

# **Diversion in the Investigation Process for Children in Conflict with the Law**

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## **ABSTRACT**

Objectives of the Research to find out the framework of thought that underlies the implementation of Diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System through Diversion. This research method uses normative juridical. What is meant by normative juridical research type is the research method carried out by focusing on positive legal norms in the form of statutory regulations. In this normative legal research, we will examine statutory regulations that will explain the appropriate form of diversion in resolving children's criminal cases in order to fulfill children's rights. Result Restorative Justice is a Diversion. If the child's case meets the requirements for diversion then the hope of restorative justice can be realized, namely by the success of diversion. Sometimes children's cases do not meet the requirements for diversion in accordance with the Law on the Juvenile Criminal Justice System, even though children's cases lead to restorative justice because the perpetrator and victim have received a fair solution by making peace and can recover as before. If the Diversion efforts are not completed, the child is threatened with punishment so this is not in accordance with the Principle of Deprivation of Freedom and Punishment as a last resort, because there are efforts that could have been carried out or attempted, namely Diversion, but were not carried out because there are restrictions on Diversion in Children's cases in accordance with Article 7 of the Law. -Law Concerning the Juvenile Criminal Justice System. If the Indonesian state does what the Philippine state does, namely applying diversion to every child case, then deprivation of liberty and punishment will truly be a last resort.

**Keywords:** Children, Law, Prosecutor, Constitution, Court

## **1. INTRODUCTION**

Children are an inseparable part of human survival and the survival of a nation and state. Children need to receive protection from the negative impacts of rapid development, the flow of globalization in the fields of communication and information, advances in science and technology, as well as changes in the style and way of life of some parents which have brought about fundamental social changes in people's lives which have a big influence on values. and behavior of children, as a form of commitment of the Indonesian State as stipulated in the 1945 Constitution of the Unitary State of the Republic of Indonesia, which is formulated in Article 28 B paragraph (2), in terms of providing protection for children and upholding children's rights, the Government of the Republic of Indonesia, has ratified the Convention on the Rights of the Child with Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child (Utami, 2023).



Before the birth of Law Number 23 of 2002 concerning Child Protection, basically children with problems were categorized under the term juvenile delinquency, which refers to Law Number 3 of 1997 concerning Juvenile Courts. What is meant by juvenile delinquency is regulated in Article 1 point 2 of Law Number 3 of 1997 concerning Juvenile Courts, namely children who commit criminal acts and children who commit acts that are declared prohibited for children, both according to legislation and according to other existing legal regulations. and applies in the society concerned (Junaidi, 2022).

The term Naughty Children was no longer used after the enactment of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, so the term changed from Naughty Children to Children in Conflict with the Law (ABH). Currently Law Number 11 of 2012 concerning the Juvenile Criminal Justice System uses the term for children who commit criminal acts as Children in Conflict with the Law. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System replaces Law Number 3 of 1997 concerning Juvenile Courts which is no longer in accordance with the development and legal needs of society because it has not comprehensively provided protection for children in conflict with the law (Yanto, 2017 ).

The most basic substance regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is the strict regulation of Restorative Justice and Diversion. The recovery process according to the concept of Restorative Justice is through Diversion, namely diversion or transfer from the judicial process to an alternative process for resolving criminal cases, namely through recovery deliberation or mediation. Diversion steps are made to prevent children from further legal action and for community support, besides that diversion aims to prevent the negative influence of subsequent legal action which can cause stigmatization.

Diversion is currently considered a process that has been recognized internationally as the best and most effective way of resolving cases of children in conflict with the law. This thought initially emerged because children in conflict were influenced by several other factors outside the child, such as relationships, education, family, playmates and so on (Aprita et al., 2024).

Diversion aims to achieve peace between victims and children, resolve children's cases outside the judicial process, prevent children from being deprived of their freedom, encourage the community to participate and instill a sense of responsibility in children. Diversion must be carried out at every stage starting from the level of investigation, prosecution and examination at the District Court. Diversion is said to be successful if an agreement is reached, and the case can be stopped and restorative justice is achieved, whereas if diversion is not successful then the case continues until the child is sentenced to a crime.



Children are not to be punished but must be given guidance and guidance, so that they can grow and develop as normal children who are completely healthy and intelligent. Children are a gift from Allah Almighty as potential future generations of the nation who are still in their physical and mental development period. Sometimes children experience difficult situations that make them commit unlawful acts. However, children who break the law do not deserve to be punished, let alone sent to prison.

In criminal impositions, although the punishment imposed on children can be in the form of a warning sentence or a sentence with conditions, the stigmatization of being a child who has served a sentence is attached to children who are in conflict with the law. For the sake of legal protection for children who are in conflict with the law, especially children who are in conflict with the law, by paying attention to the principles in the Juvenile Criminal Justice System, all children's cases without exception should be subject to diversion so that deprivation of liberty and punishment are truly the last resort.

## **2. RESEARCH METHODS**

Legal research using normative legal research methods in drawing conclusions using deductive thinking methods. Starting with drawing conclusions based on general things to specific things. By comparing primary legal materials and secondary legal materials, problems can be narrowed down from general to specific. Data analysis is carried out by comparing and analyzing primary legal materials to search for normative truth. Assisted with secondary data in the form of legal opinions and information from sources for later analysis and finding differences in legal opinions.

## **3. RESULTS AND DISCUSSION**

### **Diversion In The Resolution Of Children's Criminal Act Matters**

The Indonesian Criminal Law System is entering a new phase in its development. One form of reform in Indonesian Criminal Law is the regulation of criminal law from the perspective and achievement of justice towards improving or restoring conditions after incidents and criminal justice processes known as restorative justice which is different from retributive justice (emphasizing justice on retribution ) and restitutive justice (emphasizing justice in compensation) (Marbun, 2014). When viewed from the development of criminal law science and the nature of modern punishment, it has introduced and developed what is called the "Dower-Victims" relationship approach. A new approach that has replaced the action or behavior approach or "daad-



dader strafrecht". Legal experts have introduced a formula for justice, especially in upholding human rights, that there are 3 aspects of the approach to building a legal system in the context of modernization and legal reform, namely in terms of structure, substance and culture, all of which are feasible to run smoothly. integral, simultaneous and parallel (Ariyanti, 2019).

The SPPA Law was passed and promulgated on July 30 2012 and came into effect 2 (two) years after its promulgation (August 1 2014). The most basic substance in the SPPA Law is the strict regulation of Restorative Justice and Diversion with the aim of avoiding and distancing children from the justice process so as to avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to a normal social environment.

Restorative Justice and Diversion are closely related. Restorative justice as the goal of implementing diversion in the juvenile criminal justice system. Restorative Justice is a Diversion process, namely all parties involved in a particular criminal act together to overcome the problem and create an obligation to make things better by involving victims, children and the community in finding solutions for repair, reconciliation and reassurance that is not based on revenge.

The concept of a restorative justice approach is an approach that focuses more on conditions for creating justice and balance for perpetrators of criminal acts and the victims themselves. Criminal procedural and justice mechanisms that focus on punishment have been transformed into a dialogue and mediation process to create an agreement on the resolution of criminal cases that is fairer and more balanced for victims and perpetrators (Rahmawati, 2013).

Provisions regarding Diversion in the SPPA Law are regulated from Article 6 to Article 15. In Article 15 it is stipulated that "provisions regarding guidelines for implementing the Diversion process, procedures and coordination for the implementation of Diversion are regulated by Government Regulations". However, the government regulation in question, namely Government Regulation of the Republic of Indonesia Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Who Are Not Yet 12 (Twelve) Years Old, was only established and promulgated on 19 August 2015, approximately a year after the SPPA Law came into effect. Before the Republic of Indonesia Government Regulation Number 65 of 2015 was issued, the Supreme Court of the Republic of Indonesia had issued Supreme Court Regulation (PERMA) Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, to clearly regulate the procedures and stages of the diversion process that were determined and promulgated on July 24 2014.

Punishment for perpetrators of juvenile crimes does not achieve justice for the victims, considering that on the other hand it still leaves its own problems unresolved even though the



perpetrators have been punished. Looking at the principles regarding child protection, especially the principle of prioritizing the best interests of children, it is necessary to have a process for resolving children's cases outside of criminal mechanisms or what is usually called diversion (Hamzah, 2017). Therefore, diversion must be carried out at every level of examination by investigators and public prosecutors. However, the child's case must meet the requirements for diversion to be carried out in accordance with Article 7 of the SPPA Law, namely:

- a. Threatened with imprisonment for less than 7 (seven) years; And
- b. It is not a repetition of a criminal act

if the conditions are not met, then the matter of the child cannot be diverted.

In accordance with the SPPA Law, diversion is carried out through deliberation by involving children and their parents/guardians, victims and/or their parents/guardians, community counselors, professional social workers, representatives and other involved parties to reach an agreement on diversion through a justice approach. restorative. The deliberation can also involve Social Welfare and Community Workers. Mediation or dialogue or deliberation is an inseparable part of diversion to achieve restorative justice. Deliberations are carried out in a family atmosphere, are sincere and there must be no coercion and must take into account the interests of the victim. The interests of the victim are the rights of the victim or the victim's child and must be considered proportionally. Children's welfare and children's responsibilities must also be taken into account in a way that children are still given their rights but guidance is still carried out for their mistakes so that children are not free from responsibility for implementing the Diversion agreement.

The success of diversion is highly expected because with the success of diversion, restorative justice will be realized. The success of Diversion is marked by a diversion agreement. The diversion agreement can take the form of peace with or without compensation, handing it back to parents/guardians, participation in education or training at an educational institution or LPKS for a maximum of 3 (three) months or community service. Diversion agreements can also be made without the consent of the victim and/or the victim's child's family, if the crime is in the form of a violation, minor crime, crime without a victim or the value of the victim's loss is no more than the local provincial minimum wage. This is carried out by investigators together with children and/or their families, and community counselors and can involve community leaders.

Restorative justice is realized if the diversion is successful and the agreement has been fully implemented so that the child's case can be stopped. Termination of children's cases can be done at any level:



a. Level of investigation

The investigator issues a letter of decision to terminate the investigation or commonly known as SP3 (Letter of Termination of Case Investigation) which also contains the determination of evidence in accordance with the Determination of the Chairman of the District Court.

b. Prosecution rate

The Public Prosecutor issues a decision to terminate the prosecution or commonly known as SKPP (Determination to Stop Prosecution) which also contains a determination of evidence in accordance with the Determination of the Chairman of the District Court.

c. Court level

The judge on the order of the Head of the District Court publishes the determination of the suspension of the case which also contains the determination of the evidence.

With the success of this diversion, children who are in conflict with the law will avoid stigmatization and children can return to a normal social environment.

Diversion is declared unsuccessful if there is no agreement in the diversion process or the diversion agreement is not implemented. If the Diversion process. If diversion is not successful at the investigation level then the case is transferred to the prosecution stage, if it is not successful at the prosecution stage then the case is transferred to court, if diversion is not successful at the court stage, then the child's case is continued until the imposition of a crime or action against the child.

From the description above, it can be seen that the success factor for Diversion is the willingness to agree between the perpetrator and the victim and have implemented the agreement, while the factors that influence the failure of Diversion depend on the victim, if the victim does not agree to make peace. The victim or the victim's family does not agree to resolve the case using diversion, because they still believe that punishment is retaliation for the mistakes that have been committed.

In the SPPA Law, not all children's cases can be diverted. The SPPA Law still prioritizes diversion in children's cases. The higher the priority of diversion, the lower the threat of punishment and the younger the child's age. Diversion is not intended to be carried out against perpetrators of serious criminal acts, for example murder, rape, drug trafficking and terrorism, which are punishable by 7 (seven) years or more and children who have committed a second criminal act.\

### **Restorative Justice in the Juvenile Criminal Justice System**

In principle, criminal acts are the responsibility of the child himself, however, as far as possible in providing protection to children who are in conflict with the law, efforts are made to ensure that children avoid the judicial process and prevent children from being punished and





seeking steps for diversion and restorative justice, because children commit acts that violate There are many factors that influence the law (Hasan, 2013).

Deviations in a child's behavior or unlawful acts committed by a child are caused, among other things, by factors outside the child. To find out what factors encourage children to commit criminal acts, it is necessary to know their motivation. According to the Big Indonesian Dictionary, what is meant by "motivation" is the urge that arises in a person consciously or unconsciously to carry out a certain action. Motivation is also often defined as efforts that cause a person or certain group to be moved to carry out an action because they want to achieve the desired goal or get satisfaction from their actions.

First, there is a social environment around children that is harsh, both in the economic, social, political, cultural and so on. Phylogenetically, the nature of violence is innate, but to become an action, violence is a product of the social environment in society at large. Second, the school environment is formal and tends to make the relationship between teachers and students, students and students lose their human values. Love and affection are no longer the basis and goal of education because the complaint data at KPAI shows a variety of bullying against children at school, such as children who smoke, making victims feel inferior and have social disorders, senior children, threats of terror via cellphones, to sexual harassment, teachers feel they have fulfilled their obligations when they have finished delivering all the syllabus within the specified time period, regardless of the students' psychological development stages.

Third, the increasingly permissive attitude of parents towards the ties of moral values, as well as the intensity of communication means that individuals no longer focus on their skills and dedicate themselves totally to the world of work if they do not want to be eliminated from competitive career paths. Parents then hand it over completely to the school, even though modern schools or educational institutions have also been captured and are subject to the law of commodity transactions, not humanist relations (Laksana, 2017).

Fourth, the loss of public space for children's expression, such as sports, theater arts, literature, creative games, and so on, so that they are more likely to give vent to things that are destructive, uncontrollable, trial and error, actions seeking attention, venting heroism in front of friends. peers, and so on. Fifth, the extraordinary influence of the mass media, especially television, has penetrated the private sphere and indoctrinated the teachings of violence through films, soap operas, reality shows, news broadcasts and other shows. One fact is that now television has become the new religion of modern society, where the source of reference for spiritual values, investment decisions, political preferences, and culinary taste choices is handed over to television.



So when most television stations do not have social responsibility and have a children's perspective by broadcasting violent products, it is inevitable that children with violent patterns are born around them.

Sixth, the loss of role models for teenage children means they look for role models who are most easily accessible, or even have no role models at all. On the other hand, on the national political stage, we see national leaders and figures expressing a lot of violence, such as the riots of July 26 1996, the May 1998 riots, the SARA conflict in Poso, the religious war in Maluku, the disgraceful behavior of members of the DPR RI and a number of public officials, even law enforcement, really a very strong reference for the birth of children who are in conflict with the law.

With such a comprehensive understanding, it is clear that the child's position, even though he is the perpetrator (offender) of acts of delinquency, is actually a victim (victim). Victims of adult perpetrators, government and state policies, as well as the socio-cultural environment in schools and communities built by parents. Because the perpetrator is a victim, it would be unfair if he had to receive punishment from a justice system that only cornered him (Setyowati, 2021).

From 2011 to 2019, the number of cases of children in conflict with the law reported to KPAI reached 11,492 cases, much higher than the reported cases of children involved in health problems and narcotics (2,820 cases), pornography and cyber crime (3,323 cases), as well as trafficking and exploitation. (2,156 cases). "Maybe it's cyber because the era is like this. So the number of digital victims of children is very high. Children's exposure to pornography and online games is also quite high, so it's natural that the numbers have shot up," according to KPAI Commissioner Retno Listyarti. If we look closely, cases of children facing the law because they are perpetrators of sexual violence tend to increase sharply. In 2011, there were 123 cases of child sexual crimes. This number rose to 561 cases in 2014, then fell to 157 cases in 2016, and from mid-January to May 2019, the number of cases of children in conflict with the law as perpetrators of sexual violence reached 102 cases. Apart from cases of sexual violence perpetrated by children, cases of physical and psychological bullying perpetrated by children also attract quite a lot of attention. According to KPAI data, reports of cases of children in conflict with the law due to being perpetrators of physical and psychological violence reached 140 cases in 2018. "We are sure that in 2020 it will still be the same," said KPAI Commissioner Retno Listyarti.

The SPPA Law has brought changes in the regulation of juvenile crimes in Indonesia. As stated in Article 5 Paragraph (1) of the SPPA Law, it is explained that the juvenile criminal justice





system must prioritize a restorative justice approach. The SPPA Law which prioritizes restorative justice has replaced retributive justice which is no longer considered relevant.

Diversion is an important matter regulated by the SPPA Law, because the aim is to achieve peace between victims and children, resolve children's cases outside the judicial process, prevent children from being deprived of their freedom, encourage the community to participate, and instill a sense of responsibility in children. In the process of enforcing juvenile criminal law, investigators, public prosecutors and judges in seeking diversion must consider the category of criminal offense, the age of the child, the results of social research from the Fathers, and the support of the family and community environment. Moreover, a diversion agreement occurs if the consent of the victim and/or the victim's child's family has been obtained as well as the willingness of the child and his family. This shows that in implementing diversion there must be a family discussion between the child and the victim with the aim of achieving the best interests of the child while still paying attention to justice. for victims. However, if diversion fails, the stages of resolving children's cases continue in accordance with the criminal justice process. It can be said that this diversion provides an alternative for law enforcement officers in resolving children's cases without having to go through the criminal justice process.

### **Obstacles in Implementing Diversion**

According to (Kurniati et al., 2016) several obstacles that arise in implementing this diversion are: "The police officers' understanding of this diversion is still lacking, even in their experience in accompanying children, investigators still place children in the position of adults and prefer resolve this child's case through formal channels. Apart from that, public understanding is still lacking, there are even families of victims of fights between children who want the perpetrators to be sentenced to the harshest possible prison terms. Even though the perpetrator and the victim were initially good friends, they were even part of the same family."

Regarding this matter, Elisabeth Mantili (Coordinator of the PUSAKA Indonesia litigation division) also added that the obstacles in implementing this diversion are "Difficulties if the case is that both the perpetrator and the victim are children, and parents sometimes give up completely the case is handed over to the NGO, even though in fact the role of parents is also required in the process of resolving the child's case. What is even more worrying is the attitude of the authorities who do not want to cooperate, and even prefer to resolve the matter through formal channels."

The obstacle in implementing this diversion is the PKPA (Child Study and Protection Center) established on October 21 1996, which is an independent institution that upholds the principle of public accountability, prioritizes participation opportunities for children and women and respects



and supports the basic principles of children's and women's rights. as well as pluralism and upholding the principle of equality between men and women. Upholding the rights of children and women as intended by the Convention on the Rights of the Child (KHA) & the Convention on the Elimination of Acts of Violence & Discrimination against Women (KTP) is the most important effort underlying the birth of PKPA (Thoriq, 2024).

BAPAS which was formed by order of the Child Protection Law no. 3 of 1997 could not do anything because the results of their research were only recommendations to investigators and were not binding. In fact, BAPAS has a very important role in providing consideration for children who commit criminal acts. So sometimes it is found that children's cases continue and are decided before the court without any previous research from BAPAS. Apart from that, coordination with BAPAS was not good. This is indicated by the fact that all the results of the judge's decisions regarding children as perpetrators of criminal acts were not accepted by BAPAS as a copy, making it difficult for BAPAS to conduct further research regarding the results of the recommendations it had given for consideration. "So BAPAS experiences difficulty in following developments in handling children's cases and being accountable to their superiors."

Meanwhile, according to one of the teaching lecturers at the Faculty of Law, Yos Sudarso University, Surabaya (Edy Junaedi), the obstacles in implementing this diversion include "The existing regulations (TR and Agreement of 5 (five) departments and the National Police) regarding diversion are not yet clear. standardization and sanctions if not implemented. The TR which is used as a reference for the police in implementing diversion against children who are in conflict with the law is only a recommendation, so the police are still hesitant in carrying out diversion against children as perpetrators. Existing facilities are not yet ready, such as social institutions to accommodate children in conflict with the law to receive education and rehabilitation. Apart from that, there is an unclear funding problem from the government regarding the implementation of diversion, which should be included in the APBN."

Based on the description above, it can be concluded that several obstacles that arise in implementing this diversion are:

1. Legal regulations are not yet clear and firm in implementing diversion. So the authorities are still reluctant and afraid to apply diversion to children who are in conflict with the law, especially as perpetrators. Apart from that, the interpretation of criminal acts that can be diverted is returned to the investigator who is concerned that it will be misused and there will be no strict sanctions if diversion is not carried out;



2. The police officers' lack of understanding regarding diversion, this is due to a lack of socialization by police officers from the center to their ranks down to the lowest level;
3. BAPAS, which is supposed to provide input to the police regarding the handling of children in conflict with the law, is unable to do anything. The results of their research regarding the causes of children committing criminal acts and the appropriate conditions for handling them only take the form of recommendations, the decision of which is left to the National Police investigators to use or not. So the results are not binding and can only be acted upon if requested by the investigator.
4. There is no special institution to supervise the implementation of diversion, so there are concerns that it will be misused by the police;
5. The lack of ready facilities for carrying out diversion means that sometimes the police are confused about who to hand over the child to if their parents are unable to educate them;
6. Unclear funding for implementing diversion;
7. The community's own readiness to implement this diversion. This is due to their ignorance regarding diversion so that it is sometimes misunderstood if children are not processed according to formal procedures "as if the authorities are considered to have received bribes".

#### **4. CONCLUSION**

Restorative Justice is a Diversion. If the child's case meets the requirements for diversion then the hope of restorative justice can be realized, namely by the success of diversion. Sometimes children's cases do not meet the requirements for diversion in accordance with the Law on the Juvenile Criminal Justice System, even though children's cases lead to restorative justice because the perpetrator and victim have received a fair solution by making peace and can recover as before. If the Diversion efforts are not completed, the child is threatened with punishment so this is not in accordance with the Principle of Deprivation of Freedom and Punishment as a last resort, because there are efforts that could have been carried out or attempted, namely Diversion, but were not carried out because there are restrictions on Diversion in Children's cases in accordance with Article 7 of the Law. -Law Concerning the Juvenile Criminal Justice System. If the Indonesian state does what the Philippine state does, namely applying diversion to every child case, then deprivation of liberty and punishment will truly be a last resort.



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