



## ANALYSIS OF IMPLEMENTATION OF DIVERSION AND RESTORATIVE JUSTICE AS A FORM OF PROTECTION OF CHILDREN'S RIGHTS IN CONFLICT WITH THE LAW

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### ABSTRACT

**Background.** Restorative justice involves all parties involved in a crime working together to find solutions, focusing on children and the community, with the ultimate goal of creating restorative justice. The use of restorative justice and diversion as a means of defending the rights of minors in legal trouble, as well as the nature of the issue and its impediment, are major concerns in the study's purpose.

**Research Method.** The normative approach and empirical jurisdiction are the methodological approaches employed in this work. The information used in this study was gathered from both field and library sources.

**Findings.** The community of research conducted by the Correctional Center that the rights of children in conflict with the law are less protected at lower levels, ranging from examination of the investigation up to the trial, and the application of diversion and restorative justice as a form of protection of those rights. The application of law enforcement efforts to justice restorative running optimally is a solution to these constraints. One impeding factor is the lack of a common application of the law as the foundation and guide for all law enforcement agencies, as well as the inconsistent application of regulations in the field in the handling of children in conflict with the law.

**Conclusion.** The initiative aims to promote restorative justice in legal cases involving children, transforming law enforcement's perspective from retributive and restitutive justice to a more equitable approach.

**Keywords:** Children, Diversion, Restorative Justice.

### BACKGROUND

Children a trust from Almighty God who is inherent in them dignity as a whole human being and as a child is an asset to the nation part of the younger generation, children play a very strategic role[1]. This strategic role has been recognized by the international community to give birth to a convention that essentially emphasizes the position of children as human beings who must receive protection for their rights he has.

Indonesia is one of 191 countries that ratified the Convention on the Rights of Children (Convention on the Rights of the Children) in 1990 through Decree President Number 36 of 1990. By ratifying this convention Indonesia must fulfill the rights of all children without exception, one of the rights of children That needs attention and protection is the rights of children who conflict with the law. There is concrete evidence that Indonesia has ratified the Convention on the Rights of the Child Law Number 23 of 2002 (hereinafter abbreviated to the Protection Law Children) regarding Child Protection, all of which set out the general principle of child protection, namely non-discrimination, best interests of children, continuity life and growth and development and respecting children's participation[2].

The rights of children in conflict with the law are regulated in the Convention on the Rights of the Child, According to Article 40 of the Convention on the Rights of the Child, stated that "State parties recognize the right of every child suspected, accused or recognized as having violated the criminal law to be enforced in a manner consistent with improvement the dignity

and worth of children, which strengthens children's respect for human rights and basic freedom from others taking into account the child's age and desires for increasing the reunification/reintegration of children and increasing their constructive role of children in society". According to Article 37 Paragraph (b) of the Convention on the Rights of the Child[3], it states that "No child shall be unlawfully deprived of his liberty and arbitrary. The arrest, detention or punishment of a child must be appropriate with the law and will be implemented as a last resort and for a specified period shortest".

Looking at the principles of child protection, especially the principle of non-discrimination prioritizes the best interests of children and their rights to life, survival, and development and requires respect for children's opinions[4]. Therefore, it is necessary to have a process for resolving children's cases outside of criminal mechanisms usually called diversion, because correctional institutions are not the way to solve children's problems and correctional institutions are prone to violations of children's rights. That's why diversion, especially through the concept of Restorative Justice is a very important consideration in resolving criminal cases committed by children[5].

That social protection law requires the elimination of liability criminal (mistake) and replaced in its place by the view of anti-social acts. The substance regulated in the Child Protection Law Article 64 is in the form of protection for children in conflict with legal cases and child victims of acts of criminal law, and the most basic thing in this Law is the strict regulation regarding Restorative Justice and Diversion, which is intended to avoid and keep children away from the justice process to avoid stigmatization of them[6]. The child conflicts with the law and it is hoped that the child can return to its social environment appropriately. Therefore, the participation of all parties is very necessary to make this happen.

Restorative justice is a diversion process in which all parties are involved in a particular criminal act together to solve problems and create an obligation to make things better by involving children's victims, children in conflict with the law and society in finding solutions to repair, reconciliation, and reassurance that is not based on revenge. Ultimately, this process must aim at creating restorative justice for children. The use of restorative justice and diversion as a means of defending the rights of minors in legal trouble, as well as the nature of the issue and its impediment, are major concerns in the study's purpose.

## **RESEARCH METHODS**

This research was conducted in the Bandar Lampung and Balai Police areas of Lampung Province Correctional Services. The problem approach used in research is:

- a. Normative Juridical Approach. In carrying out this research the researcher used a normative juridical approach. Using a normative juridical approach because the target of this research is law or rule (norm). The definition of rules includes legal principles, rules in meaning narrow (value), and concrete legal regulations. Research with normative legal objects in the form of legal principles, legal systems, and levels of vertical and horizontal synchronization[7].
- b. Empirical Approach. This is done by directly observing the implementation of diversion and restoration justice as a form of protecting the rights of children in conflict with the law. The data sources used in this research were sourced from library research and field research.

Secondary Data was collected using the method of library research, namely by studying the literature to obtain secondary data related to the problem under study in the form of legal principles, legal regulations, and other legal materials related to the problem under study. Primary data was data obtained directly from the research object using observation and interviews with respondent reports or sources who understand the object being studied. This is primary data only as support for the completeness of secondary data. After the data is obtained, it is arranged systematically and then analyzed using qualitative analysis methods, namely after the data can be described in detail systematically in the form of sentence descriptions and then concluded using inductive thinking so that it becomes a general description of the answer to the problem based on the research results[8].

## **FINDINGS**

### **1. Implementation of Diversion and Restorative Justice as a form of protecting the rights of children in conflict with the law**

Based on the results of research and interviews with Service Unit Investigators Women and Children (hereinafter abbreviated as PPA) at the Bandar Lampung Police, as well as the results of interviews with employees. The Lampung Province Correctional Center obtained the following data according to investigators PPA that implement diversion and restorative justice for children conflict with the law has been applied in several cases, including cases of theft, obscenity, abuse, and beatings. Diversion seeks to provide justice for cases of children who have already been diagnosed commit criminal acts to law enforcement officials as enforcers of the law. These two types of justice are explained through research into the circumstances and situations to obtain appropriate sanctions or actions (appropriate treatment).

1. Implementation of social control (social control orientation), namely enforcement officers the law places the perpetrator in charge of supervision or observation society, by compliance with the approval or warning given. The perpetrator accepts responsibility for his actions and does not expect opportunities second time for the perpetrator by the community.
2. Social service by the community towards perpetrators (social service orientation), namely carry out the functions of supervising, intervening, improving, and providing services to perpetrators and their families. Society can interfere with the perpetrator's family to provide repairs or services.
3. Towards a process of restorative justice or negotiation (balanced or restorative justice orientation), namely protecting society, allowing perpetrators to take responsibility directly to victims and the community, and making mutual agreements between perpetrator victims and society.

The starting point is that criminal law reform is essentially oriented toward policy ("policy-oriented") and at the same time a value-oriented approach ("value-oriented approach"). Criminal law reform must be carried out with an approach policy because, in essence, it is only part of a step policy or "policy" is part of legal politics/law enforcement, legal politics crime, criminal politics, and social politics. In its implementation, all related parties are brought together to reach an agreement on action against the perpetrator. The implementation of diversion was motivated by the desire to avoid negative effects on the child's psyche and development by involvement with the criminal justice system. The implementation of diversion by law enforcement officers is based on. The authority of law enforcement officials is called discretion or in Indonesian discretion.

### **2. Factors Inhibiting the Implementation of Diversion and Restorative Justice as a Form of Protection of the Rights of Children in Conflict with the Law**

Based on the results of research and interviews with PPA investigators at the Bandar Police Lampung as well as the results of interviews with Lampung Province Correctional Center Employees (BAPAS) as Head of the Child Client Guidance Sub-Section, the factors Barriers to the implementation of diversion and restorative justice as a form of protecting the rights of children in conflict with the law include 2 factors, namely internal factors and external factors. Internal Inhibiting Factors: According to PPA Investigators stated that although Restorative justice and Diversion have begun to be recognized as alternatives for handling children in conflict with the law from criminal justice and starting getting the support of many parties, there are still many obstacles faced, among others Internal barriers are: 1) Increasing needs are not commensurate with resources (good personnel and facilities); 2) Different understanding in handling children in conflict with the law in between law enforcement officials; 3) Lack of cooperation between the parties involved (law enforcement officers and workers child social); 4) Ethical problems and bureaucratic obstacles in exchanging data and information between law enforcement officers; 5) Coordination between law enforcement officers (Police, Prosecutors, Judges, Advocates, Fathers, Prisons, Prisons) are still hampered by sectoral ego constraints.

Meanwhile, according to the Lampung Province Correctional Center (BAPAS) as Head of the Child Client Guidance Sub-Section, internal barriers faced are: 1) There is no common perception among law enforcement officials regarding the handling of children in conflict with the law in the best interests of the child; 2) Limited facilities and infrastructure for handling children in conflict with the law; 3) Lack of policy formulation to implement the social rehabilitation process for children which conflicts with the law, in this case the social department or social organization communities engaged in education, coaching and job training so that they can be sent to social institutions to be specially trained and given recovery mental and behavioral; 4) Lack of protection for children who conflict with the law however. Such a wish is not easy to carry out because of the provisions in the system Current correctional services for children do not provide such opportunities.

According to PPA Investigators, External Inhibiting Factors stated that in implementing the Restorative Justice and Diversion system there are still many obstacles external causes include: 1) Inconsistency in implementing regulations. There is no uniform application of law as a basis and guideline for all law enforcement agencies, inconsistencies in the application of regulations in the field handling children in conflict with the law, the simplest problem can be seen in the various limits that constitute the minimum age for a child related regulations. As a result, law enforcement officials made a decision which is inconsistent in the case of children who conflict with the law that has similarity of the elements of the act; 2) Legal substance that does not accommodate the implementation of restorative justice. Meanwhile, according to the Lampung Province Correctional Center (BAPAS) as Head of the Child Client Guidance Sub-Section, external barriers faced are: 1) Lack of support and cooperation between institutions. This problem is another obstacle that still occurs in many cases to enforce legal provisions, including handling children in conflict with the law, many legal professionals still consider mediation as a second-class method of seeking justice which they failed to achieve justice at all, even though currently the judge is the party who can mediate cases children who conflict with the law are not like civil mediation allowing non-judges to act as mediators in court; 2) Community participation is not yet optimal.

### **3. Solutions to Obstacles to Implementing Diversion and Restorative Justice as a form of protecting the rights of children in conflict Law**

Based on the results of research and interviews with PPA investigators at the Bandar Police Lampung PPA Investigators, as well results of interviews with Correctional Center Employees (BAPAS) Lampung Province, Head of the Child Client Guidance Sub-Section, that in implementing Diversion and Restorative Justice need a solution. According to investigators PPA at the Bandar Lampung Police, the solutions that can be implemented are 1) Law enforcement efforts to implement restorative justice optimally; 2) Making regulations that accommodate all provisions regarding the handling of children who conflict with the law through a restorative justice approach, socialization to all law enforcement officers and the community, coordination between law enforcement officers; 3) Changing the paradigm of law enforcement officials from a retributive and restitutive approach justice becomes restorative justice. Therefore, it is necessary to make efforts so that the authorities law enforcers involved in handling children in conflict with the law so as not to only refer to Law Number 11 of 2012 concerning Systems Criminal Justice and Law Number 23 of 2002 concerning the Protection of Children, but also refers to national and international instruments as well as Letters Joint Decision; 4) There is a need to provide special children's detention rooms and children's courtrooms, as well as apparatus law enforcers who are certified specifically to handle the problems of children in conflict with the law.

Meanwhile, according to the Lampung Province Correctional Center (BAPAS), Head of the Child Client Guidance Sub-Section, the solution that can be to do is: 1) Law enforcement officials who handle children's problems should prioritize peace over formal legal processes. Mediation in children's cases needs to be socialized to the wider community; 2) It is necessary to increase the human resources of the law enforcement officers involved in handling children in conflict with the law through socialization education and special training so that they can understand the rights of children contained in it. Laws can be protected and enforced.

## **DISCUSSIONS**

### **1. Implementation of Diversion and Restorative Justice as a form of protecting the rights of children in conflict with the law**

The application of the concept of diversion of existing forms of formal justice is a more prioritized effort to protect children from imprisonment[9]. Apart from that, it can be seen that child protection with a diversion policy can be implemented in all levels of justice starting from the community before the crime occurs with take precautions. After that, if there are children who commit violations then they need to be processed by the police. Furthermore, if the child who committed the offense has already been arrested by police in every judicial examination to be able to carry out a diversion form stop the investigation for the protection of child perpetrators. Then if the child's case has reached court, the judge can implement the idea of diversion in the interests of the child perpetrator by the procedures and takes priority children can be released from prison. Lastly, if the child is already there in prison, prison officials can create a diversion policy towards children so that children can be transferred to social institutions, or alternative sanctions that are useful for the development and future of children but diverted to remove them from the justice system. One main thing about this form is the cautious attitude of the police, where young people who have been handled by the police are only given verbal and written warnings after the child is released, and this is the end of the problem unless it is a child. If the person commits a further violation (repeats) then a process will be carried out in advance[10]. Next, to differentiate and determine what is good and bad for you in committing an unlawful act, it is an action that involves aspects moral and psychological[11]. Without having this moral and spiritual strength, a person cannot be held legally responsible for the actions taken and the existence of the elements error, meaning whether it is true that the child committed an act that can be punished or not prohibited by law.

According to the Head of the Center's Child Client Guidance Sub-Section Corrections (BAPAS) stated that the implementation of diversion and restorative justice for children in conflict with the law has been implemented with recommendations on the results of community research (Litmas) conducted by Correctional Center (BAPAS)[12]. Litmas is carried out after notification from police investigators and employees BAPAS conducts community research (Litmas) for a minimum of 3 days and a maximum of 7 days, the research was carried out through observation and in-depth interviews about the child's social background in the home and community environment, economic conditions and parents' daily behavior. After the Litmas is carried out, BAPAS employees make it report then the results of the litmas report are submitted to the investigator and copied to prosecutors and courts[13]. Investigators follow up on the results of Litmas whether the child conflicts with the law, diversion, and restorative justice can be carried out. The case continues in the next legal process. In the last period, the Correctional Center has provided recommendations for the results of community research (Litmas) by carrying out diversion and restorative justice on 30 cases including cases of abuse, theft, immorality/obscenity. The results of community research (Litmas) conducted by BAPAS show that the rights of children in conflict with the law are less protected at the examination level starting from the investigation process up to the trial process. From the results of the research level Investigations carried out by child police often result in violence when questioned for information and forced to admit their actions so the results of the Minutes Police examinations (BAP) and BAPAS Litmas results are sometimes contradictory, a child not accompanied by a legal advisor while the child does not understand at all questions asked by the police[14].

This condition greatly influences psychological development and the future children, mistreatment received by children in the investigation process and detention carried out on children in conflict with the law has no impact positive on children, which causes children to become traumatized, children drop out of school, feel they are not useful and rejected by the environment[15]. In Article 40 of the Convention on the Rights of the Child, participating countries recognize the rights of each child who is suspected, accused, and admitted to having violated the law criminals to be treated in a manner consistent with enhancing the dignity and worth of children, which strengthens children's respect for human rights and basic freedoms from others taking into account the age of the child and the desire to promote integration

return/reintegration of children and increasing the constructive role of children in public. Regarding the protection of children, according to researchers, they adhere to the Volgest Theory, according to Von Savigny's Volgest theory is that law grows from the behavior of society influenced by technology, social, political, and cultural science[16].

Grammatically, the meaning of diversion is a diversion. Where is diversion carried out? motivated by the desire to avoid negative effects on the child's soul and development by his involvement with the criminal justice system[17]. Furthermore, according to Chris Graveson, diversion is a process that has been recognized internationally as the best and most effective at handling children in conflict with the law. Intervention for children who deal with the law is very broad and varied, but more emphasis is placed on detention and punishment, regardless of how minor the offense is or the child's young age. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officials is called discretion or in Indonesian discretion[4]. If based on the situation and conditions described above, then efforts to implement diversion and restorative justice are the right step for the resolution of cases of children in conflict with the law.

Based on the description above, it can be seen the duties and functions of the police as investigators in cases of children in conflict with the law, in addition to carrying out investigations as well strive to carry out diversion and restorative justice by working together and coordinating with the Correctional Center (BAPAS) and then the Center Corrections coordinates with the families of children who conflict with the law[18].

## **2. Factors Inhibiting the Implementation of Diversion and Restorative Justice as a Form of Protection of the Rights of Children in Conflict with the Law**

Based on the research results above, it is connected to the Volgest theory according to Von Savigny[16], it can be seen that within the framework of carrying out the Main Duties and the function of POLRI and BAPAS continues to strive to achieve justice in a society that develops and is desired by the society itself a framework for realizing diversion and restorative justice. Grammatically, the meaning of diversion is a diversion. Where is diversion carried out? motivated by the desire to avoid negative effects on the child's soul and development by his involvement with the criminal justice system. Furthermore, according to Chris Graveson, Diversion is a process that has been recognized internationally as the best and most appropriate way of dealing with children in conflict with the law. Intervention for children who deal with the law is very broad and varied, but more emphasis is placed on detention and punishment, regardless of how minor the offense is or the child's young age. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officials is called discretion or in Indonesian discretion.

## **3. Solutions to Obstacles to Implementing Diversion and Restorative Justice as a form of protecting the rights of children in conflict Law**

Based on the formulation of these two laws and regulations, Barda Nawawi Arief [19]detailed the main duties of the National Police as law enforcers who maintain security domestically, which more broadly includes various very noble and noble aspects, namely: a) Aspects of public order and security; b) Aspects of protection for individuals and society / from disturbances/actions, breaking the law/crime; from societal ills and dangerous beliefs; including aspects of community service with provide protection and assistance; c) Aspects of social education in the field of legal obedience/compliance among citizens; d) Aspects of law enforcement in the field of justice, especially in the field of investigation and investigation.

The contribution of this research is for future improvements to the police and police officers Correctional Centers (BAPAS) which handle children's problems should implement the concept of diversion and restorative justice and the need for outreach to the wider community. There needs to be a special detention room for children in the police and there needs to be police officers and Correctional Center officers (BAPAS) who are specially certified in handling problems of children in conflict with the law.

## CONCLUSION

Children's rights conflict with the law is less protected at the inspection level starting from the process investigation until the trial process. There is no uniform application of law as a basis and guideline for all law enforcement agencies, implementation inconsistencies regulations in the field in handling children in conflict with the law, and problems that the simplest can be seen in the various limits that constitute the minimum age a child to the relevant regulations as a result of law enforcement officials making inconsistent decisions in cases of children in conflict with the law which have similar elements of action.

## REFERENCES

- [1] Kiswanto BBA, Mashdurohatun A. The Legal Protection Against Children Through A Restorative Justice Approach. *Law Dev J*; 3. Epub ahead of print 2021. DOI: 10.30659/ldj.3.2.223-231.
- [2] Rodliyah R. Diversion as an Alternative Criminal Case Settlement. *Int J Multicult Multireligious Underst*; 6. Epub ahead of print 2019. DOI: 10.18415/ijmmu.v6i4.1013.
- [3] Hernawarman K, Santiago F. Regulation of Child Criminal Action Through Diversion in the Child Criminal System. 2022. Epub ahead of print 2022. DOI: 10.4108/eai.30-10-2021.2315736.
- [4] Hendarto Y, Ma'ruf U. Diversion In Children Criminal Justice System Through Restorative Justice. *J Daulat Huk*; 1. Epub ahead of print 2018. DOI: 10.30659/jdh.v1i2.3269.
- [5] Alhakim A. DIVERSION AS A LEGAL CONCEPT THAT IS EQUITABLE FOR CHILDREN IN INDONESIA. *Mizan J Ilmu Huk*; 11. Epub ahead of print 2022. DOI: 10.32503/mizan.v11i2.3102.
- [6] Azim N. The Role of the Correctional Hall of Serang in the Settlement of Child Offender Through Diversion in Juvenile Justice System. *Int J Soc Sci Res Rev*; 4. Epub ahead of print 2021. DOI: 10.47814/ijssrr.v4i1.60.
- [7] Suyanto. *Metode Penelitian Hukum Pengantar Penelitian Normatif, Empiris dan Gabungan*. Unigres press, 2022.
- [8] Qomariah SN. Buku Ajar Riset Keperawatan. *Reposytori Univ Gresik*.
- [9] Sarwadi S, Bawono BT. Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia. *J Daulat Huk*; 3. Epub ahead of print 2021. DOI: 10.30659/jdh.v3i4.13145.
- [10] Suyanto, Qomariah SN, Syaiful Y, et al. LEGAL CASE AND HEALTH PERSPECTIVE OF BULLYING LEADING TO BLINDNESS. *Equal Int Law J* 2023; 1: 143–147.
- [11] Suyanto. PERSUASIVE ASSISTANCE AND PROBLEM-SOLVING FOR THE ESTABLISHMENT OF VILLAGE-OWNED ENTERPRISES. *Equal Int Law J* 2023; 1: 110–115.
- [12] Sa'bani K, Zulfa EA. Optimizing the Role of Correctional Institution in Resolving Cases Through Diversion at the Class I Correctional Institution of Tangerang. *Leg Br*; 12. Epub ahead of print 2023. DOI: 10.35335/legal.v12i1.722.
- [13] Sari FV. The Role of the Public Prosecutor in settlement of Child Cases Through Diversion at the Purwokerto District Attorney. *UMPurwokerto Law Rev*; 1. Epub ahead of print 2020. DOI: 10.30595/umplr.v1i2.8659.
- [14] Ulul Amri AS, Khisni A. Role of Judges in Handling Criminal Procedures for Children through Diversion of Justice. *Law Dev J*; 3. Epub ahead of print 2021. DOI: 10.30659/ldj.3.1.140-147.
- [15] Qomariah SN, Amin NS, Azizah YN, et al. Stress Management Education and Training Program Reduces The Anxiety Levels Of Students Facing The National High School

Exam. ... *Glob Heal J*, <https://syntificpublisher.com/index.php/synthesis/article/view/15> (2023).

- [16] Aulia MZ. Friedrich Carl von Savigny tentang Hukum: Hukum sebagai Manifestasi Jiwa Bangsa. *Undang J Huk*; 3. Epub ahead of print 2020. DOI: 10.22437/ujh.3.1.201-236.
- [17] Wangga MSE, Widjajanti E, Wulandari WR, et al. Diversion: The Concept of Child Criminal Case Resolution in Indonesia. *Law Humanit Q Rev*; 2. Epub ahead of print 2023. DOI: 10.31014/aior.1996.02.02.62.
- [18] Mubarak Z, Sulchan A. THE ROLES OF INVESTIGATOR IN IMPLEMENTING DIVERSION ON CHILDREN CRIMINAL ACTION. *Int J Law Reconstr*; 2. Epub ahead of print 2018. DOI: 10.26532/ijlr.v2i1.2992.
- [19] Rustamaji M. Biomijuridika: Pemikiran Ilmu Hukum Pidana Berketuhanan dari Barda Nawawi Arief. *Undang J Huk*; 2. Epub ahead of print 2019. DOI: 10.22437/ujh.2.1.193-223.



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