if the case has been resolved amicably, usually the victims, perpetrators, and community leaders or parties involved come to the

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<sup>13</sup>Askohar Askohar, Siti Rodhiyah Dwi Istinah, "Legal Protection of Children in the Investigation Process by Investigators Based on Restorative Justice", *Law Development Journal*, Vol 3, No 3 (2021) , [jurnal.unissula.ac.id/index.php/ldj/article/view/16087](http://jurnal.unissula.ac.id/index.php/ldj/article/view/16087)

<sup>14</sup> Nur Azizah, Ira Alia Maerani, "Implementation Of The Diversion Policy On Child As A Criminal Based On Justice Value", *Law Development Journal*, Vol 3, No 3 (2021) <http://jurnal.unissula.ac.id/index.php/ldj/article/view/16105>

Grobogan Police PPA Unit to ask for opinions and suggestions. However, if the crime of theft is accompanied by violence that threatens life, the victim or the victim's family usually does not want to make peace. Without a statement signed by the victim, the crime of theft with violence will proceed to the next stage.<sup>15</sup>

Diversion of children in conflict with the law can result in an agreement in the implementation of diversion, namely: peace with or without compensation; handover to parents/guardians; participation in education or training to educational institutions, social welfare organizations or social welfare institutions; community service program. Therefore, at the level of implementing educational institutions, social welfare institutions and community service programs, they must be able to act as a forum or agent for changing the behavior of children who commit crimes to become intelligent and qualified individuals. However, at the practical level, it is still questionable, there are still few programs that favor children, and structural improvements must be made to support the interests of these children.

Investigators' considerations in carrying out diversion efforts against children in conflict with the law only refer to and are guided by Article 7 paragraph (2) of the SPPA Law, which is threatened with imprisonment of less than 7 (seven) years and is not a repeat of the crime. Based on the crime of decency committed by a child with Case Number: No. LP/B//88/X/2020/JATENG/Resgrob that the perpetrator may be subject to Article 45 paragraph (1) of Act No. 19 of 2016 concerning Amendments to Act No. 11 of 2008 concerning Information and Electronic Transactions, the defendant's actions with intentionally and without right to distribute accessible electronic information, and/or electronic documents containing content that violates morality, shall be punished with imprisonment for a maximum of 6 years and/or a fine of a maximum of Rp. 1 Billion.

However, sometimes in carrying out their duties, the Grobogan Police PPA investigators are not successful in trying to implement diversion with restorative justice. This is because the victim is not willing to make peace which is marked by a statement letter requesting that the perpetrator be punished and processed like an adult perpetrator.

Then, the obstacle faced by investigators in carrying out diversion is that there is no BAPs agency because if the Police investigators carry out Diversion efforts, they still write to the Pati Papas so that the implementation takes time. The absence of a Bapas agency in Grobogan Regency as a supporter of successful diversion is a very influential factor. The existence of the BAPs is very much needed in terms of providing considerations in accordance with Article 9 of the UUSPPA.

Constraints on police discretionary policy in dealing with minor crimes consist of internal and external constraints from the police. The ideal police discretionary policy in dealing with minor crimes is that the first does not conflict with the rule of law, the second is in accordance with legal obligations that require official action to be taken, the third action must be appropriate and reasonable and included in the

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<sup>15</sup> Interview with the Head of the PPA Unit of the Grobogan Police Satrekrim Ipda Abdul Kadir, SH, 22 February 2021

environment of his office, based on the considerations based on coercive circumstances, respecting human rights.<sup>16</sup>Based on the results of interviews, there are several factors that can inhibit diversion at the Grobogan Police, including:

- The legal factor itself or the role itself  
In relation to law enforcement of the crime of theft committed by children, Ipda Kadir said that he was charged with Article 362 of the Criminal Code with a maximum imprisonment of 5 (five) years by looking at the provisions in Article 81 of the UUSPPA. The threat of imprisonment for adults and in Article 7 UUSPPA contains a threat of imprisonment for under 7 years, diversion must be sought.
- Law enforcement  
This law enforcement factor is the Grobogan Police investigator who applies diversion efforts in criminal acts committed by children, especially regarding human resources, the inhibition of diversion by the Grobogan Police PPA investigators is caused by: (1) with the large number of cases of child crimes, it makes the obstacles or limitations of child investigators, because in the structure of the Women and Children Service Unit there are only 9 (nine) members; (2) coordination between related institutions in the process of implementing diversion is not optimal, especially the processing of old diversions, but investigators from the Grobogan Police can overcome this by approaching each institution to prioritize the implementation of fast and effective diversion.
- Factor facilities or facilities.  
Soerjono Soekanto believes that law enforcement cannot work properly if they are not equipped with proportional vehicles and communication tools. Therefore, facilities and facilities have a very important role in the implementation of diversion in the Grobogan Police area. The obstacle faced by the Grobogan Police in implementing diversion based on the facility factor is that diversion requires complete facilities and infrastructure for the development of children who are in conflict with the law.
- Community factor  
Law enforcement comes from the community and aims to achieve security in society, every citizen has at least some legal awareness. The degree of community legal compliance is one indicator of the functioning of the law itself. Ipda Abdul Kadir explained that after a crime was committed by a child, investigators in carrying out diversion were hampered by the role of the community. The families of the victims are still often found, especially when they are about to carry out diversion, they do not want peace on the grounds that they have not forgiven the perpetrators' actions, as well as the many requests for compensation that are usually desired by the victim's family, thus making the implementation of the diversion last longer than expected. Therefore,
- Cultural factors.

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<sup>16</sup> Saptanti Lastari, Sri Kusriyah, "Police Discretion Policy In Handling Middle/Minor Crimes (Tipiring) Based On Justice Value", *Law Development Journal*, Vol 3, No 3 (2021), <http://jurnal.unissula.ac.id/index.php/ldj/article/view/16102>

Culture has a very large function for humans and society, such functions are so that humans can understand how they should act, act, and determine their attitudes when dealing with other people. Ipda Abdul Kadir explained that the Grobogan community still lacks legal awareness, low legal awareness is an obstacle for law enforcement. People who do not understand the existence of diversion efforts by assessing diversion do not produce justice. No matter how well the arrangement of the legal structure to carry out the legal rules established without the support of the legal culture in the Grobogan community, diversion will not work effectively.

#### 4. Closing

The implementation of progressive legal theory for children who commit crimes is manifested in the form of diversion. The basis for implementing diversion against children who commit criminal acts is the fulfillment of children's rights, providing protection and providing legal protection to children. The special juvenile court has provided space for the implementation of diversion in a wider scope providing legal protection for children. The role of Grobogan Police investigators in diversion enforcement against children who commit crimes on the concept of legal certainty sees the age of the child as the perpetrator of a crime. Children who are in conflict with the law in the Bareskrim Polri environment, it is stated that in conducting investigations and investigations of criminal acts, especially those relating to children, investigators must pay attention to human rights and provide protection for children.

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#### **Interview**

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