

# APPLICATION OF DIVERSION PENAL MEDIATION ON SEXUAL VIOLENCE CASES TO REALIZE CHILD PROTECTION FOR VICTIMS OF SEXUAL VIOLENCE

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## Abstract

*Diversion is the granting of the authority of law enforcers to transfer the settlement of Child cases from the criminal justice process to the criminal justice process, with the aim of achieving peace between the victim and the child who commits a crime. This research is to find out about: how to apply diversion to cases of sexual violence against children, and whether diversion penal mediation can be applied to cases of sexual violence to realize the protection of children victims of sexual violence. Based on research in Central Java, barriers to the application of diversion system are from legislative factors, structural factors as well as community legal cultural factors. Along with the application of reasoning mediation diversion, these obstacles can be avoided. The application of the diversion penal mediation as a means to protect children of perpetrators and children of victims of child sexual violence. In the future there needs to be a willingness and courage for child law enforcers, to apply the diversion penal mediation to cases of child sexual violence*

*Keyword: diversion, penal mediation sexual violence*

## Abstrak

Diversi adalah pemberian kewenangan penegak hukum untuk melakukan pengalihan penyelesaian perkara Anak dari proses peradilan pidana ke proses di luar peradilan pidana, dengan tujuan untuk mencapai perdamaian antara korban dan anak yang melakukan tindak pidana. Penelitian ini untuk mengetahui tentang: bagaimana penerapan diversifikasi terhadap perkara kekerasan seksual terhadap anak, dan apakah diversifikasi mediasi penal dapat diterapkan terhadap perkara kekerasan seksual untuk mewujudkan perlindungan anak korban kekerasan seksual. Berdasarkan penelitian di Jawa Tengah, hambatan dalam penerapan diversifikasi berasal dari faktor perundang-undangan, faktor struktural maupun faktor budaya hukum masyarakat. Dengan penerapan diversifikasi mediasi penal, maka hambatan-hambatan tersebut dapat dihindari. Penerapan diversifikasi mediasi penal sebagai sarana untuk melindungi anak pelaku dan anak korban kekerasan seksual anak. Di masa mendatang perlu ada kemauan dan keberanian bagi penegak hukum anak, untuk menerapkan diversifikasi mediasi penal terhadap perkara kekerasan seksual anak.

Kata kunci: diversifikasi, mediasi penal, kekerasan seksual

## Introduction

Diversion is a given privilege to the law authorities that is countable of every actions in handling or completing such predicament of child violation by choosing informal way that is; to stop or not to continue/release the legal process or to take/give in to the society and other social service activities.<sup>1</sup> In Indonesia,

Diversion is established in Article 6 Law No. 11 Year 2012 that of legal system of child where the applied system is to reach peace between victim and the child; to finish the case of children outside jurisdiction; to avoid children from democracy removal; to drive society to participate; and to put in responsibility sense to children.

Diversion becomes one of the legal tools that is considered accommodative to some par-

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<sup>1</sup> Setya Wahyudi, 2011, *Implementasi Ide Diversi dalam Pembaruan Sistem Peradilan Pidana Anak di Indonesia*, Yogyakarta: Genta Publishing, p. 4.

ties (law authorities, suspects, victims, and society) in completion of a case whether it is outside of jurisdiction or else. In a functional way, the appliance of diversion is used as an education tool as well as guidance system, and a society protection (particularly to children/violation under age).<sup>2</sup>

Such law system of children is made to satisfy, to serve, and for the importance of children. Thus, the implementation of diversion should be done in contextually as long as the parties involved in the case agree to do a diversion. So, it needs to be accommodated. The parties are the victims and/or the family, victim's children.

Law No.11 Year 2012 is in affect effectively since 30 July 2014. As it is implemented effectively, some varieties of consequences for all parties in settling cases of children is the preparation of the institution; regulation; cultural law, as well as the assistance of completing the law.<sup>3</sup>

Last year, it has been once conducted a research of the effort of implementation of diversion in the law system. It is known that the attempt for diversion implementation does not always succeed. This happens due to the jurisdiction obstacle or the others that it makes the children of the suspect and the victim's children gain no protection from diversion system.<sup>4</sup> Based on the law research of children law system and research of doctrine comparison, there are various diversion systems, such as: warn-

ing; informal and formal diversion,<sup>5</sup> as well as diversion of panel mediation.<sup>6</sup>

Concerning of these different kinds of diversion, it needs to be searched about penal mediation that concerns with its capability implementation to the sexual harassment on children. Based on the explanation above, the study needs to be conducted that concerns with the systematic of the diversion implementation to the sexual harassment case on children in Central Java, as well as how diversion of penal mediation can be implemented to the sexual harassment children case in the aim of realization of child protection from sexual harassment.

## Research Method

This research is descriptive research which applies normative<sup>7</sup> jurisdiction approach and sociological jurisdiction, so that the research not only study about law in the book but also about law in action. The data is comprised of primary data and secondary data, that the source of this research is the norm of law, document, internet,<sup>8</sup> police, and judges. The technique of data collection of this study is: downloading data in the internet, observation, and interview in the location of research to the informant with snowball method in order to get the adequate answer for the research questions. The location is in the Central Java, particularly in district court areas: Purwokerto, Pekalongan, Pati, Semarang, Purworejo dan Surakarta. The collected data is arranged systematically in the form of table, as well as, explanation of sentences narratively in order to be analyzed quantitatively and qualitatively.

## Discussion

<sup>2</sup> Budi Suhariyanto, "Penerapan Diversi untuk Menangani Problema Penyelesaian Perkara Pelanggaran Lalu Lintas di Pengadilan", *Jurnal Hukum dan Peradilan*, Vol. 04 No. 1 Maret 2015, p. 163,168.

<sup>3</sup> Suyanto Edi Wibowo, "Implikasi berlakunya Undang-Undang No. 11 tahun 2012 tentang Sistem Peradilan Pidana Anak Terhadap Kelembagaan dan Regulasi Pelaksana (Refleksi Menjelang 2 tahun masa berlakunya)", *Jurnal Legislasi Indonesia*, Vol. 13 No. 2, June 2016, p. 131.

<sup>4</sup> Hamidah Abdurahman, et.al., "The model of Law Enforcement for Juvenile Delinquent in the Process of Infestation Based on Law Number 11 Year 2012 Concerning Juvenile Justice System", *Jurnal Dinamika Hukum*, Vol. 16, No. 1, January 2016, p. 54

<sup>5</sup> Setya Wahyudi, *op.cit.*, p.62-63, 67, 70-71.

<sup>6</sup> Barda Nawawi Arief, 2012, *Mediasi Penal Penyelesaian Perkara Pidana Di Luar Pengadilan*, Semarang: Pustaka Magister, p. 4-5.

<sup>7</sup> See Amiruddin and H. Zainal Asikin, 2004, *Pengantar Metode Penelitian Hukum*, Jakarta: PT RajaGrafindo Persada, p. 118-131.

<sup>8</sup> Johnny Ibrahim, 2006, *Teori & Metodologi Penelitian Hukum Normatif*, Malang: Bayumedia Publishing, p. 323

Children who experienced sexual harassment can have a negative impact such as psychological disorder that causes children an unstable emotion; children become stressful post-trauma that is indicated with heavy stress like having nightmares, feeling guilty, feeling lonely, and confused; confident decreases; and educational problems. The social and psychological effect is the one that affects so much to the victims of sexual harassment, especially rapes. The victims often get the spotlight and become mostly spoken problems, and will definitely be abandoned by society. The victims deserve their right to get law protection; counseling for psychological problems; medical attention; no gain; guidance for the victim, and law support.

Various decision as an attempt to the completion of sexual harassment cases on children, is listed as follows;<sup>9</sup> peace treaty; stopping the investigation due to the deal made; giving educational fee support to the victim; considering certain aspects for mediation; get the married if the victims are pregnant; pointing out the loss of the victim; conducting law process while protecting the children; settlement in mediation way through local culture.

### The Implementation of Diversion on Sexual Harassment Cases

The bases or requirements of the diversion implementation is based on Law No. 11 Year 2012 which has been implemented is as follows: Diversion is obliged to attempt on every check of jurisdiction; Diversion cannot be implemented to the law cases that threatens more than seven years, and not the continuous of the law action. The application of diversion need to get the victim's approval and/or the family of the victims, unless it is a light crime. Moreover, the implementation of diversion must take into account the categorization of criminal act, the age of doer, result from the society research, and support from family and society. Based on the research, the condition of the diversion implementation to cases of criminal act done to

children in the form of physical abuse, sexual harassment, and nudity, in 2014 to August 2017 at Police station of Central Java in Semarang is as follows.

**Table 1.** Diversion Implementation to Physical abuse and Sexual, Nudity of 2014 to 2017

No	Cases	Diversion implemented	Diversion not implemented	Amount of Cases
1	Physical Abuse to Children	20	10	30
2	Sexual Harassment	4	43	47
3	Violence acts of Lewdness	7	15	22
Total		31 (30%)	68 (70%)	99 (100%)

Source: Local Police of Central Java made

Based on the research result, the case of sexual harassment of children is still less implemented concerning the diversion. Out of the forty seven cases of sexual harassment in the diversion process, there were only four cases. Same thing happens to violences of lewdness to children that diversion is still less used. The amount of violence of lewdness is 21 cases while the implemented diversion is only 7 cases. With this condition, it can be concluded that the child of the sexual/lewdness harassment or the victim of the sexual/lewdness harassment cannot get protection through diversion system. The result of the factors that drive diversion as well as holds it back is explained in the form of table as follows.

**Table 2.** The supportive factors of diversion and its frequency

No.	Factor of diversion implementation	Frequency
1	Forgiving both suspect and victims	6
2	Victims are gained compensation	6
3	Persuasive support of the law authorities as a mediator	6
4	The involvement of religious figures, youth, social agency, psychologist	5
5	The suspects' remorse	4
6	Rehabilitation program	1
7	Presumption of punishment from God	1
8	The involvement of correctional center	1

<sup>9</sup> Research result from research locations observation.

Source: Local Police of Central Java made

Based on the table above, it is seen that the opinion regarding the primary factor that support the diversion is as follows; suspects and victims forgives each other and the victim is paid with compensation; persuasive support of the law authorities as a mediator; the involvement of religious figure, youth, social agency, and psychological condition of the child that they will not do that again as well as the capability of the parents of guiding, so that the case will be stopped and the suspects are returned back to their parents.<sup>10</sup>

Furthermore, according to the result, it is known that the opinion about the condition that hold back the diversion implementation in the child case is explained in the table below.

**Table 3. Factors that hold back the diversion implementation and its frequency**

No.	Obstacle in Diversion	Frequency
1	The victim's demands that their case to be continued in the court	5
2	The parties do not understand with diversion program	5
3	Putting suspect into jail is more satisfying	5
4	The limitation of facilities and infrastructure	1
5	Being unforgiveable each other	5
6	Intervention of Counsellor	2
7	Compensation is too high	2
8	There are special investigators concerning children	1
9	The existence of life sentence in prison more than 7 years	6

Source: Local Police in Central Java made

Based on the table above, there seems to be an opinion regarding the factor that hold back the diversion which is the requirement of diversion probation to the child criminal act with the life sentence of seven years in prison; victims' demands that their case to be conti-

nued in the court; the existence of presumption of prison sentence satisfies the victims; either parties do not forgive each other; either party do not understand the diversion system; compensation is too high; the intervention of Counsellor that the case to be processed of informal check as well as the suspect has been jailed.<sup>11</sup>

In addition to that, there are some factors that could cause diversion system to run minimally that is; no existence of understanding as well as comprehension of vision or the goal of restorative justice in the children court; no existence of comprehension that decision of criminal act of the suspect to children is the last attempt; no existence of understanding that the best decision is to return them to their parents to be educated and guided as what it should be; the authorities have not yet the will and capability that is matched with the principle that says *the best interest of the children* which is always prioritized when handling children in the face of law.<sup>12</sup>

Towards temporary arrested child doers, then the police (investigator) keeps investigating or passing it to the general prosecutor party. If the child doers arrested then this indicates a serious crime; victim's side feel very aggrieved; or for the sake of doer's safety upon the act of judgmental by the society. Besides, the investigator or police would think twice when they want to stop the investigation because of the pre-trial institution.

Briefly it is able to say that the implementation of diversion still have several obstacles, either from substantial aspect, structural aspect, or cultural aspect. Obstacle from substantial aspect is on the existence of limitation on the kind of criminal act in which able to implement diversion. Obstacle on structural aspect is because the number of children educator is still limited. The obstacle on the legal

<sup>10</sup> Observation and interview result towards law enforcers in Purwokerto, Pekalongan, Pati, Semarang, Purworejo and Surakarta,

<sup>11</sup> Observation and interview result towards law enforcer in Purwokerto, Pekalongan, Pati, Semarang, Purworejo and Surakarta

<sup>12</sup> Randy Pradityo, "Restorative Justice dalam Sistem Peradilan Pidana Anak", *Jurnal Hukum dan Peradilan*, Vol. 05 No. 3 November 2016, p. 328,329.

cultural aspect, is because of the vision of revenge target upon the bad act is still very hard to solve. This causes the law enforcement have willingness to in which that is merely expected to deter the children.<sup>13</sup>

As stated by Ivonne Tiurma Rismauli, judges today tend to punish the children under the basic that the children's act troubles immoral society, and the existence of revenge vision is still the main consideration in judging children.<sup>14</sup> The settlement of criminal action on sexual abuse through diversion system is that the victim is going to have legal protection in the form of: psychological recovery by counseling; medical aid; compensation; victim supervision, and law support.

Various kinds of diversion system decision as the effort in the settlement of the case of sexual abuse to children in the location of the research are:<sup>15</sup> conciliation process; termination of the investigation because the agreement is achieved; giving financial support on victim's education; not putting the child doer of criminal act under arrest; keep doing the confirmation of suspect; considering certain aspects for the mediation; marrying if the victim is pregnant, and prioritizing compensation towards victim; doing the legal process but still protecting the children, or case settlement by family custom.

Main reason on the case of sexual abuse and obscene act on children is not done with diversion because the punishment of sexual abuse and the obscene act exceed 7 (seven) years of prison. Based on the Regulation Number 35 Year 2014 about the Change of the Regulation Number 23 Year 2002 on the Protection of Children, punishment of the sexual abuse

on children, as it is regulated in the Article 81, the punishment is 5 (five) years of prison at least and 15 (fifteen) years at the longest. With the fine of 5.000.000.000 (Five billion) Rupiah at most.

Based on the result of the research, the case of sexual abuse and obscene action by children to children with the diversion in it are 11 of 69 cases. By then, although the punishment of the criminal act towards the case of sexual abuse and obscene action exceed 7 (seven) years of prison, and if then the parties (victim's side and the doer's side) both agree to do diversion in a form of family discussion, then diversion is going to be implemented and the case would be would not be proceeded to the prosecution. This indicates that limited diversion must be done towards the case of sexual abuse and obscene action that is not fulfilling the conditions in which this cannot stop the desire of the parties and under the approval of law enforcement.

### Implementation of Penal Mediation Diversion

Mediation diversion is done to gather the criminal doer with the victim in which done outside the formal process in court. The rejection spots of vision principles in the implementation of penal mediation diversion are as follows:<sup>16</sup> *first*, all parties to forget the law framework because the crime is the interpersonal conflict; *second*, make the doer realize the crime consequences of their mistakes, and calming the victim's side as well as erasing their fear; *third*, avoiding the strict law process so the penal mediation would be the informal process nor bureaucratic; and *fourth*, doer and the victim as the subject who has private responsibility, not seen as object from the criminal law procedure. Kinds of penal mediation are: informal mediation; traditional village or tribal moots; victim-offender mediation; reparation negotiation programs; community panels or courts; and family and community group confe-

<sup>13</sup> Setya Wahyudi, "Implementasi Azas Keadilan Restoratif dalam Pembaharuan Sistem Peradilan Pidana Anak Indonesia (Kajian Perspektif Perbandingan Hukum dan Pengembangan Hukum Pidana)", *Prosiding* in the National Conference of Indonesian Comparative Law Lecturers Association (Asosiasi Dosen Pengajar Hukum Perbandingan Indonesia/ADPHI), 20-21 July 2017, Surabaya: Faculty of Law, University of Airlangga, p. 191-192.

<sup>14</sup> Ivonne Tiurma Rismauli, "Penjatuhan Pidana Terhadap Anak sejak Dibertakukannya Undang-Undang No. 11 tahun 2012 tentang Sistem Peradilan Pidana Anak", *Jurnal Idea Hukum*, Vol. 3, No. 1, March 2017, p. 613.

<sup>15</sup> Observation result in the research locations.

<sup>16</sup> Barda Nawawi Arief, *op.cit.* p. 4-5.

rence.<sup>17</sup> The traits and characteristic of each kind are as follows.

**Table 4.** Types of Penal Mediation and Its Traits

No.	Types of Penal Mediation	Traits
1	<i>Informal mediation</i>	<ol style="list-style-type: none"> <li>1. It is done by the member of criminal court</li> <li>2. All parties are invited</li> <li>3. It is done informally</li> <li>4. The purpose is to not proceeding it to the prosecution</li> </ol>
2	<i>Traditional village or tribal moots</i>	<ol style="list-style-type: none"> <li>1. All society are gathered to solve the crime conflict among the people around.</li> <li>2. This model is implemented in the rural areas.</li> </ol>
3	<i>Victim-offender mediation</i>	<ol style="list-style-type: none"> <li>1. Involving every parties to meet.</li> <li>2. Attended by appointed mediator.</li> <li>3. Can be done in every process of police, prosecution, trial, or process after the conviction.</li> <li>4. Cases that can be implemented by all criminal offenders,</li> <li>5. There is type of certain criminal action that is done by children,</li> <li>6. It is a children beginner offender; and</li> <li>7. It is also a serious criminal act.</li> </ol>
4	<i>Reparation negotiation programmes</i>	<ol style="list-style-type: none"> <li>1. This mediation is used to value compensation, or</li> <li>2. To value the enhancement that needs to be paid by the criminal offender.</li> </ol>
5	<i>Community panels or courts</i>	<ol style="list-style-type: none"> <li>1. Program to turn criminal case from the prosecution or rial into something more flexible and informal</li> <li>2. Involving the elements of mediation or negotiation.</li> </ol>
6	<i>Family and community group conference</i>	<ol style="list-style-type: none"> <li>1. Involving victim,</li> <li>2. Criminal offender,</li> <li>3. Offender's family, and</li> <li>4. Local citizen, and certain bad guys and victim's supporters.</li> <li>5. Achieving comprehensi-</li> </ol>

- ve agreement and satisfying one for the victim
6. Helping to keep the offender out from difficulties or further issues.

As it is mentioned before in the research result that the main hampering factor of diversion in the case of sexual abuse is the terms of limitation on how diversion cannot be implemented towards punishment for more than 7 (seven) years of prison. There is no such limitation on the model of penal mediation diversion because all penal mediation parties agreed to set aside the law framework. The parties consider that case as interpersonal conflict, and not a law conflict.

The implementation of *Informal mediation* can be done towards the case of sexual abuse. Settlement effort through mediation (conciliation) is way more effective and efficient. This is because it is done informally and done by their own parties without being bounded by proof rules. All parties that are cooperatively related would have the same goals which is to win and free of the emotion and revenge.<sup>18</sup> It is now trending in the jurisprudence that if both sides have already good then this would be the basic of the judge to make decision of any prosecution. Due to such decision, the offender does not get punished.<sup>19</sup>

Diversion with the informal mediation model is done by the member of criminal court, and all invited parties in which then would be done informally. The parties from both sides agreed to not proceeding to the prosecution. By the implementation of the penal mediation diversion especially in the form of informal mediation, the effort to protect children offender and the victim of sexual abuse can be achieved through diversion system. The Indonesian Na-

<sup>18</sup> Rahadi Wasi Bintoro, "Implementasi Mediasi Litigasi di Lingkungan Yurisdiksi Pengadilan Negeri Purwokerto", *Jurnal Dinamika Hukum*, Vol. 14 No.1, January 2014, p.14.

<sup>19</sup> Budi Suhariyanto, "Kedudukan Perdamaian sebagai Penghapus Pemidaan Guna Mewujudkan Keadilan dalam Pembaruan Hukum Pidana", *Jurnal Rechtsvinding, National Law Coaching Media*, Vol. 6, No. 1, April 2017, p. 18.

<sup>17</sup> *Ibid.*, p. 6

tional Police has the responsibility and authority in keeping security and maintaining social order, enforcing the law, protecting, and giving service to the people.<sup>20</sup> Police universally have a legal obligation namely *Discretionary Power* because of the duty and authority, in which with this authority the police is authorized to proceed and not proceed a case based on their own judgment. The authority of police discretionary is accommodated in article number 16 verse (1) letter l, verse (2) and Article 18 in the Regulation of Indonesian Republic National Police. Based on Article 6 verse (1) letter l, verse (2), police may take move that is not opposite with the rules of the law; in line with law obligation which oblige all movement to be done in order, logically, and considering the condition and respecting human right. Based on the Article 18 then the police can make a move based on their own judgment by paying attention the benefit and risk from their action purely for the sake of general business. Terms about the authority of police discretion diversion is used as law basis and chance for the police as the investigator to be able to implement diversion towards children case.<sup>21</sup>

### Conclusion.

The implementation of diversion towards the case of sexual abuse done by the children with the victim which is also children, is now still having obstacles. The obstacles are coming from the constitutional factor on how the sexual abuse is threatened to be imprisoned for the exceeding number of 7 (seven) years. Obstacles from the structural factor is on the limitation of the understanding from law enforcement about diversion in the children court system and the lack of the facilities the implementation of diversion system. Obstacle from social custom cultural factor is on the assumption that the case of children sexual abuse is considered as a very serious case, so the people form the victim's family disagree implementing diversion. Penal mediation diversion can imple-

mented towards the case of children sexual abuse. In its implementation, all people from both sides take aside the general framework and consider that a case of children sexual abuse is an interpersonal conflict.

### Recommendation

The implementation of penal mediation diversion can be used as the platform to protect the offender's children and the children of the sexual abuse victim. Willingness and courage for the children law enforcement are needed to implement penal mediation diversion towards the case of children sexual abuse in the future.

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<sup>20</sup> Article 13 Law No 2 year 2002 about National Police of Indonesian Republic.

<sup>21</sup> Setya Wahyudi, *op. cit.*, p. 198, 199, 200.

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