

## The Efforts to Implement Diversion to Realize Restorative Justice for Children in Conflict with the Law in the Juvenile Criminal Justice System

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### Abstract.

*One form of legal protection for children is to realize the fulfillment of the rights and obligations of the child itself. Especially for children in conflict with the law, their problem solving process requires special attention. This study aims to analyze the application of diversion in restorative justice for children who are in conflict with the law in the juvenile criminal justice system. The type of research conducted is descriptive research with the type of normative legal research related to the application of diversion in restorative justice in the criminal justice system. The results showed that the application of diversion in restorative justice in the system of applying diversion to children in conflict with the law in the juvenile justice system, is the implementation of a system in restorative justice to provide justice and legal protection to children in conflict with the law without ignoring the child's criminal responsibility. Diversion is not a peaceful effort between children in conflict with the law and the victim or his family, but a form of punishment for children in conflict with the law in an informal way. The recommendation in this study is that law enforcement officers in carrying out their duties of investigating, prosecuting, examining and determining case decisions at court trials should prioritize the application of diversion as an alternative to the application of imprisonment. Massive socialization of diversion is needed to the community.*

*Keywords: Criminal; Diversion; Justice; Restorative.*

### 1. Introduction

Efforts that support the realization or implementation of rights and obligations are a form of child protection. The resolution of problems with children in conflict with the law still requires further study. The system of law enforcement against crimes committed by children can cause problems because the perpetrators of the crimes themselves are children who are not legally capable of the law. Children as national assets have a strategic role as the successor of a nation, for this reason the quality of children is greatly influenced by the process and form of treatment received by the child.

The development of the application of child criminal law in Indonesia, a number of children who commit crimes will still be processed legally. This is still done because the community has been harmed by the action, both materially and even life. However, because the perpetrator of the crime is a child, it can cause problems in its implementation. This is because law enforcement against children sometimes ignores the child's age limit<sup>1</sup>.

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<sup>1</sup>Bambang Purnomo, Gunarto, Amin Purnawan, Penegakkan Hukum Tindak Pidana Anak Sebagai Pelaku Dalam Sistem Peradilan Pidana Anak, Semarang: Fakultas Hukum UNISSULA. Jurnal Hukum Khaira Ummah, Vol, 13 No. 1 March 2018.

Indonesian children are assets as human beings who have the right to survival, the right to grow and develop, participate in and receive protection against human rights, protection from criminal acts and discrimination and civil rights for the freedom of the child. This is in accordance with the explanation of Act No. 35 of 2014 concerning amendments to Act No. 23 of 2002 concerning child protection which states that children are a mandate as well as a gift from God Almighty, which we must always protect because they have inherent dignity, dignity and rights as human beings that must be upheld.<sup>2</sup>

Indonesia currently faces cases of children reaching 33%<sup>3</sup>. Based on this, it requires the resolution of appropriate cases as regulated in the Law on the juvenile justice system which is contained in Act No. 11 of 2002 which states that the resolution of problems with children in conflict with the law uses the application of restorative justice through the diversion system. The substance of the law regulates various rights owned by children, including the right to life, the right to a name, the right to education, the right to think, the right to play, the right to be creative, the right to associate, the right to rest, the right to expression and the right to social security.

Various kinds of cases in children that occur around us, for example, cases of theft, fights, traffic violations, sexual harassment, drugs, and even cases that are quite widespread today are motorcycle gang associations. Based on Act No. 11 of 2002 which is the reference for the juvenile criminal justice system, the mechanism remains through the usual formal procedures, namely through the process of investigation and investigation by the police, the prosecution process by the prosecutor's office and finally the trial process by the court.

Based on the laws and regulations contained in Act No. 3 of 1997 concerning Juvenile Court, then Act No. 23 of 2002 concerning Child Protection and Act No. 39 which contains Human Rights, the Unitary State of the Republic of Indonesia legally provides form of protection for children in conflict with the law.

The negative view or stigma of society towards children in conflict with the law can also have a negative impact on the condition of the child. Therefore, children who are in conflict with the law have the right to obtain legal protection to maintain the dignity of the child.

*Restorative justice* is one approach that can be used as an effort or solution to handle criminal cases in children who are in conflict with the law, where its implementation uses efforts in the form of the application of Diversion.

Based on the background described above, the problem in this paper focuses on the study of how to apply diversion in restorative justice to children who are in conflict with the law in the juvenile criminal justice system.

## 2. Research Methods

The type of research conducted is descriptive research with the type of normative legal research related to the application of diversion in restorative justice

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<sup>2</sup>Article 1 of Act No. 35 of 2014 concerning Amendments to Act No. 23 of 2002 concerning Child Protection.

<sup>3</sup>Supardji Rasban, (2018), "Kasus Kekerasan Terhadap Anak di Indonesia Capai 33%," Media Indonesia, October, p.12

in the criminal justice system. Normative legal research is intended to examine and examine legal norms in Act No. 11 of 2012 and other related laws and regulations.

### 3. Result and Discussion

Everyone has the same position before the law, therefore the quality of child protection in conflict with the law should pay attention to a level that is at least equal to legal protection for adults.<sup>4</sup> Based on the opinion of Arif Gosita in Hambali (2018), child protection is an effort made to fulfill the rights and obligations of the child himself. These efforts are legal actions that have legal consequences, so that they can prevent the child from being treated arbitrarily by his parents.

Various criminal acts of child crime are caused by several intrinsic motivational factors and extrinsic motivational factors from the level of child delinquency itself<sup>5</sup>, that is:

- Intrinsic motivation.  
Included in this category are intelligence factors (a person's intelligence), age factors, sex factors, and the position of children in the family.
- Extrinsic Motivation.  
Included in this category are family factors, education and school factors, children's social factors and the influence of mass media.

The development of criminal law for children in Indonesia, there has been a change in perspective in the course of the philosophy of criminal justice for children, which at first was retributive justice (defending the law by establishing errors and regulating punishment), then turning into rehabilitation (recovery process) and in the end experiencing change to restorative justice. Restorative justice is a legal settlement process carried out outside the criminal justice system by involving victims, perpetrators, families of victims and perpetrators' families, the community, and all parties who have an interest in a criminal act to reach a legal settlement.<sup>6</sup>

In order to realize this restorative justice, it is necessary to implement diversion for children who are in conflict with the law in the criminal justice system for children. Diversion is an act of diverting the settlement of children's crimes from the criminal justice process to processes outside of criminal justice. The diversion approach in restorative justice as regulated in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System is a new breakthrough that is not known in the conventional criminal justice system.

It can be seen that the number of children in conflict with the law in 2011 amounted to 695 children, then in 2012 increased to 1,413 and in 2013 to 1,428 cases. This figure continues to increase to 2,208 cases in 2014, and until July 2015

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<sup>4</sup>Syamsu Haling, Paisal Halim, Syamsiah Badruddin, & Hardianto Djanggih, "Perlindungan Hak Asasi Anak Jalanan Dalam Bidang Pendidikan Menurut Hukum Nasional Dan Konvensi Internasional". *Jurnal Hukum & Pembangunan*, Vol.48, No.2, April-June 2018, p. 362-363.

<sup>5</sup>I Dewa Putu Gede Anom Danujaya, *Formulasi Model Sistem Pemidanaan Anak Di Indonesia*, *Jurnal Daulat Hukum UISSULA Semarang* : Volume 1 Issue 1, March 2018. ISSN : 2614-560X.

<sup>6</sup>Aryani Witasari, *Implementasi Diversi Guna Mewujudkan Restorative Justice Dalam Sistem Peradilan Pidana Anak*, *Jurnal Hukum Unissula, Semarang* : Vol. 35 No. 2, 2019

cases of children in conflict with the law amounted to 403<sup>7</sup>. Then based on data from the Indonesian Child Protection Commission (KPAI) it was noted that cases of child complaints increased during the corona pandemic. The number rose 8.3% from 4,369 cases in 2019 to 4,734 cases from January to August 2020<sup>8</sup>.

Efforts to implement diversion are carried out, aimed at avoiding and distancing children from the formal judicial process so that they can avoid negative stigma against children who are in conflict with the law and it is hoped that children can return to the social environment properly. Therefore, the participation of all parties in order to realize this is very necessary. The process must aim to achieve restorative justice, both for the perpetrator (child) and for the victim. Diversion efforts in realizing restorative justice are a process that all parties involved in a particular criminal act together solve problems and create an obligation to make things better by involving victims and perpetrators.

The application of diversion is motivated by the desire to avoid the negative effects on children's mental conditions and child development caused by the juvenile criminal justice system<sup>9</sup>. With the implementation of diversion, children's human rights are guaranteed and prevent children from dealing with the law from the views of the surrounding community regarding their status as naughty children. Persuasive action is the main principle in efforts to implement diversion by giving someone the opportunity to correct their mistakes. With this effort, it is hoped that there will be no more torture, coercion or acts of violence against children. This is the main purpose of implementing diversion. With the application of diversion, the law can be enforced without committing acts of violence and pain by giving an opportunity for someone to correct his mistakes without going through criminal penalties by a state that has full authority.

According to Wahyudi (2011), the application of diversion to children has several main objectives, namely:

- Avoiding children from detention;
- Avoiding the stigma of children as criminals;
- Preventing repetition of crimes committed by children;
- Perform the necessary intervention against the victim without going through a lengthy legal process.

There are several conditions so that efforts to implement diversion can realize restorative justice<sup>10</sup>, including:

- Provide motivation for children to learn to be responsible for mistakes made;

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<sup>7</sup>Anonim, Kasus Anak Berhadapan Hukum Kian Banyak, Ini Kata Mendikbud <http://www.solopos.com/2016/01/25/perlindungananak-kasus-anak-berhadapan-hukum-kianbanyak-ini-kata-mendikbud-684467> accessed on 2 September 2021

<sup>8</sup>Dwi Hadya Jayani. Kasus Pengaduan Anak Indonesia. <https://databoks.katadata.co.id/datapublish/2021/04/09/kasus-pengaduan-anak-naik-83-saat-pandemi-corona>. accessed on September 9, 2021.

<sup>9</sup>Rr. Putri A. Priamsari, "Mencari Hukum Yang Berkeadilan Bagi Anak Melalui Diversi", Jurnal Law Reform, Vol.14, No.2, 2018, p.228

<sup>10</sup>Fiska Ananda, Penerapan Diversi sebagai Upaya Perindungan Hukum Terhadap Anak Pelaku Tindak Pidana, Semarang : Fakultas Hukum UNISULLA, Journal Daulat Hukum :Vol. 1. No.1 March 2018. ISSN : 2614-560X.

- Provide opportunities for children to do good which aims to replace the mistakes that have been made;
- Provide opportunities for victims to participate in the process;
- Provide motivation and opportunities for children to maintain good relations with their immediate family;
- Provide opportunities for the community for losses obtained by criminal acts committed by children.

Efforts to implement diversion in realizing restorative justice according to Peter C. Kratcoski in Hengky Kurniawan there are three types of concepts for implementing the implementation of diversion programs, namely:

- The implementation of social control (social control orientation), namely legal experts hand over the perpetrators in the responsibility of observing the community, with obedience to the approval or warning given. The perpetrator accepts responsibility for his actions and is not expected by the community to give the perpetrator a second chance.
- Social services by the community to actors (social service orientation), namely carrying out functions to supervise, interfere, improve and provide services to perpetrators and their families. The community can interfere with the perpetrator's family to provide repairs or services.
- Towards a process of restorative justice or negotiation (blanced or restorative justice orientation), namely protecting the community, giving the opportunity for the perpetrator to be directly responsible to the victim and the community by making a mutual agreement between the victim, the perpetrator and the community.

The criminal settlement through the application of diversion aims to make the child (the perpetrator) aware that the criminal act committed is a wrong action and can harm others. Thus, if the implementation of diversion is successfully agreed upon by all relevant parties, especially the victim at the level of investigation by the police, the child as the perpetrator will immediately obtain the restoration of his rights. On the other hand, if the diversion attempt has not been successful, it will be continued at the level of investigation by the Prosecutor's Office, and if the diversion is still not successful, it will be forwarded to the court. Implementation of diversion in the Police for a maximum of 30 (thirty) days (Article 29 Paragraph (2) of the Juvenile Criminal Justice System Law),

In the application or implementation of diversion in Indonesia, legal experts have several requirements that are used as a reference in its implementation which are contained in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System article (8), including:

- The diversion stage is carried out through a deliberation process involving children and their parents, community leaders, and related parties based on a restorative justice approach.
- If necessary, this stage of deliberation can involve social welfare workers and/or the community.
- The implementation of diversion efforts must pay attention to the following:
  - Prioritize victims.
  - Welfare and responsibility of children (perpetrators).

- Doing away from negative stigma.
- Doing away from retaliation.
- Pay attention to social harmony.
- Propriety, decency and public order.

The application of diversion based on article 9 contained in Act No. 11 of 2012 concerning the juvenile criminal system also contains several provisions or conditions related to its implementation, namely:

- Investigators, public prosecutors and judges when implementing diversion must pay attention to:
  - Type of crime.
  - Child's age.
  - The results of research analysis from the Fathers.
  - Get support from the family and community.
- The diversion agreement must obtain approval from the victim and or the victim's child's family as well as the willingness of the child and his family, unless there are several things such as:
  - The crime is in the form of a violation.
  - Minor crime.
  - Crime without victims.
  - The victim's loss has a value of no more than the minimum wage for the local area.

Efforts to apply diversion can be carried out if the crime that occurs involves a child as the perpetrator, if it fulfills the following considerations:

- Pay attention to the type of crime.
- Pay attention to the age of the perpetrator.
- Paying attention to the results of research from the Fathers.
- Criteria for losses incurred.
- The level of public anxiety related to crimes committed by children.
- There is consent of the victim/family.
- The willingness of the perpetrator and his family.
- If the child commits a crime together with an adult, then the adult must receive a legal process in accordance with the procedure.

The application of diversion can be pursued for the realization of restorative justice, both for children and for victims. Restorative justice is for the diversion process, where all parties involved in a particular crime jointly solve problems and create an obligation to make things better by involving victims, children, and the community in finding solutions to repair, reconciliation, and reassure the heart that is not based on revenge<sup>11</sup>.

In the juvenile criminal justice system, efforts to implement diversion have several advantages or advantages, namely:

- There is no need to detain children.
- Get rid of negative stigma against children.
- It is an opportunity for children to improve their lives for the better.

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<sup>11</sup>Anita Indah Setyaningrum dan Umar Ma'ruf, Diversi sebagai Bentuk Penyelesaian Perkara Pidana Anak Melalui Pendekatan *Restorative Justice* Oleh Penyidik Polda Jawa Tengah, Jurnal Hukum Khaira Ummah, Fakultas Hukum Unissula Semarang, Volume 12. No. 4. December 2017

- Provide opportunities for children to learn responsibility.
- I hope this crime is not repeated.
- Keep the child away from following a lengthy judicial process, which can have a negative effect on the child.

In essence, the juvenile criminal justice system, which involves children as perpetrators and who is in conflict with the law, must pay attention to the best interests of the child without harming and depriving the child of human rights and the most important thing is to keep the child away from the negative perspective of society and the surrounding environment towards the child.

#### 4. Conclusion

Efforts to implement diversion to realize restorative justice for children who are in conflict with the law in the juvenile justice system are the implementation of a system in restorative justice to provide justice and legal protection to children who are in conflict with the law without ignoring the child's criminal responsibility. Diversion is not a peaceful effort between children in conflict with the law and victims or their families, but a form of punishment for children in conflict with the law in an informal way. The application of diversion in restorative justice in the Juvenile Criminal Justice System is the transfer of the settlement of children's cases from the criminal justice process to a process outside of a fair criminal justice with an emphasis on restoring back to its original state, and not retaliation. In addition, diversion is a form of punishment that has aspects of education for children.

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