

Legal Reconstruction of Diversion Based on Justice Value

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Abstract

The nature of diversion regulation in Indonesian law from the provisions of Article 7 paragraph (2) letter a of the Juvenile Criminal Justice System Law (SPPA) is ambiguous because it only applies to a crime punishable by imprisonment under 7 years and yet it was made to protect children's right when facing the law. This urges the author to research the weaknesses of this law and what legal reconstruction it needed to reach justice value. This research is a Juridical-Empirical type of research that is used to examine the function of a norm that lays the law as an instrument that applied to society. The analysis used in this research is descriptive-qualitative. The result shows that The weakness that arises in the regulation of diversion with the juvenile criminal justice system lies in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System especially in Article 7 Paragraph 2 point a which postulates that the act must be subject to legal sanctions if the arrangement is in the laws and regulations so that the application of legislation becomes rigid and less flexible as the cases must go through Courts and Criminal Implementing Body (Lapas) as required by law, where because these institutions lack synergy, the processing takes time. This condition is also further worsened with the fact that legal awareness in the community is still not good in realizing justice for all parties, even though the term restorative justice has been circulated in the Indonesian Criminal Justice system. In order to solve this, Reconstruction of the diversion regulation is needed to suit the value of justice which is in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System Article 7 Paragraph 2 point a.

Keywords: Legal Reconstruction, Diversion, Juvenile Crime, Justice Value.

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INTRODUCTION

The tendency of increasing violations committed by children or young perpetrators that lead to criminal acts has encourage the efforts to tackle and handle them specifically in the field of juvenile criminal law and their programs. This is closely related to the special treatment of juvenile. In the settlement of criminal acts, there needs to be a difference between the behavior of adults and juvenile, and if viewed from the position of children protection law, then they must not be burdened with obligations the same to adults, because as long as a person is still called a child, during that time he or she is not held accountable, therefore should a problem arises against the child when facing trial, their rights are protected by law [1].

Referring to the problem of handling children who commit criminal acts, there are 3 (three) stages [2], as follows: (1) Includes prevention of children from criminal acts. This stage includes the implementation of

social policy goals that enable children to grow in accordance with their best interests. (2) It is marked that the child is in contact with the formal procedures of the criminal justice system. This stage is a form of child responsibility through the criminal justice process. (3) Resocialization begins with the isolation process in the correctional institution until the release of the child.

In consistency with the above framework, the international standard for the juvenile criminal justice system is principally aimed at promoting the specificity of juvenile criminal justice practices and developing a different criminal justice system so that the treatment of children in conflict with the law is in accordance with their age and maturity level.

This is because there is a gap in the level of maturity between adults and children, both morally, cognitively, psychologically, and emotionally. Therefore, in building a juvenile justice system, it is

necessary to have the perspective that children who are in conflict with the law are basically victims, even though the child has committed a crime where one of the elements in this juvenile justice system that is quite interesting to study is Diversion.

Diversion in the field of criminal law, is the transfer of the process from a long and very rigid case settlement system to a shorter one directed to juvenile crime [3]. Mediation or dialogue or deliberation as an integral part of diversion to achieve restorative justice is a school of thought which according to Howard Zehr [4], closely related to the term of restorative justice that he defines as a process to involve, enable the involvement of a wider range of parties, namely those who have an interest in a specific offense. Then, together, identify and direct the losses, needs, and obligations in order to heal and place the rights of the parties as possible points to be resolved.

Based on the above perspective, the best interests of children in conflict with the law and children as victims are the main considerations. So that the handling efforts are not carried out in the spirit of retaliation but in the spirit of awareness. And the handling itself is also intended to protect and nurture children in conflict with the law so that children can meet their long futures ahead and to provide opportunities for children to grow and develop optimally.

Based on several theories of punishment, it can be said that, Diversion has relevance to the purpose of punishing children, which can be seen from the following things: 1) Diversion as a process of transferring from the judicial process to the non-judicial process, with the aim to prevent children from the ba effect of criminal law. which often lead to bitter experiences in the form of prolonged stigmatization (negative stamp), dehumanization (exile from society), and to prevent children from the possibility of prisonization which is a means of transferring crimes against children. 2) Deprivation of liberty against children, both in the form of imprisonment and in other forms of deprivation through criminal justice mechanisms, provides a traumatic experience for children, so that children's development and mental growth are disrupted. The bitter experience of being in contact with the world of justice will be a dark shadow to a child's life that is not easily forgotten.

With the implementation of the diversion, the child is protected from the application of criminal law which in many theories has been postulated as a criminogenic factor, which means it also prevents children from the possibility of becoming evil again (residive), preventing society from becoming victims of crime. With Diversion, it will provide 2 (two) benefits at once to individual children. First; children can still

communicate with their environment so they do not need to adapt socially after the crime. Second; children are protected from the negative impact of prisonization which is often a means of transferring crime.

However, problems arise when in the dimensions of justice (*gerechtigheid*) and expediency (*zweckmassigkeit*), the nature of diversion from the provisions of Article 7 paragraph (2) letter (a) of the Juvenile Criminal Justice System Law (SPPA) which determines that diversion is carried out in terms of, "*criminal acts committed threatened with imprisonment under 7 (seven) years*" ambiguity, namely the polarization of the formation of the SPPA Law as on one hand, the diversion provisions are carried out in the case of criminal acts punishable by imprisonment for under 7 (seven) years, but on the other hand the diversion provisions are not implemented in case of a criminal offense punishable by imprisonment of 7 (seven) years or more and if it is a repetition of a crime. This problem is what urges the author to study it further in research with the main problem as follows:

1. What are the weaknesses of the diversion regulation in Indonesia Currently?
2. How is the reconstruction of the diversion regulation in Indonesia based on justice value?

METHOD OF RESEARCH

This type of research is a kind of empirical juridical, or referred by field research that examines the provisions of applicable law and what happens in reality in society [5]. Juridical empirical research is legal research on the enactment or implementation of normative legal provisions in action at any particular legal event that occurs in society. Or in other words, a research conducted on the actual situation or real conditions that occur in the community with the intention of knowing and finding the facts and data needed and to differentiate with previous research whether it is intended or not [6], after the required data has been collected then leads to the identification of the problem which in turn leads to problem solving.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses Of The Diversion Regulation In Indonesia Currently

One thing that must be kept in mind from the enactment of a Juvenile Criminal Justice System is that Children are not "*miniature*" adults who are mentally and physically mature. They have not been able to make decisions for themselves, are lacking responsibility awareness, are not aware of their roles, and are sometimes unable to control their minds, hearts, and emotions in a balanced way yet. It is too much for a child to bear the responsibility of a fatal accident, while an adult is already able to think before acting, then feels.

A child by nature still has reasoning power that is not yet good enough to distinguish between good and bad things. Crimes committed by children, in general, are a process of imitating or being influenced by persuasion from adults. The formal criminal justice system which ultimately places children in prison status certainly brings considerable consequences in terms of child growth and development. The process of punishment given to children through the formal criminal justice system by putting children in prison did not succeed in deterring children and becoming better individuals to support their growth and development process. Prison often makes children more professional in committing crimes as they interacted with other inmates there [7].

Because of this, Law Number 11 of 2012 concerning the Criminal Justice System for children is expected to bring progress to the protection of children. As Article 1 of Law Number 11 of 2012 states that the juvenile criminal justice system is the entire process of resolving cases of children in conflict with the law, starting from the investigation stage to the stage of mentoring after serving a crime. The juvenile criminal justice system (Article 2) is implemented based on protection, justice, non-discrimination, respect for children's opinions, child's survival and development, child development and guidance, proportionality, avoidance of retaliation, deprivation of liberty, and punishment as a final measure.

The restorative approach and the principle of diversion are the spirit of Law Number 11 of 2012 created to humanely resolve juvenile criminal cases. The restorative approach is the settlement of criminal cases involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a just settlement emphasizing restoration to its original state, and not retaliation. Diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside of criminal justice. Or, it can be said that the diversion principle emphasizes settlement outside the court, using a family approach and coaching and no longer with imprisonment or punishment. As the purpose of the diversion principle regulated in Article 6 of Law Number 11 of 2012 is to achieve peace between victims and children, the settlement of juvenile criminal cases outside the court is to prevent children from deprivation of independence, encourage community participation, and to instill a sense of responsibility in children.

In regard to this problem, if Diversion is applied, it can be implemented in several forms, namely: [8]

a. Diversion in the form of a warning, this will be given to the police for minor offenses. As part of the warning, the perpetrator will apologize to the victim. Warnings like this have often been made to avoid juvenile cases.

- b. Informal diversion, which is applied to minor violations where it is deemed inappropriate to merely warn the perpetrators, and to the perpetrators, a more comprehensive intervention plan is needed. Victims should be invited to ascertain their views on informal diversion and what they want in the plan. Informal diversion must have a positive impact on victims, families, and the children themselves. This need to be done to ensure that child offender will be suitable for informal diversion. In this informal diversion plan, the child will be responsible, therefore acknowledging the needs of the victim and the child, and if possible the parents are held accountable for the incident.
- c. Formal diversion, which is carried out if informal diversion is not possible, but does not require court intervention. Some victims will feel the need to tell the child how angry and hurt they are, or they want to hear it directly from the child. Because the problem arises from within the child's family, it is better if other family members are present to discuss and develop a good diversion plan for all parties affected by the act. This formal diversion process in which the perpetrator and victim meet face-to-face is internationally referred to as "*restorative justice*".

However, the implementation of diversion must be carried out selectively after going through various considerations as stated by Ferli Hidayat that child delinquency can be considered from the category of delinquency or crimes committed in three categories, namely mild, moderate, and severe levels. In general, children who commit minor delinquency are carried out as much as possible. For serious crimes, diversion is not an option however it is limited to crimes that are classified as minor or minor crimes, such as minor theft, minor assault without causing injury, or minor damage to property. Moderate delinquency or crime is a type of crime in which there is a combination of all conditions. All conditions are taken into consideration to determine the appropriateness to be diverted or not to be diverted. For serious crimes such as sexual assault and physical assault that causes serious injury. The circumstances that exist in children as perpetrators of crime are different. Therefore, the factors that can be considered for the implementation of diversion need to be observed. Some of the situational factors that take into consideration the implementation of diversion can be stated as follows: [9].

- a. The seriousness of the act: mild, moderate, or severe.
The background of the action that can be taken into consideration,
- b. Previous violations
- c. The degree of involvement of the child in the case
- d. The child's attitude towards the act. If the child admits and regrets, then this can be taken into account.
- e. The reaction of parents and/or family to the act,

- f. Suggestions given to make repairs or apologize to the victim,
- g. The impact of the act on the victim
- h. The victim's views on the treatment methods offered.
- i. The impact of sanctions or punishments previously received by child perpetrators.
- j. If it is in the public interest, then the legal process must be carried out.

2. Reconstruction Of The Diversion Regulation In Indonesia Based On Justice Value

In the Law No. 11 of 2012 concerning the Juvenile Criminal Justice System Article 1 paragraph 6 states that: "*Restorative Justice is the settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing recovery to return to its original state, and not using retaliation.*"

Law enforcement officers, especially from the Police, from the beginning of handling cases where the perpetrators are minors, should be able to act according to procedures and objectively find the initial source of the incident, not only on the location but also on the background of the incident. In relation to this, Law No.1 of 1974 Article 47 paragraph (2) concerning Marriage, states that: "*Parents represent the child regarding all legal actions inside and outside the Court.*" this matter can be used in the future as a basis for prosecution against parents if the handling of the incident is related to the negligent nature of the parents of the perpetrator and results in a major event which is also contained in Law no. 1 of 1974 concerning marriage, in Article 45 paragraph (1) concerning the obligations of parents. So that restorative justice here does not necessarily make cases where the perpetrator is a minor into diversion and escape from criminal snares in order to provide an optimal deterrent effect so that the value of justice can be shared between the perpetrator and the victim and their family.

Children as part of the younger generation are the successors to the ideals of the nation's struggle and human resources for national development. In the context of realizing quality Indonesian human resources who are able to lead and maintain national unity and integrity within the unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia, continuous guidance is needed for survival, growth and physical, mental, social development, and protection from all possibilities that will endanger them and the nation in the future in order to Provide opportunities for children so that through coaching, their identity will be obtained to become independent, responsible, and useful human beings for themselves, their families, communities, nations, and countries.

The task of parents is very important in the growth and development of children in mental and spiritual so that there is much negligence from parents that lead to child delinquency so that the risk of children becoming perpetrators of crimes is so great [10].

Disclosure of legal facts in a criminal act is part of the criminal law enforcement process that cannot be considered easy and simple. Likewise, in realizing civil society, then of course, it is not as easy as turning the back of the hand as when law enforcement is faced with a criminal act whose level of proof is very difficult and complex, it is not impossible that the resulting court decision product can result in wrong or inaccurate results. If this happens, it will have an impact on the law enforcement process that can injure the sense of justice for the parties involved or certain communities. As a result, a wave of public discontent emerged which culminates in to legal reform. In line with the principle adopted in criminal procedural law, namely equal treatment of everyone before the law, this principle is better known as the equality before the law principle. Universally, these principles are recognized as the embodiment of a state of law (*rechstaat*), and Indonesia as a state of Law as affirmed in Article 1 paragraph (3) of the 1945 Constitution, the recognition of these principles illustrates that Indonesia upholds human rights.

In such an elitist legal situation, if the policy formulation of legislation is carried out using legal concepts as understood in the legal-positivist tradition of thinking, which views the law as only limited to the circle of laws and regulations and which carry out the meaning of Legislation. Formally-speaking; By ignoring social values in society, what will happen is a law that serves the interests of the elite, not the interests of the wider community, so that the goal of law to realize justice will be further away from what is expected. If the state of law (*rechstaat*) has been read by perpetrators and law enforcement as a state of law and state of procedure, then this means that the country is experiencing a serious decline. For this reason, the legal formulation policy requires a "*flexible*" legal concept in order to protect children's rights, which in this case, is Diversion.

The implementation of Diversion lies in the authority of law enforcement officers who handle criminal cases to take action to continue the case or stop the case, to take certain actions in accordance with their policies. Based on this, there is a policy whether the case is continued or terminated. If the case is continued, then there will be criminal sanctions that must be carried out. However, if the case is not continued, then from the beginning, the investigation stage of the case will be terminated for the benefit of both parties, in which the principle is to restore the relationship that

occurred because of a crime for the future interest of both parties. This is the main principle on why diversion is carried out, especially for child crimes, which is to realize the welfare of the children themselves. Through diversion, it can provide opportunities for children to become new figures who are clean from criminal records and does not become recidivists.

The purpose of diversion is to find a way to deal with violations of the law outside the courts or the formal justice system. There are similarities between the goals of discretion and diversion. The implementation of diversion is motivated by the desire to avoid the negative effects on the psyche and physical development of children by being involved with the criminal justice system. The implementation of diversion by law enforcement officers is based on the authority of law enforcement officers which is called discretion or according to the concept of diversion in handling cases of children in the police who are in conflict with the law, due to the adventurous nature of children, punishment for children is not merely to punish but to re-educate and improve. In order to avoid children from exploitation and violence, it would be better to use diversion, not punishment. The concept of diversion is also based on the fact that the criminal justice process against child offenders through the criminal justice system causes more harm than good. The basic reason is that the court will stigmatize children for their actions, so it is better to avoid them from leaving the criminal justice system.

Diversion as an effort to invite the public to obey and enforce state law, its implementation still considers a sense of justice as a top priority in addition to providing opportunities for perpetrators to take non-criminal paths such as compensation, social work, or parental supervision. Diversion does not aim to perpetuate law and justice at all but tries to use a minimum of coercion to make people obey the law.

The diversion policy in handling criminal acts committed by children is currently carried out based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. The Juvenile Criminal Justice System must prioritize a restorative justice approach, and diversion must be pursued with the aim of achieving peace between victims and children. In addition to that, also to resolving child cases outside the judicial process; to prevent children from deprivation of liberty; to encourage people to participate; and to instill a sense of responsibility in children. Therefore, an approach with a restorative settlement model or called restorative justice is more appropriate to be applied in dealing with child offenders [11].

So far, child offenders who commit crimes can be subjected to criminal penalties. Although in principle

it departs from criminal liability based on fault, but in certain cases, the concept also provides the possibility of very strict liability (Strict Liability) in Article 37 of the Draft Criminal Code, and vicarious liability in Article 37 of the Criminal Code. 36 of the Draft Criminal Code paragraphs 1 – 3 which reads: (1) “A person can only be held accountable if that person commits a criminal act intentionally or due to negligence.” (2) “An act that can be punished is an act that is carried out intentionally, unless the laws and regulations explicitly specify that a criminal act committed by negligence can be punished.” (3) “A person can only be held accountable for certain consequences of a criminal act for which the criminal threat is aggravated by the law if he or she can reasonably predict the possibility of such a consequence, at least there is negligence.”

However, in practice, child offenders who commit criminal acts are more forwarded to diversion in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System Article 1 paragraph 6 which reads : Restorative Justice is the settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not using retaliation If the perpetrator is a child under 18 years of age.

Judging from the broad social defense aspect that covers human values, education, and justice. Diversion has also included these values. Human values are manifested by treating ABH specifically, not only that, but also in the Convention on the Rights of the Child (CRC) it is also emphasized that juvenile crime is treated with due regard to values according to dignity, children's human rights, and to be able to help children in the reintegration process into society. The educational value in the diversion can be seen from the involvement of children in the process of recovering to their original state for victims, meaning that children will learn to be responsible and correct their mistakes. The value of justice in the diversion can be seen from the diversion process, with diversion, it can be said that it is fair for the future of child perpetrators and fair for the recovery of victims' losses. And fulfilling this sense of justice is what is meant by restorative justice in the principle of diversion.

Based on the above description, the reconstruction of the diversion regulation in Law Number 11 of 2012 concerning the Child Criminal Justice System that is based on justice value is in paragraph (1), which must be changed in to:

- a. Threatened with imprisonment for under 7 (seven) years; however, if the threat is above 7 years, it can be considered for diversion as long as it is based on the agreement of both parties and the community as well as to make peace.

- b. The compensation received by the first party is in the form of money mutually agreed upon by both parties.
- c. There is an agreement from both parties to stop the case from going through the legal process.

With the reconstruction of norms, namely diversion, which was initially limited to criminal provisions with a threat of under 7 (seven) years, to become without limitation, according to the author, is necessary to achieve the value of justice.

The essence of justice referred to here is an assessment of treatment or action by examining it from a norm. So in this case, there are two parties involved, namely the party who makes the treatment or action and the other party who is subject to that action, in this discussion, the parties in question are the authorities or the government, as the party that regulates people's lives through legal instruments, and the community as a party whose procedures for acting in the state are regulated by legal provisions.

The principle of justice in the formation of law and the practice of law has a position in official documents on human rights as even long before the human rights documents were issued, the principle of justice had been used as the moral basis for organizing people's lives. Natural law philosophers such as Augustine taught that the eternal law that lies within God's mind is also found in the human soul. Participation of the eternal law is seen in a sense of justice, which is an attitude of the psyche to give to everyone what is their due. This principle indicates that the essence of the demand for justice is that for any purpose, a person's human rights must not be violated, human rights must be respected, this right is inherent in humans not because they are given by the state, but because of their dignity as human beings. This means that if someone has the right to something, other people also have the same right.

Starting from this thought, the regulation of community rights and freedoms using the criteria of justice shows that in humans, there is a feeling of justice that leads people to an assessment of the factors that play a role in the formation of law. This realization of the feeling of justice is not only owned by citizens but also by the authorities. Therefore, by building on the principles of justice, justice can be referred to as legal principles or legal ideas. This is in accordance with the teachings of Immanuel Kant which says that justice is based on human dignity. Thus the formation of law must reflect a sense of justice and aim to protect human dignity. Justice is a fundamental normative principle for the state.

On this basis, the criteria for the principle of justice are fundamental and fundamental, because all

countries in the world are always trying to apply the principles of justice in the formation of their laws. The principle of justice has a special place in the entire history of legal philosophy. In the concept of modern states, the emphasis on the principle of justice is given by stating that the real purpose of the law is to create justice in society.

For the Indonesian people, the link between this theory and social justice based on Pancasila is that the conception and perception of justice must be in accordance with the feelings of a nation. Accordingly, the talk about law is also closely related to justice. Law is something that binds and if the bond is associated with humans, then the bond must reflect a sense of justice. Justice as a conception is justice in the "*ideal*" world, however, The world of justice should be formulated in an attempt to translate the world of ideas into a world of "*reality*". Therefore, the regulation of citizens' rights and freedoms must be built on the principles of justice based on Pancasila. For this reason, the desired law is a law that provides protection for the members of the community, including protection of the rights of citizens to associate and assemble. Protection, in this case, means that the sense of justice that exists in the conscience of the citizens must be fulfilled.

CONCLUSION

1. The weakness that arises in the regulation of diversion with the juvenile criminal justice system lies in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System especially in Article 7 Paragraph 2 point a which postulates that the act must be subject to legal sanctions if the arrangement is in the laws and regulations so that the application of legislation becomes rigid and less flexible as the cases must go through Courts and Criminal Implementing Body (Lapas) as required by law, where because these institutions lack synergy, the processing takes time. this condition is also further worsened with the fact that legal awareness in the community is still not good in realizing justice for all parties, even though the term restorative justice has been circulated in the Indonesian Criminal Justice system.
2. Reconstruction of the diversion regulation to suit the value of justice is in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. So Article 7 Paragraph 2 point a are as follows: Diversion as referred to in paragraph (1) is carried out in the event that a criminal act is committed: (1) is threatened with imprisonment of less than 7 (seven) years; However, if the threat is above 7 years, it can be considered for diversion as long as it is based on the agreement of both parties and the community as well as to make peace. (2) the existence of compensation received by the first party in the form of money mutually agreed by both

parties. (3) there needs to be an agreement from both parties to stop the case from the legal process.

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