

Implementation of The Diversion Policy on Child as A Criminal Based On Justice Value

Nur Azizah^{*)} and Ira Alia Maerani^{**)}

^{*)} Central Java High Court, E-mail: azizah.ok3@gmail.com

^{**)} Faculty of Law Universitas Islam Sultan Agung (UNISSULA) Semarang

Abstract

The purpose of this study is to examine and analyze the application of diversion policies against children as perpetrators of crimes that have not been fair, the obstacles in implementing diversion policies against children as perpetrators of crimes and the application of diversion policies against children as perpetrators of crimes based on the value of justice in the future. This study uses a sociological juridical approach, with analytical descriptive research methods. 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 application of diversion in handling crimes committed by children at the Central Java Regional Police through a family deliberation process. The application has not been fair because all criminal cases of children have not all been carried out with diversion efforts. The obstacles encountered in the application of diversion in handling criminal acts by children at the Central Java Regional Police are: 1) Threats of criminal acts with sanctions of 7 years and over. 2) Problems Appear If Parents Are Community Leaders 3). The existence of intervention on the side of the victim. 4). Lack of Optimal Ability of Investigators in Implementing Diversion Policy. 5). There is no common ground and agreement between the victim and the perpetrator. The solutions to the obstacles faced are: 1) The threat of imprisonment is reviewed. 2). If parents, community leaders must be cooperative. 3). Need to eliminate intervention from any party. 4). Optimization of investigator capabilities. 5). Efforts to mediate between the victim and the perpetrator. The application of the diversion policy in the future is that diversion must consistently be carried out in child crimes.

Keywords: Policy; Diversion; Child.

1. Introduction

For modern countries like Indonesia, the desire to effectively guarantee the rights of citizens and regulate the orderly state administration has encouraged every country to adopt constitutionalism.¹Indonesia is a legal state that adheres to the principle of legality in its criminal justice system. The principle of legality is explained in Article 1 paragraph (1) of the Criminal Code which states that "An act cannot be punished, except based on the strength of the provisions of the existing criminal legislation." Before the comparison is made from the sound of the article, it is clear that the principle of legality applies to the criminal justice system in Indonesia, meaning that an act can only be punished if there are rules that regulate the act in advance.

¹Adhe I smail A, "Constitutionalism Concept in Implementation of Indonesian State Administration". *Jurnal Daulat Hukum Volume 4 Issue 2, June 2021* ISSN: 2614-560X.

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.² 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.³

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 police is a subsystem in the criminal justice system that is sufficient to determine the success and work of the entire system in providing services to the public.⁴ 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 security and public order, orderly and upholding the law, the implementation of protection, protection and service to the community and the establishment of public peace by upholding human rights.⁵

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 (feitelijkhandelingen).

Legal action is an action that causes 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,

²Ardito, Y P, Umar Ma'ruf and Aryani Witasari. "Implementation of Criminal Action Prosecution Online in Realizing Principle of Fast Prosecution, Simple & Low Cost", *Jurnal Daulat Hukum*, Volume 4 Issue 2, June 2021 ISSN: 2614-560X.

³Feri, S W, 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

⁴Nurfita A T, Sri Endah Wahyuningsih and Arpangi. "The Police Role in Investigating the Crime of Child Murder as a Result of Infidelity Relationships". *Law Development Journal* ISSN : 2747-2604 Volume 3 Issue 1, March 2021, (86 – 92).

⁵Kelik Pramudya, 2010, *Pedoman Etika Profesi Aparat Hukum*, Pustaka Yustisia, Jakarta, p. 52-53.

performances and others, while actions based on fact/real 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 officials⁶.

Actions taken by the police in dealing with cases committed by children include diversion, namely the idea of granting authority to law enforcement officers 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 diversion formulation can be carried out at all levels of examination, namely from 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 process⁷.

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 act⁸.

So far, (Das Solen) child offenders who commit crimes can be subject to criminal penalties. Although in principle it departs from criminal liability based on fault (Liability Based on Fault), but in certain cases the concept also provides the possibility of very strict liability (Strict Liability) in Article 37 of the Draft Criminal Code, and vicarious liability in Article 37 of the Criminal Code. 36 of the Draft Criminal Code paragraphs 1 – 3 which reads:

(1) "A person can only be held accountable if that person commits a criminal act intentionally or due to negligence." (2) "An act that can be punished is an act that is carried out intentionally, unless the laws and regulations explicitly specify that a criminal act committed by negligence can be punished." (3) A person can only be held accountable for certain consequences of a criminal act for which the criminal threat is aggravated by law, if he or she can reasonably suspect the possibility of such a consequence, at least there is negligence."

However, in practice (Das Sein) child offenders who commit criminal acts are more forwarded to diversion in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System Article 1 paragraph 6 which reads: "Restorative Justice is the settlement of criminal cases by involving the perpetrator, victim, family of the

⁶Sadjijono, 2010, *Memahami Hukum Kepolisian*, LaksBangPresindo, Yogyakarta, p. 140.

⁷Purniati, Mamik Sri Supatmi, dan Ni Made Martini Tinduk, tt, *Analisa Situasi Sistem Peradilan Anak (Juvenile Justice System) di Indonesia*, Departemen Kriminologi Universitas Indonesia & UNICEF, p. 4.

⁸Dwi Hapsari Retnaningrum, 2008, *Perlindungan Terhadap Anak Yang Melakukan Tindak Pidana (Kajian Tentang Penyelesaian Secara Non-Litigasi Dalam Perkara Tindak Pidana Anak di Kabupaten Banyumas, Purbalingga, Banjarnegara, Kebumen, dan Cilacap)*, Laporan Penelitian, FH UNSOED, Purwokerto, p. 59.

perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing recovery return to its original state, and not retaliation." If the perpetrator is a child under 18 years of age.

Seen from the broad social defense aspect that covers human, educational and justice values. Diversion has also included these values. Human values are manifested by treating ABH specifically, not only that in the Convention on the Rights of the Child (CRC) it is also emphasized that ABH are treated with due regard to values according to the dignity, human rights of children, and can help children in the reintegration process into society. The educational value in diversion can be seen from the involvement of children in the process of recovering to their original state for victims, meaning that children will learn to be responsible and improve their mistakes. The value of justice in diversion can be seen from the diversion process, with diversion it can be said that it is fair for the future of child perpetrators and fair for the recovery of victims' losses.

The juridical basis for the formation of diversion refers to Article 28 paragraph (2) of the 1945 Constitution, Act No. 39 of 1999 concerning Human Rights, Act No. 23 of 2002 concerning Child Protection 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.⁹

The purpose of this study is to analyze the application of diversion policies to children as perpetrators of crimes that have not been fair, to analyze the obstacles in implementing diversion policies to children as perpetrators of crimes, and to analyze the application of diversion policies to children as perpetrators of crimes based on the value of justice in the future which will come ?

2. Research Methods

The approach method used in this study uses a sociological juridical method, namely in addition to using legal principles and principles in reviewing, viewing, and analyzing problems, as they are,¹⁰ which in this case relates to the implementation of bank secrecy in the implementation of the diversion policy against children as perpetrators of criminal acts. The specifications in this study are analytical descriptive. Descriptive research is a research method that is intended to systematically and accurately describe the facts and characteristics of the research field.

Sources of data used in this study are primary, secondary, and tertiary data sources. Primary data sources are objects that are observed directly in the field and interviewed informants. Primary legal materials consist of: Law of the Republic of Indonesia Number 2 of 2002 concerning the State Police of the Republic of Indonesia. Tertiary legal materials consist of dictionaries, encyclopedias.

⁹ Interview with Kompol Purwanto, SH, Head of the Ditreskrim Polda Central Java, on 28 June 2021 at 10.00 WIB.

¹⁰ Soerjono Soekanto, 2010, *Pengantar Penelitian Hukum*, Universitas Indonesia Press, Jakarta, p. 10.

The data collection method used to obtain data that has a relationship with the object of research is interviews with resource persons and document review, while the data analysis method used is qualitative data analysis in this study including data reduction, data presentation and conclusions/verification.

3. Result and Discussion

3.1. The Implementation of Diversion Against Children as Unjust Criminal Actors

Children are not miniature adults who are mentally and mentally mature. They have not been able to make decisions for themselves, are responsible, are not aware of their roles, and control their minds, hearts and emotions in a balanced way. It is too heavy for a child to bear the responsibility of a fatal accident, while an adult thinks before acting, then feels.¹¹

A child by his nature still has reasoning power that is not yet good enough to distinguish between good and bad things. Criminal acts committed by children in general are a process of imitating or being influenced by persuasion from adults. The formal criminal justice system which ultimately places children in prison status certainly brings considerable consequences in terms of child growth and development. The process of punishment given to children through the formal criminal justice system by putting children in prison did not succeed in deterring children and becoming better individuals to support their growth and development process. Prison often makes children more professional in committing crimes¹².

Act No. 11 of 2012 concerning the Criminal Justice System for children is expected to bring progress to the protection of children. As Article 1 of Act No. 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 final measure, avoidance of retaliation.

The diversion approach is the spirit of Act No. 11 of 2012 to humanely resolve child legal cases. The approach is the settlement of criminal cases by involving the perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a just settlement emphasizing restoration to its original state, and not retaliation. Diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside of criminal justice. Or it can be said that the diversion principle emphasizes settlement outside the court, with a family approach and coaching, no longer with imprisonment or punishment. As the purpose of the diversion principle regulated in Article 6 of Act

¹¹ Interview with AKP Puji Hari Sugiyanto, SH, Officer of the Ditreskrim Unit of the Central Java Police, on 28 June 2021 at 11.00 WIB.

¹² M.Joni dan Zulchan Z. Tanamas, 1995. *Aspek Hukum Perlindungan Anak dalam Perspektif Konvensi Hak Anak*, Citra Aditya Bhakti, Bandung, p. 67

No. 11 of 2012 is to achieve peace between victims and children, resolve child cases outside the court.

3.2. Barriers to Implementing Diversion Policy Against Children as Criminal Actors

The obstacles faced in legal construction related to peace as a legal umbrella in the diversion policy at the level of investigation of juvenile crimes are:

- Threat of criminal offense with sanctions of 7 years and over
This is burdensome for children, because on the one hand, even though the child and the perpetrator's parents are responsible for the crime they have committed, they have the right to a future when they are children.
- Problems Appear If Parents Are Community Leaders
In managing cases of children who are in conflict with the law, if parents are community leaders, sometimes they feel prestige when asked for guarantees from parents, so that children will not run away, will not eliminate or damage evidence so that the process hinders the process of handling diversion in children. .
- There is an Intervention on the Victim's Party
The companion will only make the law "biased" if the victim's witness is still in doubt, but there is an assistant who sits beside him to 'strengthen' then the victim's witness can take the wrong policy! Isn't there a principle in the Criminal Code that we always hold on to, namely: "It is better to free the guilty, than to imprison the innocent?" The 'intervention' witness doubts. So that makes it difficult for the diversion process
- Lack of Optimal Ability of Investigators in Implementing Diversion Policy.
In this case, investigators have difficulty in handling diversion with suspected minors. Due to the lack of infrastructure that supports the implementation of child diversion, and these investigators may have just been transferred, they do not understand about diversion with child suspects
- There is no meeting point and agreement between the victim and the perpetrator
Like other agreements, diversion agreements can be subject to cancellation or null and void if the agreement violates the legal terms of the agreement (for example, if the victim does not agree with the diversion process). If the Diversion process does not result in an agreement, then the juvenile criminal justice process will continue.¹³

3.3. Implementing Diversion Policy Against Children as Perpetrators of Crime Based on Justice Values in the Future

Investigation of children in the case of naughty children at the Central Java Police is carried out by Child Investigators, who are determined based on the Decree of the Head of the Indonesian National Police or an official appointed by

¹³ Interview with Iptu Untung Setiyahadi, SH, MH, Officer of the Ditreskrimsus Unit of the Central Java Police, on June 29, 2021 at 10.00 WIB.

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 Central Java 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 can ask for consideration or advice from educational experts, mental health experts, religious experts or other social workers.

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 certificate 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, it 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 Central Java Regional Police consider the benefits of diversion to the community in early and fast handling of deviant behavior 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.¹⁴

4. Closing

The conclusion in this study is that the application of diversion in handling criminal acts committed by children at the Central Java Regional Police through a family deliberation process where this family deliberation is chosen in resolving cases of theft committed by children is intended to resolve children's cases through deliberation involving families the perpetrator and the victim's family, facilitated by a neutral party facilitator, in this case the Central Java Police acting as a neutral party and the Correctional Center (Bapas). The obstacles encountered in the application of diversion in handling criminal acts by children at the Central Java Regional Police are: a) Threats of criminal acts with sanctions of 7 years and over. b) Problems Appear If Parents Are Community Leaders. c) The existence of intervention on the part of the victim. d) Lack of Optimal Ability of Investigators in Implementing Diversion Policy. e). There is no common ground and agreement between the victim and the perpetrator. The solutions to the problems faced are: a). The threat of imprisonment is reviewed. b). If parents, community leaders must be cooperative. c). Need to eliminate intervention from any party. d). Optimization of investigator capabilities. e). Efforts to mediate between the victim and the perpetrator. The implementation of diversion 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, it can be good or vice versa, therefore, it is necessary to have a special police unit that is trained in serving and handling children.

In the case of criminal acts committed by children in this study, the Central Java Police can actually develop their investigations first so that suspects who have not been registered can be included in the diversion application process because in the application of diversion itself there is an element of educating the suspects. After the process of applying diversion to suspects of criminal acts involving children, it is necessary to think about the follow-up to the application of diversion, so that suspects who are still in the category of children do not repeat their actions and can return to the community, are not excluded because of their actions, and can back to learning so that they can develop themselves to reach the future.

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¹⁴ Dwi Hapsari Retnaningrum, *ibid.*, p. 59.

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Interview

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