

RECONSTRUCTION OF DIVERSION POLICY IN INVESTIGATIONS OF CRIME COMMITTED BY CHILDREN AT THE CENTRAL JAVA REGIONAL POLICE BASED ON PROGRESSIVE LAW

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ABSTRACT

General principles of child conversion are non-discrimination, the best benefits for children, life and growth, and respect for children's participation. More than 4,000 Indonesian children were brought to court for minor crimes, such as stealing. In general, they do not get support both from lawyers and social services. This condition is very alarming because many children have to deal with the court system and they are placed in detention and imprisonment with adults. This study aims to examine and to analyze various factors in the investigation of crimes committed by children in Central Java Regional Police and influencing factors, as well as reconstructing policies in investigating crimes committed by children in Central Java Regional Police based on progressive law. The method used in this research was sociological juridical or Socio-Legal Approach, which was related to social reality and real human behavior. Primary data collection methods were done by doing observation and depth interviews to the relevant key informants who had chosen by the researcher based on the research characteristic. The results of this study found that the implementation of the policy in criminal investigations carried out by children in the Central Java Regional Police has only run 15%, this can be said to be ineffective. This is more due to the legal culture of the community. Therefore, it is necessary to make provisions in Article 10 by adding a paragraph in the third paragraph of Law Number 11 year 2012.

Keywords: Reconstruction of Diversion Policy, Investigation, Child Crime

Background

The development of crime is now increasingly high, both at the level of quality and quantity of crime. Moreover, it is associated with the problem of increasingly difficult economic needs, increasingly narrow employment opportunities, competitiveness and increasingly competitive community skills make the increasing number of unemployment that has an effect on trends and threat of the number of criminal acts.

Indonesia is a legal state that adheres to the principle of legality in its criminal justice system. The legality principle is explained in Article 1 paragraph (1) of the Criminal Code which states that "An act cannot be punished, except based on the strength of the provisions of existing criminal legislation." Before the comparison is made from the sound of the article, it is clear that the principle legality applies to the criminal justice system in Indonesia, meaning that an act can only be convicted if there are rules that govern in advance the act.

Police institutions in Indonesia are regulated in the Republic of Indonesia Law Number 2 year 2002 concerning the Indonesian National Police. The National Police of the Republic of Indonesia as an important law enforcement tool in the domestic government. In carrying out their duties, they always uphold the human rights of the people and state law. The police is demanded their profession fairly and wisely, and brought peace and tranquility. The National Police of the Republic of Indonesia is a tool used in the awareness and responsibility of the community, upholding the law and providing protection, and service to the community in the framework of domestic security. As a state tool, the Indonesian National Police also has an obligation to respect, protect and enforce human rights in carrying out their duties and functions.

The National Police of the Republic of Indonesia aims to realize domestic security which includes the maintenance of public security and order, law enforcement and upholding, the implementation of protection and service to the community and the establishment of public peace by upholding human rights.¹

The child is a mandate from God Almighty that every child is attached to the dignity of a whole person. Children as a part and young generation are the successors of the ideals of the nation's struggle and human resources for national development. But the reality of the state of the child in this world has not yet arisen.² Every child has a high level of dignity and every child born must get his rights. This is in accordance with the provisions of the Convention on the Rights of the Child which was ratified by the Indonesian government through Presidential Decree No. 36 year 1990, then also set forth in Law Number 4 year 1979 concerning Child Welfare and Law No. 23 year 2002 concerning Child Protection. All of these laws put forward general principles of child protection, namely non-discrimination, the best interests for children, survival and growth, and respect for children's participation. More than 4,000 Indonesian children are brought to court every year for minor crimes, such as theft. In general they do not get support, both from lawyers and social services. This condition is very alarming because many children have to deal with the justice system and they are placed in detention and imprisonment with adults so they are vulnerable to violence.

The diversion program provides benefits to the community in early and rapid handling of deviant behavior. This initial handling also saves costs which are the costs incurred by the local police. Children as perpetrators of the crime will be given instructions by the police, criminal counselors, judicial department officials, and schools. Then the child voluntarily follows appropriate consultations and/or education and social activities. If the person in question is successful in this program, the prosecutor does not prosecute the case and will not record in the case file for the act.³

So far, (Das Solen) child perpetrators who commit criminal acts can be charged with criminal penalties. Although in principle, it departs from Liability Based on Fault. In certain cases the concept also provides the possibility of strict accountability (Strict Liability) in Article 37 of the Criminal Code Draft, and substitute liability (Vicarious Liability) in Article 36 of the Criminal Code Draft paragraphs 1-3 which reads: (1) "A person can only be accounted for if the person commits a crime intentionally or because of negligence." (2) "Acts that can be convicted are acts committed intentionally, except legislation the invitation determines explicitly that a criminal act committed with negligence can be punished." (3) A person can only be accounted for a certain consequence of a criminal act which is subject to criminal penalties, if it is appropriate to have expected the possibility of such consequences to be at least - there is no negligence."

However, in practice (Das Sein) child perpetrators who commit criminal acts are further continued to be diversified in Law No. 11 year 2012 concerning Criminal Justice System Article 1 paragraph 6 which reads: "Restorative Justice is the settlement of criminal acts involving the perpetrator, the victim, the family of the perpetrator/victim, and other related parties to jointly seek a just solution by emphasizing recovery in the original state, and not retaliation. "In case the perpetrator is a child not yet 18 years old.

Judging from social defense aspect that has a range of human values, education and justice, diversion has also included these values. Humanity's value is realized by treating child facing the law specifically. Furthermore, in the Convention on the Rights of the Child (CRC) it is also emphasized that children facing the law is treated by paying attention to the values in accordance with the child's dignity, human rights, and can help children in the reintegration process in society. Educative value in diversion can be seen from the involvement of children in the recovery process to the original situation for victims, meaning that children will learn to be responsible and improve their originality. The value of justice in diversion can be seen from the process of diversion. With diversion, it can be said to be fair for the future of child perpetrators and fair for the recovery of victims' losses.

The juridical basis for the formation of diversion refers to Article 28 paragraph (2) of the 1945 Constitution, Law Number 3 year 1999 concerning Human Rights, Law Number 23 year 2002 concerning Child Protection which in its provisions still considers special aspects of protection for children. The guarantee of the forms of protection of children's rights can also be said to be the driving factor of the importance of diversion accommodated in a law. What is the policy of diversion in the investigation of crimes committed by children in the Central Java Regional Police, how is the reconstruction of diversion policies in the investigation of crimes committed by children in the Central Java Regional Police based on progressive law.

Discussion

1. Diversion Policy in Criminal Investigations on Crime Committed by Children in Central Java Regional Police

The policy of diversion is nothing but an effort to invite the community to obey and uphold the law of the country, while implementing the consideration of the sense of justice as a top priority in addition to providing opportunities for perpetrators to

¹ Kelik Pramudya, 2010, *Pedoman Etika Profesi Aparat Hukum*, Pustaka Yustisia, Jakarta. p. 52-53.

² Anis Mashdurohatun, 2003, *Ide Pidana Kerja Sosial Dan Implementasinya Dalam Kebijakan Formulasi Hukum Pidana Untuk Di Indonesia*, Program Pasca Sarjana Universitas Diponegoro, Semarang, p.1.

³ Dwi Hapsari Retnaningrum, 2008, *Perlindungan Terhadap Anak Yang Melakukan Tindak Pidana (Kajian Tentang Penyelesaian Secara Non-Litigasi Dalam Perkara Tindak Pidana Anak di Kabupaten Banyumas, Purbalingga, Banjarnegara, Kebumen, dan Cilacap)*, Laporan Penelitian, FH UNSOED, Purwokerto, p. 59.

take non-criminal channels such as compensation, social work or parental supervision. Diversion does not aim to perpetuate the law and at all, but try to use elements of coercion to keep people to obey the law with a minimum force.

Criminal responsibility in a foreign language is referred to as "*toereken-baarheid*," "criminal responsibility," "criminal liability," the criminal liability here is intended to determine whether a person can be accounted for a crime or not against the action taken.⁴

In the 1982-1983 Criminal Code concept, article 27 states that criminal liability is an objective condemnation of the criminal act based on the law, objectively to the manufacturer who fulfills the statutory requirements to be liable to criminal conviction because of his/her actions.⁵

According to Roeslan Saleh, criminal acts do not include responsibility. Criminal act according to Roeslan Saleh is the people who commit criminal acts and indeed have errors, it is as the basis for criminal liability. The unwritten principle says, "will not be punished if there is no mistake," is the basis for criminals to be punished.⁶

Someone made a mistake, according to Prodjohamidjojo, if at the time of delict (offence), it was seen from the point of view of the community to be reprehensible⁷. Thus, according to him someone gets criminal depends on two things, namely (1) there must be an act that is contrary to the law, or in other words, there must be an element against the law. In the form of deliberate and or negligence, the actions that violate the law can be accounted for to him. So there is a subjective element.

It is understood that criminal acts have consequences regarding the nature of crime⁸, namely the first approach that sees crime as sin or indecent acts that other humans do. Both approaches see evil as a manifestation of the abnormal attitude and personality of the offender so that he does crime.

In the case of the ability to be responsible when viewed from the inner state of a person who commits a criminal act, it is a matter of responsible ability and an important basis for determining the existence of an error, in which the mental state of the person who commits a crime can be considered normal, because the person who normal, healthy this is what can regulate his/her behavior according to the community measurement/norms.⁹

Meanwhile, more explicitly, Simons said that being able to be responsible is able to realize the unlawful conduct and in accordance with the conviction determined his/her will¹⁰. Furthermore, according to Sutrisna, for the ability to be responsible there must be two elements, namely: (1) the ability to discriminate between good and bad deeds, in accordance with the law and those that are against the law; (2) the ability to determine his will according to conviction about the good and bad of the act.¹¹

The problem of children in conflict with the law is very troubling. Law No. 3 year 1997 concerning Juvenile Justice is no longer sufficient in providing solutions to children who are dealing with the law. Based on this issue, the House of Representatives of the Republic of Indonesia together with the Government of Indonesia discussed the Draft Law on the Juvenile Justice System from 2011 to 2012. The Bill on the Juvenile Justice System (RUU SPPA) was submitted by the President to the Leadership of the DPR-RI with Letter No. R12/Pres/02/2011 dated February 16, 2011. The President assigned the Minister of Law and Human Rights, Minister of Social Affairs, State Minister for Women's Empowerment and Child Protection, and the State Minister for Administrative Reform and Bureaucratic Reform to represent the President in the discussion of the SPPA Bill. Meanwhile, the House of Representatives of the Republic of Indonesia appointed Commission III to further discuss the SPPA bill through the Deputy Chairperson of the Republic of Indonesia's House of Representatives No. TU.04/1895/DPR RI/II/2011.¹²

If the judge punishes the perpetrator (the child perpetrator), then the maximum primary sentence is reduced by one third, if the act is punished by death, it can be sentenced to a maximum of 15 (fifteen) years and additional punishment as mentioned in Article 10 of the Criminal Code letter b numbers 1 and 3 are not included (Article 47 of the Criminal Code).

The existence of differences in determining the minimum age limit and maximum age in child criminal liability is actually not an impossible thing. Since the determination of these criteria is adjusted to the situation, conditions, and historical background and

⁴S.RSianturi, 1996, *Asas-asas Hukum Pidana Indonesia dan Kebijakan Formulasiya*, Cet IV, Alumni Ahaem-Peteheam, Jakarta, p. 245.

⁵Djoko Prakoso, 1987, *Asas-asas Hukum Pidana di Indonesia*. Edisi Pertama, Liberty, Yogyakarta, p. 75.

⁶*Ibid.*

⁷Pradjohamidjojo, Martiman, 1997, *Memahami dasar-dasar Hukum Pidana Indonesia*, PT. Pradnya Paramita, Jakarta, p. 31.

⁸Andi Matalatta, 1987, *Santunan bagi korban*, dalam J.E. Sahetapy (ed.)... *Victimology sebuah Bungarampai Pustakasinar Harapan*, Jakarta, p. 41-42.

⁹Sutrisna, IGusti Bagus, "*Peranan Keterangan Ahli dalam Perkara Pidana (Tijauan terhadap pasal 44 KUHPP)*," dalam Andi Hamzah (ed.), 1986, *Bunga Rampai Hukum Pidana dan Acara Pidana*, Ghialia Indonesia, Jakarta, p. 78.

¹⁰*Ibid.*

¹¹Sutrisna, *Ibid.* p. 83.

¹²Jefferson B. Pangemanan, *Pertanggungjawaban Pidana Anak Dalam Sistem Peradilan Pidana Indonesia*, Lex et Societatis, Vol. III/No. 1/Jan-Mar/2015, P. 103.

culture of each country. As stated in the Beijing Rules 4 that in the legal system that recognizes the age limit of accountability for children, the beginning of the age limit of accountability should not be set too low by remembering the child's emotional, mental and intellectual maturity.

Law Number 11 year 2012 concerning Child Criminal Justice System which replaces Law Number 3 year 1997 concerning Juvenile Courts which states that 'the child in conflict with the Law' is a child who is 12 (twelve) years old but not yet 18 (eighteen) years. It is clear that the lawmakers have agreed that the age of 8 (eight) years is indeed an age that cannot yet be held accountable for the actions committed, because a child of that age still does not understand what he is doing.

If a child who is not 12 (twelve) years old has committed or is suspected of committing a crime or in other words that the child is not even 18 (eighteen) years old then the child will still be tried in the child's trial. More clearly in Article 20 stated that: "In the event that a crime is committed by a child before even 18 (eighteen) years of age and submitted to a juvenile court after the child has exceeded the age limit of 18 (eighteen) years, but has not reached the age of 21 (twenty one) years, the child is still submitted to the child's hearing".¹³

2. Reconstruction of Diversion Policy in Criminal Investigations on Crime Committed by Children at the Central Java Regional Police based on Progressive Law

The Government seeks to improve the system of legal protection for children in conflict with the law in the Indonesian Criminal Justice System in Indonesia by issuing Law No. 11 year 2012 concerning the Criminal Justice System for Children which was then abbreviated as SPPA which was ratified on July 3, 2012.

According to Article 1 paragraph (2) of Law No. 35 year 2014 concerning Child Protection, what referred to as child protection is: all activities to guarantee and protect children and their rights in order to live, grow and participate optimally in accordance with human dignity and dignity, and to be protected from violence and discrimination.

Article 1 point 8 of Act Number 11 year 2012 concerning the Criminal Justice System of the Child affirms that Investigating officials are Child Investigators. Investigators, who can conduct investigations on children suspected of committing a particular crime are investigators who can only be specifically carried out by a Child Investigator.

Article 18 of Law No. 11 year 2012 states that the process of investigation carried out on children of perpetrators of crimes must pay attention to the best interests of the child and try to maintain a family atmosphere. This provision requires that the examination be carried out with an effective and sympathetic approach. Effectively it can be interpreted that the examination does not take a long time, using that which is easy to understand, and can invite the suspect to provide clear information.

Article 22 of Law No 11 year 2012 concerning the Criminal Justice System of the Child states that the Investigator when investigating a child suspected of being a criminal does not use toga or attributes of service. Child investigators can be concluded to take a sympathetic approach, and not to do coercion, intimidation, which can cause fear and trauma to children.¹⁴

Article 27 of Law No. 11 year 2012 states that Investigators in the case of investigating a child who is reported or filed a criminal offense must ask for consideration or advice from the Community Advisor, and if necessary, can also ask for consideration or advice from education experts, psychologists, psychiatrists, religious leaders, Social Workers Professionals or Social Welfare Personnel, and other experts.¹⁵ If the investigation is carried out without involving the Community Counsel, then the investigation is null and void.¹⁶

Diversion pursuant to the provisions is in article 29 paragraph 1 (one), investigator is obliged to seek Diversion within 7 (seven) days after the investigation begins. Paragraph 2 (two) of the Diversion process as referred to in paragraph (1) shall be conducted no later than 30 (thirty) days after the commencement of Diversion. This law also regulates the Child Identity as contained in article 19 paragraph (1) and (2) which reads: the identity of the child, the victim's child and/or witness must be kept confidential in the news in the print or electronic media. The identity as referred to in paragraph (1) includes the name of the child, the name of the victim's child, the name of the witness's child, the name of the parent, address, face, and other matters that can reveal the identity of the child, child of the victim, and/or child of the witness. The decision itself in court according to article 61 paragraph (1) and (2) is carried out in a court session which is open to the public and may not be attended by the child and the identity of the child, victim's child and/or child of the witness must be kept secret by the mass media as referred to in Article 19 by only using initials without pictures.

The draft Criminal Code of 2008 considers that mistake can mainly occur with intentional acts, while negligence is an exception. Only certain actions considered important enough to be punished even if they occur because of the negligence of the perpetrator. Article 36 of the Draft Criminal Code stipulates: "Acts that can be punished are acts committed, intentionally, except that the laws and regulations specify that a criminal offense committed with negligence can be punished". This caused the Draft Penal

¹³Hadi Setia Tunggal, *UU RI Nomor 11 Tahun 2012*, Harvarindo, Jakarta, 2013

¹⁴MaidinGultom, 2008, *PerlindunganHukumTerhadapAnakdalamSistemPeradilanPidanaAnak di Indonesia*, Bandung , PT. RefikaAditama, p. 101

¹⁵Pasal 27 ayat 1 dan 2 Undang-Undang No. 11 tahun 2012 TentangSistemPeradilanPidanaAnak

¹⁶Maidin Gultom, *Op.Cit.p.105*

Code to say "deliberately" was no longer a formulation of a criminal act. Rather it is formulated in the General Rules. Meanwhile, "because of its negligence" remains a part of the formulation of criminal acts.

Understanding of the concept of progressive law is inseparable from the conditions of legal thinking that are the background of the birth of progressive law. Legal understanding according to progressive law confirms that the law is an institution that aims to bring people to a just, prosperous life and make people happy.¹⁷ In the concept of progressive law, the human position is the main center in judging the law whether good or bad, right or otherwise.

Community needs for the role of law in providing benefits, legal certainty and justice are farther from reality, given the many legal issues that have not been resolved properly. The number of corruption cases that were revealed in the public but did not get a satisfactory solution became the main trigger for the emergence of progressive legal thinking. The public's trust in the law is fading so that the law is no longer regarded as a commander in every matter that befalls this nation. It is very ironic for a country that bases itself on the law but cannot enforce the law because there is no public trust. Based on the description above, the reconstruction of the value of diversion policy in the investigation of crimes committed by children based on progressive law to realize the role of parents and the government to educate children so they do not commit criminal acts.

Table. 5.1
Reconstruction of Diversion Policy in Investigations of Crime Committed by Children at the Central Java Regional Police Based on Progressive Law.

No.	Construction	Weaknesses	Reconstruction
1.	<p>Article 10 of Law Number 11 year 2012 concerning the Child Criminal Justice System which reads: Verse 1: Diversion Agreement to complete action of criminal in the form of violation, minor criminal act, criminal act without victim, or the loss of victims is no more than the value of the minimum wage from the local province referred to in Article 9 paragraph (2), it can be carried out by investigator together with the perpetrator and/or his family, the Advisor Society, and can involve the community leaders.</p> <p>Paragraph 2: Diversion Agreement as intended in paragraph (1) is carried out by the Investigator on recommendations from the Community Counselors can take the form of:</p> <ol style="list-style-type: none"> return of losses in the event of a victim; medical and psychosocial rehabilitation; return to parents / guardians; participation in education or training at Education institutions or LPKS no later than 3(three months); or community service for a maximum of 3 (three) months. 	<ul style="list-style-type: none"> Suspects of child perpetrators get special rights due to diversion even though they must fulfill the requirements as stipulated in the provisions of the legislation. There has been no sanction for parents who neglect to educate so that children commit criminal acts. 	<p>Reconstruction in Article 10 by adding a paragraph in the third paragraph of Law Number 11 year 2012 concerning the Criminal Justice System of Children. So Article 10 reads: Verse 1: Diversion Agreement to complete action criminal in the form of violation, minor criminal act, criminal act without victim, or the loss of victims is no more than the value of the minimum wage of the local province referred to in Article 9 paragraph (2), it can be carried out by investigator together with the perpetrator and/or his family, the Advisor Society, and can involve the community leader.</p> <p>Paragraph 2: Diversion Agreement as intended in paragraph (1) is carried out by the Investigator on recommendations Community Counselors can take the form of:</p> <ol style="list-style-type: none"> return of losses in case that there is victim; medical and psychosocial rehabilitation; return to parents / guardians; participation in education or training at Education institutions or LPKS no later than 3(three months); or community service for a maximum of 3 (three) months. <p>Paragraph 3: Parents who fail to educate and supervise children are subjected to sanctions in the form of social work, educating and financing children and the government to be good children, so that no more criminal acts are committed by the child.</p>

¹⁷Satjipto Rahardjo, 2009, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia*, Genta Publishing, Yogyakarta, p. 2

Conclusion

The diversion policy in the investigation of crimes committed by children is currently carried out based on Law Number 11 year 2012 concerning the Juvenile Justice System. The Child Criminal Justice System must prioritize a restorative justice approach, and must be pursued diversion with the aim of achieving peace between victims and children. In addition, completing child cases outside the judicial process; avoid children from deprivation of liberty; encourage people to participate; and instill a sense of responsibility to children. Therefore, the approach with a restorative settlement model or called restorative justice is more appropriate to be applied in dealing with violators of child age law. The implementation of diversionary policies is influenced by systemic problems and is structured in the building of the state legal paradigm in Indonesia, which is the legal culture of society.

Reconstruction of the policy of diversion in the investigation of crimes committed by children refers to the construction of peace/diversion in implementing restorative justice at the level of investigating criminal acts based on progressive law in the future the ideal pattern is to use Progressive Peace Law. Progressive Peace Law considers that the law is as an "institution that aims to deliver human beings to a just, prosperous life and make people happy", which is expected by the community, especially the people involved in traffic accidents that have deliberated and agreed to achieve peace. Progressive Law of Peace can respond to the will of the people involved in traffic accidents that crave justice and benefits that are faster and more tangible. The reconstruction is Article 10 by adding a paragraph in the third paragraph of Law Number 11 Year 2012. So Article 10 paragraph 3 reads : Parents who fail to educate and supervise children are subject to sanctions in the form of social work, educate and finance children and the government to become good children, so that no more criminal acts committed by the child.

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