

# THE POSITION OF DIVERSION AGAINST VICTIMS OF CHILD SEXUAL ABUSE

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## **Abstract**

The application of diversity by law enforcement officials is based on the authority of law enforcement officials called discretion or child discretion as the potential of the state in the context of the survival and glory of the nation, is how the government's commitment in making children superior. priority in the formation of juvenile judges and courts as the last bastion in the process of resolving children who face the law in Court. Police and communities must synergize and develop common perceptions of diversion and restorative justice. Parents must participate in providing protection to children by fulfilling children's rights, protecting children's interests and further increasing supervision of children's environments and playgrounds.

**Keywords:** Diversion, Application, Children

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## **INTRODUCTION**

Children are part of the citizens who must be protected because they are the next generation of the nation who will continue the leadership of the Indonesian nation. Every child, besides being obliged to get formal education such as school, is also obliged to get moral education so that they can grow into useful figures for the nation and state. In accordance with the provisions of the Convention on the Rights of the Child ratified by the Indonesian government through Presidential Decree Number 36 of 1990, then also stated in Law Number 4 of 1979 concerning Child Welfare and Law Number 23 of 2002 concerning Child Protection and Law Number 11 of 2012 concerning the Criminal Justice System (Zainuddin et al., 2013).

All of them put forward the general principles of child protection, namely non-discrimination, best interests of children, survival and development and respect for children's participation. Legal protection for children can be done as an effort to protect the law against various freedoms and human rights of children (Kansil, 2005). Child sexual abuse is a form of child abuse in which an adult or older adolescent uses a child for sexual stimulation. Forms of child sexual abuse include soliciting or pressuring a child to engage in sexual activity (regardless of the outcome), providing indecent exposure of genitals to a child, displaying pornography to a child,

having sexual intercourse with children, physical contact with a child's genitals (except in certain non-sexual contexts such as medical examinations), viewing a child's genitals without physical contact (except in non-sexual contexts such as medical examinations), or using children to produce Effects of sexual violence on children include depression, post-traumatic stress disorder, anxiety, tendency to be further victimized in adulthood, and and physical injury to the child among other problems (Desiandri, 2017). Sexual abuse by family members is a form of incest, and can generate more serious repercussions and long-term psychological trauma, especially in cases of parental incest. Under the law, "child sexual abuse" is an umbrella term describing criminal and civil acts in which adults engage in sexual activity with minors or exploitation of minors for the purpose of sexual gratification. The American Psychiatric Association states that "children cannot consent to sexual activity with adults", and condemns such acts by adults: "An adult who engages in sexual activity with a child is committing a criminal and immoral act that can never be considered normal or socially acceptable behavior (Djamil, 2017).

The current criminal justice system is too focused on the perpetrator and pays little attention to the victim. What often happens is that the victim's involvement in the criminal justice system only adds to the trauma and increases her sense of helplessness and frustration at not being given adequate protection and legal remedies (Gultom, 2014). Today's criminal justice system is indeed too "offender centered", so it requires us to improve the position of the victim in this system so that what he gets is not only symbolic satisfaction, the victim of crime is basically the party who suffers the most in a criminal act, because it does not get as much protection as the law provides to the perpetrators of crime (Hartono, 2010).

As a result, when the perpetrator of the crime has been sentenced to criminal sanctions by the court, the condition of the victim of such a crime is not cared for at all. In fact, the issue of justice and respect for human rights does not only apply to perpetrators of crimes but also victims of crime (Polk, 2014). In every handling of criminal cases, law enforcement officials (police, prosecutors) are often faced with the obligation to protect two interests that seem contradictory, namely the interests of the victim who must be protected to recover his suffering because he has been a victim of crime (mentally, physically, and materially), and the interests of the accused / suspect even though he is guilty but he remains a human being who has human rights that must not be violated Diversion is The transfer of the process to the child case resolution system is long and very rigid. Mediation or dialogue or deliberation as an integral part of diversion to achieve restorative justice (Mulyadi, 2013).

## **METHODS**

The specifications carried out in this study are normative legal research, where normative legal research is research conducted or focuses on positive legal norms in the form of laws and regulations.

Method The approach used in this study is an empirical normative approach method. The normative approach is the basis of religious rules and laws and regulations, while the empirical is

based on existing reality (sociological). So the empirical normative combines the two, namely looking at the enactment of laws as well as their effects in society / sociological.

## **RESULTS AND DISCUSSION**

Criminal Law is part of the overall law in force in a country that establishes the principles and rules for: (Afrianti et al., 2008)

1. Determine which acts may not be done, which are prohibited accompanied by threats or sanctions in the form of certain crimes for those who violate the prohibition.
2. Determine when and in what cases those who have violated the prohibitions may be charged or punished as threatened.
3. Determine in what manner the criminal imposition can be carried out if any person is suspected of violating the prohibition.

Some divisions of criminal law on the basis of:

1. Criminal law in a state of silence is material criminal law and criminal law in a state of motion is formal criminal law
2. Objective criminal law is criminal law seen from the prohibition of doing so, namely prohibitions accompanied by threats to those who violate the prohibition and subjective criminal law is a rule that contains the right or authority of the state to determine prohibitions in an effort to achieve public order, enforcing (coercive nature) criminal law in its form by imposing a crime on the violator of the prohibition, carry out criminal sanctions that have been imposed by the state on violators of the law.

The purpose of criminal law is known to be two streams, namely:

1. To scare everyone, don't do bad deeds.
2. To educate people who have done bad deeds to be good and acceptable again in the life of their environment.

Criminal liability with a view to determining whether a defendant or suspect is responsible for a criminal act that occurred or not. Subjectively to makers who meet the requirements in the criminal law to be criminally charged for their actions while the requirement for criminal liability or the imposition of a crime, there must be an element of guilt in the form of intentionality or negligence (Priyatno, 2004). The ability to be responsible can be interpreted as a normal or healthy mental state that has one's mind in distinguishing between good things and bad things. Further elements of criminal accountability, psychological aspects, guilt must also be sought in the mind of the perpetrator that shows a relationship with the actions he committed so that the perpetrator can be held accountable for his actions. A person who has a mental disorder cannot be said to have an inner relationship between himself and his actions done because the person is not aware of the consequences of the actions he does (Soekanto, 2015). Regarding sexual harassment that in the Criminal Code does not use the term sexual harassment but uses the term crime against decency as stipulated in Chapter XIV of the second book on crimes. In chapter XIV is a crime against decency contained in articles 281-298. The responsibility for the criminal act of sexual

abuse against women if the perpetrator is a child in the law on the juvenile criminal justice system number 11 of 2012 is who is 8 years old but has not reached 18 years old and is not married, then the child is given a diversion (Soetodjo, 2010).

Diversion is the transfer of juvenile case resolution from the criminal justice process to a process outside the criminal process whose purpose is not to have a negative impact on the child's psyche and development by its relationship with the criminal justice system (Soemitro, 2020).

The purpose of diversion is to achieve peace between victims and children, resolve children's cases outside the judicial process, prevent children from being deprived of independence, encourage the community to participate and instill a sense of responsibility to children. The diversion process must pay attention to the interests of the victim, the welfare and responsibility of the child, the avoidance of negative stigma, the avoidance of retaliation, The concept of diversion is based on the fact that the criminal justice process against child perpetrators of criminal acts through the ordinary criminal justice system does more harm than good (Setyowati et al., 2017). The basic reason is that the court will stigmatize children for their actions, such as children being considered evil, so it is better to avoid them outside the criminal justice system. Consideration is carried out by the court, namely the philosophy of the juvenile criminal justice system to protect and rehabilitate child perpetrators of criminal acts. Diversion is also carried out as an effort to prevent a child offender from becoming an adult criminal. It is this child prevention effort that leads law enforcement officials to take diversion authority (Wahyudi, 2011). According to Mrs. Triana Widiastuti S.H., M.H., as the General Criminal Prosecutor at the Yogyakarta State Prosecutor's Office, she perna stated that the purpose of diversion is to find a way to deal with violations of the law outside the court. The implementation of diversion is motivated by the desire to avoid negative effects on child development by its involvement with the ordinary criminal justice system. The implementation of diversion by law enforcement officials is based on the authority of law enforcement officials called discretion In addition, diversion is also carried out for the reason of providing an opportunity for children of law violators to become good people again through non-formal channels by involving related parties. Diversion as an effort to invite the community to obey and enforce state law, its implementation still considers the sense of justice as a top priority in addition to providing opportunities for child perpetrators to take non-criminal paths such as compensation, social work or parental supervision. Diversion does not aim to perpetuate law and law at all, but tries to use the element of coercion to a minimum to make people obey the law (Waluyadi, 2009).

### **Understanding the Concept of Diversion**

Children who violate the law or commit criminal acts are greatly influenced by several other factors outside the child such as association, education, playmates and so on. To protect children from the influence of the formal process of the criminal justice system, human thought arises or legal and humanitarian experts to make formal rules for the act of removing a child who commits a violation of the law or commits a criminal act from the criminal justice process by providing

other alternatives that are considered better for children. Based on these thoughts, the concept of diversion was born, which in Indonesian terms is called diversion or diversion.

Legal protection efforts for children who face the law need to be continuously pursued in order to maintain the welfare of children considering that children are one of the valuable assets for the progress of a nation in the future. Legal protection for children who face the law can be interpreted as an effort to protect the law against various freedoms and human rights of children. So the issue of legal protection for children covers a very wide scope.

Children's rights according to Law No. 35 of 2014 concerning amendments to Law No. 23 of 2002 concerning child protection contained in articles 4 (four) to article 18 (eighteen).

Diversion agreements to resolve crimes in the form of violations, minor crimes, victimless crimes, or the value of victim losses not exceeding the value of the local provincial minimum wage as referred to in article 9 paragraph (2) can be carried out by investigators together with perpetrators and / or families, community counselors, and can involve community leaders.

### **Purpose of Diversion**

According to Levine, the concept of diversion began with the establishment of juvenile justice in the 19th century, which aimed to exclude children from the adult justice process so that children would no longer be treated the same as adults. The main principle of implementing the concept of diversion is persuasive action or non-penal approach and giving an opportunity to someone to correct mistakes. Officers in carrying out diversion show the importance of obedience to laws and rules. Officers diversion persuasively and evasive arrests using violence and coercion.<sup>8</sup>

Diversion is done with the excuse of giving law violators an opportunity to become good people again through non-formal channels by involving community resources. Diversion seeks to provide justice to cases of children who have already committed criminal acts to law enforcement officials as law enforcement authorities. Both justices are presented through a study of the circumstances and situations to obtain appropriate sanctions or actions.

Three types of diversion program implementation viz.

1. Implementation of social control (*social control orientation*),
2. Social service by the community to perpetrators (*social serviceorientation*

Towards the process *restorative justice* or consultation (*balanced orrestorative justice orientation*).

### **Version Execution**

The implementation of diversion by law enforcement officials is based on the authority of law enforcement officials called *discretion* or in Indonesian discretion.

The police as the first gateway to deal with children in conflict with the law determine whether a child will proceed to criminal proceedings or other informal actions. For serious crimes such as murder, rape, violent theft, police proceed to court or make arrests. Children are distinguished from adults, the fulfillment of facilities that protect child development, education, hobbies, access to family, protection of children's reproductive rights, protection from torture and physical and mental treatment, and short and expeditious judicial processes.

Children of criminal offenders who according to the assessment of the seriousness of the crime will then be processed by the public prosecutor to proceed to the trial process. The public prosecutor after receiving a report from the investigator about the case, the public prosecutor makes a prosecution plan for the case. The public prosecutor in conducting the prosecution initially submits a plan of charges against the child to be submitted to the leadership and then the leader will respond to the proposed prosecution plan. The decision of the approved claim will be submitted to the court as a process of transferring the case from the public prosecutor to the court.

The juvenile court has a special function, the specificity is normatively reflected by judges who can hear children's cases appointed in a special way, meaning that not all judges can try children's cases, then the specificity also lies in the trial (procedural law), judges cannot wear toga, prosecutors cannot wear official clothes. The examination of children in court is required to be accompanied by a companion, the companion is not a lawyer but an institution and the trial process is closed and the examination with a single judge.

The implementation of the concept of diversion is carried out with the aim of preventing children from the negative implications of the existing criminal justice system, preventing children from entering the juvenile criminal justice system and eliminating the label of criminals against children who have already become victims of the existing social system and development. The concept of diversion is developed in almost all countries, because this concept of diversion shows success in saving and providing protection to tan children; and the granting of other rights in accordance with the provisions of laws and regulations.

Article 18 of Law No. 23 of 2002 states, every child who is a victim or perpetrator of a criminal act is entitled to legal assistance and other assistance. In the explanatory part of Law No. 23 of 2002, it is said that other assistance in this provision includes medical, social, rehabilitation, vocational and educational assistance. Every case that enters the police, if the perpetrator has not been accompanied by a legal representative, the RPK Polda team is obliged to report it to the LBH Anak institution, so that children who are perpetrators or victims of criminal acts can get legal assistance and assistance.

Juvenile court proceedings will be conducted differently from regular court proceedings. In each hearing the panel of judges will be present as mediators and advisors, without wearing the judge's uniform and other attributes. This is done to maintain the emotional and psychological stability of the child. With this condition, the child does not feel to be the most evil person and is very guilty

## **CONCLUSION**

In solving criminal cases, often the law prioritizes the rights of suspects or defendants too much and while the rights of victims are ignored. As stated by Andi Hamzah, in discussing criminal procedural law, especially those related to human rights, there is a tendency to explore matters related to the rights of suspects without paying attention to the rights of victims thus Punishment for perpetrators of Child Crime does not then achieve justice for victims, considering that from the other side it still leaves its own problems that are not resolved even though the perpetrators have been punished. Looking at the principles of child protection, especially the principle of prioritizing the best interests of children, it is necessary to resolve children's cases outside the criminal mechanism or commonly called diversion. The institution of punishment is not a way to solve children's problems because it is prone to violations of children's rights. Therefore, an event and procedure are needed in the system that can accommodate the resolution of cases. According to the applicable regulations regarding the criminal responsibility system for children is the same as adults, it's just that the criminal threat is not the same as adults. Based on Article 23 of Law No. 3 of 1997, children can be sentenced in the form of principal or additional crimes and acts, actions can be used in the best interests of the child, while punishment is the last solution that must be chosen and if the perpetrator is an adult, his responsibility is entangled with Article 289 of the Criminal Code regarding lewd acts and Article 310 regarding unpleasant acts.

### BIBLIOGRAPHY

- Afrianti, Achmad, R., & Nashriana, N. (2008). *PERANAN JAKSA AGUNG MUDA PERDATA DAN TATA USAHA NEGARA (JAM DATUN) DALAM PEMBERANTASAN TINDAK PIDANA KORUPSI*. Sriwijaya University.
- Desiandri, Y. S. (2017). Diversi Terhadap Anak yang Berkonflik dengan Hukum di Tingkat Penyidikan. *USU Law Journal*, 5(1).
- Djamil, N. (2017). *Anak Bukan untuk dihukum*. Sinar Grafika.
- Gultom, M. (2014). *Perlindungan hukum terhadap anak dalam sistem peradilan pidana anak di Indonesia*. Refika Aditama.
- Hartono, P. (2010). Penegakan Hukum Pidana melalui Pendekatan Hukum Progresif. *Sinar Grafika, Jakarta*.
- Kansil, C. (2005). Dan Christine ST Kansil. *Sistem Pemerintahan Indonesia, Jakarta, Bumi Aksara*.
- Mulyadi, L. (2013). Eksistensi Hukum Pidana Adat Di Indonesia: Pengkajian Asas, Norma, Teori, Praktik dan Prosedurnya. *Jurnal Hukum dan Peradilan*, 2(2), 225–246.
- Polk, K. (2014). *When men kill: Scenarios of masculine violence*. Cambridge University Press.
- Priyatno, D. (2004). *Kebijakan Legislasi tentang Sistem Pertanggungjawaban Pidana Korporasi di Indonesia*. CV Utomo.
- Setyowati, E. P., Pratiwi, S. U. T., Hertiani, T., & Samara, O. (2017). Bioactivity of fungi *Trichoderma reesei* associated with sponges *Stylissa flabelliformis* collected from national park West Bali, Indonesia. *Journal of Biological sciences*, 17(8), 362–368.
- Soekanto, S. (2015). *Efektivitas hukum dan peranan sanksi*. Remadja Karya.
- Soemitro, I. S. (2020). *Aspek hukum perlindungan anak*. Bumi Aksara.
- Soetodjo, W. (2010). *Hukum Pidana Anak*, Bandung: PT. Refika Aditama.
- Wahyudi, S. (2011). Tanggung Jawab Rumah Sakit Terhadap Kerugian Akibat Kelalaian Tenaga Kesehatan Dan Implikasinya. *Jurnal dinamika hukum*, 11(3), 505–521.
- Waluyadi, K. (2009). *Pengadilan dan Hukum Pidana*. Mandar Maju, Bandung.
- Zainuddin, A. A., Selamat, R., Baharudin, A., Ghaffar, S. A., Rahim, N. C. A., & Aris, T. (2013). Nutritional status of Malaysian primary school children aged 8-10 years: findings from the 2008 National IDD Survey. *Malaysian Journal of Nutrition*, 19(2).

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#### First publication right:

International Journal of Social Research (Insight)

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