

The Implementation Of Diversion Policy In The Criminal Judgment System Of Child As A Criminal Actor

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Abstract

The purpose of this study is to examine and analyze the policy of implementing diversion in the juvenile criminal justice system as criminals in the current positive law and to examine and analyze the policy of implementing diversion in the juvenile criminal justice system as perpetrators of criminal acts in the criminal law reform that will be implemented. in the future. This study uses a sociological juridical approach, with a descriptive analytical research method. The data used are primary and secondary data which will be analyzed qualitatively. The research problem was analyzed using the theory of justice and the theory of expediency. The results of the study concluded that the diversion policy in handling criminal acts committed by children through a family deliberation process where this family deliberation was chosen in resolving criminal cases committed by children was intended to resolve cases of children through deliberation involving the perpetrator's family and the victim's family facilitated by facilitator from a neutral party in order to obtain agreement from both parties. The application has not been fair because all juvenile criminal cases have not all been diverted. Diversion policy in the future is consistency in carrying out diversion efforts or diversion is a mechanism that allows children to be diverted from the social service process, prioritized, because the involvement of children in the judicial process has actually undergone a stigmatization process. The application of this mechanism at all levels of examination will greatly reduce the negative impact of children's involvement in the judicial process. Child investigation is a starting point that affects a child's personality, he can be good or vice versa, therefore, it is necessary to have a synergy between the police, prosecutors, and courts in serving and handling children. because the involvement of children in the judicial process has actually undergone a stigmatization process. The application of this mechanism at all levels of examination will greatly reduce the negative impact of children's involvement in the judicial process. Child investigation is a starting point that affects a child's personality, he can be good or vice versa, therefore, it is necessary to have a synergy between the police, prosecutors, and courts in serving and handling children. because the involvement of children in the judicial process has actually undergone a stigmatization process. The application of this mechanism at all levels of examination will greatly reduce the negative impact of children's involvement in the judicial process. Child investigation is a starting point that affects a child's personality, he can be good or vice versa, therefore, it is necessary to have a synergy between the police, prosecutors, and courts in serving and handling children.

Keywords: Policy, Diversion, Child Actors.

1. Introduction

To provide security to every citizen, it is necessary to take action by law enforcement officers to carry out legal processes against anyone who commits a violation or criminal act. The implementation of law enforcement against perpetrators of criminal acts must be in a system consisting of subsystems that relate to one another

called the criminal justice system or in English called the Criminal Justice System.¹

Police institutions in Indonesia are regulated in the Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia. The National Police of the Republic of Indonesia as a law enforcement tool is primarily tasked with maintaining domestic security, in carrying out its duties always upholding the human rights of the people and state law. The police are required to carry out their profession fairly and wisely, as well as to bring security and peace. The National Police of the Republic of Indonesia is a state instrument that plays a role in maintaining public security and order, upholding the law and providing protection, protection and services to the community in the context of maintaining domestic security. As a state instrument, the Indonesian National Police also has an obligation to respect,

The function of the police is one of the functions of the state government in the field of maintaining security and public order, law enforcement, protection, shelter and service to the community.

The National Police of the Republic of Indonesia aims to realize internal security which includes the maintenance of public security and order, order and the rule of law, the implementation of protection, protection and service to the community as well as the establishment of public peace by upholding human rights.²

Police action is every action or action of the police based on their authority in the context of carrying out government functions in the field of maintaining security and public order, providing protection, shelter and service to the community and law enforcement. Police actions position the police as legal subjects, meaning as drager van de rechten en plichten or supporters of rights and obligations where the police (as an institution and function) carry out various actions that are legal actions (rechtelijkhandelingen) as well as actions based on facts / facts. (feitelijkhandelingen).

Legal action is an action that gives rise to certain legal consequences, such as actions in the context of law enforcement (arrest, examination, detention, confiscation, search and others) or actions to control road users, demonstrations, performances and others, while actions based on fact/true means actions that have no relevance to the law, therefore, do not cause legal consequences such as holding ceremonies, inauguration of police offices or buildings, etc., which are usually carried out by government officials³.

The actions taken by the police in dealing with cases committed by children include diversion, namely the idea of giving law enforcement officials the authority to take policy actions in dealing with or resolving child violations by not taking formal steps, including stopping or not continuing. / release from the criminal justice process or return / hand over to the community and other forms of social service activities. Policy The diversion formulation can be carried out at all levels of examination, namely from

¹Marlina, 2009, Juvenile Criminal Justice in Indonesia: Development of the Concept of Diversion and Restorative Justice, Refika Aditama, Bandung, p. 5.

²Kelik Pramudya, 2010, Guidelines for Professional Ethics of Legal Apparatus, Yustisia Library, Jakarta. p. 52-53.

³Sadjijono, 2010, Understanding Police Law, LaksBangPresindo, Yogyakarta, p. 140.

investigation, prosecution, examination at a court hearing to the stage of implementing a decision. This policy formulation is intended to reduce the negative impact of children's involvement in the judicial process⁴.

A criminal act is an act that is prohibited by a statutory regulation, where the prohibition is accompanied by the threat of sanctions in the form of certain crimes for anyone who violates the prohibition. The settlement of criminal cases is carried out through the evidentiary process, namely the prosecution process which is carried out directly in an experiment. In judicial practice, the process always begins with an arrest, detention, then being prosecuted by the public prosecutor, which ends with a judge's decision.⁵

The diversion program provides benefits to the community in early and fast handling of deviant behavior. This initial treatment also saves costs which are the burden incurred by the local police. Children as perpetrators of these crimes will be given instructions by the police, criminal advisors, officers from the justice department, and schools. Then the child voluntarily participates in appropriate consultation and/or education and social activities. If the person concerned is successful in this program, the prosecutor will not prosecute the case and will not record in the case file the act.⁶

The juridical basis for the formation of diversion refers to Article 28 paragraph (2) of the 1945 Constitution, Law Number 39 of 1999 concerning Human Rights, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which in its provisions still considers aspects of special protection for children (ABH). The guarantee of other forms of protection for children's human rights can also be said to be a driving factor for the importance of diversion being accommodated in a law.

In an effort to diversify in criminal cases in order to realize law enforcement that is appropriate or relevant to the values that live in the community, restorative justice efforts are applied which is an approach in solving criminal problems involving victims, perpetrators, and elements of society in order to create a substantive justice. Circular Letter of the Chief of Police Number 8/VII/2018, that the application of the principle of restorative justice in the concept of investigation and investigation of criminal acts in order to realize the public interest and a sense of community justice that does not yet have a legal basis and can be used as a guideline for its implementation and in the context of realizing non-uniform understanding and application of justice restorative within the Indonesian National Police, a product with legal force is needed as a guide for investigators and Polri investigators who carry out, including guarantees of legal protection and control supervision. This statement is further strengthened by the presence of the Regulation of the Chief of the Police of the Republic of Indonesia

⁴Purniati, Mamik Sri Supatmi, and Ni Made Martini Tinduk, tt, Situation Analysis of the Juvenile Justice System in Indonesia, Department of Criminology, University of Indonesia & UNICEF, p. 4.

⁵Ferry, SW and Arpangi. Settlement Policy of Criminal Actions which Performed by Children through Penal Mediation. Jurnal Daulat Hukum Volume 4 Issue 2, June 2021 ISSN: 2614-560X.

⁶Dwi Hapsari Retnaningrum, 2008, Protection of Children Who Do Criminal Acts (Study of Non-Litigation Settlement in Child Crime Cases in Banyumas, Purbalingga, Banjarnegara, Kebumen, and Cilacap Regencies), Research Report, FH UNSOED, Purwokerto, p. 59.

Number 6 of 2019 concerning Criminal Investigation.

The purpose of this study is the purpose of research in this study is to examine and analyze the policy of implementing diversion in the juvenile criminal justice system as criminals in the current positive law and to examine and analyze the policy of implementing diversion in the juvenile criminal justice system as perpetrators of criminal acts in the criminal justice system. future criminal law reforms.

2. Writing Method

The approach method used in this research is the sociological juridical method. The specifications in this study are descriptive. Sources of data used in this study are primary data sources, secondary data, and law enforcement data for police investigators. Primary legal materials consist of: the 1945 Constitution of the Republic of Indonesia, the Criminal Code, the Criminal Procedure Code, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection. Secondary legal materials consist of books, documents of research results in the field of law, especially the problem of crimes committed by children. Data collection methods used are interviews with sources and document review,

3. Research Results and Discussion

3.1. Policy on the Implementation of Diversion in the Juvenile Justice System as a Crime in the Current Positive Law

The stages of implementing diversion in the Juvenile Criminal Justice System include:

- 1) Stages of Implementing Diversion in the Investigation Process.
When an investigator receives a report of a criminal act, the steps taken are to conduct an investigation and investigation. Then the investigator will contact the Correctional Center (Bapas) to coordinate. The Fathers will make a community research report in collaboration with the Village Head or Community Leader and provide advice to investigators to conduct diversion. On the advice of the Fathers, investigators will facilitate the diversion.
- 2) Stages of Implementation of Diversion in the Prosecution Process.
At the prosecution stage, the public prosecutor is obliged to seek diversion no later than 7 days after receiving the case file from the investigator. The diversion process will be carried out for a maximum of 30 days. In the diversion process, there will be deliberation between the child and his/her parents or guardian, the victim and his/her parents or guardian, community advisor, and professional social worker.
- 3) Stages of Implementation of Diversion in the Trial Process.
In the trial stage, the head of the court is obliged to determine the judge or panel of judges to handle the case of the child no later than 3 days after receiving the case file from the public prosecutor. Judges are required to seek diversion no later than 7 days

after being appointed by the head of the district court as a judge. Diversion is carried out for a maximum of 30 days.

Meanwhile, according to the Chief of the Police of the Republic of Indonesia, the factors that are considered in the application of diversion in cases of theft committed by children are:

- 1) The nature and condition of the action;
The nature of the violation, namely the theft committed by children in the crime of theft, is light because what is stolen is goods that are not too expensive and only want to be owned by the child but the child cannot afford it.
- 2) Previously committed violations;
Based on the results of the investigation, it is known that the suspects in the crime of theft admit that they have never committed a crime, especially since they are still children and students.
- 3) The degree of involvement of the child in the case;
The suspects are still in the process of maturation so they do not understand and know the legal consequences of what they have done so that the Central Java Regional Police are of the opinion that the suspects are not too deeply involved in the criminal acts they committed.
- 4) The child's attitude towards the act;
During the investigation process at the Police, the suspected children behaved politely and uncomplicatedly and acknowledged and regretted what they had done .
- 5) The reaction of the parents and/or the child's family to the act;
After the parents of the suspects found out that their children had committed the theft, they said that they did not think that their children had committed the theft. Then the parents of the suspects have tried to accompany their children who are involved in criminal acts up to the investigation process.
- 6) The impact of the act on the victim;
The impact caused by the actions of the suspects in the crime of theft committed by children is relatively small, especially since the victim has been sincere and willing to cooperate and compromise with the parents of the suspect.

In the Regulation of the State Minister for Women's Empowerment and Child Protection of the Republic of Indonesia Number 15 of 2010 concerning General Guidelines for Handling Children in Conflict with the Law, it is regulated on the handling of a restorative justice approach for children who commit criminal acts with the following types:

- 1) Mediating the victim with the perpetrator
- 2) Family Meeting

Law Number 11 of 2012 concerning the Criminal Justice System for children is expected to bring progress to the protection of children. As Article 1 of Law Number 11 of 2012 states that the juvenile criminal justice system is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving a crime. The juvenile criminal justice system (Article 2) is implemented based on the following systems: protection, justice, non-discrimination, respect for children's opinions, child survival and development, child development and

guidance, proportionality, deprivation of liberty and punishment as a last resort, avoidance of retaliation.

The diversion approach can be applied to resolve cases of children in conflict with the law. The objectives of the diversion effort are: to prevent children from being detained, to avoid being labeled as criminals, to prevent repetition of criminal acts committed by children, to hold children accountable for their actions, to carry out necessary interventions for victims and children without having to go through a formal process, avoiding children from participating in the judicial system process, keeping children away from the negative influences and implications of the judicial process. As stated by Barda Nawawi Arief, diversion can be carried out by the police, prosecutors, courts and correctional institutions. The application of diversion at all levels is expected to reduce the negative effect of children's involvement in the judicial process. Basically a law enforcement will be successful and run optimally if it cannot be separated from the three pillars that influence each other, namely fulfilling the structure, substance, and legal culture.⁷

The application of the diversion policy towards children as perpetrators of criminal acts should be able to provide legal certainty. Legal certainty is a question that can only be answered normatively, not sociologically. Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. It is clear in the sense that it does not cause doubt (multi-interpretation) and logical in the sense that it becomes a norm system with other norms so that it does not clash or cause norm conflicts. Norm conflicts arising from uncertainty in the rules can take the form of norm congestion, norm reduction or norm distortion. Legal certainty refers to the application of a clear, permanent, consistent and consequent law whose implementation cannot be influenced by subjective circumstances. Legal certainty will be achieved if the law is as much as possible in the law. The law contains contradictory provisions (the law is based on a logical and practical system). Laws are made based on *rechtswerkelijkheid* (true legal conditions) and in the law there are no terms that can be interpreted differently.

The application of a diversion policy against children as perpetrators of criminal acts should be able to provide legal benefits. Law is the lifeblood of a nation to achieve the ideals of a just and prosperous society. For Hans Kelsen the law itself is a *sollens* category (the category of necessity) instead of a *seincategorie* (a factual category). What this means is that the law is constructed as a necessity that regulates human behavior as rational beings. In this case, what is being questioned by the law is not 'how the law should be' (what the law ought to be) but 'what is the law'. Some people argue that the usefulness of the law (*zweckmasiggkeit*) is highly correlated with the purpose of sentencing, especially as a special prevention so that the defendant does not repeat committing acts against the law, and in general prevention everyone is careful not to violate the law because sanctions will be imposed. Therefore, the judge's decision must benefit the judiciary, the general public and the development of science.

⁷Achmad Ali, 2002, *The Downfall of Law in Indonesia*, PT. Ghalia Indonesia, page, 97, Jakarta.

3.2. Policy on the Implementation of Diversion in the Juvenile Justice System as a Crime in Criminal Law Updates in the Future

The restriction on diversion in Article 7 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, should be explained in the Commentary Rule 11 of the Beijing Rules, that diversion is specifically aimed at the offense of non serious nature. However, it was further stated that diversion need not be limited to small/mild cases, thus making diversion an important tool/instrument (it need not necessarily be limited to petty cases, thus rendering diversion an important instrument). the diversion restriction for the repetition of a criminal act deserves to be reviewed, because it is not in the same breath as Article 119 of the Criminal Code Bill which states that: does not apply to children who repeat criminal acts". So according to the New KUHP Bill the provision of "criminal weighting" which does not apply to child recidivists, is not a form of "compensation" (such as this diversion). This means that diversion should still apply to child recidivists.⁸However, the SPPA Law and the Draft Criminal Code are also not without loopholes where the success of the diversion is highly dependent on the consent of the victim, which consequently places the best interests of the child as the second choice. Whereas the Convention on the Rights of the Child emphasizes the principle of "the best interests of the child" in the diversion process and not on the peace process as the concept of the SPPA Law and the RKUHP. This clearly explains that the State is silent and only submits the Diversion decision completely to the negotiating table. As far as the sentencing of children is concerned, the RKUHP does not significantly close the gaps in the SPPA Law, even more like the adaptation of the SPPA Law.

Basically the law is inseparable from what humans and society do to it. This creates habits that are ultimately respected and obeyed by humans and society itself in particular. In addition, the law is full of touches and an outpouring of values or construction of ideas by the makers and their users. Law contains ideas as a result of the minds of legislators, these ideas contain several aspects of certainty, justice, and social benefits. Because these ideas are still abstract, they must be realized into reality. The process of realizing these abstract ideas into reality is what law enforcement means.

This is indeed very relevant to a system of legal institutions in Indonesia which only prioritizes aspects of legal certainty and does not prioritize other aspects too much, therefore in a legal institution mandated by law in enforcing the law in Indonesia. Indonesia is less than optimal, and sometimes other problems arise outside of the legal route which are only fixated on the law because in enforcing the law it is only rigid without seeing the values that live in society and its sociological aspects.

In conveying an idea, it is also inseparable from what is expected and aspired by the community as a whole, the idea in making a legal framework also cannot conflict with the basis of the Indonesian state as set out in the ideological framework of the Indonesian state or the constitution of the state of Indonesia which is based on law.

⁸Muhamad Mahrus Setia Wijaksana, 2020, Criminal Law Reform Policy on the Concept of Restorative Justice in the Juvenile Criminal Justice System in Indonesia, Rechtsvinding Journal, Media for National Law Development.

Rechstaats), and not on mere power (Machtstaats). This also applies to law enforcement in Indonesia which must be based on the values of legal certainty, justice and benefit.

Justice is generally defined as a fair act or treatment. While fair is impartial, impartial and side with the right. Justice according to the study of philosophy is when two principles are fulfilled, namely: firstly, it does not harm a person and secondly, the treatment of every human being is what is their right. If these two can be met then it is said to be fair. In justice there must be a comparable certainty, which if combined from the combined results will be justice.

In practice, the meaning of modern justice in handling legal problems is still debatable. Many parties feel and consider that the judiciary has been unfair because it is too procedural, formalistic, rigid, and slow in giving a decision on a case. It seems that these factors cannot be separated from the judge's perspective on the law which is very rigid and normative-procedural in carrying out legal concretization. Ideally, judges must be able to become living interpreters who are able to capture the spirit of justice in society and are not shackled by the normative-procedural rigidity that exists in a statutory regulation, no longer just as *la bouche de la loi* (the mouthpiece of the law). Furthermore, in interpreting and realizing justice, Natural Law Theory since Socrates to Francois Geny still maintains justice as the crown of law. Natural Law Theory prioritizes "the search for justice".⁹There are various theories about justice and a just society. These theories concern rights and freedoms, opportunities for power, income and prosperity.

Investigation of children in the case of naughty children in the Police is carried out by Child Investigators, who are determined based on a Decree of the Head of the Indonesian National Police or an official appointed by him. Thus, the General Investigator cannot conduct an investigation into the case of a naughty child, except in certain cases, such as there is no child investigator in that place.

The investigative authority possessed by the Indonesian National Police in dealing with criminal acts committed by children is the initial process in a court process for children involved in criminal matters. This is because whether or not a child in conflict with the law can be processed in juvenile justice is very dependent on the results of the investigation conducted by the police by first asking for consideration or advice from the community advisor. If deemed necessary, investigators may also seek consideration or advice from education experts, mental health experts, religious experts, or other community officials. Meanwhile, for the interests of the child himself, the investigation process must be kept confidential.

In the process of assessing children and their cases, investigators collect information in a family atmosphere and in conducting investigations, investigators are obliged to immediately ask for consideration or advice from the community advisor within 1 x 12 hours and if necessary may ask for consideration or advice from educational experts, mental health experts, religious experts or other social workers.

⁹Theo Huijbers. 1995. *Philosophy of Law in Historical Trajectory*. Yogyakarta: Kanisius. p. 196.

Then the determination of the identity of the child as the perpetrator of the crime of theft is proven by a birth certificate/birth certificate or other valid certificates such as diplomas, report cards, family cards and certificates from RT, RW and so on.

The next process is that an agreement has been reached between the parties, namely the victim and the suspect, in this case represented by the families of the suspects, then the results of the agreement are signed by the investigator, community advisor, perpetrator, parent/guardian, victim/parent/guardian, community leaders, religious leaders and teachers, but in the event that no agreement is reached, the legal process will continue and investigators will immediately delegate the case file to the public prosecutor by attaching the results of the agreement.

Diversion is a mechanism that allows children to be diverted from the social service process, prioritized, because the involvement of children in the judicial process has actually undergone a stigmatization process. The application of this mechanism at all levels of examination will greatly reduce the negative impact of children's involvement in the judicial process. Child investigation is a starting point that affects a child's personality, he can be good or vice versa, therefore, it is necessary to have a special police unit that is trained in serving and handling children.

The National Police of the Republic of Indonesia considers the benefits of diversion to the community in early and fast handling of deviant behavior committed by children. This initial treatment also saves costs which are the burden incurred by the local police. Children as perpetrators of these crimes will be given instructions by the police, criminal advisors, officers from the justice department, and schools. Then the child voluntarily participates in appropriate consultation and/or education and social activities. If the person concerned is successful in this program, the prosecutor will not prosecute the case and will not record in the case file the act.¹⁰

The application of the diversion policy towards children as perpetrators of criminal acts based on the value of justice is that we must be able to realize justice as Pancasila justice. Pancasila has a flexible character or nature and is able to provide the demands of the times in following the globalization of changing times. In discussing justice issues that arise in society, Pancasila is able to provide answers to these problems. Pancasila is able to provide the values of justice as a legal reform in Indonesia. Legal reform in Indonesia is very much needed because there are still many new problems that cannot be reached by law. These problems should be resolved with one vision, mission, goals and perceptions of Pancasila in carrying out legal reform in Indonesia.

In the current reform era, Pancasila is seen as part of the past experience which is considered bad. As a political concept, Pancasila in the New Order era was once used as ideological legitimacy in justifying the New Order state with all its goals. This problem then made Pancasila forgotten. So it is very difficult to avoid if there is a discrediting of Pancasila today. Pancasila was also blamed and became the cause of the destruction and became the main basis for making mistakes by looking at the new order

¹⁰Dwi Hapsari Retnaningrum, *ibid.*, p. 59.

government. Many people are reluctant to talk about Pancasila and feel there is no need to talk about it. It could even be that people who speak Pancasila are considered to want to return to the past. But moving on from that, of course we have to look more specifically at the importance of Pancasila. The substance of Pancasila contains positive values that are able to provide change for this nation. These positive values are able to provide a foundation for the creation of justice for the Indonesian people. Relevance to justice, the value of justice contained in Pancasila can be the basic foundation for the formation of a just and civilized humane law and social justice for all Indonesian people.

Pancasila as the root of the legal ideals of the Indonesian nation has the consequence that in the dynamics of the life of the nation and state, as a view of life adopted will give direction to thoughts and actions. Legal ideals are ideas, intentions, inventions and thoughts regarding law or perceptions of the meaning of law, which in essence consists of three elements, namely justice, usability or benefits and legal certainty. The ideal of law is formed in the minds and hearts of humans as a product of the unification of life views, religious beliefs and social realities. In line with that, the science of law and Indonesian law should rely on and refer to the ideals of the law.¹¹

4. Closing

The conclusion in this study is that the diversion policy in handling criminal acts committed by children is through a family deliberation process where family deliberations are chosen in resolving cases of theft crimes committed by children. facilitated by a neutral party facilitator in order to obtain an agreement from both parties, in this case the police, prosecutors and courts act as neutral parties.

The suggestion in this study is that the Police can develop their investigation first so that suspects who have not been registered can be included in the process of applying diversion because in the application of diversion itself there is an element of educating the suspects, it is necessary to think about the follow-up to the application of diversion, so that suspects who are still category of children who do not repeat their actions and can return to the community, are not excluded because of their actions, and can return to learning in order to develop themselves to reach the future. The hope is that the new Criminal Code will become a law that can be a basic guideline for the direction of the purpose of punishing children, of course aiming at the best interests of children.

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