

Formulation Policy about Diversion in the System of Juvenile Criminal Justice as an Effort for Criminal Prevention

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ABSTRACT--*The juvenile justice system law regulates diversion, namely the transfer of settlement of cases of children in conflict with the law from criminal justice processes to processes outside of criminal justice. Diversion is carried out in the case of a crime committed: threatened with imprisonment under 7 (seven) years; and is not a repeat of a criminal offense. The research method used in this study uses normative juridical research types, using secondary data and data analysis using qualitative analysis. The results of the research show that: The diversion provisions can prevent imprisonment and avoid stigmatization of children in conflict with the law and it is hoped that children can return to the social environment naturally. But in its implementation it causes discrimination against children who are in conflict with the law, considering that in many cases children often commit crimes not alone, but together with their friends, for example: theft committed together. In such case, because of the threat of theft which is carried out together including theft by weighting (violating Article 363 of the Indonesian Criminal Code), which is punishable by imprisonment for a maximum of 7 years, it cannot be diversified, and this is detrimental to the child especially if the stolen item not very expensive, so the non-discrimination principle listed in Article 2 point c does not materialize. Therefore there needs to be a revision of the diversion provisions in Undang-Undang Republik Indonesia No. 11 Tahun 2012.*

Keywords: *diversion, juvenile justice system*

I. INTRODUCTION

Recent developments in modernization have not only had a positive effect, but also a negative impact. Advances in technology have an impact on the problem of crime, which has increased in number and its modus operandi, not even done only by adults but, children today also commit crimes.

According to data from the Indonesian Child Protection Commission (KPAI), cases of children facing law or ABH, are the most frequently reported cases to KPAI. From 2011 to 2019, the number of ABH cases reported to KPAI reached 11,492 cases, far higher than reported cases of children who were caught in health and

drug problems (2,820 cases), pornography and cyber crime (3,323 cases), and trafficking and exploitation (2,156 cases). If examined, the ABH number for being a perpetrator of sexual violence tends to jump sharply. In 2011, there were 123 cases of child sexual crimes. The number rose to 561 cases in 2014, then dropped to 157 cases in 2016, and in mid-January to May 2019, the number of ABH cases as perpetrators of sexual violence reached 102 cases. In addition to cases of sexual violence committed by children, cases of abuse such as physical and psychological abuse of children also take a lot of attention. According to KPAI data, the ABH report for being a perpetrator of physical and psychological violence reached 140 cases in 2018.[1]

From the data of the Indonesian Child Protection Commission mentioned above, the need for countermeasures. One of the efforts to tackle crime is to use criminal law with criminal sanctions. Considering children are the successors of the nation that must be protected, and Indonesia as part of the international community must actively participate in the implementation of the Convention on the Rights of the Child as ratified by the Government of the Republic of Indonesia by Presidential Decree No 36 of 1990 regarding ratification of the Convention on the Rights of the Child, the handling of children in conflict with the law needs serious handling. Even children as perpetrators of crime need to be protected, and protected so that they can meet their long future, become children who have independence, are responsible and are useful for themselves, their families, their communities, their nation and state.

Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 concerning the Juvenile Criminal Justice System, in addition to regulating the criminal effort also regulates the non-criminal effort in overcoming crime. Non-penal efforts regulated in the Child Criminal Justice System Law in the form of regulation concerning diversion. Diversion is a diversion of the settlement of child cases from criminal justice processes to processes outside of criminal justice. Diversity can be carried out in the event that a crime is committed: threatened with imprisonment for under 7 (seven) years; and is not a repeat of a criminal offense. [2]

Perpetrators of criminal offenses of children cannot be equated with adult crimes, therefore more serious

attention is needed in handling children in conflict with the law.

Imprisonment is not the best choice for educating children who are in conflict with the law. Criminal justice in handling children in conflict with the law will only cause stigma as a criminal that will befall a child and is the beginning of a failure and even a disaster in the future. Therefore many parties think of various alternative approaches, especially in overcoming the problem of children in conflict with the law, namely by using the concept of Restorative Justice through the application of diversion.[3]

Diversion is currently one of the legal facilities which is considered to be very accommodating to the interests of the parties in resolving cases of children in conflict with the law. It's just that in its implementation there are still obstacles faced by law enforcement officials, both at the level of investigation, prosecution, and trials, and cause discrimination against children who commit criminal acts.

Based on the background of the aforementioned problems, it needs to be investigated regarding: **"Policy Formulation Regarding Diversion in the Juvenile Criminal System as an Effort to Overcome Crime"**.

Formulation of the problem

In this paper the research questions are:

1. What is the formulation policy regarding diversion in the juvenile justice system as an effort to combat crime?
2. What is the significance of diversion in the juvenile justice system?

II. RESEARCH METHOD

The research method used in this study uses a type of normative juridical research, by conceptualizing the law as a norm that is a benchmark for human behavior, with an emphasis on secondary data sources. Secondary data used in this study were collected from primary sources in the form of legislation, namely Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 concerning the Child Criminal Justice System, literature books and children's cases which were resolved on a diversion basis. The data collection method uses documentary studies. The data obtained is presented in a descriptive description of the sentence.

Based on the formulation of the problem and the purpose of the study, it can be identified that the main problem in this study includes one of the criminal law policies, especially the formulation policy in formulating diversion. Therefore the approach used is a policy-oriented approach. However, because the main target in this research is on legislative policy issues, namely regarding the legislation in establishing and formulating diversions, the approach is mainly pursued through a normative juridical approach that relies on secondary data and is supported by a case approach, as a supporting element,

The research specification used in this research is analytical descriptive, that is, research that aims to provide a detailed, systematic and comprehensive picture of everything related to the formulation policy regarding diversion in the juvenile justice system as an effort to deal with crime analyzed with legal theories and practice implementation of positive law regarding the above problems.

Data analysis is an activity in research in the form of conducting studies or reviews of data processing results which are assisted with theories that have been obtained previously. Analysis of the data in this study, using a qualitative approach which analyzes the data or legal materials obtained during the study with legal theories, legal principles, legal doctrines, and legislation related to research problem.

III. FINDINGS AND DISCUSSION

A. Policy Formulation

Criminal law enforcement policy is a series of processes that consist of three policy stages. First, the stage of policy formulation or legislative policy stage, namely the stage of preparation/formulation of criminal law. Second, the stage of judicial/applicative policy, namely the stage of applying criminal law. Third, the executive/administrative policy stage, namely the stage of implementing/executing criminal law. The first stage (legislative policy) is the stage of law enforcement "in abstracto" while the second and third stages (the stage of judicial and executive policy) is the stage of law enforcement "in concreto". [4]

The three stages of the criminal law enforcement policy contain three powers or authorities, namely legislative powers/authorities that formulate or determine actions as acts that can be convicted (criminal acts) and criminal sanctions, powers/authorities of law application by law enforcement officials, and powers/authorities execute or carry out the law concretely by the authorized apparatus/agency.

The stage of formulation/formulation of criminal law, or efforts and policies to make good criminal law regulations in essence cannot be separated from the purpose of overcoming crime. Crime prevention efforts with criminal law are essentially an integral part of efforts to protect the community.

The stage of drafting/formulating criminal law is an attempt to realize good regulations, in accordance with the circumstances and situations at one time. Sudarto said this as legal politics. Based on the above understanding of political politics, Sudarto further stated that implementing the politics of criminal law means holding elections to achieve the best results of criminal legislation in the sense of meeting the requirements of justice and effectiveness. [5] Implementing criminal law politics means an effort to realize the regulations criminal law in accordance with the

circumstances and situation at a time and for future periods.[6]

Based on Sudarto's opinion above, the central problem in the politics of criminal law or criminal law policy is the problem of determining what actions should be made criminal acts (criminalization and sanctions what should be used or imposed on the offender).[7]

The crime prevention policy by using criminal law, cannot be separated at all from the *niiai* problem because Indonesia, based on Pancasila and its national development policy line, aims to shape Indonesian people as a whole. If the criminal will be used as a means for that purpose, then the humanistic approach must also be considered. This is important not only because the crime is essentially a human problem, but also because the criminal nature contains an element of suffering that can attack the interests or the most valuable values of human life. The humanistic approach in the use of criminal sanctions does not only mean that the criminal imposed on the offender must be in accordance with civilized human values, but must also be able to raise the offender's awareness of human values and the values of community life.

B. Diversion

Diversion according to Article 1 point 7 of Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 is the transfer of settlement of child cases from criminal justice processes to processes outside of criminal justice. Diversity, regulated in Article 6 through Article 15 of Undang-Undang Republik Indonesia Nomor 11 Tahun 2012.

Diversi aims:

- a. Achieve peace between victims and children;
- b. Settling cases of children outside the judicial process;
- c. Avoiding children from deprivation of independence;
- d. Encourage people to participate;
- e. Instill a sense of responsibility to the child;

According to Article 7 paragraph (1), at the level of investigation, prosecution and examination of cases of children in the District Court must be tried diversion. Diversified. Diversity can be carried out in the case of a criminal offense: threatened with imprisonment for less than 7 (seven) years and does not constitute a repeat of the crime.

The diversion process is carried out through deliberations involving children and their parents/guardians, victims and/or parents/guardians, community counselors, and professional social workers based on a restorative justice approach.

The restorative justice approach (if examined) contains 3 (three) main elements, namely:

1. Crime is viewed more substantively as a form of conflict between individuals that causes "injuries" (physical / non-physical) to victims, society and the perpetrators themselves rather than violations of the state.
2. The objective of the criminal justice process must be to be able to create peace in society, through conciliation of

the parties and repairing the "wounds" resulting from crime.

3. The criminal justice process must be able to facilitate the active participation of victims, perpetrators and their communities in order to find a solution to the conflict.^[8]

The diversion process must pay attention to:

- a. The interests of victims;
- b. Child welfare and responsibility;
- c. Avoidance of negative stigma;
- d. Retaliation avoidance;
- e. Community harmony; and
- f. Decency, decency, and public order.

Investigators, Public Prosecutors and Judges in diversion must consider:

The category of crime, the age of the child, the results of community research from Bapas and the support of the family and community environment.

The diversion agreement must obtain the consent of the victim and/or the family of the victim's child and the willingness of the child and his family, except for: Crimes in the form of violations, minor crimes, crime without victims; or the value of the victim's loss is not more than the value of the local provincial minimum wage.

Community advisory recommendations can be in the form of: Return of losses in the event of casualties, medical and psychosocial rehabilitation, surrender to parents/guardians, participation in education or training in Educational Institutions or LPKS within a maximum of 3 (three) months; or community service for a maximum of 3 (three) months.

Results of the diversion agreement may take the form of, among others: Peace with or without compensation, submission back to parents / guardians, participation in education or training in educational institutions or LPKS no later than 3 (three) months or community service.

Diversion as a form of criminal mediation starts from the following working principles:

1. Conflict handling
The mediator's job is to get the parties to forget the legal framework and encourage them to be involved in the communication process. This is based on the idea, that crime has caused interpersonal conflict. That conflict is what the mediation process is aiming for.
2. Process-oriented (Process Orientation).
Penal mediation is more oriented to the quality of the process than the results, namely: making the perpetrators of the crime aware of their mistakes, the needs of the conflict resolved, the peace of the victim from fear and so on.
3. Informal Proceeding.
Penal mediation is an informational process, not bureaucratic in nature, avoiding strict legal procedures.
4. There is active and autonomous participation of the parties (Active and autonomous Participation).

The parties (perpetrators and victims) are not seen as objects of criminal law procedures, but rather as subjects who have personal responsibility and ability to act. They are expected to act on their own free will.^[9]

The results of the agreement, submitted by the direct supervisor of the official responsible at each level of examination to the District Court in accordance with the jurisdiction within a maximum of 3 (three) days after the agreement was reached to obtain the determination. The determination is carried out within a maximum period of 3 (three) days from the receipt of the diversion agreement. Determination is conveyed to the social counselor, investigator, public prosecutor, or judge within a maximum of 3 (three) days from the date of stipulation. Upon receipt of the decision, the investigator issues the termination of the investigation, or the prosecutor issues the termination of the prosecution (Article 12).

In the event that the diversion process does not produce an agreement, or the diversion agreement does not take place, the juvenile criminal justice process will continue (Article 13).

Oversight of the diversion process and the implementation of the resulting agreement is with the direct supervisor of the official responsible at each level of examination. During the diversion process takes place until the diversion agreement is implemented, the community supervisor is required to provide assistance, guidance and supervision. In the event that a diversion agreement is not carried out within the stipulated time, the Community Guidance immediately reports it to the responsible official. The responsible official is obliged to follow up on the report within a maximum period of 7 (seven) days (Article 14).

C. Policy Formulation Regarding Diversion in the Juvenile Criminal System as an Effort to Overcome Crime

According to Article 16 of Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 concerning the juvenile justice system, the provisions of proceedings in the criminal procedure law also apply in the juvenile criminal court proceedings, unless otherwise specified in this Act.

The current formulation policy on the juvenile justice system is regulated in Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 concerning the Child Criminal Justice System. This law is a special criminal law, which regulates the whole process of resolving cases of children dealing with the law from the investigation stage to the guidance stage after undergoing the crime.

The most basic substance in this law is the strict regulation of restorative justice and diversion intended to avoid and keep children away from the judicial process, so as to avoid stigmatization of children in conflict with the law and it is hoped that children can return to the social environment naturally. Restorative justice is a diversion process, where all parties involved in a particular crime jointly resolve the problem and create an obligation to make things better by involving victims, children and the

community in finding solutions to improve, reconcile, and reassurance that is not based on retaliation.

Diversion can be carried out in the event that a criminal offense is threatened with imprisonment of less than 7 (seven) years and does not constitute a repeat of the crime. This kind of provision results in not all children getting the same rights in the juvenile justice process, especially the right to get diversion. Such juridical facts, cause children who commit crimes with a criminal threat of 7 (seven) years can not be diversified, especially those that are threatened more than 7 (seven) years in prison. For example: children who jointly commit crimes of theft by weighting. Even though the price of stolen goods is not very expensive, but because it is done together, it is a criminal act of theft by weighting (violating Article 363 of the Criminal Code). In cases like this the defendant cannot be diversified, because the criminal threat is 7 (seven) years. In practice, judges in convicting cases like this often impose a sentence of only a few months (short imprisonment). This short prison sentence is not beneficial for the formation of the child. This short prison sentence causes the child to get a stigma or an evil stamp that will harm the child's future, and this is not the best solution for the child. In some cases progressive judges will split the case individually and are not subject to Article 363 but Article 362, so that children can be diversified. This is a strategy of the judge to prevent children from imprisonment. However this is risky, because it violates the provisions of Article 7 paragraph (1) of Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 concerning the Child Criminal Justice System.

Likewise, the criteria for not being a repeat of a crime, this is also sociologically detrimental to the interests of the child, bearing in mind that not all children commit crimes because of the child's will, the environment can affect the occurrence of a crime.

Provisions regarding limiting criminal and receptive threats in getting diversion according to the authors are not quite right, all children should get diversion. The level of loss of the victim, the purpose of the crime and the motive for committing the crime is what the author thinks should be considered a diversion condition. For example: helmet theft is carried out by children together, with the value of the stolen item is not so great, then the motive for doing evil is caused or influence/persuasion from other people/friends. The goal is for something that is urgent or very necessary, then it should be considered subject to diversion.

In Austria, a crime that can be subject to diversion is if it is threatened with a crime of no more than 5 (five) years in prison or 10 (ten) years in a child case. It can even be used for cases of very severe violence (Extremely severe violence).^[10]

The provision of diversion, as an effort to tackle non-criminal offenses tends to discriminate against children as perpetrators of crime, because not all cases of children are treated equally, this is contrary to the principle of the

juvenile justice system, which is listed in Article 2 point c. Undang-Undang Republik Indonesia Nomor 11 Tahun 2012, which states that, the juvenile justice system is implemented based on the principle of non-discrimination.

Sociologically, deviations of behavior or unlawful acts committed by children can originate from outside the child himself. The development of rapid development, advances in science and technology, and changes in the style and way of life of some parents, can be a criminogen factor for the occurrence of crimes committed by children. ^[11] On the other hand philosophically, children are having a strategic role, in the best interest of children should be lived in as the best interest for the survival of humanity. Therefore it is necessary to reformulate this diversion arrangement further.

D. The Meaning of Diversion in the Children's Criminal Justice System

The diversion process must pay attention to: the interests of victims, the welfare and responsibility of children, avoidance of negative stigma, avoidance of retaliation, community harmony, and decency, decency, and public order. Results of the diversion agreement can take the form of, among others: Peace with or without compensation, submission back to parents/guardians, participation in education or training in Educational Institutions or LPKS for a maximum of 3 (three) months or community service, but in the practice of the victim more often ask for compensation. Regarding this compensation in the Criminal Code as a general criminal law is not regulated, but in the Juvenile Justice System Law, especially in diversion regulation is permitted. This is because the purpose of diversion is one of them to prevent children from imprisonment.

The significance of diversion for children is as follows:

1. Avoiding stigma for children.

Diversion can be carried out at each stage of the case inspection process, starting from the level of investigation, in the practice of investigating it will bring together children and parents / guardians, victims and / or parents / guardians, social counselors. Then a consultation will be held with the investigator as the mediator. If agreed upon in the deliberation regarding

diversion, an agreement will be made and determined by the Court. Thus, if an agreement has been reached, the process ends at the investigation level so that the child does not continue in the next stage of the case inspection process. So that children can avoid imprisonment and do not get the stigma of being a naughty child or ex-convict.

2. Avoiding children from psychological pressure in the trial process.

Diversion is a diversion of settlement of child cases from criminal justice processes to processes outside of criminal justice. Through diversion the child avoids the criminal justice process, which can make the child avoid psychological pressure during the trial.

3. Instill a sense of responsibility to the child.

Deliberation conducted by the child and parents/guardians, victims and/or parents/guardians, community counselors and investigators can foster awareness of the child to be responsible for actions committed even by peaceful means between the victim and child.

IV. CONCLUSION

1. Policy Formulation Regarding Diversion in the Juvenile Criminal System as an Effort to Overcome Crime, there is an un- synchronization between Article 7 and Article 2, the diversion process which is a diversion of the settlement of child cases from criminal justice processes to processes outside of criminal justice, non-discriminatory against children, so that not all cases of children can be resolved by diversion. Particularly for a midwife the threat of 7 years cannot be resolved by diversion, even though the level of loss of sacrifice is very small. Therefore there needs to be a revision. The level of loss of the victim, the purpose of the crime and the motive for committing the crime is what the author thinks should be considered a diversion condition.
2. The Meaning of Diversion in the Children's Criminal Justice System, namely to prevent children from negative stigma, prevent children from imprisonment, prevent children from psychological pressure in the trial process and instill a sense of responsibility towards children.

REFERENCES

- [1] Anak Berhadapan Hukum Tertinggi, Potret Buram Perlindungan Anak Indonesia <https://www.suara.com/health/2019/07/23/071000/anak-berhadapan-dengan-hukum-potret-buram-perlindungan-anak-di-indonesia?page=all>
- [2] Pasal 7 ayat (2) Undang-Undang No. 11 Tahun 2012.

- [3] M. Ghufuran H. Kordi K, 2015, *Durhaka Kepada Anak Refleksi Mengenai Hak dan Perlindungan Anak*, Yogyakarta: Pustaka Baru Press, pp. 190.
- [4] Barda Nawawi Arief, 2012, *Kebijakan Formulasi Ketentuan Pidana, Dalam Peraturan Perundang-undangan*, Semarang: Pustaka Magister, pp.10.
- [5] Sudarto, 1981, *Hukum dan Hukum Pidana*, Bandung: Alumni, pp. 159-161.
- [6] Sudarto, 1983, *Hukum Pidana dan Perkembangan Masyarakat*, Bandung: Sinar Baru, pp. 20.

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- [7] Barda Nawawi Arief, 2011, *Bunga Rampai Kebijakan Hukum Pidana, Perkembangan Penyusunan Konsep KUHP Baru*, Jakarta: Kencana Prenada Media Group, pp. 30.
- [8] Paulus Hadisuprpto, 2010, *Delinkuensi Anak Pemahaman dan Penanggulangannya*, Malang: Selaras, pp. 174.
- [9] Stefanie Trankle, The Tension between Judicial Control and autonomy in Victim-offender Mediation-a Microsociological Study of a Paradoxical Procedure Based on Examples of the Mdiation Process in Germany and France, http://www.iuscrim.mpg.de/forsch/krim/traenkle_e.htm
- l. Barda Nawawi Arief, 2012, *Mediasi Penal, Penyelesaian Perkara Di Luar Pengadilan*, Semarang: Pustaka Magister, pp 5-6.
- [10] Pasal 10 g (1) KUHAP Austria.
- [11] Penjelasan Undang-Undang Republik Indonesia No.11 Tahun 2012.