



Study of Handling Children in Conflict with Post-Usa Law in Responsibility Theory and Sociological Approach

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Abstract

Article 1 (number 3) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (abbreviated UUSPPA): "A child in conflict with the law, hereinafter referred to as a child, is a child who is 12 (twelve) years old but not yet 18 (eighteen) years old who is suspected of committing a crime. So in this case, a child protection system is needed that can guarantee the growth and development of children who are in conflict with the law. One form of discrimination protection is against children in conflict with the law, namely by diversion and restorative justice. This study aims to see the effectiveness of the application of diversion and restorative justice in Indonesia by taking samples of cases of children that occurred at the Ponorogo Police and the Ponorogo District Court in terms of the Legal and Sociological Accountability approach. The purpose of this study is that the child who is the perpetrator of a crime is able to take responsibility and be held accountable for his actions both for himself, the victim, his family and society, so as to provide a deterrent effect and not repeat the same or different crimes. This research is a qualitative approach, the process is more important than the result, the analysis tends to be done by inductive analysis, and meaning is essential. While the type of research is a case study, namely children in conflict with the law, namely the Police and the Ponorogo District Court. so that it provides a deterrent effect and does not repeat the same or different crimes. The research method used in this study is a qualitative approach, the process is more important than the results, the analysis tends to be carried out by inductive analysis, and meaning is essential. While the type of research is a case study, namely children in conflict with the law, namely the Police and the Ponorogo District Court. so that it provides a deterrent effect and does not repeat the same or different crimes. The research method used in this study is a qualitative approach, the process is more important than the results, the analysis tends to be carried out by inductive analysis, and meaning is essential. While the type of research is a case study, namely children in conflict with the law, namely the Police and the Ponorogo District Court.

Keywords: *Diversion; Liability; Children in Conflict with the Law*

Introduction

Children are the future hope of a nation. However, the development of the era in the current era of technology and globalization, also affects the behavior of children and does not even rule out the possibility of children becoming perpetrators of criminal acts. Children whose behavior deviates from a social and legal order are often referred to as "bad children". A child who commits a crime or in the Juvenile Court System Act is called a child in conflict with the law, in this case as stipulated in Article 1 (number 3) of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (abbreviated UUSPPA): "A child in conflict with the law, hereinafter referred to as a child, is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years old who is suspected of committing a crime."¹

In the context of criminal procedural law, it is emphasized that criminal investigation activities carried out by the police, prosecutors, judges and other officials must prioritize the interests of the child or see what criteria are best for the welfare of the child concerned without reducing attention to the interests of the community. Meanwhile, from the perspective of criminal science,² Paul Hadisuprpto,³ believes that the imposition of criminal charges against delinquents or children in conflict with the law tends to harm the mental development of children in the future. This detrimental tendency is the result of the effects of criminal penalties, especially imprisonment, which is in the form of a stigma (bad stamp). This was also stated by Barda Nawawi Arief,⁴ imprisonment can provide a stigma that will carry over even if the person concerned does not commit another crime. As a result of applying stigma to children, it will be difficult for them to return to being "good" children.

Therefore, the alternative for handling juvenile criminal cases based on the mandate of the Juvenile Criminal Justice System Law is diversion. Diversion comes from English diversion which means "diversion". Based on the general guidelines for the Indonesian language, which were refined and the general guidelines for the formation of terms, adapted in Indonesian into diversion.⁵ According to Romli Atmasasmita, diversion is the possibility of the judge stopping or diverting/not continuing the examination of cases and examination of children during the examination process before the trial.⁶ In Article 1 point 7 of the Juvenile Criminal Justice System Law, it is stated that diversion is the transfer of settlement of children's cases from the criminal justice process to processes outside of criminal justice.

The Juvenile Criminal Justice System Act has regulated diversion which functions so that children in conflict with the law are not stigmatized as a result of the judicial process they must undergo. The use of the diversion mechanism is given to law enforcers (Police, Prosecutors, Judges, other institutions) in dealing with lawbreakers involving children without using a formal court. The application of diversion is intended to reduce the negative impact of children's involvement in a judicial process and to improve children's welfare and provide special protection to children who are in conflict with the law.⁷

This diversion formula consequently shifts the perspective of our law enforcers from being positivist and rigid to progressive and compromising, this can be seen in the collaborative efforts between law enforcement agencies (the Indonesian Police, the Indonesian Attorney General's Office, and the Indonesian Supreme Court) which are incorporated into the law enforcement agencies. memorandum of

¹ Wiwik Afifah, *Pertanggungjawaban Pidana Anak Konflik Hukum*, (DIH, Jurnal Ilmu Hukum Pebruari 2014, Vol. 10, No. 19, Hal. 48 – 62), 54.

² Romli Atmasasmita, *Problem Kenakalan Anak-anak Remaja*, (Armico, Bandung, 1983), 45.

³ Paulus Hadisuprpto, *Pemberian Malu Reintegratif sebagai Sarana Non penal Penanggulangan Perilaku Delikuen Anak*, (Disertasi Program Doktor Ilmu Hukum Universitas Diponegoro, Semarang, 2003), 5.

⁴ Didik M. Arief Mansur dan Elisatris Gultom, *Urgensi Perlindungan Korban Kejahatan*, (Raja Grafindo, Jakarta, 2007), 37.

⁵ Setya Wahyudi, *Sistem Peradilan Pidana Anak Di Indonesia*, (Citra Aditya Bakti, Bandung), 14.

⁶ Romli Atmasasmita, *Sistem Peradilan Pidana Perspektif Eksistensialisme dan Abolisionisme*, (Bina Cipta, Bandung), 20.

⁷ Jefferson B. Pangemanan, *Pertanggungjawaban Pidana Anak Dalam Sistem Peradilan Pidana Indonesia*, (Lex et Societatis, Vol. III/No. 1/Jan-Mar/2015), 104.

understanding with B-3523/E/EJP/2012 related to the implementation of restorative justice.⁸ Therefore, not all cases of children in conflict with the law must be resolved through formal courts, and provide an alternative for settlement with a restorative justice approach, so that cases of children in conflict with the law can be diverted in the best interests of the child and by considering justice for the victim.⁹ While restorative justice is a settlement process involving perpetrators, victims, their families and other parties involved in a crime, jointly seeking a solution to the crime and its implications by emphasizing recovery and not retaliation.¹⁰

In relation to children in conflict with the law, there are 2 (two) categories of child behavior that make them have to deal with the law, namely:¹¹

1. Status Offence is a child's delinquent behavior which if committed by an adult is not considered a crime, such as disobeying, skipping school or running away from home;
2. Juvenile delinquency is a child's delinquent behavior which if committed by an adult is considered a crime or a violation of the law.

From these criteria, law enforcement officers in dealing with the actions of children under the age of 18 (eighteen) years must investigate very carefully whether the child has been able to legally distinguish the consequences of his actions or not.

Based on the description of the background above, there are several cases of handling diversion and restorative justice which eliminate the ability of children to be legally responsible and are not in accordance with the principles contained in the Child Protection Act. This is based on the results of research by researchers on the diversion and restorative justice process from 2017 – 2019 in the Ponorogo Police KPPA unit, and the Ponorogo District Court.¹² In practice, there are several juvenile criminal cases that result in children as perpetrators being able to repeat their actions again, although in different criminal acts, and can get diversion and restorative justice both at the police, prosecutor's and court levels. From this, the researcher is interested in examining the handling of diversion and restorative justice, related to the aspect of legal responsibility for children and a sociological approach. The purpose of this study is that the child who is the perpetrator of a crime is able to be responsible and accountable for his actions both for himself, the victim, his family and society, so that it provides a deterrent effect and does not repeat the same or different crimes.

The research method used in this study is a qualitative approach, which has natural characteristics (natural setting), is descriptive, the process is more important than the result, the analysis tends to be done by inductive analysis, and meaning is essential.¹³ While the type of research is a case study,¹⁴ namely an intensive description and analysis of certain phenomena or social units such as individuals, groups,

⁸ Betania Fransiska Sitanggang, Irma Cahyaningtyas, *Penanganan Perkara Anak Dalam Perspektif Jaksa Penuntut Umum*, (Jurnal Pembangunan Hukum Indonesia Volume 2, Nomor 1, Tahun 2020, DOI: 10.14710/jphi.v2i1.66-81), 67.

⁹ Nasir Djamil, *Perlindungan Pidana Anak Di Indonesia* (Grafindo Persada, Jakarta, 2011), 137.

¹⁰ *Ibid.*, 132.

¹¹ Chairul Bariah, Mohd. Din, Mujibussalim, *Perluasan Pertanggungjawaban Terhadap Tindak Pidana Yang Dilakukan Oleh Anak*, (Syiah Kuala Law Journal : Vol. 1, No.3 Desember 2017), 74.

¹² Martha dan Dewi, *Penerapan Perlindungan Hukum Terhadap anak Yang Berkonflik Dengan Hukum*, (Nata Karya, Ponorogo, 2018)

¹³ Pendekatankualitatif adalah prosedur penelitian yang menghasilkan data deskriptif berupa kata-kata tertulis atau lisan dari orang-orang-orang dan perilaku yang dapat dialami. Lihat dalam Lexy Moleong, *Metodologi Penelitian Kualitatif* (Bandung: PT Remaja Rosda Karya, 2000), 3.

¹⁴ Ada 6 (enam) enam macam metodologi penelitian yang menggunakan pendekatan kualitatif, yaitu etnografi, studi kasus, teori grounded, penelitian interaktif, penelitian ekologi dan penelitian masa depan. Marriam, S.B., G Simpson, E.L., *A. Guide to research for Educators and trainer on adults*. (Malabar, Florida: Robert E. Krieger Publishing Company, 1984)

institutions or society.¹⁵ The case research here is the handling of cases of children in conflict with the law, namely the Police and the Ponorogo District Court.

The Concept of Legal Liability

According to the Big Indonesian Dictionary (KBBI) responsibility is the obligation to bear everything, if anything happens, you can be prosecuted, blamed, and sued. In the legal dictionary, responsibility is a must for someone to carry out what has been required of him.¹⁶ According to the law, responsibility is a consequence of the consequences of a person's freedom regarding his actions related to ethics or morals in carrying out an act.¹⁷ Furthermore, according to the Quarterly Point, accountability must have a basis, namely things that cause a legal right for a person to sue another person as well as in the form of things that give birth to other people's legal obligations to provide accountability.¹⁸

In English, criminal liability is referred to as responsibility, or criminal liability. The concept of criminal responsibility is actually not only a matter of law, but also about moral values or general decency adopted by a society or groups in society, this is done so that criminal responsibility is achieved by fulfilling justice.¹⁹ Criminal liability is a form of determining whether a suspect or defendant is responsible for a crime that has occurred. In other words, criminal liability is a form that determines whether a person is released or sentenced.

According to Roeslan Saleh, criminal liability is defined as the continuation of objective reproaches that exist in a criminal act and subjectively fulfills the requirements to be convicted for the act.²⁰ What is meant by objective censure is that the act committed by a person is a prohibited act, the prohibited act referred to here is an act that is contrary to or prohibited by law, both formal law and material law. While what is meant by subjective reproach refers to the person who made the forbidden act, or it can be said that subjective reproach is a person who commits an act that is prohibited or contrary to the law. If the act committed is an act that is reproached or an act that is prohibited, but if within the person there is an error that causes irresponsibility, then criminal liability is not possible.²¹

In criminal liability, the burden of responsibility is borne by the perpetrators of criminal offenses related to the basis for imposing criminal sanctions. A person will have the nature of criminal liability if a thing or act committed by him is against the law, but a person can lose the nature of responsibility if an element is found in him that causes the loss of a person's ability to be responsible.

According to Chairul Huda that the basis of a criminal act is the principle of legality, while the perpetrator can be punished on the basis of error, this means that a person will have criminal responsibility if he has committed an act that is wrong and contrary to the law. In essence, criminal liability is a form of mechanism created to react to the violation of a certain agreed-upon act.²²

The element of error is the main element in criminal liability. In the sense that a criminal act does not include criminal liability, a criminal act only refers to whether the act is against the law or prohibited

¹⁵Bogdan dan Biklen, *Qualitative Research for Education, An introduction to theory and methods*. (Boston: Allyn and Bacon, 1982, Inc).

¹⁶ Andi Hamzah, *Kamus Hukum*, (Ghalia Indonesia, 2005), 128.

¹⁷ Soekidjo Notoatmojo, *Etika dan Hukum Kesehatan*, (Rineka Cipta, Jakarta, 2010), 34.

¹⁸ Titik Triwulan dan Shinta Febrian, *Perlindungan Hukum bagi Pasien*, (Prestasi Pustaka, Jakarta, 2010), 48.

¹⁹ Hanafi Amrani, Mahrus Ali, *Sistem Pertanggung Jawaban Pidana*, (Cetakan pertama, Jakarta, Rajawali Pers, 2015), 16.

²⁰ Roeslan saleh, *Pikiran-Pikiran Tentang Pertanggung Jawaban Pidana*, (Cetakan Pertama, Jakarta, Ghalia Indonesia), 33.

²¹ *Ibid.*, 33.

²² *Ibid.*, 34.

by law, regarding whether a person who commits a criminal act is then convicted depends on whether someone who commits a criminal act has an element of error or not.²³

Pertanggungjawaban pidana dalam common law system selalu dikaitkan dengan mens rea dan pemidanaan (punishment). Pertanggungjawaban pidana memiliki hubungan dengan kemasyarakatan yaitu hubungan pertanggungjawaban dengan masyarakat sebagai fungsi, fungsi disini pertanggungjawaban memiliki daya penjatuhan pidana sehingga pertanggungjawaban disini memiliki fungsi control sosial sehingga didalam masyarakat tidak terjadi tindak pidana.²⁴

Besides that, criminal responsibility in the common law system is related to mens rea, that criminal responsibility is based on a mental state, namely a guilty mind. Guilty mind implies a subjective error, i.e. a person is found guilty because the maker is judged to have wrong thoughts, so that person must be responsible. The existence of criminal responsibility is imposed on the maker, the criminal maker must be punished. The absence of a no guilty mind means that there is no criminal responsibility and the result is that the maker is not punished.²⁵

Errors as part of the mens rea are also interpreted as errors for violating the rules, or violating the laws and regulations. Anyone who violates the law then that person must be responsible for what has been done. Mistakes as an element of responsibility in this view make a guarantee for someone and make control of one's freedom over others. The existence of this guarantee makes a person protected from the actions of others who violate the law, and as a control because everyone who violates criminal law is burdened with criminal responsibility.²⁶

The Criminal Code does not clearly state the system of criminal responsibility adopted. Several articles in the Criminal Code often mention mistakes, either intentional or negligent, but unfortunately the meaning of intentional error or negligence is not explained by law. there is no further explanation regarding intentional errors or omissions, but based on the doctrine and opinions of legal experts regarding the articles in the Criminal Code it can be concluded that in these articles contain elements of intentional errors or negligence which must be proven by the court, so that to punish perpetrators who commit criminal acts,²⁷ This means that in terms of criminal liability, it cannot be separated from the role of the judge to prove the elements of criminal responsibility itself because if these elements cannot be proven true, then someone cannot be held accountable.²⁸

Sociological Theory Approach

Sociology is one of the disciplines in the category of social science. The word sociology comes from the Latin socius which means friend, and the Greek logos which means word, story, language.²⁹ In simple terms, sociology is defined as the study of society.³⁰ The use of the term sociology was first coined by Auguste Comte in his book "Cours De Philosophie Positive". Sociology was then defined in more depth by experts.

Menurut Pittirim Sorokin, sosiologi adalah ilmu yang mempelajari hubungan dan pengaruh timbal balik antara aneka macam gejala sosial (gejala agama, ekonomi, hukum, politik, dan sebagainya); hubungan dan pengaruh timbal balik antara gejala sosial dengan gejala non-sosial (geografis, biologis,

²³ *Ibid.*, 34.

²⁴ *Ibid.*, 34.

²⁵ *Ibid.*, 35.

²⁶ *Ibid.*, 35.

²⁷ Hanafi Amrani, Mahrus Ali, 2015, *Sistem Pertanggungjawaban Pidana*, 52.

²⁸ *Ibid.*, 52-53.

²⁹ Ahmad Hakim, A., & Saebani, B. A. *Filsafat Umum Dari Metologi Sampai Teofilosofi*. Bandung: Pustaka Setia, 2008), 2.

³⁰ *Ibid.*

dan sebagainya), serta ciri-ciri umum dari semua jenis gejala-gejala sosial. Sedangkan menurut Ogburn dan Nimkoff, sosiologi adalah penelitian ilmiah terhadap interaksi sosial dan hasilnya, yaitu organisasi sosial. Soemardjan dan Soemardi, sosiologi adalah ilmu yang mempelajari struktur sosial, proses sosial, termasuk perubahan sosial.³¹

Sosiologi sebagai suatu disiplin ilmu tentulah memiliki ciri-ciri atau karakteristik yang ilmiah. Berikut adalah empat ciri-ciri sosiologi sebagai ilmu:³²

- 1) Sociology is empirical, meaning that sociology as a science is based on the observation of reality and is not speculative or presupposes a truth. So the truth that is tested must be based on scientific research.
- 2) Sociology is theoretical, meaning that science is built into a theory (abstraction) that is logically arranged for the purpose of finding the cause and effect of a social phenomenon.
- 3) Sociology is cumulative, meaning that it is based on pre-existing theories. As a dynamic science, sociology develops from existing theories, which are then criticized, improved, so that these theories can be more relevant to the times.
- 4) Sociology is nonethical, meaning that sociology questions the facts that occur in society, not about the good and bad facts.

The object of sociological study is human. Science whose object of study is humans is not only sociology, but the difference between sociology and other sciences that study humans is that sociology studies the social aspects of humans, or more commonly referred to as society.³³ The main points of study of sociologists include:³⁴

- 1) Emile Durkheim: Sociologist who studies the social facts that exist in society. Social facts are structures that are external and coercive for the individual. Examples of social facts are poverty, unemployment,
- 2) Karl Marx: Sociologist who studies social conflicts, especially in the industrial era where there are many conflicts between the bourgeoisie or the owners of capital and the proletariat or workers.
- 3) Max Weber: Sociologist who studies rationality and social action.
- 4) Wright Mill: Sociologist who discovered the concept of sociological fantasy
- 5) Peter Berger: Sociologist who studies social reality.

Sociology as a science has the following functions:³⁵

- 1) As social research. The advantage of sociology as a social science is its adequate research capabilities. In sociology, research or research is something that needs to be mastered both in quantitative and qualitative methods. This research aims to look at the symptoms and facts that exist in society empirically and objectively, so that the data from this field is then used to take a step to overcome the problem.
- 2) Help review a social plan. Sociology can be used for community social mapping which is used as the basis for an institution or agency in making policies or social planning. The purpose of this mapping is that the plans or policies that are made can be effective and effective in solving social problems that exist and have a broad impact on many people.

³¹ *Ibid.*

³² Jones, P. (2010). *Pengantar Teori-Teori Sosial dari Fungsionalisme hingga Post Modernisme*. (Jakarta: Yayasan Pustaka Obor Indonesia, 2010), 12.

³³ *Ibid.*

³⁴ *Ibid.*, 12-13.

³⁵ Pip Jones, *Pengantar Teori-Teori Sosial*, (Jakarta: Yayasan Obor, 2009), 35.

- 3) The function in social development is to improve the quality of society from a social and cultural perspective, including aspects of social structure (institutions, rules, culture (values, norms, ideology), and social processes (interaction, negotiation,).

The first person to use the term sociology was Auguste Comte, therefore he is known as the father of world sociology. To academics, Comte is better known as a philosopher than a sociologist. Initially he developed a discipline called social physics, which later became known as sociology. Sociology is called social physics because it tries to adopt the natural sciences into the social realm. Comte's famous thought is about the law of three stages of human thought, namely the theological stage (emphasizing belief in supernatural powers), then the metaphysical stage (emphasizing on abstract forces, such as nature), and the positivistic stage (belief in science).³⁶

Sociology then became a science that developed in Europe, especially in Germany and France. The development of sociology in Europe is growing rapidly also because of the industrial revolution in England, and the social revolution in France. One of the most famous thinkers of sociology is Karl Marx. Marx is a German citizen. Marx is not just a mere sociologist, but he is also known as a philosopher and economist. Marx's famous sociological study is the social conflict between employers and workers. The group of employers or owners of capital is known as the bourgeoisie, while the workers are known as the proletariat. This conflict occurs because of differences in interests and gaps, as well as the exploitation of the bourgeoisie against the proletariat.³⁷

Another great thinker was Emile Durkheim. Emile Durkheim is a person who was born in France. Durkheim's best-known thought is social fact. Social fact is a structure that is outside the individual (external), and is coercive. In addition to social facts, Durkheim's famous concept is the division of labor which is part of the social change from mechanical society to organic society. Mechanical society is characterized by a life that is still traditional, togetherness is still strong, and the division of labor is still low, such as hunting and farming. Organic society is characterized by a more modern life, higher individuality, and a more complex division of labor (more diverse jobs). Durkheim's thinking was sufficiently influenced by Comte, so he was also known as a positivist scientist,³⁸

The next character is Max Weber. Like Karl Marx, Weber was a German citizen. Weber's famous sociological study is social action. Weber explained that there are four types of social action, namely:³⁹

- 1) Traditional actions, namely actions that are carried out because of habit
- 2) Affective actions, namely actions that are based on feelings or emotions
- 3) Value-oriented actions, namely actions taken based on a belief
- 4) Instrumental rational action, which is using a certain tool or method in achieving a goal

In addition to social action, Weber is also famous for his thoughts on rationality, bureaucracy, and power. These sociological figures are known as classical sociological thinkers. Their thinking is the root of modern sociology, which developed later. Besides Comte, Marx, Durkheim, and Weber, there are actually other classical sociological thinkers, such as Herbert Spencer (study of social evolution), Pittirim Sorokin (study of culture), Ferdinand Tonnies (Paguyuban and Patembayan), and others.

³⁶ George Ritzer, (2011). *Teori Sosiologi Dari Sosiologi Klasik Sampai Perkembangan Terakhir Postmodern* (Terjemahan). (Yogyakarta: Pustaka Pelajar, 2011), 12.

³⁷ Novri Susan, *Sosiologi Konflik: Isu-isu konflik Kontemporer*, Jakarta: Kencana Prenada Group, 2009), 5.

³⁸ Setiadi, E., & Kolip, U. *Pengantar Sosiologi Pemahaman Fakta dan Gejala Permasalahan Sosial: Teori, Aplikasi, dan Pemecahannya*. (Jakarta: Prenadamedia Group, 2011), 24.

³⁹ Scott Lash, *Sosiologi Post Modernisme*, (Yogyakarta: Kanisius, 2004), 10.

In subsequent developments, the term modern or contemporary sociology emerged. Modern sociology is more concerned with the three major perspectives of sociology, namely:⁴⁰

- 1) Structural functional, namely the perspective that sees symptoms in society consisting of social systems that are interrelated because they have functions with each other and aim to achieve a balance or equilibrium. This perspective is based on Durkheim's thinking. The figures of modern sociology are Talcott Parson and Robert Merton.
- 2) Conflict, which is a perspective that sees that in a social phenomenon there are always differences in interests and there is a strata in society. This perspective is based on the thoughts of Marx. The modern sociologists of conflict perspective are Ralf Dahrendorf and Lewis Coser.
- 3) Symbolic interaction, namely the perspective that sees the symbols and signs of a symptom, and sees the actions of the actors involved in social phenomena. This perspective developed from the thoughts of Weber. The characters from this perspective are George H. Mead and Herbet Blumer.

The development of sociology is always dynamic with the times. In the next period, there were studies on postmodernism, postcolonialism, and even towards a digital society filled with technology.

technology and the internet. However, you can get more material on this subject if you take courses in the social sciences, especially sociology. In Indonesia itself, there are already several well-known sociologists, who have contributed to the development of sociology in Indonesia.

Implementation of Diversion and Restorative Justice Settlement at the Police, and Court Level in Ponorogo

The handling of the diversion by the Ponorogo Police, involves the Madiun Fathers, namely by bringing together the two parties between the perpetrator and the victim and their parents. Bapas makes an agreement signed by both parties, by the child and victim for settlement of cases outside the court. Investigators issue SP 3 if the case only once, then the case is not continued. But if the case is more than 2 times, then there is no diversion, the case will proceed to the Prosecutor's Office then the file will be transferred to the court, explained Brigadier Ritus Nur, Spi.⁴¹

Restorative justice is a concept of thought that responds to the development of the criminal justice system by emphasizing the need to involve the community and victims who feel excluded from the mechanism that works in the current criminal justice system, namely through diversion. Marian Liebmann provides several formulations of the basic principles of restorative justice⁴² as follows :

a. Prioritize victim support and healing;

Healing of victims of sexual harassment, both from adult perpetrators and child perpetrators must be prioritized. Victims of sexual harassment can be victims of sodomy cases for boys, or victims of girls.

The cases in the PPA unit of the Ponorogo Police, victims of sexual harassment in 2017 were 3 cases, in 2018 a total of 2 cases were not successfully diverted even to the SP3 process. The number of victims of sexual harassment in 2017 was 1 in cases of sexual intercourse, and in 2018 there were 1 in cases of spreading nude photos through electronic transactions from the two cases successfully diverted. Even though the perpetrators of sexual harassment have been punished, and have received sanctions.

⁴⁰ *Ibid.*

⁴¹ Wawancara dengan Bripta Ritus pada tanggal 15 Desember 2019 di Polres Ponorogo.

⁴² Marian Liebmann (2007, 26-28) memberikan beberapa rumusan prinsip dasar *restorative justice*

This is not the case with victims of sexual harassment who will experience trauma, it takes time and strategies for victims to recover. Bripka Ritus said that during an investigation at the police, it would be easy to be charged with heavy articles and sanctions, victims of abuse would be afraid to meet other people, especially men. The examination will be carried out by a psychologist and a policewoman who examines it, and even then it is not easy to get an explanation from the victim because usually the victim will be depressed and depressed so that they cannot communicate smoothly.

b. The offender is responsible for what he did;

Perpetrators must be responsible for the criminal acts that have been committed, perpetrators who have repeated their actions are not entitled to restorative justice. As stated in Article 7 paragraph (1) At the level of investigation, prosecution, and examination of children's cases in district courts, diversion must be sought. Paragraph (2) Diversion as referred to in paragraph (1) shall be carried out in the event that a criminal act is committed: is punishable by imprisonment of less than 7 (seven) years; and is not a repetition of a crime.

c. Dialogue between victims and perpetrators to reach understanding;

A (peaceful) diversion agreement must be reached between the perpetrator and the victim. The diversion process is carried out through deliberation by involving the child and his/her parents/guardians, the victim and/or his/her parents/guardians, Community Counselors, and Professional Social Workers based on a Restorative Justice approach. If necessary, deliberation involving Social Welfare Personnel, and/or the community. The Diversion Process must take into account: the interests of the victim; Child welfare and responsibilities; avoidance of negative stigma; avoidance of retaliation; social harmony, propriety, decency, and public order.⁴³

d. There is an attempt to properly place the losses incurred;

The diversion agreement must obtain the approval of the victim and/or the victim's child's family as well as the willingness of the child and his/her family, except for: a criminal act in the form of a violation; minor crime; a victimless crime; the value of the victim's loss is not more than the value of the local provincial minimum wage.⁴⁴

e. Offenders must be aware of how not to repeat the crime in the future;

It is hoped that ABH perpetrators who arrive at the juvenile trial will not repeat their actions again. Meanwhile, ABH perpetrators who are successfully diverted are required to make a statement that they will not repeat their actions. The perpetrators and victims will meet in the presence of the police, Fathers, social services, and KPPA. The community also helps to integrate both victims and perpetrators.

Penal mediation is a form of dispute resolution outside the Court (Alternative Dispute Resolution) which is more popular in civil cases, but that does not mean it cannot be applied in criminal law circles. There are several rules that can be the legal basis for the application of Penal Mediation in Indonesia⁴⁵ in criminal cases, the basis for implementing diversion by the police are: Letter of the Indonesian National

⁴³ Lihat Pasal 8 ayat (1) dan ayat (2) Undang-Undang No 11 Tahun 2012 tentang Peradilan anak.

⁴⁴ Lihat Pasal 9 ayat (2) Undang-Undang No 11 Tahun 2012 tentang Peradilan anak.

⁴⁵ Barda Nawawi Arief. *Mediasi Penal di Indonesia*(Jakarta;Putaka Buku.2007). hal 37-38.

Police No. Pol : B/3022/XXI/2009/SDEOPS, 14 December 2009, Regarding Case Handling Through Alternative Dispute Resolution (ADR).⁴⁶

This letter is a reference for the police to resolve cases of minor crimes, such as Articles: 205, 302, 315, 352, 373, 379, 384, 407, 482, this letter is effective if a case is still in the stage of investigation and investigation. . And this is also applied in handling child diversion. Several points of emphasis in the Police Letter include:

- 1) Strive to handle criminal cases that have minor material losses, settlements can be directed through ADR;
 - (a) Settlement of cases through ADR must be agreed upon by the parties in the case, but if no agreement is reached, it must be resolved in accordance with professional and proportional legal procedures;
 - (b) Settlement of cases through ADR must be based on deliberation and consensus and must be known by the surrounding community;
 - (c) Settlement of cases through ADR must respect social/customary legal norms and fulfill the principles of justice;
 - (d) For cases that have been resolved through ADR so that they are no longer touched by other legal actions.
- 2) The offense committed is in the form of a violation which is only punishable by a fine. According to Article 82 of the Criminal Code, the authority/right to claim the offense is nullified if the Defendant has paid the maximum fine for the offense and the costs incurred if the prosecution has been carried out. This provision in Article 82 of the Criminal Code is known as "afkoop" or "payment of a peaceful fine" which is one of the reasons for eliminating prosecution.⁴⁷
- 3) Criminal acts are committed by children under the age of 8 years. According to Law No. 11/2012 (Child Court), the age limit for juvenile delinquents who can be brought to court is at least 8 years and has not yet reached 18 years. For children under 8 years old, investigators can hand the child back to their parents, guardians. (Article 5 of Law No. 11/ 2012).⁴⁸
- 4) Law No. 39/1999 concerning the Human Rights Court which authorized Komnas HAM (established based on Presidential Decree No. 50/1993) to mediate in cases of human rights violations Article: 1 to 7; Article 76:1; Article 89:4; Article 96.⁴⁹

Punishment for perpetrators of child crimes does not then achieve justice for the victims, considering that from the other side it still leaves its own problems that are not resolved even though the perpetrators have been punished. Seeing the principles regarding child protection, especially the principle of prioritizing the best interests of the child, a process for resolving child cases is needed outside the criminal mechanism or commonly called diversion. Punishment institutions are not a way to solve children's problems because they are prone to violations of children's rights.⁵⁰

Therefore, we need an event and procedure in the system that can accommodate the settlement of cases, one of which is to use a restorative justice approach, through a legal reform that does not only change the law but also modifies the existing criminal justice system, so that all objectives what the law

⁴⁶ Surat Kepolisian Negara Republik Indonesia No. Pol : B/3022/XXI/2009/SDEOPS Surat Kepolisian Negara Republik Indonesia No. Pol : B/3022/XXI/2009/SDEOPS

⁴⁷ Lihat Pasal 82 KUHP

⁴⁸ Lihat Undang-undang No 11 Tahun 2012 tentang Pengadilan Anak

⁴⁹ Lihat Undang-Undang Nomor. 39/1999 tentang Pengadilan HAM

⁵⁰ www.blogWendra Rona Putra.// PBH LBH Padang//Bantuan Hukum/Fasilitator Diversi. Diakses tanggal 1 Juli 2020.

wants is achieved. One form of the restorative justice mechanism is dialogue among the Indonesian people, better known as "deliberations for consensus". So that diversion, especially through the concept of restorative justice, becomes a very important consideration in resolving criminal cases committed by children.

If the diversion agreement is not fully implemented by the parties based on a report from the Penitentiary's Social Advisor, the Judge continues to examine the case in accordance with the Child Criminal Justice Procedure Code. If deemed necessary, the diversion facilitator can summon community representatives or other parties to provide information to support the settlement and/or can hold separate meetings (caucuses). A caucus is a separate meeting between the Diversion Facilitator and one party that is known to the other party.⁵¹

Handling in a diversionary manner by the BAPs brings together the two parties between the perpetrator and the victim. The investigator will issue sp 3 if the case is only 1 time, then the case is not continued. But if the case is more than 2 times then there is no diversion, the case will proceed to the Prosecutor's Office then the file will be transferred to the court. Fathers make an agreement signed by both parties, by the child and the victim for the settlement of cases outside the court.

Furthermore, it is explained that ABH in the juvenile justice law, it is not allowed for children to be imprisoned but by working socially. This is as mandated in the child protection law that children should not be imprisoned but work for social workers. After the file is submitted to the police, the police will carry out an investigation, go to the prosecutor's office and the court. From the court it will be decided several years in prison or free, in the case of children the punishment is not imprisonment but with social work. For detention policies from the police, it is mandatory to report to the police, then if you don't report it, the child will have to deal with the police again.

While at the Court level based on literature research on the judges' decisions at the Ponorogo District Court, namely based on the four decisions that were sampled for this study, what was decided by the panel of judges from cases in 2015, 2016, 2017, and 2018, the results of research from interviews with the clerk of the criminal division, Mr. Wahyudi, then Mr. Didik, and the Prosecutor, Mrs. Tartilah, it can be seen that what was decided by the panel of judges in these cases were:

1. The examination of children's cases in the Court is in accordance with the SPPA Law, where the trial atmosphere is made child-friendly and family-friendly.
2. Pre-trial examination is also carried out by a single judge for diversion in the Court which brings together the perpetrator and his parents, the victim and his parents, representatives from the prosecutor's office and the counselor and counseling for children from child BAPAS.
3. If the diversion fails, the judge in his decision is also in accordance with the SPPA Law, namely promoting a restorative justice punishment system, namely by not sending children to prison, but being put into fostered Islamic boarding schools, or punishments that keep children from losing their rights but still be held accountable for their actions.
4. In addition, the procedures carried out by the panel of judges are in accordance with the Child Protection Act and the Child Criminal Justice System Act.

Law No. 11 of 2012 concerning Juvenile Justice and PERMA No. 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System Judges are signs in dealing with children's cases, which include:

⁵¹ *Ibid.*

- a) According to the SPPA Law, Diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system, which aims to: (1) Achieve peace between victims and children; (2) Resolving cases of children outside the judicial process; (3) Preventing children from being deprived of liberty; Encouraging the community to participate; and (4) Instilling a sense of responsibility to the child.
- b) According to PERMA No. 4 of 2014, the Diversion Deliberation is a deliberation between parties involving the Child and his/her parents/guardians, victims and/or their parents/guardians, Community Advisors, Professional Social Workers, representatives and other involved parties to reach a diversion agreement through a justice approach. restorative. Meanwhile, the facilitator is a judge appointed by the head of the court to handle the case of the child in question. Diversion is the transfer of the process to a long and very rigid child case settlement system. Mediation or dialogue or deliberation as an integral part of diversion to achieve restorative justice.
- c) PERMA No. 4 of 2014 it is explained that Diversion is applied to children who are 12 (twelve) years old but not yet 18 (eighteen) years old or 12 (twelve) years old even though they have been married but are not yet 18 (eighteen) years old, which suspected of committing a crime (article 2). This PERMA also regulates the stages of diversion deliberation, in which the facilitator appointed by the Chair of the Court is obliged to provide opportunities for: Children to be heard about the accusations Parent/Guardian to convey matters relating to the child's actions and the form of settlement expected by the Victim/Child Victim/Parent/ Guardian to provide feedback and the expected form of completion.⁵²

The Effectiveness of Diversion and Restorative Justice from Legal Responsibility Theory and Sociological Theory

Based on data on handling children at the Ponorogo Police and at the Ponorogo Court, children in conflict with the law (ABH) fall into the second category, namely juvenile delinquency. adults is considered a crime or a violation of the law.

Meanwhile, if you look at the age of children in conflict with the law (ABH) who entered the Ponorogo Police data from 2017 to 2019,⁵³ where the child is able to be responsible, has been in accordance with the requirements in Article 1 point 3 of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (abbreviated UUSPPA): "A child in conflict with the law, hereinafter referred to as a child, is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years old who is suspected of committing a crime. Some ABHs who have reached the court process, based on what researchers have examined at the Ponorogo District Court, the age of the child who committed a crime is in accordance with the SPPA Law, the type of punishment is in accordance with the restorative justice system and at the Court level diversion is also still carried out before the case examination. at the trial.

According to the law, responsibility is a consequence of the consequences of a person's freedom regarding his actions related to ethics or morals in carrying out an act.⁵⁴ Furthermore, according to the Quarterly Point, accountability must have a basis, namely things that cause a legal right for a person to sue another person as well as in the form of things that give birth to other people's legal obligations to provide accountability.⁵⁵

In the case of children, or children in conflict with the law (ABH), the element of criminal responsibility for children who make mistakes, where the error is included in the category of violation or crime, based on the SPPA Law, is a child who is 12 (twelve) years old and up to the age of 12. 18

⁵² Lihat PERMA No 4 tahun 2014 tentang Pedoman Pelaksanaan Diversi dalam Sistem Peradilan Pidana Anak

⁵³ Lihat data perkara di Polres Ponorogo pada BAB III penelitian ini, halaman 82 – 112.

⁵⁴ Soekidjo Notoatmojo, *Etika dan Hukum Kesehatan*, (Rineka Cipta, Jakarta, 2010), 34.

⁵⁵ Titik Triwulan dan Shinta Febrian, *Perlindungan Hukum bagi Pasien*, (Prestasi Pustaka, Jakarta, 2010), 48.

(eighteen) years. Meanwhile, for a child who commits a crime he is not yet 12 years old, there is a transfer of criminal responsibility to his parents or guardians. This has also been explained in the SPPA Law.

In cases that are processed in the Police, if the child is not yet 12 years old, the alternative solution is diversion, namely by bringing together the perpetrator, the perpetrator's parents, and the victim and the victim's parents, for child victims. Meanwhile, if the victim is an adult, the victim does not need to be accompanied by his parents. Diversion for cases of children under 12 years old is carried out directly by the police, represented by officers in the Ponorogo Police KPPA unit, if you need counseling and assistance in certain cases, officers from the Madiun BAPAS are brought in.⁵⁶

Regarding a child who is not yet 12 years old, if he repeats his actions again, diversion is also used to resolve the case. For example, in the case of theft, there was a case in 2018, previously in 2017 a child with the initials ABA, had committed a crime of theft because in July 2017 the child was not yet 12 years old, then he was diverted. In December 2017 this child repeated his actions, and was diverted again. Then in 2018 from June to September 2018 this child also committed theft, by September this child was 12 years 5 months old. Because the act of theft has been done repeatedly and he is old enough to account for his actions, in September 2018 at the Police level no diversion was carried out.⁵⁷

Seeing this case, the action of the police is to delegate criminal responsibility which in the common law system relates to mens rea, that criminal responsibility is based on a mental state, namely a guilty mind, namely repeated theft. the child does, so that when the age is right in accordance with the SPPA Law, the child at the police level can no longer be diverted.

Guilty mind implies a subjective error, that is, a person is found guilty because the maker himself is judged to have wrong thoughts, so that person must be responsible. The existence of criminal responsibility is imposed on the maker, the criminal maker must be punished, namely the child. Although later in the next process there will still be opportunities for diversion, namely at the level of the Prosecutor's Office and the Court, but responsibility for the actions of the child can be charged to him, because the criminal acts he has committed have been repeated, with many victims. In the next process, in imposing responsibility for the child, restorative justice must be prioritized, where punishment is intended to change the child for the better and regret his actions.

Looking at the facts at the Court and at the Ponorogo Police, which are the objects of this research, it can be concluded that the elements of criminal liability imposed on children in conflict with the law (ABH) are as follows:

1. Diversion helps the handling of children's cases more quickly and avoids punishments that have an adverse impact on children, even though the child has an element of error, but it is still prioritized first for diversion. Several cases in the Ponorogo District Court and in the Police, some were successful and some failed. If this fails, then the child will automatically go through the stages of the prosecution process and even be sentencing in court, although at the prosecutor's and court level, diversion is still sought first. This is a form of responsibility that must be borne by the child. Meanwhile, if successful, responsibility is transferred to the child's parents as the perpetrator, and the child is also sentenced, which is a form of accountability, such as social work after school, job training,
2. Diversion can be repeated on the condition that the child in conflict with the law is still under 12 years old, based on Article 7 of the SPPA Law. So that the full responsibility for the element of the child's mistakes becomes the responsibility of his parents.

⁵⁶ Hasil wawancara dengan petugas BAPAS Madiun pada awal Januari 2020, di kantor BAPAS MADIUN.

⁵⁷ Lihat data BAB III penelitian ini, hal. 91 – 92.

3. In accountability, mistakes made by children must meet the elements of a criminal act. From the results of data searches and interviews with Police and Court officers described in Chapter III, the elements of a criminal act have been fulfilled. The existence of this element can then be processed by law by doing a diversion for those who do it for the first time.
4. In criminal responsibility for children, the element of forgiving reason must still be considered, namely that the future of the child is still long, this child can improve himself again, so that models of responsibility that are responsive to children must be put forward. Where the form of accountability is a form in which the child can be held accountable for his actions, and regret his actions, so that he does not commit the crime that can harm himself, his family and society. Although in some cases there are children who commit criminal acts repeatedly. This is different handling if the person committing the crime is an adult, where there is no excuse for forgiveness.

The application of diversion and restorative justice to children in conflict with the law, in the theory of legal (criminal) responsibility, is the main choice where on the one hand responsibility for children's crimes can be transferred to adults, namely their parents. While on the other hand the child also remains responsible for his actions, with the models of accountability that have been regulated in the Child Protection Law and the Child Criminal Justice System Act.

When viewed from the sociological approach of diversion and restorative justice, it is an approach also in the social sciences, namely the social approach of Max Weber is a sociologist who studies rationality and social action. In the theory of social relations, Weber explains that there are four types of social action, namely:⁵⁸

1. Traditional actions, namely actions that are done out of habit.
2. Affective actions, namely actions based on feelings or emotions.
3. Value-oriented actions, namely actions taken based on a belief.
4. Instrumental rational action, namely using a certain tool or method in achieving a goal.

When examined from Max Weber's sociological approach, the application of diversion and restorative justice to children in conflict with the law, then:

1. When viewed from a traditional sociological approach, diversion which means transfer, where responsibility for the actions of children can be transferred to a family system or peace, is a traditional approach, which is a custom or habit of Indonesian society that has existed since hereditary. Where the settlement of a child criminal case, looking at the future of the child, and the parenting pattern of his parents, then diversion is an alternative that can be interpreted and accepted by the Indonesian people, so that in the end this is accommodated and stipulated in the SPPA Law.
2. Diversion and restorative justice are effective actions, where the community or law enforcement officers still have feelings or emotions towards children who commit a crime. Where the community and law enforcement officers assume that the mistakes made by the child can still be corrected and the pattern of behavior can still be changed, taking into account the future. So that a child who has made a mistake and is categorized as a crime can remain responsible and become more mature in the future.
3. Diversion and restorative justice in Max Weber's sociological approach is an act of handling children in conflict with the law, which is a value-oriented action, which is an act that is carried out as a belief. So that it is associated with diversion and restorative justice, policy makers have the belief that diversion and restorative justice are the best alternatives to be applied by law enforcement officers from the police, prosecutor's and court levels so that the child is able to account for his actions, but still pays attention to his future. Because when viewed from the

⁵⁸ Scott Lash, *Sosiologi Post Modernisme*, (Yogyakarta: Kanisius, 2004), 10.

purpose of Diversion which is regulated in Article 6 of the Juvenile Criminal Justice System Law states that the purpose of diversion is to achieve peace between victims and children, resolve child cases outside the judicial process, prevent children from being deprived of liberty, encourage the community to participate and instill a sense of responsibility in children. Meanwhile, restorative justice is a settlement process involving perpetrators, victims, their families and other parties involved in a crime, jointly seeking a solution to the crime and its implications by emphasizing recovery and not retaliation.

4. Diversion and restorative justice in Max Weber's sociological approach are instrumental rational action, namely using a certain tool or method in achieving a goal. Diversion must be attempted at the level of investigation, prosecution and examination of children's cases in court and this has been clearly stated in the UUSPPA. Even though in practice it is for a crime that has just been committed for the first time and is not a repeat crime.

When viewed from the theory of structural functionalism proposed by Parsons, namely: the application of diversion and restorative justice as contained in the SPPA Law, where the application of diversion and restorative justice is first, a social system that is structured in the stages of handling children in conflict with the law, so that they can operate in a harmonious relationship with other systems. Second, the application of diversion and restorative justice is supported by the community and law enforcement officers, where accountability for the child's actions can still be carried out. child companions from NGOs, BAPAS, and other institutions, where the diversion and restorative justice system puts forward a form of accountability that still pays attention to the future of the child. Fourth, the diversion and restorative justice system is able to control children's behavior that has the potential to disrupt public order, namely with forms of accountability that can still be accepted by the community and are able to make children regret their actions and mature children to be better and can be accepted again by the community. Fifth, in the application of the diversion and restorative justice system, if it causes a conflict, it must be controlled, that is, it must remain under the supervision of the community and law enforcement officials. Sixth, the diversion and restorative justice system for its survival, this system requires language,

However, when viewed from a postmodern sociological approach, the diversion system and restorative justice in handling children in conflict with the law also have weaknesses, namely that there are several cases of children which are cases of repetition. From the results of the research in Chapter III, the results of research in the Police from 2017 - 2019, there are 5 cases of children which are repetitions. So from the post modern approach, diversion and restorative justice in handling children in conflict with the law, have not been able to provide a deterrent effect for the child.

The emergence of postmodern social theory and its differences with modern social theory. Modern social theory seeks universal, historical, and rational foundations for analysis and for criticizing society. Postmodern thinkers reject this foundation and tend to be relativistic, irrational and nihilistic. So that adherents of postmodern social theory view the diversion and restorative justice system in handling children in conflict with the law also has weaknesses, where due to a transferable punishment system and remedies that tend to result in children repeating their actions, they can still be troubling to the community and result in children being unable to take responsibility.

Closing

The application of diversion and restorative justice carried out by the Police and Courts in Ponorogo Regency, is (1) continuing to prioritize the support and healing of victims; the offender is responsible for what he or she did; (2) The perpetrator must be responsible for the criminal act; (3) Dialogue between the victim and the perpetrator to reach an understanding, a (peaceful) diversion agreement must be reached between the perpetrator and the victim. The diversion process is carried out

through deliberation involving the child and his/her parents/guardians, victims and/or their parents/guardians, community advisors, and professional social workers based on a Restorative Justice approach. (4) The diversion agreement must obtain the approval of the victim and/or the family of the victim's child as well as the willingness of the child and his family, except for: a criminal act in the form of a violation; minor crime; a victimless crime; the value of the victim's loss is not more than the value of the local provincial minimum wage. (5) Offenders must be aware of how not to repeat the crime in the future.

Judging from the theory of legal (criminal) responsibility, it is the main choice where on the one hand responsibility for criminal acts of children can be transferred to adults, namely their parents, where for criminal acts committed by children under the age of 12 years and for those who have only committed an offense once crime or not repetition. While on the other hand the child also remains responsible for his actions, with the models of accountability that have been regulated in the Child Protection Law and the Child Criminal Justice System Act, namely through diversion and restorative justice. Meanwhile, from the sociological approach, diversion has been in accordance with sociological theories, especially the theory put forward by Max Weber and Parsons. Namely the diversion and restorative justice system in handling children in conflict with the law, can be accepted by the community whose main purpose is diversion (diversion) and restoration (restorative) of children as perpetrators of criminal acts. As well as aiming at the harmonization of life in the community also continues to run in harmony.

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