

LEGAL PROTECTION AGAINST CHILDREN OF CRIMINAL OFFENSES THROUGH THE IMPLEMENTATION OF DIVERSION IN INDONESIA

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Citation: Diding Rahmat.,. Legal Protection for Children Who Are Criminals Through the Implementation of Diversion in Indonesia. *LEX LAGUENS: Journal of Law and Justice Studies* 2.2.2024. 54-66

Submitted:10-08-2024 **Revised:**17-08-2024 **Accepted:**28-08-2024

Abstract

This research aims to analyze the application of diversion as a legal protection measure for children involved in criminal acts. Diversion is an alternative case resolution process that aims to avoid negative stigma and punishment that can harm a child's development. The research method used is normative juridical, by examining statutory regulations, official documents and related literature. The research results show that the implementation of diversion in Indonesia has been regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which provides guidelines for law enforcement officers in implementing diversion. In addition, legal protection for children who commit criminal acts through the implementation of diversion provides an opportunity for children to receive more humane treatment, safeguards children's rights, and encourages community participation in the resolution process. Thus, it is hoped that the implementation of diversion can provide restorative justice and reduce the possibility of children repeatedly violating the law.

Keywords: Legal Protection, Children, Diversion

A. INTRODUCTION

Children are an important asset for the nation, playing a strategic role as the next generation. In the Indonesian context, they are the successors of the ideals of the nation's struggle. Apart from that, children are hope for parents as well as for the nation and state, who are expected to continue development and have a vital role in ensuring the continued existence of the nation in the future. Therefore, every child must receive guidance from an early age, with the widest possible opportunities to grow and develop optimally in physical, mental and social aspects. Moreover, childhood is a crucial period for the formation of a person's character, personality and character, so that they have the strength, ability and determination to live life.¹

In various development and protection efforts, we are often faced with challenges and problems that arise in society. Sometimes, deviant behavior is found among children, some of whom even commit acts that violate the law, regardless of social and economic status. Apart from that, there are also children who, for various reasons, do not get the opportunity to receive attention

¹ Maidin Gultom. *Legal Protection of Children in the Juvenile Criminal Justice System in Indonesia* (Bandung: Refika Aditama, 2008), 1.

physically, mentally or socially. These inadequate conditions, whether consciously or not, often encourage children to carry out actions or behavior that are detrimental to themselves, their families or society. Deviant behavior or violations of the law committed by children can be caused by various factors, including lack of love, care, guidance, and guidance in developing attitudes, behavior, adjustment, and lack of supervision from parents, guardians, or foster parents. This makes them more susceptible to being influenced by an unhealthy social environment, which can be detrimental to the child's personal development.²

Diversion as regulated in Article 1 number 7 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is a process of resolving cases of children who are involved with the law, who move from the criminal justice route to a path outside of criminal justice. This process is carried out through deliberation involving children, parents, community counselors, advocates and social workers. The aim of this diversion is to prevent children from being deprived of their freedom, so that children are not trapped in the criminal justice process. In this way, children can avoid stigma or negative labels and can reintegrate into their social environment.³

The implementation of diversion is based on the desire to avoid negative impacts, especially on children's mental development, which might arise if criminal cases are resolved through the criminal justice system. The implementation of diversion provisions is very important because with diversion, children's human rights can be more guaranteed. Apart from that, diversion also helps prevent children in conflict with the law from being stigmatized as "bad children." With diversion, suspected involvement of children in criminal acts can be resolved without having to go through a formal legal process.⁴

The concept of diversion originates from the establishment of juvenile justice in the 19th century, which aimed to separate children from the adult justice process so that they would no longer be treated the same as adults. The main principle in implementing diversion is persuasive action or a non-penal approach that gives individuals the opportunity to correct their mistakes. With this approach, it is hoped that there will be no more torture, coercion or violence against

² Prasetyo, T. "Implementation of Diversion for Child Crimes in the Juvenile Criminal Justice System," *Legal Reflections: Journal of Legal Studies* 9, no. 1 (2015): 1-14.

³ Bemba, R.K.P. "Diversion Efforts by the Public Prosecutor in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System," *Jurist-Diction* 3, no. 2 (2020): 649-668.

⁴ Adly, F.N. "Diversion as a Form of Settlement of Child Criminal Cases at the Investigation Level in Cases of Morality Crimes in the Legal Area of the East Java Regional Police," *Journal of Dialectical Sociology* 15, no. 1 (2020): 26-32.

children. This is the main aim of implementing diversion. Through diversion, the law can be enforced without having to use violence or painful punishment, by giving someone the opportunity to correct their mistakes without having to undergo criminal punishment by a state that has full authority.⁵

Based on the background stated above, how is diversion implemented in Indonesia? and what is the legal protection for children who commit crimes through the implementation of diversion in Indonesia?

B. RESEARCH METHODS

This research is a type of legal research that uses a normative juridical approach. A normative juridical approach is an approach that is based on legal material by examining theories, concepts, legal principles and statutory regulations that are relevant to the research being conducted. This method is also known as library research (*library research*), where researchers study statutory regulations, books, and other documents related to the research topic. In this research, the data used is secondary data consisting of three types of legal materials. First, primary legal materials, namely materials sourced from applicable laws and regulations, such as Law Number 23 of 2002 concerning Child Protection, as well as other regulations relevant to research. Second, secondary legal materials, namely materials that explain primary legal materials, are obtained through literature related to the research issue. Third, tertiary legal materials, which provide further instructions or explanations for primary and secondary legal materials, such as newspapers, the internet, legal dictionaries and the Big Indonesian Dictionary. Data analysis techniques are carried out through analytical methods, namely by interpreting the phenomena that occur. The process of analyzing legal materials is carried out by collecting all the necessary legal materials, which are not in the form of numbers, and connecting them to the problem being studied.

⁵ Marlina, *Introduction to the Concept of Diversion and Restorative Justice in Criminal Law* (Medan: USU Press, 2010).

C. RESEARCH RESULTS AND DISCUSSION

1. Implementation of Diversion in Indonesia

The implementation of diversion is driven by the desire to avoid negative impacts on children's lives and development due to involvement in the criminal justice system. Diversion carried out by law enforcement officers is based on authority called discretion. With the application of the concept of diversion, current formal justice places more emphasis on efforts to protect children from imprisonment.

The state has the discretionary authority to divert (divert) children in conflict with the law from the formal criminal justice process to a settlement process through peace outside of court. Children should be avoided as much as possible from arrest, detention and imprisonment, which should be a last resort. Diversion is a form of discretion carried out by components of the criminal justice system, such as the police, prosecutors and courts, aimed at children involved in legal conflicts. This diversion is a policy that aims to prevent children from the formal criminal justice process.

In implementing diversion in Indonesia, there are various statutory provisions, both international and national regulations, which serve as guidelines for implementing diversion for children who are in conflict with the law, especially as perpetrators. Here are some important references:

1) International Regulations

- a) *Convention on the Rights of The Child* (Convention on the Rights of the Child): Regulates children's rights and child protection globally, including the rights of children in conflict with the law.
- b) *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*: This regulation sets international minimum standards for the administration of juvenile justice, which emphasizes the protection of children in the legal process.
- c) *The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*: Regulates protection for children who have lost their freedom, including standards of treatment that must be met in the criminal justice system.

2) National Regulations

- a) Law of the Republic of Indonesia Number 2 of 2002 concerning the Police of the Republic of Indonesia: Regulates the role of the police in law enforcement, including authority in the diversion process.
- b) Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection: Guarantees the basic rights of children, including protection for children in conflict with the law.
- c) Law of the Republic of Indonesia Number 3 of 1997 concerning Children's Courts: Regulates special judicial procedures for children in conflict with the law.
- d) Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System: Provides a clear legal basis regarding the implementation of diversion in the juvenile justice system.
- e) TR Kabareskrim Number 1124/XI/2006 concerning Guidelines for Implementing Diversion for the Police: Provides special guidance for the police in implementing diversion for children in conflict with the law.

These regulations create a comprehensive legal framework to protect children's rights and ensure that children in conflict with the law receive treatment in accordance with international and national standards.

Diversion is implemented to provide protection and rehabilitation to perpetrators with the aim of preventing children from growing into adult criminals. In the general explanation of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, it is stated that restorative justice is part of the diversion process. This means that all parties involved in a crime work together to resolve the problem and create an obligation to improve the situation. This process involves victims, children and communities in finding solutions that focus on repair, reconciliation and recovery, without prioritizing revenge.⁶

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System regulates diversion which functions so that children in conflict with the law are not stigmatized as a result of the judicial process they must undergo. This is in accordance with what is stated in the UN Resolution on *United Nation Standard Minimum Rules for the Administration of*

⁶ Yati Sharfina Desiandri, "Diversion of Children in Conflict with the Law at the Investigation Level," *USU Law Journal* 5, no. 1 (January 2017): 147-157.

Juvenile Justice (The Beijing Rules) What is meant by diversion is the granting of authority to law enforcement officials to take policy actions in handling or resolving the problem of child offenders without taking formal steps, including stopping or continuing or releasing them from the criminal justice process or returning or handing them over to the community and the form -other forms of social service activities.⁷

In Article 6 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, the objectives of diversion are determined as follows:

- a. Achieve peace between victims and children.
- b. Resolving children's cases outside the judicial process.
- c. Prevent children from deprivation of liberty.
- d. Encourage the public to participate.
- e. Instill a sense of responsibility in children.

As part of the subsystem in the juvenile criminal justice system, every law enforcement apparatus, namely the Police, Prosecutor's Office and Court, must have the same goal in carrying out diversion duties, as regulated in Article 6 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. These three components are in one unit known as the Criminal Justice System (*Criminal Justice System*) and must function synergistically to create a legal system that provides a sense of justice and legal protection for children.

In implementing diversion in Indonesia, there are a number of conditions that serve as guidelines for law enforcement officials. The conditions for diversion are regulated in Article 8 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which includes:

- 1) The diversion process is carried out through deliberation involving children and their parents/guardians, community counselors, and professional social workers, based on a restorative justice approach.
- 2) If necessary, the deliberation referred to in paragraph (1) can involve social welfare workers and/or the community.
- 3) The diversion process must consider:
 - a) Victim's interests.

⁷ R. Wiyono, *Juvenile Criminal Justice System in Indonesia* (Jakarta: Sinar Graphics, 2016), 47.

- b) Children's welfare and responsibilities.
- c) Avoiding negative stigma.
- d) Avoidance of retaliation.
- e) Community harmony.
- f) Decency, decency and public order.

Furthermore, in Article 9 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, there are provisions regarding the implementation of diversion as follows:

- 1) Investigators, Public Prosecutors and Judges must consider the following things when carrying out diversion:
 - a) Category of criminal offense.
 - b) Child's age.
 - c) Community research results from Bapas.
 - d) Support from family and community environment.
- 2) Agreements in the diversion process must obtain approval from the victim and/or the victim's child's family as well as the child and family's willingness, except for:
 - a) Criminal acts that include violations.
 - b) Minor criminal offenses.
 - c) A crime that has no victims.
 - d) The value of the victim's losses is no more than the local provincial minimum wage.

Several criteria for criminal acts involving children as perpetrators, which should be resolved using the diversion principle approach, include:

- a. Criminal acts that are punishable by a maximum criminal sanction of one year must be prioritized for diversion, while criminal acts that are punishable by a sanction of more than one year to five years can be considered for diversion. Diversion must be sought for all cases of theft, except those that result in physical or life loss.
- b. Pay attention to the age of the perpetrator; The younger the perpetrator, the more urgent it is to apply the principle of diversion.
- c. Research results from BAPAS; If factors are found that encourage children to be involved in criminal acts beyond the child's control, then the application of the diversion principle becomes more urgent.

- d. Losses resulting from criminal acts of children; If the loss is material and not related to a person's body or soul, then the application of diversion becomes even more necessary.
- e. The level of community anxiety due to children's actions.
- f. Consent from the victim or family.
- g. Willingness of the perpetrator and his family.
- h. If a child commits a crime together with an adult, the adult must be processed according to applicable legal procedures.

2. Legal Protection for Children Who Are Criminals

The concept of child protection covers a very broad area, where protection is not only limited to the physical and mental aspects of children, but also includes protection of all their rights and interests which ensure healthy growth and development, both physically, mentally and socially. . Considering the position of children as the next generation who will carry the nation's noble ideals, potential future leaders, and the hopes of previous generations, they need to be given the widest possible opportunities to grow and develop optimally in all aspects.

In Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, minors are defined as individuals who are 12 years old but have not reached 18 years, and this law categorizes children involved in criminal acts into three groups:

- a. Article 1 number 3 states that children in conflict with the law, hereinafter referred to as children, are individuals who are 12 years old but have not yet reached 18 years and are suspected of committing a criminal act.
- b. Article 1 point 4 defines children who are victims of criminal acts, hereinafter referred to as child victims, as children who are not yet 18 years old and who experience physical, mental suffering and/or economic loss as a result of criminal acts.
- c. Article 1 point 5 explains that a child who is a witness in a criminal act, hereinafter referred to as a child witness, is a child who is not yet 18 years old and can provide information for the purposes of investigation, prosecution and examination in court regarding a criminal case that has been seen and heard. , or experienced it himself.

Article 1 point 1 of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection defines children as individuals who have not reached the age of 18 years, including those who are still in the womb. Child protection is an effort

and activity that involves all levels of society in various roles and positions, realizing the importance of children's existence for the future of the nation.

To protect the interests and rights of children in conflict with the law, the Indonesian Government has established several laws and regulations, including Law Number 39 of 1999 concerning Human Rights, Law Number 3 of 1997 concerning Juvenile Justice, and Law Number 23 of 2003 regarding Child Protection. Regarding the protection of children's rights in conflict with the law, Article 66 of Law Number 39 of 1999 states that:

- a. Every child has the right not to be subjected to torture, abuse or inhumane punishment.
- b. The death penalty or life imprisonment cannot be imposed on perpetrators of criminal acts who are still minors.
- c. Every child has the right to freedom and cannot be deprived of it against the law.
- d. Arrest, detention or imprisonment of children can only be carried out in accordance with applicable law and should be a last resort.
- e. Every child who is deprived of his freedom has the right to receive humane treatment and attention to his personal development needs in accordance with his age, and must be separated from adults, unless it is in the interests of the child.
- f. Every child who loses his or her freedom has the right to receive legal aid or other assistance effectively at every stage of the applicable legal process.
- g. Every child who is deprived of his freedom has the right to defend himself and obtain justice before an objective and impartial Children's Court, in a hearing that is closed to the public.

Article 59 Law no. 23 of 2002 concerning Child Protection states that the government and other state institutions have an obligation to provide special protection to children in emergency situations, children in conflict with the law, children from minority and isolated groups, children experiencing economic or sexual exploitation, children who are trafficked, children who are victims of abuse of narcotics, alcohol, psychotropic substances and other addictive substances, children who are victims of kidnapping, sales and trafficking, children who are victims of physical or mental violence, children who have disabilities, and children who are victims of abuse and neglect.

In this context, there is a general assumption that the term "children in conflict with the law" only refers to children as perpetrators of criminal acts. However, Article 64 of Law

Number 23 of 2002 clearly states that special protection for children in conflict with the law, as explained in Article 59, includes children in conflict with the law as well as children who are victims of criminal acts. This special protection is carried out in several ways:

- a. Treatment of children must be carried out in a humane manner, in accordance with the child's dignity and rights.
- b. Provision of accompanying officers from the start of the process.
- c. Provision of special facilities and infrastructure.
- d. Imposing appropriate sanctions is in the best interests of the child.
- e. Continuous monitoring and recording of the development of children in conflict with the law.
- f. Ensure the continuity of the child's relationship with parents or family.
- g. Providing protection from disclosing children's identities through mass media to avoid negative stigma.

In the context of legal protection efforts for children, especially those in trouble with the law, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System specifically regulates diversion and restorative justice in resolving children's cases. The aim of this arrangement is to ensure that children's rights in conflict with the law are protected and guaranteed. In this law, it is stipulated that at the level of investigation, prosecution and examination of children's cases in district courts, diversion is mandatory.

a. Diversion at the investigation stage

The police function as the main gateway in the juvenile criminal justice system and are the first party with authority to determine the status of children who are in trouble with the law. Article 7 of the Juvenile Criminal Justice System Law explicitly states that investigators are obliged to carry out diversion. Investigators must carry out diversion within a maximum of seven days after the investigation begins. The diversion process must be carried out within no more than thirty days after the start of the diversion. If the diversion process is successful in reaching an agreement, the investigator must submit the minutes and diversion agreement to the head of the district court for a determination to be made. If diversion fails, investigators must continue the investigation and transfer the case to the Public Prosecutor by including diversion minutes and community research reports.

b. Diversion at the prosecution stage

Based on principles *Welfare Approach* In handling violations committed by children and in accordance with the provisions in the Juvenile Criminal Justice System Law, the Prosecutor as Public Prosecutor has the right to carry out diversion. The Public Prosecutor is required to carry out diversion no later than seven days after receiving the case file from the investigator, and diversion must be carried out within a maximum of thirty days. If the diversion process is successful, the Public Prosecutor must submit the minutes and diversion agreement to the head of the district court for a determination to be made. However, if diversion fails, the Public Prosecutor must submit a diversion report and transfer the case to court by attaching a report on the results of the community research.

c. Diversion at the court examination stage

Children in conflict with the law have the right to be protected during every stage of justice, whether dealing with the police, prosecutors or during trials in court. As previously explained, diversion through a restorative justice approach is a process of resolving children's cases involving the perpetrator, victim, their family and other parties involved in the criminal case. This process aims to jointly seek a resolution to criminal acts and their impacts, with a focus on restoring them to their original state.⁸

The application of diversion as a step to achieve restorative justice has been reflected in the juvenile criminal justice system in Indonesia. Basically, this system aims to protect the rights and interests of children. Therefore, it can be stated that the juvenile criminal justice process should be viewed as *last resort*, no *first remedy*. The main aim of the juvenile criminal justice process is not to impose punishment, but to improve conditions, maintain and protect children, and prevent destructive court actions.

The juvenile criminal justice system that applies to children in conflict with the law continues to prioritize the best interests of children without depriving them of their human rights and tries to avoid negative stigmatization that may arise as a result of the judicial process. In fact, the court process was established by the state to resolve conflicts that arise in society with a neutral approach. However, the court is not the only institution for resolving conflicts, because the parties involved in the conflict do not always choose to use existing

⁸ Prakoso, Abintoro. *Juvenile Criminal Justice System Reform* (Yogyakarta: Laksbang Graphics, 2012), 234.

resolution mechanisms in the judiciary, such as in the case of resolving children in conflict with the law which can be achieved through channels outside the court.

D. CONCLUSION

The implementation of diversion in Indonesia as an effort to legally protect children who commit criminal acts has shown positive developments. This process not only prevents children from being punished, but also gives them the opportunity to correct mistakes and avoid negative stigma that could affect their future. Through approach *restorative justice*, diversion allows the involvement of victims, perpetrators and the community in finding constructive solutions. However, challenges in implementing diversion still exist, such as the need for better awareness and understanding from law enforcement officials and the community regarding the importance of protecting children's rights. Therefore, there needs to be continuous efforts to strengthen the implementation of diversion so that it can be more effective in providing legal protection and supporting the positive development of children in conflict with the law.

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