

Reconstruction of Diversion Regulations in a Juvenile-Crime System Based on Justice Value

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Abstract

The purpose of this research is to analyze and examine: 1) the regulation of diversion requirements in the current juvenile criminal justice system is not based on the value of justice; 2) weaknesses in the regulation of diversion requirements in the juvenile criminal justice system which is currently not based on the value of justice; 3) reconstruction of diversion requirements regulations in the juvenile criminal justice system based on the value of justice. This research is a qualitative research, with a sociological juridical approach, descriptive analysis, using primary data and secondary data, using the Grand Theory: Lawrence M. Friedman's Legal System Theory and Pancasila Justice Theory; Middle Theory: Law Enforcement Theory Soerjono Soekanto; and Applied Theory: Progressive Legal Theory Satjipto Rahardjo. The research findings are: (1) The regulation of diversion requirements in the juvenile criminal justice system is not currently based on the value of justice because the regulation of diversion requirements in children's cases is contrary to the values of Pancasila justice, and in the perspective of legal norms, the diversion requirement with restrictions is punishable by imprisonment under 7 (seven) years is discriminatory compared to the case of adults who can mediate or peacefully are limited by criminal threats, (2) The weakness of the regulation on diversion requirements is not based on the value of justice, because the regulation on diversion requirements is regulated in Article 7 of Law Number 11 of the Year 2012 concerning the Juvenile Criminal Justice System is discriminatory between child cases and adult cases. (3) Reconstruction of the regulation on diversion requirements in Article 7 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System based on the value of justice, especially paragraph (2) whose initial phrase reads Diversion as referred to in paragraph (1) is carried out in the case of a crime committed: threatened with imprisonment under 7 (seven) years; and is not a repetition of a crime. Reconstructed into Diversion as referred to in paragraph (1) is carried out in the event that the crime committed is not a repetition of a crime.

Keywords: Diversion, Juvenile-Crime, Justice Value.

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INTRODUCTION

The concept of diversion is 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 such as children being considered evil, so it is better to avoid them outside the criminal justice system. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (Office of the High Commissioner for Human Rights, 1985) points 6 and 11 contain a statement regarding diversion, namely as a process of transferring children in conflict with the law from the justice system criminal proceedings to

informal processes such as returning to social institutions, both government and non-government.

Diversion is a transfer of settlement of cases of children suspected of committing certain criminal acts from a formal criminal process to an amicable settlement between the suspect or defendant or perpetrator of a crime and the victim facilitated by the family and/or community, Child Social Advisors, Police, Prosecutors or Judges (Folk, 2003).

Diversion is a child's privilege given to them when dealing with the law in handling legal cases, it cannot always or easily be carried out until there is an

agreement between the two parties, namely the victim and the Child Facing the Laws (ABH) party, and the privilege in question. It is a special right that is limited by the requirements of Article 7 paragraphs (2a) and (2b) of the Juvenile Law-Crime System (SPPA) Law, namely that diversion can only be carried out in the event that the crime committed is punishable by imprisonment of under 7 (seven) years; and is not a repetition of a crime. This means that if it does not meet the requirements of Article 7 paragraph (2a) and (2b) of the SPPA Law, diversion cannot be carried out, even though both parties agree to do diversion. One of the diversion agreements that was canceled was in the case of a child who was processed at the Cirebon District Court in case Number 11/Pid.Sus-Anak/2019/PN.Cbn.

Based on cases where the diversion agreement was canceled because the Diversion conditions were blocked in Article 7 UU-SPPA and Article 3 Perma RI 4/2014, blurring the provisions of diversion privileges in handling legal cases, children must be treated differently from adults. In Article 27 Paragraph (1) UU-SPPA. Empirically, there are indeed differences with the adult case in the North-East Jakarta District Court Decision Number 46/Pid/78/UT/Wanita, which was subsequently used as jurisprudence, wherein the trial, the defendant was declared by the judge to be legally and convincingly proven, both the primary allegations of Article 333 of the Criminal Code which is threatened with a maximum of 8 (eight) years, subsidiary, Article 368 paragraph (1) of the Criminal Code which is threatened with a maximum of 9 (nine) years or a subsidiary again 315 of the Criminal Code, but the actions are carried out by peaceful settlement between the parties does not constitute a crime or offense that can be punished again, and to be released from the accusation of all legal charges. The differences that occur in these two cases illustrate that the privileges referred to are actually given in the case of adults, not in the case of ABH.

The law should be for humans, not humans for the law as stated by Satjipto Rahardjo (2006), and the cancellation of the diversion which has been agreed upon by both parties and has been handled in agreement on a sufficient seal, the cancellation is due to the provisions of Article 7 UU-SPPA and Article 3 Perma RI 4 /2014, describes this provision as a form of injustice and even a violation of human rights, because as stipulated in the Civil Code (KUH-Perdata), that an agreement is an agreement that has been made applies as law for those who made it, thus the provisions referred to is an unfair provision and has entered the privacy area. Therefore, In line with the above background, the author created research where the problem is formulated as follows:

1. What are the weaknesses of the regulation on diversion requirements in the current juvenile criminal justice system?

2. How is the reconstruction of the regulation on diversion requirements in the juvenile criminal justice system based on the value of justice?

METHOD OF RESEARCH

This study uses a constructivist legal research paradigm approach. The constructivism paradigm in the social sciences is a critique of the positivist paradigm. According to the constructivist paradigm of social reality that is observed by one person cannot be generalized to everyone, as positivists usually do.

This research uses descriptive-analytical research. Analytical descriptive research is a type of descriptive research that seeks to describe and find answers on a fundamental basis regarding cause and effect by analyzing the factors that cause the occurrence or emergence of a certain phenomenon or event.

The approach method in research uses a method (*socio-legal approach*). The sociological juridical approach (*socio-legal approach*) is intended to study and examine the interrelationships associated in real with other social variables (Toebagus, 2020).

Sources of data used include Primary Data and Secondary Data. Primary data is data obtained from field observations and interviews with informants. While Secondary Data is data consisting of:

1. Primary legal materials are binding legal materials in the form of applicable laws and regulations and have something to do with the issues discussed, among others in the form of Laws and regulations relating to the freedom to express opinions in public.
2. Secondary legal materials are legal materials that explain primary legal materials.
3. Tertiary legal materials are legal materials that provide further information on primary legal materials and secondary legal materials.

Research related to the socio-legal approach, namely research that analyzes problems is carried out by combining legal materials (which are secondary data) with primary data obtained in the field. Supported by secondary legal materials, in the form of writings by experts and legal policies.

RESEARCH RESULT AND DISCUSSION

1. Weaknesses of the Regulation On Diversion Requirements in The Current Juvenile Criminal Justice System

The term juvenile criminal justice system is a translation of the term Juvenile System, which is a term used to mean a number of institutions incorporated in the courts, which consist of the police, public prosecutors and legal advisors, supervisory agencies, child detention centers, and other facilities meant as Child development facilities.

The juvenile criminal justice system is a juvenile criminal justice law enforcement system consisting of a child investigation subsystem; child prosecution subsystem; juvenile judge examination subsystem; and the subsystem of the implementation of criminal law sanctions for children, which is based on the material criminal law of children, formal criminal law for children, and the law for implementing sanctions for criminal law on children, where the purpose of this juvenile criminal justice enforcement system emphasizes the interests of protecting and welfare of children.

In the juvenile criminal justice system, the term "children" here are children who are in conflict with the law, children who are victims, and children who are witnesses in criminal acts. Children in conflict with the law are children who are 12 years old but not yet 18 years old who are suspected of committing a crime; Children who become victims are children who are not yet 18 (eighteen years old) who have suffered physical, mental, and or economic losses due to criminal acts; A child who becomes a witness is a child who is not yet 18 (eighteen years old) who can provide information for the benefit of the legal process starting at the level of investigation, prosecution and trial regarding a criminal case that has been heard, seen and or experienced;

In the event that a criminal act is committed by a child before the age of 18 and submitted to a court hearing after the child has exceeded the age limit of 18 years but has not yet reached the age of 21, the child is still submitted to the juvenile court (Article 20 of Law No. 11 of 2012 concerning the Judicial System Child Crime).

Furthermore, in the event that a child under 12 years of age commits or is suspected of committing a criminal act, the investigator, community advisor, takes a decision to hand it over to the parent/guardian or to include him/her in educational programs (Utami, 2020), coaching at government agencies or social welfare organizing institutions that handle the social welfare sector, as stated in Article 21 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System in conjunction with Article 67 of Government Regulation of the Republic of Indonesia Number 65 of 2015 concerning the Implementation of Diversion and Handling of Children who are not yet 12 (Twelve) Years old.

In adult cases (aged 18 years and over) each level of examination does not need to be accompanied by a parent/guardian, but in cases where a child is in conflict with the law, it is necessary to be accompanied by a parent/guardian.

One thing that differentiates Adult cases From Juvenile is the existence of Diversion. It is a process that is internationally recognized as the best and most effective way of dealing with children in conflict with the law. Interventions with children in conflict with the law are broad and varied, but most emphasize detention and punishment, regardless of how minor the offense is or how young the child is (Marlina, 2008).

The word "diversion" was first introduced as vocabulary in a report on the implementation of juvenile justice submitted by the President of the Australian Crime Commission in the United States in 1960.

The implementation of the diversion program in the juvenile justice system moves towards a goal that places more emphasis on child protection in the juvenile criminal justice system. The implementation of diversion is an effort to avoid the negative effects of the juvenile criminal justice system on children. With the implementation of diversion, there is no decision and there is no stigma that states as a criminal child or a naughty child. So the child in question does not bear the label of evil as a result of the court's decision.

Several studies on the implementation of juvenile criminal justice show that the criminal justice process for children has a negative impact on children. Imprisonment for children shows a tendency to be detrimental to the mental development of children in the future. Currently, the majority of children are in conflict with the law, especially those brought to the criminal justice system, the judges still impose the punishment for deprivation of liberty. If children are in prison, many of their rights guaranteed by the Child Protection Act are not fulfilled. In addition, with the limited number of detention houses and juvenile prisons, children are often combined with adult detainees. This detrimental tendency is a result of the involvement of children in the juvenile criminal justice process and is caused by the effects of criminal sanctions in the form of stigma (Hadisuprpto, 2003).

The concept of diversion in the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU-SPPA). discusses the whole 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 definition of diversion in this law is contained in Article 1 paragraph 7 and the purpose of making this diversion concept is contained in Article 6 which states that diversion aims to achieve peace between victims and children, resolve cases of children outside the judicial process, prevent children from deprivation of independence, encourage the community to participate and instill a sense of responsibility in children.

2. Reconstruction of The Regulation On Diversion Requirements In The Juvenile Criminal Justice System Based on the Value Of Justice

Diversion as an effort to invite the public to obey and enforce state law, however, 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 state supervision.

The purpose of sentencing formally has just been formulated in the concept of Article 51 of the September 2019 Draft Criminal Code (RUU-KUHP Sep 2019) which is formulated as follows:

1. Prevent the commission of criminal acts by enforcing legal norms for the protection of the community;
2. Socialize the convicts by conducting coaching and mentoring so that they become good and useful people;
3. Resolve conflicts caused by criminal acts, restore balance, and bring a sense of security and peace in society; and
4. Cultivate a sense of remorse and free the guilt of the convict.

Article 54 paragraph (1) i and j of the RUU-KUHP Sep 2019 states that in sentencing it is obligatory to consider the effect of the crime on the victim or victim's family in addition to forgiveness from the victim and/or her family, therefore it can be seen in the RUU-KUHP Sep 2019 has scheduled restorative justice and diversion. However, in the Sep 2019 Draft Criminal Code, the diversion process is only known in cases of children. Diversion in Article 112 paragraph (1) of the Draft Criminal Code of September 2019 states that a child who commits a crime that is threatened with imprisonment for under 7 (seven) years and is not a repetition of the crime must be sought for diversion. This means that every investigator, public prosecutor, and judge in examining a child is obliged to seek diversion. Diversion is currently only known in criminal acts involving children.

Law No. 11 of 2012 concerning the criminal justice system which regulates the diversion process, children's cases in Indonesia that go through the trial process have far decreased. By referring to the application of diversion in children's cases, diversion is certainly an interesting idea in solving the problem of general crimes. Because some general crimes actually do not need to go through the trial process that through diversion or the transfer of a case, of course, it will cut down the cases that have accumulated in the judiciary, thus justice can be achieved and also cut down on the bureaucratic system that is too long (Triwati, 2021).

Examinations in courts of children in the first instance are carried out by a single judge, but the Chief Justice of the Court in examining children's cases with

the judges of the panel of judges in the case of a criminal offense punishable by imprisonment of 7 years or more difficult to prove. The judge in examining a child's case in a children's trial is declared closed to the public except for the reading of the verdict. Then in the trial process (Article 55 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System) the Judge is obliged to order parents/guardians or companions or other legal aid providers; In the event that the parents or guardians are not present, the trial will be continued accompanied by an advocate or other legal aid provider and/or community advisor.

Whereas when examining a child of a victim or child of a witness, the judge may order that the child be taken out (Article 58 of Law RI Number 11 of 2012 concerning the Juvenile Criminal Justice System). In the event that the child of the victim or child of a witness is unable to give testimony before a court session, the judge may order that the child of the victim or child of a witness be heard outside the trial through electronic recording conducted by the community advisor in the presence of the investigator or public prosecutor and advocate or legal aid provider, through a remote examination or teleconference (Article 58 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System).

The judge before making a decision provides an opportunity for the parent/guardian/companion to state things that are beneficial to the child, then when the court decision is read it is held in a trial open to the public and may not be attended by the child.

Sentences against children in conflict with the law may be subject to criminal acts and actions, and children can only be sentenced or subject to the provisions of this Law.

Whereas children in legal conflict who are not yet 14 years old can only be subject to non-criminal actions, which include returning to parents, surrendering to someone, treatment in a mental hospital, and treatment at the Social Welfare Organization (LPKS), the obligation to attend formal education and or training held by the government or private bodies and the revocation of the driver's license, and correction of the consequences of the crime (Wiharsa, 2017). Meanwhile, children aged 14 years and over may be sentenced to various types of crimes as stipulated in Article 71 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, which are as follows:

The main crime consists of a. warning penalty; b. conditional punishment (guidance in institutions, community services, supervision); c. work training; d. coaching in institutions and prisons; (Widodo, 2018).

Additional punishment in the form of deprivation of profits obtained from criminal acts, fulfillment of customary obligations.

If in material law a child in conflict with the law is threatened with a cumulative punishment in the form of imprisonment and a fine, the fine shall be replaced with job training for a minimum of 3 months and a maximum of 1 year. The punishment for restricting freedom imposed on children is a maximum of the maximum imprisonment that is threatened against adults (Article 79 paragraph 2 of the Republic of Indonesia Law Number 11 of 2012 concerning the Juvenile Criminal Justice System), while the special minimum provisions for imprisonment do not apply to children. (Article 79 of the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System).

Detention of children in conflict with the law is placed at the Temporary Child Placement Institution (LPAS), while the place where the child is serving his criminal period is placed at the Child Special Guidance Institute (LPKA). Then the place where children get social services is at the Social Welfare Organization (LPKS) (Rachma, 2021).

Against the judge's decision at the first level, both children in conflict with the law and the public prosecutor can certainly take further legal efforts, namely appeal, cessation, and review.

Against children who are proposed as children in legal conflict, namely child victims and child witnesses are entitled to all protections and rights regulated by the provisions of laws and regulations.

Based on the analysis and study above, both theoretically and empirically, it is the obligation of law enforcement to seek diversion in cases of children, in line with Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that: *"Everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law"*. Everyone referred to in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, including children. However, this provision becomes unproductive and even paradoxical if the diversion that has been successfully attempted is simply canceled because it is considered contrary to the applicable provisions, thus the diversion effort is not intended for children in litigation, but for children in litigation for the purposes of the applicable law, in contrast to diversion. or islah or peace in Islamic law where even the crime of murder is punishable by the death penalty, if both the perpetrator and the victim agree to make peace, then the case can be resolved with the agreement. Thus the concept of peace in Islamic law should be used in the diversion. In cases of children,

because it does not conflict with the 1945 Constitution of the Republic of Indonesia, especially Article 29, that the state is based on the One Godhead.

Starting from the study and analysis, in essence, the regulation regarding children has been regulated explicitly in the Indonesian constitution, namely relating to the regulation of Human Rights as regulated in the 1945 Constitution of the Republic of Indonesia and various derivative laws and regulations, thus there is a paradox in the regulation of good diversion which is regulated in the SPPA Law as well as in the RUU-KUHP-Sep-2019, are contrary to the cultural values that are adhered to and firmly held by the Indonesian people which are implied and stated in the 1945 Constitution of the Republic of Indonesia, because they are discriminatory and do not have legal certainty, particularly related to Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which states that: *"Everyone has the right to recognition, guarantees, protection, and fair legal certainty and equal treatment before the law"*. Everyone referred to in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, including children.

CONCLUSION

Based on the discussion above, it can be concluded that (1) KHI only contains family law even though Islamic law is very complex and is not limited to family law. (2) Family law which is the formulation and result of the existing *ijtihad* of Indonesian ulama does not need to be revised because of its suitability and acceptance of various schools of thought in Indonesia. (3) Islamic law is always based on valid and recognized *madhhabs* and *madhhabs* in this world based on the 2004 Amman Treatise and 8 others, namely Sunni, Shi'i, Dhahiri, and Ibadli (Hanafi, Maliki, Shafi'i, Hambali, Dhahiri, Zaidi, Jafari, Ibadli). (4) There are 3 schools of thought that live and develop in Indonesia with their derivative mass organizations (Sunni Syafi'i, Sunni Hambali/Salafi - Wahabi, and Shi'i). (5) The three schools of thought in Indonesia are prone to conflict and can trigger disharmony and national disintegration. (6) The need for regulation of the recognition and harmony of various schools of thought in Indonesia through the KHI channel by reconstructing the 1991 Indonesian KHI with additions; recognition, protection, and harmony of various schools of thought with national insight as a complement to the contents of Islamic law and a unifying and harmonious forum that is based on justice-based law.

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