

Implementation of Restorative Justice in the Settlement of Criminal Acts Committed by Children

Maharani¹, Syamsuddin Muchtar², Audyna Mayasari Muin³

¹(Graduate Student, Faculty of Law, Hasanuddin University, Indonesia)

²(Associate Professor, Faculty of Law, Hasanuddin University, Indonesia)

³(Lecturer, Faculty of Law, Hasanuddin University, Indonesia)

Abstract: The purpose of this study is to analyze the effectiveness of the implementation of restorative justice and the obstacles in resolving criminal acts committed by children. By using a sociological juridical approach based on primary data, which is diversion documents, this study still uses secondary data to support primary data. The results showed that the effectiveness of the implementation of restorative justice in the resolution of criminal offenses committed by children after the existence of Government Regulation Number 65 Year 2015 is evidenced by the data from the Makassar City Police Department, the Makassar District Prosecutor's Office and the Makassar District Court explaining that there were successful child crimes in diversion. However, at the level of investigation restorative justice is still less effective. Constraints faced in the implementation of restorative justice, namely: understanding of the definition of diversion, the limits of the policy of implementing diversion, public trust in the rules of implementing diversion.

Keywords: children, diversion, restorative justice.

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I. INTRODUCTION

The definition of criminal acts in the Criminal Code (Kitab Undang-Undang Hukum Pidana/KUHP) is known as *Strafbaarfeit* and in the literature on criminal law often uses the term offense, whereas the legislators formulate a law using the term criminal events or criminal acts or criminal acts.¹ There is a relationship correlation between the substance arrangement of legal substance of the criminal law materiel and criminal law formal with the effort to the protection of the victim of crime.² According to Simons, that *Strafbaarfeit* (literal translation: a criminal event) is an illegal act related to the wrong (*schuld*) of someone who is capable of being responsible. The mistake referred to by Simons is a mistake in the broad sense which includes *dolus* (deliberately) and *culpa late* (negligent).³

The application of diversion which is part of the implementation of the principle of restorative justice is essentially a form of development of the punishment system towards de-institutionalization which has been tried to be adapted into the Indonesian legal system as an alternative form of imprisonment, especially for children in conflict with the law.⁴ Diversity is an important element of restorative justice. Diversion is a diversion of the settlement of child cases from criminal justice processes to processes outside of criminal justice.⁵ The concept of restorative justice pursued through diversion in juvenile justice is an attempt to provide legal protection to children who are facing legal problems.⁶

The success of national development has increased community legal awareness.⁷ Restorative Justice finds a foothold in the basic philosophy of the fourth principle of Pancasila.⁸ The restorative justice approach focuses the resolution of criminal acts on restoration to its original state and not retaliation. This is relevant to the concept of diversion as a diversion of cases from litigation to non-litigation, as a remedy for victims and the community, and not to focus on retaliation.⁹

Diversion is contained in Chapter II of Law of the Republic of Indonesia No.11 Year 2012 concerning the Criminal Justice System for Children (*Sistem Peradilan Pidana Anak/SPPA Law*). Article 1 Number 7 SPPA Law explains Diversion is the transfer of the settlement of a child case from the criminal justice process outside the criminal court. Article 1 number 3 of the SPPA Law explains the implementation of this Diversion must be considered several things including:

- 1) The interests of the victim;
- 2) Children's welfare and responsibilities;
- 3) Avoidance of negative stigma;
- 4) Avoidance of retaliation;
- 5) Community harmony;

6) Compliance, decency and public interest.

The purpose of the diversion as regulated in Article 16, namely:

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

Requirements for diversion are regulated in Article 7, which is that diversion must be carried out at the level of investigation, prosecution and examination of cases of children in a district court in the case of a crime committed:

- a. Threatened with imprisonment of under 7 years;
- b. Not a repeat of a crime.

Article 5 number 2 of the SPPA Law explains the juvenile justice system as referred to include:

- 1) Investigation and criminal prosecution of children carried out in accordance with statutory provisions, unless otherwise specified in this law;
- 2) Child trials conducted by courts in the general court environment; and
- 3) Guidance, guidance, supervision, and/or assistance during the criminal implementation process or action and after serving a criminal or action.

There are several things that must be considered in the diversion process. Some things that must be considered by investigators, public prosecutors, and judges in conducting diversion are regulated in Article 9 of the SPPA Law, namely:

- a. Criminal category;
- b. Age of child;
- c. Results of community research from the Correctional Institution (Bapas);
- d. Family and community support.

Restorative justice is a form of a new approach in the resolution of criminal cases.¹⁰ Because it is so urgent the position of children in future lives, the state as the authority in national life should respond to this problem seriously.¹¹ Since the enactment of Law of the Republic of Indonesia No.11 Year 2012 dated 31 July 2014 until the enactment of Government Regulation of the Republic of Indonesia No. 65 Year 2015 dated 19 August 2015, there were no clear guidelines regarding the implementation of the diversion. However, to overcome the problems regarding guidelines and procedures for diversification prior to the Government Regulation referred to in Article 15 of Law of the Republic of Indonesia No.11 Year 2012, the Supreme Court issued Supreme Court Regulation (*Peraturan Mahkamah Agung/Perma*) Number 4 Year 2014 concerning Guidelines for the Implementation of Diversion in the Criminal Justice System for Children, while the Police and the Prosecutor's Office there are no guidelines on the implementation of Diversion. So, the authors are interested in knowing more about the Implementation of Restorative Justice in the Settlement of Criminal Acts Committed by Children since the existence of Government Regulation of the Republic of Indonesia Number 65 Year 2015 and Obstacles in the Implementation of Restorative Justice in the Settlement of Criminal Acts by Children.

II. RESEARCH METHODS

This research is socio-legal research, which is research that plunges directly into the field supported by laws and related books. This type of research reveals the law that lives in society (law in action).¹² This socio-legal approach is a research approach that examines the perceptions and behaviors of legal persons (human and legal entities) and society as well as the effectiveness of positive law in society.¹³ This research is socio-legal research, namely research in the form of empirical studies concerning the process of working of law in society. Viewed from the form of research, this research is prescriptive research that aims to provide an overview or formulate a problem in accordance with the circumstances/facts that exist.¹⁴ If research is intended to get suggestions about what should be done to overcome certain problems, then the research is called prescriptive research.¹⁵ Although this research is socio-legal research based on primary data, which are diversified documents, this research still uses secondary data as supporting primary data. Analysis of the data used in this study is qualitative¹⁶ data analysis namely data analysis which emphasizes more on the deductive and inductive inference process as well as on the dynamics of the relationship between observed phenomena using scientific

logic. Qualitative data is data that is not in the form of numbers but more in the form of narratives, stories, written and unwritten documents, pictures or photographs as well as non-numeric forms.¹⁷

III. RESULTS AND DISCUSSION

Effectiveness of Restorative Justice Implementation in the Settlement of Criminal Acts Committed by Children

Diversion in Makassar can be carried out in three institutions namely the Makassar City Police Department (*Kepolisian Resort Kota Besar Makassar/Polrestabes Makassar*), Makassar District Prosecutor's Office, Makassar District Court. In accordance with Article 7 of the SPPA Law, namely: "At the level of investigation, prosecution and examination of cases of children in the district court must be pursued Diversion".

Investigation of the police force is the first level at which diversion can be carried out. The settlement of a criminal offense at the investigation level is regulated in Article 26 of the SPPA Law, which determines as follows:

- 1) Investigation of a child case is carried out by an Investigator who is determined based on the Decree of the Head of the Indonesian National Police or another official appointed by the Head of the Indonesian National Police.
- 2) The examination of the victim's child or witness' child is carried out by the investigator.
- 3) Conditions that can be set as investigators include:
 - a. Experienced as an investigator;
 - b. Have an interest, attention, dedication, and understand of children's problems; and
 - c. Has attended technical training on juvenile justice.
- 4) In the event that there are no investigators who meet the requirements, the task of investigation is carried out by investigators who carry out the task of investigating criminal offenses committed by adults.

According to *Inspektur Dua* (Ipda) Darwis, Child Investigators at Polrestabes Makassar have sought to diversify between the victims and the perpetrators. But in the process experienced several factors that affect the effectiveness of its implementation, namely:

a. Legal Factors

Ipda Darwis explained that if Diversion succeeded at the investigation level, the follow-up would only be to revoke the report recorded in the minutes of Polrestabes Makassar. The police did not report the agreement to the District Court to get a decision. This is because investigators are still guided by the Secret Telegram Letter (*Telegram Rahasia/TR*) Kabareskrim Polri No. Pol: TR/1124/XI/2006 and Secret Telegram Letter (TR) Kabareskrim Polri No. Pol: TR/395/DIT.I/VI/2008.¹⁸

The Kabareskrim Secret Telegram does not regulate the outcome of the diversion agreement, this is not in accordance with Article 9 paragraph (1) of Government Regulation of the Republic of Indonesia Number 65 Year 2015 which states that the outcome of the diversion agreement is set forth in the form of a Diversion Agreement. The secret telegram also did not regulate the stipulation of the diversion agreement by the District Court if the diversion was successful, this is different from the provisions in article 12 paragraph (3) of Government Regulation of the Republic of Indonesia Number 65 Year 2015 that the determination is made within a maximum of 3 (three) days from acceptance of the diversion agreement.¹⁹

b. Law Enforcement Factors

Ipda Darwis explained that there were 9 investigators in the Criminal Investigation Unit at Polrestabes Makassar, while there were many reports of child cases each year. Limited resources for investigators who have certificates are an obstacle.

c. Supporting Facilities Factors

According to Ipda Darwis, facilities and infrastructure still lack support, only around 30%. There is no nursery in Polrestabes Makassar, so children under investigation are usually returned to their parents. Consequently, children who were initially the perpetrators of criminal offenses are victims of abuse when they are in the community.

d. Community Factors

According to Ipda Darwis, the lack of education to the public about diversion should be carried out every six months, this is due to limited socialization costs.

e. Cultural Factors

According to Ipda Darwis, the SPPA Law which was adopted from western culture is not in accordance with the culture adopted in the community. The community considers diversion only to

protect perpetrators without thinking about the loss suffered by the victim and/or the victim's family.

The Diversion process that did not find agreement at the investigation level will proceed to the prosecution level by the Prosecutor's Office. The settlement of a criminal offense at the prosecution level is regulated in Article 41 of the SPPA Law, which determines as follows:

- 1) Prosecution of child cases is carried out by the Public Prosecutor who is determined based on the Decree of the Attorney General or other officials appointed by the Attorney General.
- 2) Requirements to be determined as Public Prosecutor include:
- 3) In the event that there is no Public Prosecutor who fulfills the requirements, the prosecution is carried out by the Public Prosecutor who performs the prosecution for criminal acts committed by an adult.

According to Bayu Murti Ywanjonoas the Public Prosecutor in the Makassar District Prosecutor's Office, that the child's public prosecutor has sought diversification with the victim and the perpetrator. During this time the diversion process did not experience obstacles to achieve the effectiveness of its implementation. Bayu explained that this was supported because of the Regulation of the Attorney General of the Republic of Indonesia Number: Per-006/A/J.A/04/2015 concerning Guidelines for the Implementation of Diversion at the Prosecution Level.²⁰

Restorative justice aims to prevent and keep children away from the judicial process so that they are free from stigmatization and it is hoped that children can be accepted back into the community. However, if the Diversion process does not find an agreement at the prosecution level, it will proceed to the level of examination of the case of children in the district court. The settlement of a criminal offense at the level of examination of a child's case in a district court is regulated in Article 52 of the SPPA Law, which determines as follows:

- 1) The Chairperson of the Court must appoint a Judge or Panel of Judges to handle the case of the child no later than 3 (three) days after receiving the case file from the Public Prosecutor.
- 2) Judges are obliged to work on Diversion no later than 7 (seven) days after being determined by the Head of District Court as a Judge.
- 3) Diversion is held for a maximum of 30 (thirty) days.
- 4) The diversion process can be carried out in the meditation room of the District Court.
- 5) In the event that the Diversion process succeeds in reaching an agreement, the Judge submits the minutes of the diversion agreement to the Chair of the District Court to make a decision.
- 6) In the event that the diversion is not successful, the case will proceed to the trial stage.

According to Bambang Nur Cahyono, as a Judge at the Makassar District Court explained that to realize diversion, one must see from three sides namely juridical, sociological, and philosophical. These are the 3 basic things towards restorative justice which are reforms injustice, while the explanation is as follows:²¹

- 1) Juridical
In terms of the law, in this case, the provisions in Law Number 11 Year 2012. Judges must see whether the child in conflict with the law is the child referred to in the SPPA Law, in this case, the age of the child.
- 2) Sociological
Judges must see the results of research from the Community Guidance on the social environment of the child, and the child's family as consideration.
- 3) Philosophical
SPPA Law explains that children must be given protection. But in reality, the children of ancient times are not the same as today, the crimes committed by children today are increasing. Children who used to do ordinary theft are now committing heavy theft because of joining the environment in Special Child Development Institute (*Lembaga Pembinaan Khusus Anak/LPKA*). Therefore, facilities and infrastructure must support, so that LPKA is provided in each district.

The diversion was also unsuccessful because the victim and/or the victim's family were not ready to forgive the perpetrators, victims and/or victims' families felt the law was only to protect the perpetrators. This is because victims often get the same crime even though from different actors.

The settlement of cases of children in conflict with the law must continue to prioritize the principles of children's rights, where arrest, detention, or even imprisonment is only done as a last resort (*ultimum remedium*) and in the shortest possible timeframe.²² The application of Diversion which is part of the implementation of the principle of restorative justice is essentially a form of development of a system of punishment towards de-institutionalization that has been tried to be adapted into the Indonesian legal system as an alternative form of imprisonment, especially for children in conflict with the law.²³

Constraints in the Implementation of Restorative Justice in the Settlement of Criminal Acts Committed by Children

The three institutions authorized to carry out a diversion in Makassar stated that so far, the diversion process has always been sought at each level. However, some of the final results of the diversion were successful and some were continued to the judicial process. The success of the restorative justice process is very dependent on the family where the child is returned. As well as the community's understanding of the restorative justice process and its objectives as well as the confidence in the implementing officers.²⁴

Implementation of diversion in Indonesia, especially the city of Makassar experienced several obstacles, namely:

1) Understanding the definition of diversion

The definition of diversion depends very much on the background and where the diversion is applied. Any violations that occur and enter the formal process will be handled by law enforcement officials until they have a legal or criminal decision against it. In the process of handling the perpetrators, the officers will implement them in accordance with applicable law. The rule of diversion is one of the policies for handling criminal acts that go into the formal justice process.²⁵

2) Limitation of the implementing apparatus policy

The apparatus must know the meaning and purpose of the diversion before carrying out the diversion. If the authorities carry out diversion as a task, the authorities must be able to take appropriate actions related to the diversion, if it will not cause a priori attitude to the community, both victims and perpetrators. As a result, the community will avoid the diversion process because they think there is an imbalance in its implementation and diversion as the arbitrariness of the authorities in translating their authority.

The policy limit on the implementation of diversion is carried out by the apparatus handling a crime. Guidance on diversion for law enforcement officers is needed, to direct the freedom of the authorities in determining their actions.²⁶

3) Community trust in the diversion implementation rules

The implementing rules in a legal policy are very important. With the implementation of regulations, law enforcement officials have guidelines for taking action.²⁷ The implementation of the diversion in Makassar at the level of investigation at the Polrestabes Makassar where if the diversion was successful, the follow-up was carried out by revoking the report recorded in the minutes of Polrestabes Makassar. The police did not report the agreement to the District Court to get a decision. This is because investigators are still guided by the Secret Telegram Letter (TR) Kabareskrim Polri No. Pol: TR/1124/XI/2006 and Secret Telegram Letter (TR) Kabareskrim Polri No. Pol: TR/395/DIT.I/VI/2008. Though this is not in accordance with the provisions of Government Regulation of the Republic of Indonesia Number 65 Year 2015

IV. CONCLUSION

The effectiveness of the implementation of restorative justice in the settlement of criminal acts committed by children after the existence of Government Regulation of the Republic of Indonesia Number 65 Year 2015 has been effective. Evidenced by the data from the Polrestabes Makassar, Makassar District Prosecutor's Office and the Makassar District Court, which explained that there have been successful criminal offenses of children in the diversion. However, a successful diversion at the level of follow-up investigation is only by revoking the report recorded in the Minutes of Polrestabes Makassar. The police did not report the agreement to the District Court to get a decision. This is because investigators are still guided by the Secret Telegram Letter (TR) Kabareskrim Polri No. Pol: TR/1124/XI/2006 and Secret Telegram Letter (TR) Kabareskrim Polri No. Pol: TR/395/DIT.I/VI/2008. The success of the restorative justice process is very dependent on the family where the child is returned. As well as the community's understanding of the restorative justice process and its objectives as well as the confidence in the implementing officers. The obstacles faced in the implementation of diversion are understanding of the definition of diversion, the limits of the policy of implementing diversion, public trust in the rules of implementing diversion.

In order to realize the optimization of the implementation of restorative justice, the legal apparatus needs to have guidelines to take action in this case Investigators in the Police. In accordance with the mandate of Article 30 of Government Regulation of the Republic of Indonesia Number 65 Year 2015 which explains that further provisions regarding the procedure for implementing diversion at the investigation level are regulated by a Regulation of the Head of the Indonesian National Police. If these provisions do not yet exist, then investigators should be guided by Government Regulation of the Republic of Indonesia Number 65 Year 2015. Where this Government Regulation is an implementing regulation of Law of the Republic of Indonesia Number 11 Year 2012. Investigators need to receive special training in order to understand how the application of diversion can be carried out and which cannot be done so that the case of the child no longer reaches the level of the case examination in court but is completed at the investigation level. The community needs to get socialization of understanding about children in conflict with the law does not always have to be imprisoned but

can be resolved by diversion through a form of restorative justice, so that victims and perpetrators understand the form of a fair settlement.

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