

# Legal Reconstruction of Diversion in Juvenile Crime System Based on Dignified Justice

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## Abstract

The purpose of this research is to find the weakness of the Juvenile Crime System and how to reconstruct the law based on dignified justice in socio-legal research, using the constructivism paradigm. The approach method used in this research is social legal research, concept approach, and comparative approach. Research result shows the Weaknesses that causes the law cannot be implemented properly because the provisions on the terms of Diversion regarding the limitation of criminal penalties under 7 years in Article 7 of the Juvenile Crime System (SPPA) Law which are based on the application of the article during investigations and prosecutions allow for subjective views in addition to the fact that there are several law enforcers who do not implement a legal provision as they should. Therefore, the legal reconstruction is in the form of the Elimination of the conditions for imprisonment under 7 (seven) years in Article 7 paragraph (2) letter (a) of the SPPA Law. The general principles contained in the Convention on the Rights of the Child should be taken into consideration to amend or remove conditional restrictions on diversion for imprisonment under 7 years because they have deviated from the essence of children's rights and the general principles contained in the Convention on the Rights of the Child.

**Keywords:** Legal Reconstruction, Juvenile Crime, Diversion, Dignified Justice.

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## INTRODUCTION

In the case of a child who is suspected of committing a crime or who is referred to as a child in conflict with the law, the principle of the best interests of the child must be the main consideration in all handling actions and the government is responsible for providing special protection. In terms of providing special protection, Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA Law) acts as a specialized law that replaces the existence of Law Number 3 of 1997 concerning Juvenile Court which is considered no longer in accordance with legal needs in society and has not comprehensively provided special protection to children who are dealing with the law.

The most basic substance in the SPPA Law is strict regulation regarding Restorative Justice and Diversion which is intended to avoid and distance children from the judicial process (which generally ends in imprisonment) so as to avoid stigmatization of children who are in conflict with the law and it is hoped

that children can return to justice. The social environment, in a reasonable way, because so far it has become a global discourse that legal processes and imprisonment often have a destructive effect on children, ranging from evil or naughty labels that are often attached to children who proceed with the law, traumatic conditions, interruption of the educational process to physical violence and psychology experienced by children. A process that prioritizes imprisonment as an alternative punishment for children will also become an even more sophisticated criminal "school". The effect is not only today but also in the future when these children grow up.

Based on the perspective above, the basis of the best interests of children in conflict with the law and children as victims are the main consideration. So that efforts to handle it are not carried out in a spirit of revenge but in a spirit of awareness. And handling is also intended to protect and protect children who are in conflict with the law so that children can face their long

future and provide opportunities for children to grow and develop optimally.

Since 2011 the number of children in conflict with the law was 695, then in 2012, it increased to 1,413, and in 2013 to 1,428 cases. This trend continued to increase to 2,208 cases in 2014, and until July 2015 there were 403 cases of children dealing with the law.

Events that are often in the spotlight both through print and electronic media in the Juvenile Criminal Justice System when children have to deal with the law in the judicial process are not only found in big cities but have also penetrated into districts/cities. This also occurs in the jurisdiction of South Sulawesi, especially institutions and institutions related to the Juvenile Criminal Justice System process such as the Police, Prosecutors, District Courts, Advocates, Legal Aid Institutions, and Correctional Centers.

One of the cases involving children in conflict with the law is that of Alif Syahdan (15 years) and his father, Adnan Achmad, who face seven years in prison. Both of them are suspects in the beating of an Architecture subject teacher at SMKN 2 Makassar, Dasrul. MA (15) and his father, Adnan Achmad were subject to Article 170 of the Criminal Code regarding beatings with the threat of 7 years in prison (Tribun Makassar, 2017).

The existence of children in detention and correctional institutions together with adults places children in a situation prone to becoming victims of various acts of violence. Therefore, strong attention and efforts are needed to minimize the losses that can be suffered by children who are forced to deal with the legal process in the criminal justice system

Therefore an event and procedure are needed in the system that can accommodate the settlement of cases, one of which is to use a restorative justice approach, through a legal renewal that does not merely change the law but also modifies the existing criminal justice system, so that all objectives are met. what is required by law is achieved. One form of the restorative justice mechanism is a dialogue which among Indonesian people is better known as "*deliberation for consensus*". So diversion, especially through the concept of restorative justice, becomes a very important consideration in resolving criminal cases committed by children. Therefore, Based on this description, the author is interested in conducting research and examining the problem in a scientific paper titled "*Legal Reconstruction Of False Statements In Corruption Case Pretrial As Quasi-Delict Based On Justice Value*" where the main problem discussed in this article is as follows:

1. What are the weaknesses of diversion regulations in the juvenile justice system?

2. How is the reconstruction of diversion regulations in the Juvenile Criminal Justice System based on the value of dignified 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 (Faisal, 2010):

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 Diversion Regulations in the Juvenile Justice System

Every criminal case must, first, go through the process of settling cases that are carried out using the criminal justice system, the same also applies to crimes committed by children. The objectives of the Juvenile Criminal Justice System in the SPPA Law are not written in real terms, but can be known from the

provisions in the "General Explanation" of the Law, namely:

*"...The most basic substance in this law is strict regulation regarding Restorative Justice and Diversion which is intended to avoid and distance children from the judicial process so as to avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to the social environment naturally".*

Therefore, the participation of all parties is needed in order to make this happen. The process must aim at creating restorative justice, both for children and for victims.

Restorative justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation (Nazeri, 2019).

Restorative justice is regulated in Article 5 of the SPPA Law, which states that the Juvenile Criminal Justice System must prioritize a restorative justice approach including:

- a. Investigation and prosecution of criminal offenses carried out in accordance with the law unless otherwise stipulated in this law;
- b. Trials of children conducted by courts within the general court environment; And
- c. Guidance, supervision, and/or assistance during the process of executing a crime or action and after serving a crime or action.

Given the unique characteristics and characteristics of children and for the sake of protecting children, when discussing cases involving children in conflict with the law, one must see that children's actions have certain motivations and characteristics that are clearly different from adult perpetrators. As expressed in the Convention on the Rights of the Child which expressly states that: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration (in all actions concerning children carried out by public or private social welfare institutions, judiciary, government agencies or legislative bodies, the best interests of the child are the primary consideration)".*

By looking at the best interests of children who are in conflict with the law, in its development the juvenile justice system has begun to give birth to a concept of resolving criminal cases committed by children known as diversion. Diversion is the transfer of settlement of criminal cases from the criminal justice process to processes outside the judiciary by taking into

account the agreement of the perpetrator, victim, perpetrator's family, and victim's family (Arafat, 2022).

Diversion is one of the efforts to answer all the challenges of handling children who are in conflict with the law at this time. The word diversion comes from the English diversion which means avoidance or diversion. Diversion is an action or treatment to divert a case from a formal process to an informal process or to place juvenile offenders out of the juvenile justice system or to place juvenile offenders out of the criminal justice system. This means that not all cases of delinquent children must be resolved through formal justice channels, and provide alternatives for settlement with a justice approach in the best interest of the child and taking into account justice for the victim.

Based on the SPPA Law, the implementation of diversion is regulated in Article 5 paragraph (3) which states that in the Juvenile Criminal Justice System (covering investigations, criminal prosecution of children, and trials of children) it is mandatory to seek diversion. What is meant by Diversion (according to Article 1 point 7 of the SPPA Law) is the transfer of settlement of child cases from the criminal justice process to processes outside the criminal justice. The Diversion process is carried out through deliberations involving children and their parents/guardians, victims and/or parents/guardians, community counselors, and professional social workers based on a restorative justice approach (Article 8 of Law Number 11 of 2012).

Diversion, if it meets the legal requirements, can be attempted starting from the level of Child Investigator at the Police, or at the level of the Child Prosecutor at the District Attorney's Office, as well as at the level of examination at the District Court by the Juvenile Judge. However, even though the requirements and efforts have been made by law enforcers, not all cases of children dealing with the law can end through diversion (Wahyu, 2018). Many factors and problems become obstacles in seeking Diversion. Obstacles in the implementation of diversion usually occur due to the attitude of the victim's family that does not accept the implementation of diversion and considers that diversion does not yet represent responsibility for the child who committed a crime and compensation commensurate with the circumstances that have arisen. Another weakness is the existence of provisions regarding the terms of diversion regarding the limitation of punishment under 7 years in Article 7 of the SPPA Law which is based on the application of the article during investigations and prosecutions which allows subjective views to occur.

The implementation of diversion is motivated by the desire to avoid negative effects on the mind and physical development of children through their involvement with the criminal justice system. This

diversion effort or diversion idea is the best solution that can be used as a formula for solving several cases involving children as perpetrators of crimes. The authority to carry out diversion is from law enforcement officials at each level of examination, namely at the level of investigation, prosecution, and examination of child cases in district courts as contained in Article 7 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU SPPA), Specifically at the prosecution level, where Juvenile criminal justice procedures are regulated in Chapter III Part Four Article 41 and Article 42 of the SPPA Law.

The SPPA Law has regulated diversion which functions so that children who are in conflict with the law are not stigmatized as a result of the judicial process they must undergo. This is in accordance with what is stated in the UN Resolution on the United Nation Standard Minimum Rules for the Administration of Juvenile Justice or commonly known as The Beijing Rules. Diversion is the granting of authority to law enforcement officials to take discretionary measures in dealing with or resolving child offenders' problems by not taking formal means, including stopping or continuing or releasing from the criminal justice process or returning or handing over to the community and other forms of social service activities.

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The principle of legal protection for children must be in accordance with the Convention on the Rights of the Child as ratified by the Government of the Republic of Indonesia with Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child (Convention on the Rights of the Child). Law Number 3 of 1997 concerning Juvenile Court, previously used as a basis for the implementation of the judicial process against children who commit criminal acts intended to protect and protect children who are in conflict with the law so that children can face a long future and provide opportunities for children to through coaching, one's identity will be obtained to become an independent human being, useful for oneself, family, community and nation and state (Wahyu, 2019).

However, in practice, children are actually positioned as objects, and the treatment of children in conflict with the law tends to harm children, besides that the Law on Juvenile Justice is no longer in line with legal needs in society and has not comprehensively provided special protection to children who are faced with law. This is what the government considers to issue the SPPA Law which regulates the entire process of resolving cases of children in conflict with the law starting from the investigation stage to the mentoring stage after serving a sentence.

The implementation of diversion as protection for children in conflict with the law has been implicitly regulated in the Convention on the Rights of the Child which has been ratified by the Government of Indonesia with Presidential Decree No. 36 of 1990 concerning Ratification of the Convention on the Rights of the Child. Based on Article 37 of the Convention on the Rights of the Child it is stated that the arrest, detention, or punishment of children will be adjusted to the law and will be used only as a last resort and for the shortest and most appropriate period. Further stated in Article 40 paragraph (3) letter b Convention on the Rights of the Child. "*States Parties shall endeavor to promote the establishment of laws, procedures, powers, and institutions which apply specifically to children who are suspected of, accused of, or recognized as having infringed the penal code, and in particular where appropriate and desirable, measures to deal with such children without resorting to legal action provided that human rights and legal protections are properly respected.*"

## **2. Reconstruction of Diversion Regulations in the Juvenile Criminal Justice System Based on the Value of Dignified Justice**

The aim of diversion is to find ways of dealing with violations of the law outside the courts or the formal justice system (Toebagus, 2022). There are similarities between discretionary goals and diversion. The implementation of diversion is motivated by the desire to avoid negative effects on the soul and development of children through their involvement with the criminal justice system. The implementation of diversion by law enforcement officials is based on the authority of law enforcement officials which is called "*discretion.*"

According to the concept of diversion in handling cases of children in the Police who are in conflict with the law, because of the adventurous nature of children, the punishment of children is not solely to punish but to re-educate and improve. Preventing children from exploitation and violence would be better if it was a diversion and if it was punished it would be ineffective. The concept of diversion is also based on the fact that the criminal justice process for children of criminal 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 prevent them from leaving the criminal justice system (Arifin, 2018).

The diversion policy in handling crimes 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 the victim and the child. In addition, resolving child cases outside the judicial process; preventing children from deprivation of independence; encouraging people to participate; and instilling a sense of responsibility in children. Therefore, an approach with a restorative settlement model or so-called restorative justice is more appropriate to be applied in dealing with child offenders.

Viewed from the broad aspect of social defense which has coverage of human, educative, and justice values. Diversion has also included these values. Human values are realized by treating children facing the law (ABH) specifically, not only that in the Convention on the Rights of the Child (KHA) it is also emphasized that ABH is treated with due regard to values according to dignity, children's human rights, and can help children in the process of reintegration into society. The educational value of diversion can be seen from the child's involvement in the process of restoring the victim's original state, meaning that the child will learn to be responsible and correct his mistakes. The value of justice in the diversion can be seen from the process of diversion, with diversion it can be said that it is fair for the future of the child offender and fair for the recovery of the victim's losses. The fulfillment of this sense of justice is what is meant by restorative justice in the diversion.

As stated in Article 7 paragraphs (1) and (2), the Law on the Juvenile Criminal Justice System, article 7 paragraph (1) At the level of investigation, prosecution, and examination of child cases in district courts it is mandatory to seek diversion (2) Diversion as meant in paragraph (1) is carried out in the event that the crime committed: (a) is punishable by imprisonment under 7 (seven) years and (b) is not a repetition of a crime.

From the sentences listed in the article above, there is a sentence that must be sought for diversion, "*Compulsory*" is sought to have the meaning (Sarwadi, 2021):

- a. Diversion that Can be done and may not be done.
- b. Whether the implementation of diversion for children who are required to be 7 years old fulfills the justice value or not.

The regulation of diversion in the Law on the Juvenile Criminal Justice System raises problems because the conditions stated in Article 7 paragraph (2) letter (a) explain that diversion can be carried out if threatened with imprisonment under 7 (seven) years. This is contrary to the principles of justice, non-discrimination, and the best interests of children regulated in Article 2 of the SPPA Law. With the limitation of diversion requirements aimed at imprisonment under 7 (seven) years, in cases that are punishable by more than 7 years such as theft with violence, narcotics, abuse resulting in death, and others, the child does not get the right to diversion.

Discriminatory provisions in the diversion policy in the SPPA Law do not occur in various other countries such as the Philippines, Ireland, Thailand, and South Africa in diversion arrangements where there are no conditions limiting the threat of imprisonment which causes a child to lose his right to get diversion. The four countries have provided proper protection for children to achieve welfare and the best interests of children in accordance with the general principles contained in the CRC.

The application of diversion in the State of Indonesia which uses these conditions raises problems with the best principles for children in the Convention on the Rights of the Child and the principles of justice and non-discrimination. So it is necessary to reformulate the diversion in Article 7 paragraph (2) of the Juvenile Criminal Justice System Law so that children get the same rights under the principles of justice and non-discrimination when children commit criminal acts in any category.

Therefore, according to researchers, it is necessary to reconstruct Article 7 paragraph (2) of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System so that the limitation on the implementation of diversion in Article 7 paragraph (2) letter a will impact on the child's right to get diversion when a child commits a crime with a threat of imprisonment of 7 years and over which should be a peaceful resolution based on the purpose of diversion however, there is a limitation on the threat of imprisonment under 7 years in carrying out diversion, so the child loses his right to get diversion and is threatened with going to jail. So that it is necessary to reconstruct the Elimination of the conditions for imprisonment under 7 (seven) years in Article 7 paragraph (2) letter (a) of the SPPA Law. The general principles contained in the Convention on the Rights of the Child should be taken into consideration to amend or remove conditional restrictions on diversion for imprisonment under 7 years because they have deviated from the essence of children's rights and the general principles contained in the Convention on the Rights of the Child.

## CONCLUSION

Based on the results of the research, the following conclusions can be drawn:

- 1 The Weaknesses Of Diversion Regulations In The Juvenile Justice System in regard to the terms of diversion regarding the limitation of criminal penalties under 7 years in Article 7 of the UU-SPPA which are based on the application of the article during investigations and prosecutions allow for subjective views and It often happens that several legal regulations cannot be implemented properly because there are several law enforcers who do not implement a legal provision as they should. Therefore, one of the keys to success in law enforcement is the mentality or personality of law enforcement.
- 2 The implementation of diversion in Article 7 paragraph (2) letter (a) of the SPPA Law carries a penalty of imprisonment under 7 years to obtain diversion so the limitation on the implementation of diversion in Article 7 paragraph (2) letter a will have an impact on the child's right to get diversion when the child commits the crime above the threat of imprisonment for 7 years and above, which should have been resolved peacefully based on the purpose of diversion, but there is a limitation on the threat of imprisonment under 7 years in the implementation of diversion, so the child loses his right to get diversion and is at risk of going to jail. Therefore, it is necessary to reconstruct the Elimination of the conditions for imprisonment under 7 (seven) years in Article 7 paragraph (2) letter (a) of the SPPA Law. The general principles contained in the Convention on the Rights of the Child should be taken into consideration to amend or remove conditional restrictions on diversion for imprisonment under 7 years because they have deviated from the essence of children's rights and the general principles contained in the Convention on the Rights of the Child.

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