

The Prosecutor's Role in the Implementation of the Diversion Policy for Child

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Abstract.

The purpose of this paper is to find out and analyze the role of prosecutors in the application of diversion policies for child offenders and to analyze the obstacles and settlement solutions faced in the application of diversion for child offenders, the approach method uses a normative juridical approach, the results of the study state that the role of The prosecutor in implementing the diversion policy against the child perpetrator of a crime is a facilitator who provides views from another angle to resolve the problem to the party concerned and the obstacles faced by the prosecutor in implementing the diversion policy against child offenders are difficult to reconcile in order to reach an agreement between the two parties.

Keywords: Child; Diversion; Prosecutors.

1. Introduction

Children's rights are part of human rights that are guaranteed and protected by international law and national law, which are universally regulated, namely in the Universal Declaration of Human Rights (UDHR) and the International on Civil and Political Rights (ICPR). The Vienna Declaration held in 1993, produced by the World Conference on Human Rights (HAM), re-emphasized the principle of the First Call for Children, which emphasized the importance of national and international efforts to promote children's rights "survival protection, Development and participation."¹

The implementation of law enforcement against perpetrators of criminal acts must be in a system consisting of subsystems that relate to one another called the criminal justice system or in English it is called the Criminal Justice System..² Related to efforts to provide protection for children in conflict with the law, the juvenile criminal justice system must be interpreted broadly, not only interpreted as merely handling children in conflict with the law, but must also be interpreted to include the root causes of why children commit criminal acts and how to prevent it.

According to Mardjono Reksodiputro, the criminal justice system is a system in a society to deal with crime problems, which aims to control crime so that it is within the limits of tolerance and resolve most reports or complaints from people who are victims of crime by submitting criminals to court to give sanctions/

¹ Harkristuti Harkrisnowo, (2002), *Tantangan dan Agenda Hak-Hak Anak*, Newsletter Komisi Hukum Nasional, Edition February, Jakarta, p. 4.

² Marlina, (2009), *Peradilan Pidana Anak di Indonesia: Pengembangan Konsep Diversi dan Restorative Justice*, Refika Aditama, Bandung, p. 5.

punishment to the perpetrator. Then prevent the occurrence of crime victims and prevent perpetrators from repeating their crimes.³

Seeing the condition of handling cases of children in conflict with the law in Indonesia so far, there has been a new breakthrough to protect children from bad impacts in solving problems of children in conflict with the law, hereinafter referred to as children in conflict with the law through the juvenile criminal justice system as This has been stated in Act No. 11 of 2012, which focuses on resolving problems with restorative justice, namely: "a restoration of relationships and atonement for wrongdoing that the perpetrator of a crime (his family) wants to do against the victim of the crime (his family) (peace efforts)) outside the court with the intent and purpose that legal problems arising from the occurrence of the criminal act can be resolved properly by reaching agreement and agreement between the parties.⁴

According to Howard Zehr, restorative justice is defined as a process to involve, enable the involvement of a wider range of parties, namely those who have an interest in a specific violation. Then together, identify and direct the losses, needs, and obligations in order to heal and place the rights of the parties as possible points to be resolved. Then according to Sharpe, restorative justice has fundamental characteristics with various values called participation, democracy, responsibility, recovery, security, healing, and reintegration.

Furthermore, according to the United Nations Office on Drugs and Crime (UNODC), restorative justice refers to the process of solving crimes (crimes) by focusing on repairing victims' losses (injuries), holding perpetrators accountable for their actions, and involving the community in resolving conflicts that occur. Thus the restorative process is any process in which the victim and the perpetrator or other individuals or community members who are affected by a crime, take an active part in solving various problems that arise as a result of the criminal act with the help of a facilitator.⁵

Based on these various definitions, Johnston and Van Nes divide the definition of restorative justice into 3 (three) groups, and combine them into 2 (two) restorative justice efforts. The three groups of definitions include:

- Process-based definitions, emphasizing the interests between parties who receive the influence of a crime and the consequences of the crime. At this point, restorative justice can be said as a process that puts all parties together in a series of facts of a crime with the aim of solving and agreeing on the settlement of the consequences of criminal acts and the implications of criminal acts in the future;
- Justice-based definitions, emphasizing the outcomes and/or values of restorative justice. Justice-based restorative justice is any action that is primarily aimed at achieving justice through repairing losses resulting from the crime; and

³ Mardjono Reksodiputro, (1997), *Hak Asasi Manusia dalam Sistem Peradilan Pidana*, Jakarta, Pusat Pelayanan Keadilan dan Pengabdian Hukum Lembaga Kriminologi Universitas Indonesia, p. 84.

⁴ Hanafi Arief; Ningrum Ambarsari, Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia, *Al'Adl*, Volume X No. 2, July 2018, p.173-190

⁵ United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programme*. p. 12.

- The third definition is a combination of a process-based definition and a justice-based definition. Restorative justice is a process to define the wounds and needs of victims and perpetrators as a common goal to be resolved so that both parties, as well as the community of which they are a part, can be healed.⁶

The implementation of diversion is very dependent on the policies of the Police, Prosecutors, and Judges, or similar bodies, because the system for implementing diversion is carried out at the beginning of the criminal justice process. Diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside of criminal justice. The implementation of diversion is motivated by the desire to avoid negative effects on the soul and development of children by being involved in the criminal justice system. Prosecutors have an important role in the ongoing diversion process by involving victims, perpetrators, families of victims and perpetrators, the community and parties related to a criminal case.⁷

Diversion aims to break the vicious circle of stigmatization, violence, humiliation, and break down social bonds between actors. Diversion will also avoid the emergence of "crime schools", reduce the risk of recidivism, avoid increasing legal fees, and help integrate perpetrators. Diversion is also a constructive effort to rebuild social relations damaged by criminal acts, rather than excluding perpetrators from the context of their social life.

Starting from the complexity of the problems related to the protection that must be given to a child who is in trouble with the law, of course there must be efforts from various parties to save the nation's children. Based on the phenomena and legal facts of children in conflict with the law that continues to develop coloring the law enforcement process and the intensity of criminal acts that occur, then the implementation of enforcement must be implemented directly through the implementation of diversion, namely the transfer of the settlement of children's cases from the criminal justice process to the out-of-court process.

The purpose of this paper is to find out and analyze the role of prosecutors in the application of diversion policies for child offenders and to analyze the obstacles and solutions faced in implementing diversion for child offenders.

2. Research Methods

The approach method used in this research is the Juridical Empirical approach, namely research that examines or traces the behavior and attitudes of the community towards the applicable law. An empirical juridical approach is used to provide a qualitative description of the role of the prosecutor in the implementation of the diversion policy for child officers.

3. Results and Discussion

3.1. The Role of The Prosecutor in The Implementation of the Diversion Policy for Child Officers

⁶ Alicia Victor, *Sub-Report on Delivery; Restorative Justice*, The National Prosecuting Authority of South Africa.

⁷ Lilien Ristina, Peran Jaksa Dalam Penerapan Kebijakan Diversi Terhadap Anak Pelaku Tindak Pidana, *Ius Constituendum*, Vol 3 No 2 October 2018, p.166-178

The prosecution stage is one of the stages of resolving criminal cases carried out by the Public Prosecutor whose provisions are subject to Article 30 of Act No. 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia. Criminal Procedure Code. However, for children themselves, the prosecution process is different because the principle of *lex specialis derogat legi generalis* applies which means that special legal rules will override general legal rules as regulated in Act No. 3 of 1997 concerning Juvenile Court which was later replaced by Act No. 11 of 2012 concerning the Juvenile Criminal Justice System. Although children in terms of quality and quantity may commit acts that violate the law as adults do, the treatment provided does not have to be the same as the treatment for adults who commit crimes.⁸

In order to clarify the regulatory profile regarding the role of the prosecutor in the prosecution stage of children who commit criminal acts, the authors first determine the variables to be discussed, namely regarding:

- Prosecutors' Obligations;
- Prosecutor's Authority;
- Prosecutors' Rights;
- Prosecutor's Working Mechanism.

In terms of obligations that have been regulated in Law no. 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia Article 2 paragraph (1), namely "The Prosecutor's Office of the Republic of Indonesia, hereinafter referred to as the Prosecutor's Office, is a government institution that exercises state power in the field of prosecution and other authorities based on the law."

In relation to the desired settlement of child cases, Act No. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA) prioritizes case settlement through diversion. The settlement of child criminal cases through this diversion is the most ideal in order to resolve criminal cases involving child perpetrators with victims who are also still in the category of children and this is a tangible form of the principle of restorative justice in the SPPA law. It is said to be the most ideal form of settlement of criminal cases because the settlement through this diversion involves the active participation of the victim's child and family so that the interests of the victim's child will definitely be protected. In this diversion process, the Child and his/her family will be heard of the opinions, opinions and wishes that they expect from the Child Perpetrator/his/her family as well as what is expected from the community to ensure the loss and return of social disturbances that have been suffered by the Child Victim. Thus, if this diversion occurs, there will automatically be peace with the material that accommodates the interests of the victims.

Whereas based on the Warrant of the Head of the Semarang District Prosecutor's Office, the Public Prosecutor for the Settlement of Child Cases (P 16-A child) by Dwi Endah Susilowati, SH, against the child Syafani Rio Cristyono Bin Sulistyono, said that the above, in the opinion of the author, has been appropriately applied, according to the author. implementation of Diversion Deliberations in children, namely in order to protect and protect children, including giving the child

⁸ Nashriana, (2011), *Perlindungan Hukum Pidana Bagi Anak di Indonesia*, Raja Grafindo Persada, p.76

and their parents the opportunity to improve themselves and to prevent the perpetrator's child from being stigmatized and labeled as an ex-criminal if he is sentenced to prison.⁹

Aristotle's theory of justice focuses on 'equality of treatment' (equality) and 'lawfulness' which is defined as not taking more than what is rightfully his or equal (equal) and not violating applicable laws or obeying the law (lawful) as measure of justice.¹⁰ Following this theory, the punishment must be imposed on the perpetrator of a crime, because according to the law, it means that if someone violates the law, he will be punished. While the similarity of treatment can be interpreted that the formula is applied to all parties without any distinction.¹¹

Diversion aims to eliminate aspects of the punishment obtained if someone commits a crime, but on the other hand, the loss of this aspect of punishment does not necessarily negate the sanctions received by the perpetrators of the crime. In this case the perpetrator still gets a sanction but the sanction is not a punishment but a form of responsibility that must be done because he has made a mistake (criminal act).

Children who commit crimes based on the principle of 'equality of treatment' should not receive special treatment, while according to the law, every crime must be punished, so it is obligatory to impose a sentence according to the crime committed based on the applicable rules. However, in the applicable rules there is a regulation that recommends giving special treatment to children who are perpetrators of crimes, it can be concluded that the settlement using diversion does not conflict with the theory of justice as long as the perpetrators of the crime receive punishment in accordance with the crime committed by considering the aspects of justice. The specified 'special treatment'.

3.2. Constraints and Solutions to Settlement in the Implementation of Diversion for Child Perpetrators of Criminal Acts

In deciding the decision, there are several theories used by the judge. According to Mackenzie, there are several theories or approaches that can be used by judges in considering the imposition of a decision in a case. In deciding a criminal case, a judge must decide fairly and must comply with the applicable rules. According to Van Apeldoorn, judges must: Adapt the law to concrete factors, concrete events in society, and add to the law if necessary.¹²

The main function of a judge is to give a decision on a case submitted to him, where in a criminal case it cannot be separated from the negative proof system (*negative wetterlijke*), which in principle determines that a right or event or error is considered to have been proven, in addition to the existence of other tools. The evidence according to the law is also determined by the judge's conviction which is based on good moral integrity.¹³

⁹ Interview with Dwi Endah Susilowati, SH, Public Prosecutor on 20 August 2021

¹⁰ Munir Fuady, (2010), *Dinamika Teori Hukum*, Ghalia Indonesia, Bogor, p. 93

¹¹ Lilien Ristina, *Op Cit.* p.166-178

¹² E. Utrecht an Moch Saleh Djindang, (1983), *Pengantar Dalam Hukum Indonesia*, Sinar Harapan, Jakarta, p.204

¹³ Ahmad Rifai, (2010), *Penemuan hukum*, Sinar Grafika, Jakarta, p.96

Child protection is carried out in all aspects of life, including in this case in juvenile criminal justice, in juvenile crime it emphasizes the rights of children, both as suspects, victims, defendants, and as prisoners.¹⁴ The purpose of holding a juvenile criminal justice system is not only to prioritize criminal prosecution, but also to protect the future of children from the psychological aspect by providing protection, guidance and education. The existence of Act No. 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the Child Criminal Justice System Act), contains several important changes, one of the solutions that can be taken in handling cases of child crimes is a restorative justice approach.

The diversion approach in restorative justice as regulated in Act No. 11 of 2012 concerning the Juvenile Criminal Justice System is a new breakthrough that is not known in the conventional Criminal Justice System. Restorative justice offers the best solution in solving crime cases, namely by giving priority to the core problem of a crime. The solution that is important to note is to repair the damage or loss caused by the occurrence of the crime. Improving the social order of the community that has been disrupted due to crime is an important part of the concept of restorative justice.¹⁵

Diversion is defined as a process of diverting dispute resolution, especially the settlement of criminal cases, from what was previously inside the court to outside the criminal justice system. The diversion view obtained from this understanding often gives the wrong picture by meaning that the case is terminated and considered finished without any party responsible for the victim. People still tend to view punishment as a real/absolute consequence that must exist as a retaliation to the perpetrators of criminal acts. Most parents/guardians still feel that with diversion, the perpetrators of criminal acts do not get the 'retribution' they deserve, so they prefer to settle through ordinary legal channels. Some of the obstacles in the application of Diversion by the Prosecutor, among others:¹⁶

3.2.1. Understanding of the Definition of Diversion

Lack of understanding of this kind of understanding is one of the things that makes diversion often fail. Although diversion excludes court aspects, it does not mean that there is absolutely no punishment imposed as a form of responsibility for the perpetrators of criminal acts. The punishment received is a substitute punishment that aims to eliminate the nature of retaliation that leads to suffering and replace it with something better with the aim of giving the perpetrator the opportunity to change without getting stigmatized which can result in his future being closed.

In addition to understanding Diversion and children dealing with the law, it is necessary to know and understand the community, the most important thing is the understanding by law enforcers regarding Diversion itself so that law enforcers in applying Diversion can maximally act as mediators who provide understanding to

¹⁴ Anthony M Platt, *The Child Savers; the Invention of Delinquency*, The University of Chicago Press, Second Edition, Chicago, 1977, p. 54.

¹⁵ Supeno, Hadi, (2010), *Kriminalisasi Anak Tawaran Gagasan Radikal Peradilan Anak Tanpa Pemidanaan*, Gramedia Pustaka Utama, Jakarta, p.217

¹⁶ Interview with Dwi Endah Susilowati, SH, Public Prosecutor on 20 August 2021

victims, families and communities. Our society tends to still view punishment as a real/absolute consequence that must exist as a retaliation to the perpetrator of a crime.¹⁷

3.2.2. Unifying Thoughts between the Two Parties

Another problem encountered was regarding the agreement reached between the two problematic parties. Diversion is carried out through deliberation, but in the deliberation there are several obstacles faced in implementing diversion. Whether or not the diversion agreement is carried out and the results achieved in the diversion agreement.

There is a view of the old opinion that the real result of retaliation from a crime is punishment, then with the holding of diversion there will be inequality of justice. This injustice arises because of the assumption that with the holding of diversion, children who commit crimes do not get the 'punishment' they deserve as retaliation for their actions. So that there is a need for further understanding for both parties concerned regarding diversion.

To overcome the old views of the parents/guardians, the Prosecutor tries to provide an understanding of each party, both regarding the process and purpose of the diversion as well as regarding the cases that occurred in detail including the possibilities that will occur in the future. Meanwhile, to overcome the difficulties in reaching an agreement on whether or not to hold a diversion and the results of the service itself, the Prosecutor provides an understanding to the victim, family and community that is objective and impartial.

3.2.3. There is no uniformity in the implementation of diversion

It has been described previously that as a mandate from the implementation of the SPPA Law, internally the prosecutor's agency seeks to provide guidelines for child prosecutors who handle children's cases, namely the issuance of the Republic of Indonesia Attorney General's Regulation Number: PER-006 / A / J.A / 04 / 2015 concerning Guidelines Implementation of Diversion at the Prosecution Level. In general, the government has just issued a regulation regarding guidelines for implementing diversion, 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, so that its implementation still requires socialization.

This can be overcome by immediately socializing the Government Regulation which was just issued in August, so that uniformity in the handling of children's cases can be realized at every level in a juvenile criminal justice system. In addition, summons to the Head of the Pidum and Prosecutors can also be made through education or group dynamics in order to obtain uniformity in understanding the implementation of SPPA.

3.2.4. The sending of case files from the investigator to the prosecutor's office is too close to the end of the detention period

¹⁷ Eva Achjani Zulfa, (2011), Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan*, Lubuk Agung, Bandung, p.16

This requires research prosecutors to work extra to examine case files. When the file is declared incomplete, instructions are issued to complete the case file, but when the file is declared complete, P-21 is immediately issued with administrative completeness that must be prepared by the Research Prosecutor. Good coordination between investigators and prosecutors in handling children's cases is very necessary to anticipate the delivery of case files that are too tight, so that incomplete case files can be immediately completed by investigators and the files sent can be declared complete.

4. Conclusion

The role of the prosecutor in implementing the diversion policy against the child perpetrator of a crime is a facilitator who provides views from another angle to resolve the problem to the party concerned and the obstacles faced by the prosecutor in implementing the diversion policy against child offenders are difficult to reconcile in order to reach an agreement between the two parties, obstacles in the application of Diversion by the Prosecutor, among others, Understanding of the Definition of Diversion, Lack of understanding of this kind of understanding is one of the things that makes diversion often fail. Although diversion excludes court aspects, it does not mean that there are absolutely no criminal penalties imposed as a form of responsibility for the perpetrators of the crime; Uniting Thoughts between the Two Parties, Diversion is carried out through deliberation, but in the deliberation there are several obstacles faced in implementing diversion.

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