

The Diversion as a Form of Child Criminal Settlement through Restorative Justice Approach

Iman Hendro Santoso^{*)}, Siti Rodhiyah Dwi Istinah^{**)} and Peni Rinda Listyawati^{***)}

^{*)} Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, E-mail: faithhendro1@gmail.com

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

Abstract.

The aims of this study are as follows: To find out and analyze the handling of children's cases through Restorative justice by investigators from the Criminal and Investigation Unit. To find out and analyze the obstacles that arise in the implementation of Restorative justice by the Criminal Investigation Unit investigators and their solutions. The method used by the researcher is sociological approach to law and the specifications in this study are descriptive analytical. The sources and types of data in this study are secondary data obtained from library studies. Based on the results of the study that handling of Child Cases through Restorative Justice by Investigators of the Criminal Investigation Unit still has many pros and cons. For investigators, it is not easy to solve the crime of persecution with the principle of restorative justice because there must be an agreement between the victim's family and the perpetrator. The role of the police in this study will be associated with the increasing number of crimes committed by children. The essence of the police in following up on the occurrence of criminal acts of abuse committed by children is very important, especially in providing protection to the community, especially children. Barriers: there is still a lack of human resources for law enforcement officials, both in terms of quantity and quality. Supporting facilities and infrastructure are still very minimal, due to budget constraints. There is still a lack of socialization to the community, causing public perceptions to be still not uniform regarding the application of restorative justice in the settlement of crimes committed by children. The solution is: increasing the quantity and quality of law enforcement officers. Addition of facilities and infrastructure that support the implementation of legal protection for children.

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

1. Introduction

Children are the nation's assets, as part of the younger generation, children play a very strategic role as the successors of a nation. In the context of Indonesia, children are the successors to the ideals of the nation's struggle. This strategic role has been realized by the international community to give birth to a convention which essentially emphasizes the position of children as human beings who must receive protection for their rights.¹

The development of law in Indonesia itself is very dynamic and always changes following the development of society, legal developments, especially in the development of criminal (material) and criminal procedural law (formal) outside the territory of the Indonesian Criminal Code (Criminal Law Book) and the

¹Ruben Achmad, 2005, *Upaya Penyelesaian Masalah Anak yang Berkonflik dengan Hukum di Kota Palembang*, Jurnal Simbur Cahaya, Nomor 27, X, Jakarta, p. 24

Criminal Procedure Code (Criminal Law Book). Indonesian Criminal Procedure Code) which is currently in force. This is because the basic rules of the Criminal Procedure Code (material) of the Criminal Code and the Criminal Procedure Code (formal) from the Criminal Procedure Code which are old legal products that have not been updated or revised, only the revision / review of the articles in the two laws and regulations does not replace / revise the entire Criminal Code or KUHP.²

Protection of children in the criminal justice system is closely related/cannot be separated from justice, because in juvenile criminal justice, in addition to the laws and regulations that form the legal basis, it must be fair and in favor of children's rights, it must also be supported by a sense of justice by law enforcers, especially In the context of implementing the sanctions system for children, the judge is the most decisive, because he is the one who examines, tries, and finally decides what type of sanctions are applied to children who are proven to have committed crimes. If justice is related to child protection, then justice is reflected in good child protection reflecting justice, whose implementation protects children's rights.

Children as perpetrators of criminal acts are called delinquent children or in criminal law it is said to be juvenile delinquency. Romli Atmasasmita argues that Juvenile Delinquency is any act or behavior of a child under the age of 18 and unmarried which is a violation of applicable legal norms and can endanger the child's personal development.³For this reason, in dealing with and overcoming these various problems, it is necessary to consider the position of children with all the characteristics and characteristics that are unique as perpetrators of criminal acts. Not seeing whether the act was based on his thoughts, feelings and will, but must also look at various things that can influence the child to commit a crime. So it takes the role of parents and the surrounding community.

In dealing with children as perpetrators of criminal acts, the police must always pay attention to the conditions of children who are different from adults. The nature of children as individuals who are still unstable, the future of children as national assets, and the position of children in society who still need protection can be used as the basis for finding an alternative solution how to prevent children from a formal criminal justice system, placing children in prison, and stigmatization. of the child's position as a prisoner.

Restorative justice is a fair settlement that involves the perpetrators, victims, their families and other parties involved in a crime, jointly seeking a solution to the crime and its implications, emphasizing recovery and not retaliation. Restorative justice is an effort to support and implement the provisions as regulated in Article 16 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection which states that "Arrest or detention or imprisonment of children is only carried out if in accordance with the law. and can only be done as a last resort".

²Moch. Isa Nazarudin, Umar Ma'ruf, *Comparison Of The Implementation Of Pre-Court Process Before And After The Constitutional Court Decision Number: 21 / PUU-XII / 2014 In The Batang*, Jurnal Daulat Hukum Volume 3 Issue 1, March 2020 ISSN: 2614-560X State Court

³Romli Atmasasmita, (1993), *Problema Kenakalan Anak-Anak Remaja*, Armico, Bandung, p. 40

The police as the front line in law enforcement have a considerable responsibility to synergize the duties and authorities of the Police as regulated in Law no. 2 of 2002 concerning the Indonesian National Police, namely that the Indonesian National Police has the following duties:⁴a. Maintaining Community Security and Order. b. Enforce the Law c. Providing Protection, Guidance, and Community Services.

2. Research Methods

In this study, the author uses a research approach with socio-legal research (socio-legal research). In which the author looks at the applicable legal norms, then relates them to the facts in the field. How the law should be enforced but the reality is different from the purpose of the law itself. Therefore, in this study the authors also use primary data and secondary data.⁵ The nature of the research used is descriptive analysis. According to Whitney, the descriptive method is a fact-finding with the right interpretation.⁶ The purpose of descriptive research is to accurately describe the nature of an individual, a symptom, a situation or a particular group. The sources and types of data in this study are secondary data obtained from library studies

3. Result and Discussion

3.1. Handling Child Cases through Restorative Justice

The concept of a restorative justice approach is an approach that focuses more on the conditions for creating justice and balance for the perpetrators of crimes and the victims themselves.⁷ Procedures and criminal justice mechanisms that focus on punishment are transformed into a process of dialogue and mediation to create an agreement on a more just and balanced settlement of criminal cases for the victims and perpetrators. Restoration includes restoring the relationship between the victim and the perpetrator. Restoration of this relationship can be based on a mutual agreement between the victim and the perpetrator.⁸ The victim can convey about the loss suffered and the perpetrator is also given the opportunity to make up for it, through compensation mechanisms, peace, social work, or other agreements.⁹

Efforts to solve problems outside the court carried out by criminals (his family) and victims of criminal acts (his family) are later expected to be the basis for consideration in the process of examining criminals in court in imposing criminal sanctions by judges/assessments of judges. Justice is a consideration in

⁴Act No. 2 of 2002 concerning the Indonesian National Police. Article 13

⁵Amiruddin and Zainal Asikin, (2014), *Pengantar Metode Penelitian Hukum*, RajaGrafindo Persada, Jakarta, p.133

⁶Soejono and Abdurahman, (1999), *Metode Penelitian*, Rieneka Citra, Jakarta, p. 21

⁷Kristin Reimer. 2011, *An Exploration Of The Implementation Of Restorative Justice In An Ontario Public School*. *Canadian Journal of Educational Administration and Policy*, Issue #119, March 11, by CJEAP and the author(s), p. 4

⁸UNODC, (2006), *Handbook on Restorative Justice Programmes. Criminal Justice Handbook Series*, Vienna: UN New York, p. 5

⁹Kristin Reimer, Op.cit, p. 6

the criminal law implementation system and is included in the new Criminal Law Legislation (KUHP), especially for complaint criminal offenses (Klacht delict) so that it focuses on the conditions for creating justice and balancing legal treatment for perpetrators of criminal acts and victims of criminal acts. can be achieved properly, without having to always use criminal sanctions (imprisonment) in the final settlement. Due to the deterrent effect as the ultimate goal of sentencing (imprisonment) the perpetrators of criminal acts are no longer achieving their targets as expected. There needs to be a breakthrough in the implementation of the criminal system in Indonesia, not only through imprisonment but also through the application of restorative justice.¹⁰

The ultimate goal of this restorative justice concept is to eliminate stigma and return criminals to normal human beings, criminals can realize their mistakes, so they don't repeat their actions, do not cause revenge because the perpetrator has been forgiven by the victim, victims get compensation quickly, empower the community in overcoming crime. and, reintegration of criminals into society.¹¹

The idea of a certain object or phenomenon that is fundamental, which is used as a benchmark or point of view. The basic idea is a world view (weltblit) that is believed and determines the perspective on a phenomenon. It functions as the central cognitive resource that determines the rationality of a phenomenon, both about what is the subject matter and how to see and explain the phenomenon. As a basic idea, the basic idea is more like the mind, namely the basic idea about something. For example, legal ideals or rechtsidee, are thought constructions (ideas) that direct the law to the desired ideals. As Rudolf Stamler said, legal ideals are leitstern (guiding stars) for the achievement of the ideals of society.¹² Therefore, legal ideals will influence and function as a general guiding principle, critical norms (evaluation rules) and motivating factors in the administration of law (formation, discovery, application of law) and legal behavior. Thus, the formulation and understanding of legal ideals will facilitate their translation into various sets of authority rules and rules of behavior and facilitate the maintenance of consistency in the administration of the law.¹³ Thus, a basic idea is always constitutive, meaning that it is the basic idea that determines the problems, methods, and explanations that are considered relevant to be studied, or follow Gustav Radbruch's line of thought regarding rechtsidee which according to him serves as a constitutive basis for positive law.

The Juvenile Justice System is all elements of the criminal justice system involved in handling cases of juvenile delinquency. First, the police as a formal institution when juvenile delinquents first come into contact with the justice

¹⁰Annis Nurwianti, Gunarto, Sri Endah Wahyuningsih, *Implementasi Restoratif / Restorative Justice Dalam Penyelesaian Tindak Pidana Kecelakaan Lalu Lintas Yang Dilakukan Oleh Anak Di Polres Rembang* Jurnal Hukum Khaira Ummah Vol. 12. No. 4 December 2017

¹¹Ibnu Suka, Gunarto, Umar Ma'ruf, *Peran Dan Tanggung Jawab Polri Sebagai Penegak Hukum Dalam Melaksanakan Restorative Justice Untuk Keadilan Dan Kemanfaatan Masyarakat*, Jurnal Hukum Khaira Ummah Vol. 13. No. 1 March 2018

¹²A Hamid S Attamimi, (1990), *Perananan Keputusan Presiden RI Dalam Penyelenggaraan Pemerintah Negara*, Fakultas Pascasarjana Universitas Indonesia, Jakarta, p. 308

¹³Bernard Arief Sidharta, (1999), *Refleksi Tentang Struktur Ilmu Hukum*, Mandar Maju, Bandung, p. 181

system, which will also determine whether the child will be released or further processed. Second, prosecutors and parole agencies will also determine whether the child will be released or processed in juvenile court. Third, the Juvenile Court, the stage when the child will be placed in choices, starting from being released to being included in a sentencing institution. Finally, the institution of punishment.¹⁴

The police institution is the first state institution to intervene against children in conflict with the law. Arrest, detention, investigation, and investigation are the authority of the police to enforce the juvenile criminal justice system. In carrying out their duties, the police are given discretionary power. Discretionary authority is a legal authority where the police have the right to continue or not to continue a case. Based on this authority, the police can divert (diversion) a child's case so that the child does not have to deal with a formal criminal court settlement.

The behavior and attitude of a child reflects the attitude of the parents. The success of parents in educating the good impact will also be felt by the child. However, if parents do not succeed in educating their children, the children will do negative things that they should not do.¹⁵

The concept of restorative justice is the settlement of criminal acts that provide protection for children involving the consent of victims, perpetrators, the community. The concept of restorative justice is an alternative form of settlement of criminal acts that are directed to an informal settlement by involving all parties involved in the crime that occurred.

Whereas another area of concern is where the victim or the complainant wants the goods or the loss suffered by the violator to be returned or reported to have occurred, making the victim or the complainant consider the case to be over. It is different from the process or stages in the investigation where the police do not remove the compensation for the crime. Therefore, the application of Restorative justice in the investigation process is very necessary in accelerating the resolution of problems / disputes and the most important thing is achieving justice for the plaintiffs / disputes.¹⁶

There are three basic principles that make up restorative justice, namely:

- Remedy for those who have suffered losses due to crime;
- Perpetrators have the opportunity to be involved in the restoration of the state; and
- Courts act to maintain public order and society acts to keep peace fair.

From these three basic principles, it is known that restorative justice will provide feedback for perpetrators, victims and the people involved in it. In restorative justice also allows imprisonment if the sanctions are the demands of the victims

¹⁴Purnianti, Mamik Sri Supatmi, and Ni Made Martini Tinduk, mengutip Harry E. Allen and Clifford E. Simonsen, (2003), in *Correction in America : An Introduction, Analisa Situasi Sistem Peradilan Pidana Anak (Juvenile Justice System) di Indonesia*, UNICEF, Indonesia, p. 2

¹⁵ Saragih, B.L Ediwarman & Zul. M, 201, *Disparitas Penuntutan Pada Perkara Tindak Pidana Penganiayaan Dalam Sistem Pemidanaan di Indonesia*. *ARBITER: Jurnal Ilmiah Magister Hukum*, 1(1) 2019: 66-78.

¹⁶Ragil Tri Wibowo and Akhmad Khisni, *Restorative Justice in Application for Crime Investigation on Property*, *Jurnal Daulat Hukum Volume 1 No. 2 June 2018 ISSN: 2614-560X* [10.30659/jdh.1.2.565 - 570](https://doi.org/10.30659/jdh.1.2.565-570)

and it is true that by carrying out these sanctions the perpetrators are considered to be accountable for their actions.¹⁷

Settlement with the principle of restorative justice in criminal acts of abuse committed by children on the grounds of unsuccessful diversion efforts, therefore restorative justice is sought. Although in Law no. 35 of 2014 amendments to Law no. 23 of 2002 concerning child protection, explains that persecution carries a maximum penalty of fifteen years, but investigators still apply the principle of restorative justice on the grounds of children's future and children's rights.

The purpose of criminal persecution can be diverted based on the principle of restorative justice on the grounds of protecting the rights of children as victims and the rights of children as perpetrators. Settlement with the principle of restorative justice in the justice system is only carried out at the investigation stage. In the process of investigating children, investigators are required to examine child suspects in a family atmosphere. Investigators as law enforcers have a social position. The social position in the community owned by the investigator is the rights and obligations of the investigator.

The length of the judicial process that is carried out by children who are perpetrators of criminal acts, from the investigation process in the police until the completion of their sentence in a correctional institution is a picture of the sadness of a child. Incidents during the judicial process will be a separate experience for a child's life that is difficult to forget.

Restorative justice and diversion decisions must obtain the consent of the victim and his family as well as the willingness of the child and his family, except for a crime in the form of a violation, a minor crime, a crime without a victim, or the value of the victim's loss is not more than the local provincial minimum wage.¹⁸

The Handling of Child Cases Through Restorative Justice by the Criminal Investigation Unit of the Cirebon City Police still has many pros and cons. For investigators, it is not easy to solve the crime of persecution with the principle of restorative justice because there must be an agreement between the victim's family and the perpetrator. The role of the police in this study will be associated with the increasing number of crimes committed by children. The essence of the police in following up on the occurrence of criminal acts of abuse committed by children is very important, especially in providing protection to the community, especially children.

3.2. Barriers that arise in the implementation of restorative justice and their solutions

Such actions may include summoning and examining witnesses, confiscation of evidence, searching, summoning and examining suspects, making arrests, making detentions, and so on. Meanwhile, according to Article 1 point 1 of the Criminal Procedure Code, investigators are Indonesian State Police Officers or certain Civil Service Officers who are given special authority by law to carry out investigations. Investigations carried out by Indonesian state police officials aim to

¹⁷Yudi Hendaro and Umar Ma'ruf, *Diversion In Children Criminal Justice System Through Restorative Justice*, Jurnal Daulat Hukum Volume 1 Issue 2, June 2018 ISSN: 2614-560X

¹⁸ Utomo, W.H. (2005). *Hukum Kepolisian di Indonesia*, Prestasi Pustaka, Jakarta. p.170

collect evidence to find out whether an event that occurred is a criminal event, with investigations also aimed at finding the perpetrators. After the investigation, the next stage is an investigation. Criminal case investigations are carried out by the police in accordance with the Criminal Procedure Code and Law No. 3 of 1997 concerning Juvenile Court.¹⁹

Basically it is an effort to divert from the criminal justice process to a deliberation settlement which is basically the soul of the Indonesian nation to resolve problems in a familial way to reach consensus. This is in accordance with the sound of the 4th precept of Pancasila which reads "People led by wisdom in deliberation/representation" the essence of the meaning of the 4th precept of Pancasila above in relation to what is adopted in the context of resolving criminal cases committed by children. In a criminal case process there are several problems that become an obstacle for investigators to improve professionalism in conducting investigations.

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

The concept of Restorative Justice is a new paradigm in criminal law enforcement even though the concept has long been developed and practiced in the settlement of criminal cases in several countries that adhere to the common law system. Because the concept is relatively new, it is not surprising that efforts to apply the concept in the practice of criminal law enforcement in Indonesia, especially by the Mamasa Resort Police, have encountered many obstacles.

The Obstacles That Arise In the Implementation of Restorative Justice by the Investigator of the Criminal Investigation Unit of the Cirebon City Police, namely: there is still a lack of human resources for law enforcement officials, both in terms of quantity and quality. Supporting facilities and infrastructure are still very minimal, due to budget constraints. There is still a lack of socialization to the community, causing public perceptions to be still not uniform regarding the application of restorative justice in the settlement of crimes committed by children.

Efforts to overcome the obstacles that arise in the implementation of Restorative justice by the Investigators of the Criminal Investigation Unit of the Cirebon City Police, namely: increasing the quantity and quality of law enforcement officers. Addition of facilities and infrastructure that support the implementation of legal protection for children.

4. Conclusion

Handling of Child Cases through Restorative Justice by Investigators of the Criminal Investigation Unit still has many pros and cons. For investigators, it is not easy to solve the crime of persecution with the principle of restorative justice

¹⁹Marlina, (2009), *Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, Refika Aditama, Bandung, p.85

because there must be an agreement between the victim's family and the perpetrator. The role of the police in this study will be associated with the increasing number of crimes committed by children. The essence of the police in following up on the occurrence of criminal acts of abuse committed by children is very important, especially in providing protection to the community, especially children. Barriers: there is still a lack of human resources for law enforcement officials, both in terms of quantity and quality. Supporting facilities and infrastructure are still very minimal, due to budget constraints. There is still a lack of socialization to the community, causing public perceptions to be still not uniform regarding the application of restorative justice in the settlement of crimes committed by children. The solution is: increasing the quantity and quality of law enforcement officers. Addition of facilities and infrastructure that support the implementation of legal protection for children.

5. References

Journals:

- [1] Annis Nurwianti, Gunarto, Sri Endah Wahyuningsih, *Implementasi Restoratif / Restorative Justice Dalam Penyelesaian Tindak Pidana Kecelakaan Lalu Lintas Yang Dilakukan Oleh Anak Di Polres Rembang* Jurnal Hukum Khaira Ummah Vol. 12. No. 4 December 2017
- [2] Ibnu Suka, Gunarto, Umar Ma'ruf, *Peran Dan Tanggung Jawab Polri Sebagai Penegak Hukum Dalam Melaksanakan Restorative Justice Untuk Keadilan Dan Kemanfaatan Masyarakat*, Jurnal Hukum Khaira Ummah Vol. 13. No. 1 March 2018
- [3] Kristin Reimer. 2011, *An Exploration Of The Implementation Of Restorative Justice In An Ontario Public School*. *Canadian Journal of Educational Administration and Policy*, Issue #119, March 11, by CJEAP and the author(s), p. 4
- [4] Moch. Isa Nazarudin, Umar Ma'ruf, *Comparison of The Implementation Of Pre-Court Process Before And After The Constitutional Court Decision Number: 21 / PUU-XII / 2014 In The Batang*, Jurnal Daulat Hukum Volume 3 Issue 1, March 2020 ISSN: 2614-560X State Court
- [5] Ragil Tri Wibowo and Akhmad Khisni, *Restorative Justice in Application for Crime Investigation on Property*, *Jurnal Daulat Hukum Volume 1 No. 2 June 2018* ISSN: 2614-560X [10.30659/jdh.1.2.565 - 570](https://doi.org/10.30659/jdh.1.2.565-570)
- [6] Ruben Achmad, 2005, *Upaya Penyelesaian Masalah Anak yang Berkonflik dengan Hukum di Kota Palembang*, Jurnal Simbur Cahaya, Nomor 27, X, Jakarta
- [7] Saragih, B.L Ediwarman & Zul. M, 201, *Disparitas Penuntutan Pada Perkara Tindak Pidana Penganiayaan Dalam Sistem Pemidanaan di Indonesia*. *ARBITER: Jurnal Ilmiah Magister Hukum*, 1(1) 2019: 66-78.
- [8] Yudi Hendarto and Umar Ma'ruf, *Diversion In Children Criminal Justice System Through Restorative Justice*, Jurnal Daulat Hukum Volume 1 Issue 2, June 2018 ISSN: 2614-560X

Books:

- [1] A Hamid S Attamimi, (1990), *Perananan Keputusan Presiden RI Dalam Penyelenggaraan Pemerintah Negara*, Fakultas Pascasarjana Universitas Indonesia, Jakarta
- [2] Amiruddin and Zainal Asikin, (2014), *Pengantar Metode Penelitian Hukum*, RajaGrafindo Persada, Jakarta
- [3] Bernard Arief Sidharta, (1999), *Refleksi Tentang Struktur Ilmu Hukum*, Mandar Maju, Bandung
- [4] Marlina, (2009), *Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, Refika Aditama, Bandung
- [5] Purnianti, Mamik Sri Supatmi, and Ni Made Martini Tinduk, mengutip Harry E. Allen and Clifford E. Simonsen, (2003), in *Correction in America : An Introduction, Analisa Situasi Sistem Peradilan Pidana Anak (Juvenile Justice System) di Indonesia*, UNICEF, Indonesia
- [6] Romli Atmasasmita, (1993), *Problema Kenakalan Anak-Anak Remaja*, Armico, Bandung
- [7] Soejono and Abdurahman, (1999), *Metode Penelitian*, Rieneka Citra, Jakarta
- [8] UNODC, (2006), *Handbook on Restorative Justice Programmes. Criminal Justice Handbook Series*, Vienna: UN New York
- [9] Utomo, W.H. (2005). *Hukum Kepolisian di Indonesia*, Prestasi Pustaka, Jakarta.