



## Diversion as an Alternative Criminal Case Settlement

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### **Abstract**

This study examines diversion as an alternative settlement of criminal cases. The method used in conducting research is a normative method with a statutory approach. Implementatively diversion in the settlement of criminal cases other than adults will greatly reduce the burden of law enforcement officials in handling cases, besides that the diversion policy will also meet the needs of people who want to handle cases quickly and at a low cost.

**Keywords:** Diversion; Settlement of Criminal Acts

### **Introduction**

The term diversion is widely known in the juvenile justice system, diversion is a process that has been recognized internationally as the best and most effective way of dealing with children in conflict with the law. Interventions against children in conflict with the law are very broad and varied, but most emphasize detention and punishment, regardless of how mild the violation is or how young the child is. Children who break the law or commit criminal acts are very 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 or legal and humanitarian thought arises to make formal rules of the act of removing a child who violates the law or commits a crime from the criminal justice process by providing other alternatives considered better for children. Based on these thoughts, the concept of diversion was born, which in Indonesian terms is called diversion.

The high number of child offenders shows an indication of an increase in the number of arrests and detention of children by the police, which in turn has an even greater impact on children entering the criminal justice process. Furthermore, these conditions open up opportunities for the placement of children in detention centers and in correctional institutions. It also shows that in dealing with children in conflict with the law, law enforcement officials prefer formal legal processes over non-formal legal processes and prevent children from detention before trial as stated in the Convention on the Rights of the Child Article 37 (b), The Beijing Rules ( Items 13.1 and 2) and Law Number 39 of 1999 concerning Human Rights (Article 66), which clearly states that the arrest, detention of children must be carried out according to the law and will be applied as a last resort.

In the normative level, Law No. 8 of 1981 concerning Criminal Procedure Law (Article 7) and Law No. 2 of 2002 concerning the Police, the police have the authority to stop the investigation of cases.

This is in line with the Convention on the Rights of the Child and The Beijing Rules which provides opportunities for diversion by the Police and Public Prosecutors and other authorized officials. Diversion is a diversion or deviation in the handling of delinquent offender children outside the conventional judicial route.<sup>1</sup> Diversity can prevent children from the stigmatization process that usually occurs in the process of criminal punishment of children through the Criminal Justice System, besides the existence of diversion is needed to protect the best interests of children because through the diversion of possible criminal prosecution, the record of a child as a former defendant does not exist and by itself stigmatization of children themselves did not happen.<sup>2</sup>

The basic idea of diversion cannot be separated from the paradigm of restorative justice which is currently being studied and considered as the future paradigm of criminal law. The restorative justice paradigm has shifted the conventional view of crime, from violations of norms that cause harm, to individuals affected by crime; from punishment and the fall of sorrow, turn to reparation for losses. Recovery of losses is a major component of the restorative justice paradigm. Viewed from the aspect of resolving various conflicts, an important element of the definition of restorative justice is that it prioritizes reconciliation rather than retaliation.

Characteristics of Restorative Justice Theory according to Van Nes:

- a. *Crime is primarily conflict between individuals resulting in injuries to victims, communities and the offenders themselves; only secondary is it lawbreaking.*
- b. *The overarching aim of the criminal justice process should be to reconcile parties while repairing the injuries caused by crimes.*
- c. *The Criminal justice process should facilitate active participation by victims, offenders and their communities. It should not be dominated by government to the exclusion or others.*<sup>3</sup>

Susan Sharet has proposed five key principles that help in the restorative justice process based on Marshall's definition. The following is taken based on how it works:

First, restorative justice expects participation and consensus of all participants, Second, restorative justice seeks to restore what is damaged. Third, restorative justice seeks full and direct accountability, Fourth, Restorative justice seeks to reunite what has been released, Finally, restorative justice seeks to strengthen society in order to prevent further harm.<sup>4</sup>

<sup>1</sup> Paulus Hadisuprpto, *Peradilan Restoratif : Model Peradilan Anak Indonesia Masa Datang*, Pidato Pengukuhan Guru Besar Fakultas Hukum Universitas Diponegoro, Semarang, 2006, p. 16.

<sup>2</sup> *Ibid*, p. 17.

<sup>3</sup> Dwidja Priyatna, *Sistem Pelaksanaan Pidana Penjara Di Indonesia*, Bandung : PT.Refika Aditama, 2006, p. 15

a. Crimes are common in conflicts between individuals which result in injuries to victims, communities and individuals, only secondary is the violation of the law.

b. The overall goal of the criminal justice process must be to reconcile the parties while repairing the injury caused by a crime.

c. The judicial process must facilitate active participation by victims, perpetrators and their communities. This may not be dominated by government by or overruling others.

<sup>4</sup> Allison Morris, Gabrielle Maxwell, p. 5,6... First,restorative justice invites full participation and consensus, This means that victims and offenders are involved, but it also opens the door to others who feel that their interests have been affected (for example, neighbours who have been indirectly harmed by the crime. The invitation to participate undercourses the benefits of voluntary involvement, although, of course, offenders may participate in order to avoid traditional criminal processes. Second, restorative justice seeks to heal what is broken, A central question asked in any restorative process is "What does the victim need to heal to recover, to regain a sense of safety?" Victims may need information; they may need reparation. Offenders, too, may need healing; they may need release from guilt or fear; they may need resolution of underlying conflicts or problems that led to the crime; and they may need an opportunity to make things right. Third,restorative justice seeks full and direct accountability, Accountability does not simply mean that offenders must face the fact that they have broken the law; they must also face the people they have harmed and see how their actions have damaged others. They should expect to explain their behaviour so that the victim and community can make sense of it. They should also expect to take steps to repair that harm. Fourth,Restorative

A distinctive feature of restorative justice is that it places the victim in a central position. Another distinctive feature is keeping the offender from imprisonment through diversion, but still being held accountable. The application of restorative justice will be more effective in a criminal justice system that recognizes many forms of diversion, where each component has broad discretion. In contrast to the settlement of cases through a normal judicial process, diversion is a suitable and proportionate option in case resolution.

Diversion is also referred to as an out-of-court settlement process. Accordingly, restorative justice will be achieved through diversion if the victim freely participates actively and the perpetrators enjoy the opportunity to apologize without coercion followed by reconciliation between the parties concerned as a process of wound healing and restoration of compensation.<sup>5</sup> Diversion is carried out with consideration to provide opportunities for lawbreakers to become good people again through non-formal channels by involving community resources. Diversion seeks to provide justice to the cases of child offenders who have committed criminal offenses and are handled by law enforcement officials. And the authority for the competent authority to stop the ongoing process at any time for further diversion. There are three types of implementation of diversion, namely:

1. The implementation of social control (social control orientation), namely law enforcement officials surrender the perpetrators in the responsibility of supervision or observation of the community, with obedience to the approval or warning given. Perpetrators accept responsibility for their actions and do not expect a second chance for perpetrators by the community.
2. Social services by the community towards the perpetrators (social service orientation), namely carrying out functions to supervise, interfere, improve and provide services to the perpetrators to provide improvements or services.
3. Towards a process of restorative justice or balanced (restorative justice orientation), which is protecting the community, giving the opportunity for the perpetrators to be directly responsible to the victims and the community and making a mutual agreement between the victim, the perpetrator and the community. The implementation is that all related parties are brought together to reach an agreement on the actions of the perpetrators.<sup>6</sup>

## ***Result and Discussion***

The idea or discourse of diversion in the settlement of criminal cases for non-child cases is actually already in the supporting documents of the 9th 1995 UN Congress relating to the management of criminal justice (ie document A/CONF.169/6) revealed the need for all countries to consider “privatizing some law enforcement and justice functions “and” Alternative Dispute Resolution/ADR “(in the form of mediation, conciliation, restitution, and compensation) in the criminal justice system. Specifically, regarding ADR, it is stated in the document as follows.

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justice seeks to reunite what has been divided. Crime causes divisions between people and within communities. That is one of the most profound harms that it causes. Restorative processes work toward reconciliation of the victim and offender, and reintegration of both into the community. A restorative perspective holds that the “victim” and “offender” roles should be temporary, not permanent. Each should be drawn toward a future in which they are free of their past, no longer defined primarily by the harm they may have caused or suffered. Finally, restorative justice seeks to strengthen the community in order to prevent further harms. Crime causes harm, but crime may also reveal preexisting injustices. These can be as localized as a long term dispute between the “offender and the ‘victim” that erupted into criminal behaviour. It can be as systemic as racial and economic inequities that, while not excusing the offender’s behaviour, must be addressed in order to strengthen the community and make it a just and safe place to live.

<sup>5</sup> Eriyantouw Wahid, *Opcit*, p. 49

<sup>6</sup> Peter C. Kratcoski, *Correctional Counseling and Treatment, USA: waveland Press Inc, 2004, p. 160*

“The techniques of mediation, conciliation and arbitration, which have been developed in the civil law environment, **may well be more widely applicable in criminal law**. For example, it is possible that some of the serious problems that complex and lengthy cases involving fraud and white-collar crime pose for courts could be reduced, if not eliminated, by applying principles developed in conciliation and arbitration hearings. In particular, if the accused is **a corporation** or business entity rather than an individual person, the fundamental aim of the court hearing must be not to impose punishment but to achieve an outcome that is in the interest of society as a whole and to reduce the probability of recidivism”.

In addition, according to Barda Nawawi Arief about Alternative Dispute Resolution or ADR which is in line with the diversion idea, there are also some documents, among others:

- a. In the 9th 1995 UN Congress report on “The Prevention of Crime and the Treatment of Offenders” (document A / CONF. 169/16).
- b. In the “International Penal Reform Conference” held at Royal Holloway College, University of London, on April 13-17, 1999, it was stated that one of the key elements of the new agenda was the renewal of criminal law (the key elements of a new agenda for penal reform) is the need to enrich the formal justice system with informal systems or mechanisms in dispute resolution in accordance with human rights standards (the need to enrich the formal judicial system with informal, locally based, dispute resolution mechanisms which meet human rights standards).
- c. On September 15, 1999, the Committee of Ministers of the Council of Europe received Recommendation No. R (99) 19 concerning “Mediation in Penal Matters”.
- d. In the Vienna Declaration, the 10th / 2000 UN Congress (document A / CONF. 187/4 / Rev.3), among others, stated that to provide protection to victims of crime, it should be introduced into restorative justice mediation and restorative mechanisms (restorative justice).
- e. On 15 March 2001, the European Union created the EU Council Framework Decision on “the position of victims in criminal proceedings” (the Standing of Victims in Criminal Proceedings) - EU (2001/220 / JBZ) which includes mediation issues as well . Article 1 (e) of this Framework Decision defines “mediation in criminal cases” as: “the search prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person”. Article 10 states, each member country will try to “promote mediation in criminal cases for offenses which it considers appropriate for this sort of measure”.
- f. On July 24, 2002, Ecosoc (UN) accepted Resolution 2002/12 on the “Basic Principles on the Use of Restorative Justice Programs in Criminal Matters” which also included mediation issues.<sup>7</sup>

In Indonesia, diversion aside from the case of children is very often done by law enforcers, including the police who have discretionary authority regulated in the Police Law which allows the police to override normative legal provisions in the public interest. In some cases of fighting or minor maltreatment, traffic cases and Domestic Violence (KDRT) cases many investigators make “diversion” / discretionary efforts, if the peace that has been achieved by the parties, other than the criminal offense is usually done against minor criminal offenses or minor criminal offenses is strived for discretion by law enforcement officials at the level of investigation which means that there is a kind of peace outside the court process for the parties, and the last is the policy of rehabilitation of narcotics addicts.

Provisions regarding the rehabilitation of narcotics addicts and victims of narcotics abuse have been regulated in Law Number 35 Year 2009 and the previous law, namely Law Number 22 Year 1997, as for other policies that support the rehabilitation of narcotics addicts, namely the issuance of the Supreme Court Circular Letter (SEMA) Number 04 of 2010 which is a revision of the Supreme Court Circular Letter Number 07 of 2009, Government Regulation Number 25 of 2011 concerning Obligatory

<sup>7</sup>Barda Nawawi Arief, *Mediasi Penal : Penyelesaian Perkara Pidana Di Luar Pengadilan*

Report Policies for Addicts and Narcotics Victims and the latest policies issued by the Chairperson of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Head of the Republic of Indonesia National Police, Head of the Republic's National Narcotics Agency.

Indonesia is about “Handling Narcotics Addicts and Victims Narcotics Abuse into Rehabilitation Institutions. In the Draft Penal Code it is also regulated that the demise of the prosecution authority as contained in the Penal Code (which is spread in several articles, including Article 82 above), in the Draft Penal Draft Concept is merged into one article and expanded with the following conditions.

Article 153 RKUHP 01-21-2015

The authority of the prosecution has been dropped, if:

- a. there have been decisions that have permanent legal force;
- b. the defendant died;
- c. expired;
- d. settlement outside the process;
- e. maximum criminal fines paid voluntarily for crimes committed are only threatened with a maximum fine of category II;
- f. maximum criminal fine paid voluntarily for a crime that is threatened with a maximum jail term of 1 (one) year or a maximum fine of category III;
- g. The President grants amnesty or abolition;
- h. the prosecution was stopped because the prosecution was handed over to other countries based on the agreement;
- i. criminal offense that has no complaint or the complaint is withdrawn; or
- j. imposition of the principle of opportunity by the Attorney General.

From the provisions of the RKUHP above it can be seen that it is possible to settle criminal cases outside the court (see sub d above). Detailed arrangements do not yet exist, but certainly will be regulated further in the Draft Criminal Procedure Code.

Regarding the form of case resolution in the diversification process “Explanatory memorandum” from European Council Recommendation No. R (99) 19 concerning “Mediation in Penal Matters”, as followed by Barda Nawawi Arief, presented several models of penal mediation as follows: <sup>8</sup>

- a. “informal mediation”
- b. “Traditional village or tribal moots”
- c. “victim-offender mediation”
- d. “Reparation negotiation programmers”
- e. “Community panels or courts”
- f. “Family and community group conferences”

Ad (a): The “informal mediation” model

- 1) This model is carried out by criminal justice personnel in its normal duties, that is, it can be carried out by the Prosecutor by inviting the parties to carry out informal settlements with the aim, not to continue prosecution if an agreement is reached ; it can be done by a social worker or supervisor (probation officer), by a police official, or by a Judge.
- 2) This type of informal intervention is common in the entire legal system.

<sup>8</sup>Barda Nawawi Arief, *Mediasi Penal.....Op.Cit*, p. 6-10

Ad (b): Model “Traditional village or tribal moots” According to this model, the whole community meets to solve conflicts of crime among its citizens.

- 1) This model exists in some less developed countries and in rural / remote areas.
- 2) This model prefers benefits for the wider community.
- 3) This model precedes western law and has inspired most modern mediation programs. Modern mediation programs often try to introduce the various benefits of tribal moots in a form adapted to the structure of modern society and individual rights that are recognized according to law.

Ad (c): The “victim-offender mediation” model

- 1) Mediation between victims and perpetrators is the most common model in people's minds.
- 2) This model involves various parties who meet attended by the appointed mediator. Many variations of this model. The mediator can come from formal officials, independent mediators, or a combination.
- 3) This mediation can be held at every stage of the process, both at the police policy stage, the prosecution stage, the criminal stage or after criminal conviction.
- 4) This model is applied to all types of criminal offenders; there are special for children; some are for certain types of criminal acts (eg shoplifting, robbery and acts of violence). Some are especially aimed at child offenders, novice offenders, but there are also for serious offenses and even for recidivists.

Ad (d): Model “Reparation negotiation programs”

- 1) This model is solely for estimating / assessing compensation or reparation that must be paid by the perpetrator of a criminal offense to the victim, usually during an examination in court.
- 2) This program is not related to reconciliation between the parties, but only relates to planning material improvements.
- 3) In this model, a criminal offense may be subject to a work program in order to save money to pay compensation / compensation.

Ad (e): Model “Community panels or courts”

- 1) This model is a program to divert criminal cases from prosecution or justice to more flexible and informal community procedures and often involves elements of mediation or negotiation.

Ad (f): Model “Family and community group conferences”

- 1) This model has been developed in Australia and New Zealand, which involves community participation in the SPP (criminal justice system). Not only involving victims and perpetrators of crime, but also the families of the perpetrators and other community members, certain officials (such as police and juvenile judges) and supporters of victims.
- 2) The perpetrators and their families are expected to produce a comprehensive and satisfying agreement that can satisfy the victims and help them keep their problems out of trouble / subsequent problems.

## **Conclusion**

This diversion problem is actually not new in its implementation because at the level of investigation the police as investigators often carry out discretionary acts regulated in the police law

which is almost the same as what is carried out in the diversion, only in the act of discretion in the investigation is limited in minor criminal offenses . Meanwhile, the implementation of diversion in the settlement of criminal cases other than adults will greatly reduce the burden of law enforcement officers in handling cases. In addition, the diversion policy will also meet the needs of people who want to handle cases quickly and at low cost.

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