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Diversion Against Crime by Children Confronting the Law to Achieve Restorative Justice

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Abstract

The purpose of this writing is to try to find out the existence of law enforcement regarding diversion in the handling of cases committed by children in the Juvenile Justice System Law and to see the effectiveness of implementing the diversion policy in handling cases of criminal acts committed by children. The research was carried out in a normative juridical manner, with a statute approach and a conceptual approach using descriptive qualitative analysis. The results of this paper show that law enforcement regarding cases involving children with a diversion policy is rigidly regulated in Law, namely Law Number 11 of 2012 concerning the Juvenile Justice System, as well as related regulations such as Law Number 23 of 2002 concerning Child Protection, and Law -Law Number 13 of 2006 concerning Protection of Witnesses and Victims. In addition to law regulations there are implementing regulations such as Government Regulation Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Not Aged 12 (Twelve) Years



Old and Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System. In addition, the effectiveness of law enforcement does not run effectively in practice, this shows that the diversion policy to realize restorative justice is not being implemented properly, the linkages between external and internal components are not evenly distributed, both law enforcers and the roles of stakeholders, this has an impact The diversion policy and the goal of realizing restorative justice which has not been effectively implemented are influenced by several factors such as limited Human Resources (HR) who have not supported the implementation of the SPPA Law and training for legal structures.

A. Pendahuluan

Crimes related to juvenile cases in the juvenile justice system in Indonesia use diversion efforts in the settlement process. Diversion is a form of diversion in the process of solving a problem/case related to children, which was originally within the scope of criminal justice to be outside the scope of criminal justice.¹ Through Law No. 11/2012 on Criminal Justice System for Children, it offers a solution to the problem to handle cases related to children, because it is not directly for a child can be justified as a criminal. In order to run effectively, it is hoped that all components of society can work together to restore the situation to its original state, such as the role of the family and all stakeholders in order to have a positive impact on living life in the community without having to get excessive social sanctions, considering that this is a Children become perpetrators who sometimes don't really know that their actions are wrong and prohibited. The community will understand that restorative justice is not justice that is concerned with compensation or retribution.²

Participation of victims and perpetrators is the main principle of restorative justice in order to achieve justice as well as welfare for both parties. Achievement of case that prioritizes restorative justice will provide future guarantees for the child not to repeat the legal actions he has committed and achieve life harmony for the child.³ Indonesia has ratified the Convention on the Rights of the Child (Convention on the Rights of the Child) which was ratified by the Indonesian government through Presidential Decree No. 36/1990, which was also stated in Law No. 4/ 1979 on Child Welfare and Law No. 23/2002 on Child Protection and Law No. 11/2012 on the Child Criminal Justice System. Restorative justice referred to in the system regarding juvenile justice is a mechanism for solving a criminal case that seeks to include the perpetrator, the victim and the family of both parties, as well as parties related to

¹ Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak.

² Nikmah Rosidah, *Budaya Hukum Hakim Anak Di Indonesia*, Semarang: Pustaka Magister, (2014), pg 103

³ Apong Herlina dkk, *Perlindungan Terhadap Anak Yang Berhadapan Dengan Hukum*, Jakarta: PT. Raja Grafindo Persada,(2004), pg4

the case to jointly resolve the problem in a fair manner, whose main focus is to restore the situation as before.⁴

Other laws and regulations that have been ratified by the Indonesian government in paying attention to the sustainability of children's lives imply the restorative justice in realizing laws that promote and regulate children's rights and peace which are Law No. 4/1979 on Child Welfare, Law No. 39/ 1999 on Rights Human Rights, Law No. 35/ 2014 on Child Protection, and Law No. 11/ 2012 on Child Criminal Justice System.⁵

Today, people's life is inseparable from problems such as the rise of criminal offenders with the category of adults who commit crimes, consciously ignoring the guidelines for living as a state and being unprepared in living the values that have been set. These bad habits can be transmitted to children who do not fully understand what crime is. The widespread problem of children in making mistakes encourage the level of parents' awareness in monitoring and caring for children into question, that a child should be under parental supervision. If a child is found have problems with the law, parents can be labeled negligent.⁶

In addition, the lack of controlling attitudes in social interactions accompanied by various effects law ineffectiveness is a factor in the delinquency of children committing aberrations. Therefore, when children confront the law and become perpetrators of criminal acts, the state is able to prioritize child protection.⁷ Article 11 Paragraph (6) of the Juvenile Criminal Justice System Law stated that restorative justice is an alternative in resolving juvenile criminal cases by emphasizing restoration to its original state and not taking retaliation.⁸ Portraits of cases and facts in the field provide an illustration that juvenile criminal justice system implementation is inseparable from problems that arise so that detention for children is still carried out. The execution of the judicial process and the restoring approach is not functioning thus children experiences the same general judiciary in the police, public prosecutors and judges.⁹ Example of cases committed by children who failed to attempt diversion is persecution case by a 14 year old child who killed his victim. The Sikawang Police Unit failed to bring this case to a diversion attempt and an out-of-court effort.¹⁰ Often cases that exist are related to cases of children failures in diversion efforts and cannot bring about restorative justice.

This leads the child lead to child criminal category and enters a correctional facility that is devoted to children, but does not reduce the sense of mental concern and creates a crisis of confidence in the child's social life. Some actions that violate the norms in a child's life arise as a result of not fulfilling the intended desires, which triggers actions beyond their control.¹¹

This incident resulted in the existence of special regulations as an act of a more effective legal approach, therefore an approach that relies on justice in a restorative manner can be used

⁴Rika Saraswati, *Hukum Perlindungan Anak Di Indonesia*, Bandung: Citra Aditya Bakti, (2009), pg 1

⁵Bambang Hartono, "Analisis Keadilan Restoratif (Restorative Justice) Dalam Konteks Ultimum Remedium Sebagai Penyelesaian Permasalahan Tindak Pidana Anak," *PRANATA HUKUM* 10, no. 2 (July 31, 2015), <https://doi.org/10.36448/PRANATAHUKUM.V10I2.197>.

⁶Ahmad Faizal Azhar, "PENERAPAN KONSEP KEADILAN RESTORATIF (RESTORATIVE JUSTICE) DALAM SISTEM PERADILAN PIDANA DI INDONESIA," *Jurnal Kajian Hukum Islam* 134, no. 2 (October 29, 2019): 134-43, <https://www.syekhnujrjati.ac.id/jurnal/index.php/mahkamah/article/view/4936>.

⁷Maiding Gultom, *Perlindungan Hukum Terhadap Anak Dalam Sistem Peradilan Pidana Anak Di Indonesia*, Bandung: Refika Aditama, (2010), pg 33

⁸Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Jurnal Media Hukum* 25, no. 1 (October 12, 2018): 111-23, <https://doi.org/10.18196/jmh.2018.0107.111-123>.

⁹Bambang Widodo, "NEGARA DAN RESTORATIVE JUSTICE," *Jurnal Legalitas* III, no. 2 (2012): 14-24, <http://legalitas.unbari.ac.id> > Legalitas > article > download.

¹⁰Hendra Cipta, "Diversi Kasus Pengeroyokan Anak 14 Tahun hingga Tewas Gagal, Keluarga Ingin Lanjut ke Pengadilan", <https://regional.kompas.com/read/2019/05/21/16550061/diversi-kasus-pengeroyokan-anak-14-tahun-hingga-tewas-gagal-keluarga-ingin?page=all> di akses pada 26 Oktober 2020.

¹¹Dony Pribadi, "PERLINDUNGAN TERHADAP ANAK BERHADAPAN DENGAN HUKUM," *Jurnal Hukum Volkgeist* 3, no. 1 (December 14, 2018): 15-28, <https://doi.org/10.35326/volkgeist.v3i1.110>.

as an effort to be taken in resolving cases, as well as providing answers to distrust of the existing criminal justice system. It is still found that the juvenile justice system carries out punishments through imprisonment, giving rise to the perception that it is less effective in solving crimes committed by children.¹² The current conditions have not been able to maximize the efforts to resolve diversion in cases involving children. The problem that can be taken against this background is how is law enforcement in cases involving children by means of diversion efforts? And then, how effective is it to carry out diversion in cases relating to children?

B. Discussion

1. Law Enforcement through Diversion in Juvenile Crime Justice System of Indonesia

The existence of juvenile justice provides awareness if Indonesia understands that children is very important for an advanced generation, therefore it is hoped that children will receive their rights to receive protection in the legal system. By Indonesia formulating children's rights, it has become a mark of regulating the children protection, both as victims and perpetrators. Moreover, it carries out regulations that have been stipulated in several laws that are Law No. 11/ 2012 on the Juvenile Justice System, Law No.23/2002 on Child Protection, and Law No.13/2006 on Protection of Witnesses and Victims. Restorative justice has a policy towards the system it operates, if an act violating the law has been carried out, then in the criminal justice process discretion as it is better known to be wiser. If a criminal case occurs legal apparatus can take diversion to resolve the case informally. The process depends on who should put the perpetrators on trial.¹³

Criminal procedural law is the source of the formation of the criminal justice system, where in practice the criminal justice system still prioritizes the process of compensation or retaliation that is not balanced with the ability of offenders in the category of children. A juvenile criminal justice system is then created, better known as restorative justice. As part of the criminal justice system (but to be applied in juvenile crime) it has its own suitability so as not to disturb the balance of the implementer in his culture, society and politics that are already in the role of each country.¹⁴

The problem of criminalization often arises so that it is not uncommon for children as perpetrators to find concern because the tendency for human rights violations to be found in the course of the trial Diversion which is closely related to an effort to the juvenile criminal justice system has not been maximally implemented. Many of the judges' decisions tend to give imprisonment to children who have litigation, this has an effect on the child's survival, starting from not completing his studies at school and the loss of the child's independence will affect his psychological development.¹⁵ An example of a case that failed to pursue the path of diversion was a case experienced by junior high school students in the Semarpura District Court which was related to violence experienced by victims that was not successfully pursued through diversion solutions.¹⁶

¹²Ulang Mangun Sosiawan, "PERSPEKTIF RESTORATIVE JUSTICE SEBAGAI WUJUD PERLINDUNGAN ANAK YANG BERHADAPAN DENGAN HUKUM (Perspective of Restorative Justice as a Children Protection Against The Law)," *Jurnal Penelitian Hukum De Jure* 19, no. 10 (2019): 517–38, <https://doi.org/10.30641/dejure.2016.V16.425-438>.

¹³Herlina Apong, *Perlindungan Anak Yang Berhadapan Dengan Hukum*, Jakarta: Pt. Raja Grafindo Persada, (2004), pg 353

¹⁴*Op.Cit*, Hariman, pg112.

¹⁵ Purnianti, Mamik Sri Supatmi, dan Ni Made MartiniTinduk, mengutip Harry E. Allen and CliffordE. Simmons, dalam *Correction in America : AnIntroduction, Analisa Situasi Sistem Peradilan PidanaAnak (Juvenile Justice System) di Indonesia*, Indonesia : UNICEF, (2003), pg44

¹⁶ Bagiarta, "Diversi Gagal, Kasus Kekerasan Terhadap Siswa SMP Segera Disidangkan" di dalam <https://www.balipost.com/news/2019/09/10/86760/Diversi-Gagal,Tersangka-Kasus-Kekerasan...html> diakses pada 26 Oktober 2020.

Law No. 11/2012 on Child Criminal Justice System, Government Regulation Number 65/2015 on Guidelines for Implementation of Diversion and Handling of Children under 12 Years Old, and Supreme Court Regulation No. 4/2014 on Implementation Guidelines Diversion in the Juvenile Criminal Justice System. From this regulation, the arrangements that are stated in detail and firmly on restoring justice are for the sake of achieving a judicial process by not burdening the offender in the category of children, implementing restoration of conditions by promoting diversion as a product of restorative justice approaches, and changing the mindset of the public. Generally, this aims to not ridicule the child criminal, but in fact justice that restores is still far from achieving restorative justice, because it is related to the legal structure and substance which is sometimes out of sync between the rules and practices applied in the field by legal institutions and officials to enforce the law.

The implementation of Restorative Justice in the juvenile criminal justice system which is carried out by diversion is contained in the enactment of the Juvenile Crime Justice System Law in Article 12, and Article 52, which refers to the process of being carried out in addition to diversion and mediation. In mediation there is a mechanism, namely discussions to find a negotiation on the problem carried out by meeting t parties involved: perpetrators, victims, and other parties involved. The number of problems in implementing restorative justice in the implementation of the juvenile criminal justice system means that the form of protection of the authority of children who are dealing with the law has not yet become the main tendency. Legal policies that have been made for children who have litigated cases are still difficult to implement and implement, there are gaps between the thinking of the legal apparatus and the practice they undertake.¹⁷

Creating a balance for perpetrators and victims in handling criminal acts requires the role of law enforcement officers with strong characteristics based on the principles of the rule of law and seeing the reality that exists between legal developments in society or better known as progressive thinking. Humans in should be respectful and obedient to the law, not the opposite.¹⁸ Analysis based on statutory regulation that is Article 7 of Juvenile Crime Justice System Law which explains that at the level of investigation, the prosecution stage and the stage of examination of cases relating to the children of parties in the district court concerned can always seek Diversion.¹⁹

The increase of modernization is due to technology and information, which results in changes between the legal structure, legal substance and legal culture as a reference for legal reform. If changes in society are not accompanied by changes in regulations in the law, it will result in the ineffectiveness of law implemented, such as diversion which has not been implemented properly, because legal changes have a slow impact on the wider community, which in fact Indonesia itself is a country that has large scale area, thus the diversion application is difficult to reach in all circles of society and can bring disorder in social life.²⁰ The idea of diversion in order to realize the concept of restorative justice developed as a turning point for dissatisfaction with the formal justice system which tends to take sides and is

¹⁷Kristian Kristian and Christine Tanuwijaya, "PENYELESAIAN PERKARA PIDANA DENGAN KONSEP KEADILAN RESTORATIF (RESTORATIVE JUSTICE) DALAM SISTEM PERADILAN PIDANA TERPADU DI INDONESIA," *Jurnal Hukum Mimbar Justitia* 1, no. 2 (October 11, 2017): 592, <https://doi.org/10.35194/jhmj.v1i2.42>.

¹⁸ Rudi Rizky, *Restorative Justice (Suatu Perkenalan)*, Jakarta: Perum Percetakan Negara Ri, (2015), pg 67

¹⁹ Upaya diversifikasi tersebut pada ayat 7 ayat (2) UU SPPA menjelaskan kembali bahwa pelaksanaan adanya kebijakan diversifikasi bisa terus diupayakan semenjak ancaman suatu tindak pidana tersebut tidak lebih dari 7 tahun atau dibawah tujuh tahun serta tindak pidana tersebut tidak merupakan tindak pidana yang berulang.

²⁰Nurul Huda et al., "Asesmen Terpadu: Penerapan Restorative Justice Penanggulangan Kejahatan Narkotika Di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 1 (March 27, 2020): 111, <https://doi.org/10.30641/kebijakan.2020.v14.111-124>.

not based on justice, so that new problems emerge that cause social conflict for victims and perpetrators that can lead to new conflicts.²¹

As time develops, it is found that there is a tendency for people to choose court route as the last way to settle cases, although not all cases will get the justice it deserves. It must be understood that the results case settlement in the judiciary are impartial. Therefore, there will be parties not winning and winning the case. The difficulties that can occur due to the implementation of Diversion to achieve restorative justice are:²²

- 1) Difficult in reaching an agreement on behalf of the parties interest;
- 2) Disobeying the principles and guidelines that underlie the emergence of basic principles that have been formulated on the basis of the principles of empathy, responsibility and fairness;
- 3) The victim will directly get “re-victimization” because of the pressure;
- 4) The formal system of justice tends to be in demand and will weaken restorative justice so as to provide an excuse for the creation of only traditional laws desired by traditional leaders;
- 5) Diversion to achieve restorative justice in the framework of legal reform must be carried out systematically and taking into account the insiders involved.

2. Efforts to Enhance Diversion Policy in Restorative Justice

The implementation of a policy can run effectively and optimally depending on how the law implementation is accepted or not and carried out properly or not.²³ Regarding the implementation of diversion to achieve restorative justice for children, it can be taken from a positive perspective by deliberation, especially if the crimes committed by the child are crimes that do not cause major losses to the state or victims, such as theft that does not cause heavy material losses, often putting forward the blame of power that causes many things in handling cases that occur, which should be handled without having to go to legal path.²⁴ Children who are faced with the law, should not be treated like criminals, the role of parents must become a bridge so that the child’s character is educated, as a reference to help a child determine what is wrong and right.²⁵

Society develops rapidly than the law that regulates it, this discrepancy is the cause of the emergence of practices that cause overlapping understanding of the law between one law enforcement apparatus and one another, and law enforcement officers to the community so that it does not achieve the desired legal purpose.²⁶

The legal system adopted by Indonesia has become an influence on the application of restorative justice in Indonesia, which is clear that the Convention on the Rights of the Child which was ratified by the Indonesian government through Presidential Decree No. 36/1990 regulations on restorative justice and rights children's rights, therefore diversion and restorative justice are believed to be the right choice in advancing juvenile criminal justice

²¹ Setyo Utomo, *Sistem Pemidanaan Dalam Hukum Pidana Yang Berbasis Restorative Justice*, Jakarta: Rineka Cipta, (2016), pg 86

²² Muladi, *Restorative Justice Dalam Sistem Peradilan Pidana*, Semarang: B.P Dipenogoro, (1995), pg10

²³ Abdul Kholiq and Jurnal Justisi, “Kajian Budaya Hukum Progresif Terhadap Hakim Dalam Penegakan Hukum Pada Mafia Peradilan (Judicial Corruption) Di Indonesia,” *Justisi Jurnal Ilmu Hukum*, vol. 2, 2017, <http://www.merdeka.com/peristiwa/teri>.

²⁴ Andri Winjaya Laksana, “KEADILAN RESTORATIF DALAM PENYELESAIAN PERKARA ANAK YANG BERHADAPAN DENGAN HUKUM DALAM SISTEM PERADILAN PIDANA ANAK,” *Jurnal Pembaharuan Hukum* 4, no. 1 (April 15, 2017): 57, <https://doi.org/10.26532/jph.v4i1.1644>.

²⁵ Marlina, *Peradilan Pidana Anak Di Indonesia Pengembangan Konsep Dan Restorative Justice*, Bandung: PTRefika Aditama, (2010), pg31

²⁶ Indrawati Indrawati, “PENERAPAN HUKUM PROGRESIF DALAM PERKARA PIDANA DI BIDANG NARKOTIKA,” *Jurnal Cakrawala Hukum* 8, no. 2 (December 24, 2017), <https://doi.org/10.26905/idjch.v8i2.2117>.

and the choice of new breakthroughs in the state legal system.²⁷ The stigma on children's cases must be resolved in the trial must be removed because trials that bring children as criminal children are only carried out as a last resort and are usually used for adults who are in contact with the law. There are various differences in character behavior in children, which are different from people categorized as adults; this is the comparison of why children's rights must be fulfilled properly so as not to create vulnerability those are ignored by the state.

The problem for children who have litigation with the law when examined is in the reciprocal relationship between the historical development of a restorative approach or restorative justice. It means that diversion through the concept of restorative justice is a renewal of the structure of the juvenile criminal justice system so that it is maximized without denying children's rights. As in New Zealand, which implements family group conference (FGC) to achieve a restorative approach for all parties, the concept found in New Zealand is one small example to provide a reference for improving the current juvenile justice system. This FGC technique also has similar characteristics with the principles of restorative justice in the settlement of cases outside the court that bind young people who commit offenses in the New Zealand region.

C. Conclusion

The diversion policy tries to bridge the meeting between victims and perpetrators to carry out mediation. Increasing the readiness of the juvenile criminal law system requires attention from various aspects such as good cooperation between law enforcers and the community, institutions that support established legal progress, and the availability of adequate facilities and infrastructure. The regulations governing law enforcement on diversion policies are regulated in the Juvenile Crime Judicial System Law, Government Regulation No. 65/2015 on Guidelines for Diversion Implementation and Children under 12 Years Old Management, and Supreme Court Regulation No. 4/2014 on Implementation's Guidelines of Diversion in Juvenile Criminal Court System. Specifically and in detail, diversion can be carried out at any stage in the process before the trial process and during the trial process. Specific guidelines governing the mechanisms in the judicial process are regulated in the Perma concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System.

The efforts made to carry out and implement diversion have not been maximized nor is it effective. The supporting factors are the law enforcement officials' lack of understanding in implementing the diversion policy which has resulted in the repetition of crimes against children that can be seen and obtained based on data from the Correctional Directorate of the Ministry of Law and Human Rights. The failure to achieve a predetermined program does not escape the practice of procedures which must be disciplined in its application. The tendency to use penal mediation as an alternative to solving problems in the field of criminal law causes diversion to not function in solving juvenile cases.

²⁷Amabarsari Hanafi arif, "Penerapan Restorasi Justise Dalam Sistem Peradilan Pidana Di Indonesia," *Penerapan Restorasi Justise Dalam Hukum Pidana* 53, no. 9 (2018): 1689–99, <http://ojs.uniska-bjm.ac.id/aldii/article/download>.

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