

The Rights of Diversion In The Children's Criminal Jurisdiction System As The Intent of Legal Protection

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ARTICLE INFO

Article history:

Received September 10, 2020
Revised October 2, 2020
Accepted November 30, 2020

Keywords:

Children
Criminal
Jurisdiction
Legal Protection
The Rights

ABSTRACT

Child abuse is a complex problem and involves many aspects. Diversion is an alternative in resolving child criminal cases that conflict with the law, by trying to eliminate the stigma against children as perpetrators of a crime even though children conflict with the law but still prioritizing the best interests of children in realizing the welfare of children, as stipulated in the SPPA Law. Even though it has been stipulated in written regulations, the existence of diversion among law enforcement officers is still a problem, because the diversion process has not been explicitly regulated regarding the mechanism that must be implemented, so that a good understanding and application is needed by law enforcement officials to be able to actualize properly. the diversion of children in conflict with the law in the juvenile justice system is the implementation of a system in restorative justice to provide justice and legal protection to children in conflict with the law without neglecting the criminal liability of children. Diversion is not a peaceful effort between children in conflict with the law with victims or their families but a form of punishment against children who informally conflict with the law. Implementation of diversion in restorative justice in the juvenile justice system is the transfer of the settlement of child cases from criminal justice processes to processes outside of fair criminal justice with an emphasis on restoration to its original state, and not of retaliation. Besides diversion is a form of punishment that has the perspective of education of children

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I. Introduction

The principle of the legal protection of children must be in accordance with the Convention on the Rights of the Child as ratified by the government of the Republic of Indonesia by Presidential Decree No. 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child. The number of children's delinquency is increasing as well as the level of seriousness. Such delinquency usually begins from deviant behavior caused by various internal and external factors, Externally, negative impacts

and development, the harshness of the flow of globalists in the field of technology, communication information, and economic needs can turn out to make children easily commit criminal acts. Internally, the personality condition of the child who is still unstable becomes the basis of deviant behavior. Therefore, children who conflict with the law need to get special protection for the rights of the child to be fulfilled.

Aspects of child protection are emphasized more on the rights of the child rather than on the obligations of the child because the child, in general, has not been

burdened with obligations. Approximately 4,000 Indonesian children are brought to justice each year for minor crimes, such as theft. In general, they do not get support, either from lawyers or social services, so it is not surprising that nine out of ten children who commit crimes are thrown in jail or prison. Related to child protection, especially the principle of non-discrimination that prioritizes the best interests for the child and the right to life, survival, and child development so that it is necessary to respect the child, including against children who commit crimes. Therefore, it is necessary for a child criminal justice system in which there is a process of resolving child cases outside of conventional criminal mechanisms. There is a thought or idea for this by diversion or known as diversion process because the Correctional Institution is not the way to solve the problem of children because in the Correctional Institution is vulnerable or feared violations that cause the child to lose his rights.

Furthermore, the relevant regulation on Diversion is stipulated in Article 3 of The Supreme Court Regulation No. 4 of 2014 concerning the Guidelines for the Implementation of Diversion, which indicates that child judges are obliged to seek diversion if a child is charged with a criminal offense that is threatened with a prison sentence of under 7 (seven) years and also charged with a criminal offense that is threatened with a prison sentence of 7 (seven) years or more in the form of a subsidiarity, alternative, cumulative, or combination indictment. For example, primary subsidiarity indictment: Article 354 Paragraph (1) Penal Code (threat of imprisonment 8 years), Subsidiary: Article 351 Paragraph (2) Penal Code (threat of imprisonment 5 years), More Subsidiary: Article 351 Paragraph (1) Penal Code (threat of imprisonment 2 years 8 months).

The phenomenon that occurs in various cities in Indonesia about children who have problems with the law also occurs in Makassar, which is the capital of South Sulawesi Province, as well as the largest Metropolitan City in eastern Indonesia. Similar to other cities, Makassar as one of the big cities in Indonesia also stores the clutter of the city and all its problems. The rapid growth of infrastructure and a fairly crowded economy forced the marginals living under the Makassar city sky to be pushed, which ultimately impacted the economic condition of the people. Such conditions can trigger the occurrence of a form of crime including in this case crimes committed by children. Types of crimes committed by the city of Makassar include cases of severe persecution (animated), murder, theft by force, theft by force, theft of motor vehicles, theft of livestock to drug cases.

II. Description of Nature And Legal Protection

1. Description of Nature

The term language is derived from the word "Al-Haqq", which means truth. If it is said that science is nature, it means science that is used to seek the truth. Whereas etymologically the essence is the essence of something, the peak or source of everything.

In the Great Dictionary of Indonesian Language (KBBI), Hakikat has 2 (two) definitions, namely:

1. The definition means essence or basis.

Example: he who instills the "fact" of Islamic teachings in my heart

2. The definition means the real reality.

Examples of :p there is the "nature" of them being good people; shari'a hammer-hammering, in it, is reciprocating, on goodness must be reciprocated with goodness

Based on the definition of the above nature, it can be concluded that Essence is a sentence or expression used to indicate the true meaning or the most basic meaning of an object, condition, or thought, but some become a say that has often been used in certain conditions so that it becomes a kind of convention, the essence as it is referred to as the customary nature of habit.

The theory of fact is very broad and very much in number. The extent of the problem is the same as the breadth of the object of philosophical inquiry (material object), which is everything that exists and that may exist. The fact of the matter is the true circumstances. The nature of something is the true state of something, not a temporary state that is always changing.

Talking about the theory of nature means talking about the branch of philosophy that talks about the nature of something or the nature of objects. Scientists say that this theory of nature is the same as ontology whose job is to provide answers to the question: what exactly is the reality of something? to answer these questions, the philosopher completes and gives the answer using this theory of nature or ontology.

The answer to the previous questions can be very metaphysical (strengthening of something beyond) or can deny the existence or existence beyond. Because it is not wrong if, in this theory, scientists then divide and distract the theory of fact in the following understandings:

a. The flow of idealism

The flow assumes that behind physical reality there must be something invisible. For this

genre, it lies behind the physical, brad in the idea.

b. Kind of Materialism

This tradition assumes that reality is a material aspect. For this tradition, what the idea says, will instead arise from the reality of matter or the reality of objects.

c. Dualism

This flow seems to combine (synthesis) between physical existence and metaphysical existence. For this tradition, the existence of something that can be a physical one can also be a metaphysical one.

2. Description of Legal Protection

Legal protection of children in the business and activities of all levels of society in various positions and roles, which are well aware of the importance of children to society and the nation in the future. If they have matured their physical and mental and social growth, then the time has come to replace the previous generation. Child protection is the embodiment of justice in a society, thus child protection is sought in various areas of state life and society.

Law is an instrument whose existence is indispensable and attached to every social life of society. The law is necessary to realize and maintain a harmonious order of common life. Without the rule of law, people's lives will be scattered and can no longer be referred to as a harmonious social life.

Legal norms can be an order or prohibition that aims for each member of the community in doing something necessary to maintain the harmony of life together or vice versa so that the community does not do an action that can damage the order of life of society itself. If the ordered action is not done or in other words, a prohibition is violated then the balance of harmony of society will be disturbed.

Legal Protection Legal protection is all efforts to fulfill the right and provide assistance to provide a sense of security to witnesses and/or victims, legal protection of victims of crime as part of the protection of society can be realized in various forms, such as through the provision of restitution, compensation, medical services, and legal assistance.

In contrast to Soerjono Soekanto, Satjipto Raharjo described that legal protection is to give protection to the human rights of others and the protection is given to the community so that they can enjoy all the rights granted by the law or in other words legal protection is a variety of legal efforts that must be given by law enforcement officials to provide a sense of security, both mindfully and physically from interference and various threats from any party.

Legal protection is the protection of dignity and dignity, as well as recognition of human rights possessed by legal subjects based on the provisions of the law of arbitrariness or as a collection of rules or regulations that will be able to protect something from other things. Concerning consumers, it means that the law protects the rights of customers from something that results in the unfulfillment of those rights.

Legal protection is a picture of the workings of legal functions to realize legal objectives, namely justice, usefulness, and legal certainty. Legal protection is a protection given to the subject of law following the rule of law, whether it is preventive (prevention) or in a form that is repressive (coercive), either in writing or unwritten to enforce the rule of law.

According to Philipus M. Hadjon, legal protection for the people includes two things, namely:

1. Preventive Legal Protection Facilities

i.e. a form of legal protection in which the people are allowed to file their objections or

opinions before a government decision gets a definitive form.

The protection is provided by the government to prevent the occurrence of violations. This is contained in the legislation to prevent a violation and provide signs or restrictions in performing such obligations.

In this preventive legal protection, legal subjects are allowed to file their objections or opinions before a government decision gets a definitive form. The goal is to prevent disputes from happening. Preventive legal protection means a lot for government actions based on freedom of action because with its preventive legal protections the government is encouraged to be careful in making decisions based on discretion. There have been no specific arrangements regarding the protection of preventive law.

2. Repressive Legal Protection, which is a form of legal protection which is more aimed at resolving disputes.

Conceptually, the essence and meaning of law enforcement lie in the activities of aligning the relationship of values described in the established rules and spelling out and attitude of action as a series of elaboration of the final stage values to create, maintain, and, maintain the peace of social life. The conception that has the basis of philosophy, requires further explanation, so it will appear more concrete.

Conceptually, the legal protection provided to the People of Indonesia is an implementation of the principle of recognition and protection of human dignity and dignity based on Pancasila and the principle of the state of law based on Pancasila. Legal protection is essentially everyone's right to protection from the law. Almost all legal relationships must be protected from the law. Therefore there are many kinds of legal protections. Of the many types and kinds of legal protections, some are quite popular and have been familiar to our

ears, such as the protection of the law against children with the application of diversion in the child justice system. Legal protection of children is realized in various ways such as still putting forward the rights of the child even though the child is litigated with the law.

The regulation on the protection of the child's law has been outlined in some laws and regulations, such as Law No. 11 of 2012 on the Child Justice System, and Article 3 of Supreme Court Regulation No. 4 of 2014 on Guidelines for the Implementation of Diversion.

The principle of legal protection against government actions rests and stems from the concept of recognition and protection of human rights because according to the history of the west, the birth of concepts of recognition and protection of human rights is directed to the restrictions and laying of obligations of society and government. The dominant aspect in the western concept of human rights emphasizes the existence of rights and freedoms inherent in human nature and their status as individuals, those rights are above the state and all political organizations and are absolute so that they cannot be contested. Because of this concept, it is often criticized that the Western concept of human rights is individualistic. Then with the inclusion of social rights and economic rights and cultural rights, there is a tendency to begin to soften the individualistic nature of Western concepts. In formulating the principles of legal protection in Indonesia, the basis is Pancasila as the ideology and philosophy of the state.

The conception of legal protection for the people in the West is based on the concepts of *Rechtstaat* and "Rule of The Law". By using Western conception as a frame of mind with a foundation on Pancasila, the principle of legal protection in Indonesia is the principle of recognition and protection of human dignity

and dignity that is sourced from Pancasila. The principle of legal protection against government actions rests and stems from the concept of recognition and protection of human rights because historically in the West, the birth of concepts of recognition and protection of human rights is directed towards the restrictions and laying of obligations of society and government.

Law enforcement is one of the most important links in a relationship called the legal process. Elaborate about law enforcement, the author builds that as a stage, law enforcement as the sustainability of the stage called the formation of law. So the law as a rule or norm, formed, formulated, and predetermined by an institution that has authority for it.

The effectiveness of law enforcement is not only determined by the factors of law enforcement officials alone but also determined by legal substance and legal culture factors. In addition to these three factors, Romli Atmasasmita considers other factors that play an important role in the context of the function and role of law in development, namely the empowerment of bureaucracy (bureaucratic engineering).

Jimmy Asshiddiqie stated law enforcement is the process of establishing or functioning legal norms in real as behavior in traffic or legal relations in public and state life.

Law enforcement is a tangible form in implementing the law to realize justice and legal certainty implemented by the legal structure, namely law enforcement officials against the material or substance of the law itself for violators of the law and accepted voluntarily by the public as users of the law. The response from the community is very important as a form of support for legal products made legislation together with the government. But what should be of public concern is that the product made must be

responsive, in other words, the legal product must be in the public's favor.

Law enforcement is an effort to bring ideas of justice, legal certainty, and social benefits into reality. So law enforcement is essentially the process of an embodiment of ideas. Concrete law enforcement is the enactment of positive laws in practice as they should be adhered to. Therefore, providing justice in a case means deciding the law in concreto in maintaining and guaranteeing the adherence of material law by using the procedural means established by formal law, in this case, law enforcement officials, and is an effort to realize the ideas and concepts of law that people expect to come true. Law enforcement is a process that involves many things.

Joseph Goldstein distinguishes criminal law enforcement into 3 parts, namely:

1. Total enforcement, namely the scope of criminal law enforcement as formulated by substantive criminal law(substantive law of crime). Enforcement of this total criminal law is not possible because law enforcement is strictly limited by criminal procedural law which among others includes the rules of arrest, detention, search, confiscation, and preliminary examination. Besides, it may be possible that substantive criminal law itself provides boundaries. For example, it takes a complaint first as a condition of prosecution on the deliberations of complaints (klachtdelicten). This restricted scope is referred to as the area of no enforcement.
2. Full enforcement, after the scope of criminal law enforcement that is total, is reduced area of no enforcement in law enforcement these law enforcement is expected to law enforcement to the maximum.
3. Actual enforcement, according to Joseph Goldstein full enforcement is considered not a realistic expectation, because there are limitations in the form of time, personnel,

investigative tools, funds, and so on, all of which results in the necessity of discretion, and the rest is called actual enforcement.

As a systemic process, the enforcement of criminal law presented itself as the application of criminal law (criminal law application)involving various structural sub-systems in the form of police officers, prosecutors, courts, and correctional officers. This includes, of course, a legal advisory institution. In this case, the application of the law should be viewed from 3 dimensions:

1. the application of the law is seen as a normative system(normative system) that is the implementation of the entire rule of law that describes social values supported by criminal sanctions.
2. the application of the law is seen as an administrative system that includes interactions between various law enforcement officials, which are sub-systems of the judiciary above.
3. the application of criminal law is an asocial system(social system), in the sense that in defining criminal acts must also be taken into account various perspectives of thought that exist in the community.

III. The existence of Diversion in Indonesia after the existence of Law No. 11 of 2012 on The Criminal Justice System of Children

Human Rights is a basic right that is a direct gift from God Almighty who is attached to man as a civilized being. Human rights are an implication of one's humanity. Therefore, this right is inalienable, non-transferable, deprived, or contestable, as well as imprescriptible that cannot be lost, vanished, however, gnawed, or failed in its fulfillment. Human rights are rights inherent in human beings and reflect their dignity, so they must obtain legal guarantees.

The state, in this case, namely the government as an organization that houses and holds the mandate of the people, must carry out the affairs that have been entrusted to achieve mutual welfare. In human rights norms, the State, especially the government, is domiciled as a duty barrier to fulfill all the rights of its people. The government's efforts to fulfill these rights have been seen by the creation of Law No. 39 of 1999 on Human Rights.

The development and advancement of technology and the considerable influence of globalization, do not always bring a positive impact on the development of children. However, the development of technology received by the child without going through the filter can be a determinant factor for the child to carry out actions that are contrary to the law so that it becomes one of the factors of increasing various crimes committed by the child. Also, environmental factors in unhealthy communities can also cause children to commit delinquency (Juvenile Delinquency). In such conditions, the role of parents and community support in the surrounding environment is needed to protect children from falling into the wrong association (miscommunication).

Looking at various previous conceptions and various regulations that have been enacted by the government in terms of protecting the rights of children, even though the child conflicts with the law, the state is still obliged to protect the child considering the child is the bud of the nation's hope. One of the government's efforts is to accommodate the diversion in Law No. 11 of 2012 on the Criminal Justice System of Children. The law is the legitimacy of law enforcement officials to conduct discretion against children who face the law or conflict with the law, certainly in the name of the rights of the child that must be protected. Sonya with the enactment of SPPA which is categorized as lex specialist, then all other provisions on the definition of children must be adjusted, including policies that are born and related to the fulfillment of children's rights.

The Considerant considering Law No. 11 of 2011 on the Criminal Justice system is a patron of law enforcement officials in handling child cases that conflict with the law by staying in the corridor prioritizing the rights of the child or more appropriately giving preferential treatment to the child even though it is dealing with the law, by stating as follows:

"that to maintain its dignity and dignity, the child is entitled to special protection, especially legal protection in the criminal justice system".

Furthermore, the consideration is emphasized in the General Explanation of Law No. 11 of 2012 on the Child Justice System which states, that:

"The substance stipulated in this Law, among others, concerning the placement of Children undergoing judicial process can be placed in the Special Development Institute for Children (LPKA). The most basic substance in this Law is the strict regulation of Restorative Justice and Diversion which is intended to avoid and keep the Child away from the judicial process to avoid stigmatization of the Child facing the law and it is expected that the Child can return to the social environment reasonably. Therefore, it is necessary to participate in all parties to realize this. The process should aim at the creation of Restorative Justice, both for children and for victims. Restorative Justice is a Diversion process, i.e. all parties involved in a particular crime together overcome problems and create an obligation to make things better by involving victims, children, and communities in finding solutions to improve, reconcile, and reassure hearts that are not based on retaliation".

In law No. 11 of 2012 on the Criminal Justice System is a new momentum in the world of the child justice system with a stigma law No. 3 of 1997 on Children's Court is considered no longer relevant to the development and legal needs of the community because it has not comprehensively protected children who are

dealing with the law so it needs to be replaced with new laws.

Law No. 3 of 1997 concerning The Children's Court as the basis in the implementation of the judicial process against children who commit criminal acts is intended to protect and protect children who face the law so that the child can meet his long future and provide opportunities for the child so that through coaching will be obtained his identity to become an independent human being, useful for himself, family, society and nation and State. But in its implementation, the child is precisely positioned as an object, and the treatment of children facing the law tends to harm the child.

In-Law No. 11 of 2012 concerning the Criminal Justice System of Children in addition to accommodating diversion, namely an attempt to settle a child case outside the court to a peaceful settlement involving victims and parents who are suspected of committing certain crimes between suspects/defendants/perpetrators of criminal acts with victims who are difasilittasi by the family and/or the community, Child Community Supervisors, Police, Prosecutors or Judges with the aim that the rights of children remain fulfilled. Furthermore, this law is governed by the status of witnesses and/or victims. Similarly, the regulation on sanctions against children is determined based on the age difference of the Child, i.e. for Children who are less than 12 (twelve) years old are only subject to action, while for children who have reached the age of 12 (twelve) years to 18 (eighteen) years can be convicted and criminal.

In addition to the reasons for Law No. 3 of 1997 concerning Child Courts that do not comprehensively protect children, another reference point is the existence of a Minimum Standard Regulation issued by the United Nations on the Administration of Child Justice (BeijingRules) and ratified through UN Assembly Resolution No. 40 / 33 dated November 29, 1985.⁸ The main objectives of this criminal justice system have been

affirmed in SMR-JJ (BeijingRules) in rule 5.1 that:

a. Promoting child welfare

It is a principle that should be seen as the main focus in the child justice system. This principle can be used as a basis for not applying the use of sanctions that are solely criminal, or that are punitive. Wherever possible criminal sanctions, especially prison sentences should be seen as the last resort in child justice;

b. Mengedepankan prinsip proporsionalitas (the principle of proporsionalitas)

This second principle is a means to curb the use of punitive sanctions in the sense of retaliation. Paul H. Hann in this case expressed his opinion that the children's court should not be sold as a criminal justice for the child nor should it function solely as a social institution.

Based on the conception of the Beijing Rules, the settlement of children's cases is no longer necessary to be resolved through detention, but by actualizing another concept that is more child-benefiting, namely the concept of diversion. diakomodirnya diversion in the settlement of cases of children who are dealing with the law or against children who conflict with the law, because it is based on a very urgent reason that there is a negative impact of the criminal justice process on the world of justice, which sometimes does not favor the interests and rights of the child and most miris when the child is treated as an adult when dealing with the law.

The substance stipulated in the Most Basic Child Criminal Justice System Law is a strict regulation on diversion and restorative justice, which is intended to avoid and keep children away from the judicial process to avoid stigmatization of children who face the law and it is expected that the child can reasonably return to the social environment. Diversion is a transfer of the settlement of a child's case from the criminal justice process to a process outside the criminal justice. (Op. Cit)

The idea of diversion was proclaimed in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (SMRJ) or The Beijing Rules (UN Assembly resolution 40/33 dated November 29, 1985), where the diversion is listed in Rule 11/1 11.2 and Rule 17.4. Under the regulation, diversion is the granting of authority to law enforcement officials to take policy actions in dealing with or resolving the issue of child abuse by not taking formal avenues such as stopping or not proceeding from criminal justice proceedings or returning to the community.

The implementation of diversion is basically for how the child although punished but the punishment or sanction is more educational, with the main goal to be achieved is to deter, improve, and no longer desire to do or commit crimes again. Can't even afford to do that anymore. In other words, the implementation of diversion is based on the desire to avoid negative effects on the mind of the child's soul in its involvement in the criminal justice system.

Furthermore, the implementation of diversion is based on the desire to avoid negative effects on the soul and development of the child for his involvement with the criminal justice system. Diversion efforts or ideas are the best solutions that can be used as a formula in the settlement of some cases involving children as perpetrators of criminal acts. The authority to conduct Diversion is from law enforcement officials at each level of examination, namely at the level of investigation, prosecution, and examination of child cases in the district court as contained in Article 7.

Restorative Justice under the SPPA Law is the obligation of law enforcement to carry out diversions. Until now the concept of diversion is still a new thing among Indonesian people, especially law enforcement. Hulsman writes with Wonosutanto's translation that "it is almost impossible to provide a fair criminal under the applicable criminal justice system, judging by the way it works. Because of this fact, the working of the system is in no way

following the reasoning of the education.² The system of child funding in Indonesia has not been well realized against the especially well-run arrangements and application of the diversion.

The handling of child cases faced with a law that prioritizes the best interests for children is far from expected, so the Government issued Law No. 11 of 2012 on the Criminal Justice System of Children. The regulation on diversion has been strictly stipulated in Chapter II Article 6 to Article 15 of Law No. 11 of 2012 concerning the Criminal Justice System of Children, will be described as follows:

Article 6 :

Diversion aims at:

- a. Achieving peace between victim and child;
- b. Resolve the child's case outside the judicial process;
- c. Avoiding children from forgiveness independence;
- d. Encourage the community to participate; Dan
- e. Instilling a sense of responsibility to the child.

Article 7 :

(1) At the level of investigation, prosecution, and examination of child cases in the district court must be pursued diversion;

(2) The diversion as referred to in Paragraph (1) shall be carried out in the event of a criminal offense committed;

- a. Threatened with imprisonment under 7 (seven) years; Dan
- b. is not a repetition of criminal acts

Provision of Article 7 Paragraph (2) concerning the repetition of crimes committed by children, both similar crimes and non-similar crimes, including previous crimes resolved through the diversion

process. This article expressly gives authority for investigators, prosecutors, and judges to diversion. In fact, for now, the diversion about the legal process for the child is part and the kind of thing that must be done in the handling of the child's case that conflicts with the law. based on the article according to the author's opinion that diversion as stipulated in article 7 it is not possible to be committed against crimes committed by children with the threat of law 7 (seven) years in prison or repetition of crimes committed by children. Therefore, if it is still forced, there will be a stigma that assumes that the child who conflicts with the law is immune from the law. Thus the affirmation in the article is important to avoid the loss of legal certainty against criminal cases that are threatened to children who conflict with the law. The author is of the view that whatever the reason for the criminal prosecution of a child is to remain in the aim of providing a deterrent effect on the perpetrator or against other children who can indirectly eliminate the intention of committing a crime. The concept of diversion can still be done as long as it is still implemented with formal ordinances by the laws and regulations and upholds the principle of best interests for the child and restorative justice where recovery in the original state is the goal.

Article 15 :

Provisions on the guidelines for the implementation of the diversion process, ordinances, and coordination of the implementation of diversions are governed by government regulations

This law is a reform in the criminal justice system. This is because there is a more mandatory flexible solution than the formal justice system that has been implemented. In article 5 of Law No. 11 of 2012 concerning the Child Criminal Justice System, it is determined that the child justice system must prioritize the restorative justice approach. The law also provides legal certainty for the settlement of criminal cases out of court through diversion. Diversion is the transfer of case resolution

from the judicial process to the process outside the criminal justice.

Furthermore, the provisions of Article 96 of Law Number 11 of 2012 concerning the Child Criminal Justice System determine that investigators, public prosecutors, and judges who deliberately do not carry out the obligation to carry out diversion efforts as referred to article 7 paragraph (1) can be punished with a maximum imprisonment of 2 (two) years or a maximum fine of Rp.200,000,000.00 (two hundred million rupiahs). But over time there are pros and cons about the article because it is considered that the article restricts and even curbs law enforcement officials in this case the judge in carrying out his function as a law enforcement officer. After all, it is threatened criminally if not carrying out diversion it should not be done considering that carrying out the task as best as possible is the duty of law enforcement officials. So especially for judges, this article has been annulled by the Constitutional Court in Decision No. 110/PUU-X/2012 which states that article 96 is declared contrary to the Constitution of the Republic of Indonesia year 1945 and has no binding legal force. One big question the author raises is why is it only the Judge who is disbarred in the article? Is not in addition to judges, prosecutors and police should also have the same rights that there is no threat of punishment if not do diversion, but give the widest space for law enforcement officials in determining their steps and attitudes in the implementation of diversion of course by putting forward the provisions in the SPPA Law.

Legislators have applied the concept of the settlement of child cases oriented to restorative justice (restorative justice) in drafting laws on the Child Criminal Justice System. The application of restorative justice will lead to a shift in the direction of criminalization and the purpose of criminalization that is punishing or revenge by accounting for every action committed by imposing criminal sanctions shifts into a settlement of cases that emphasize more on

efforts to heal or restore to its original state before a criminal act. Basically in the case of a child or against a child who conflicts with, then the criminal prosecution is ultimum Remedium or a last resort or last resort that will be imposed on the child in conflict with the law, with lawmakers wanting to put a forward diversion in any child who conflicts with the law.

The concept of Diversion is based on the fact that criminal justice proceedings against children who conflict with the law through the criminal justice system pose more harm than good. Criminal law formulation policy is part of the implementation of political criminal law in terms of formulating material or articles that realize good regulations by the circumstances and situation at a time. According to the frugal author that in the handling of child cases that conflict with the law-oriented to the protection and the best interests of the child, then deprivation of liberty and criminalization is a last resort.

IV. Diversion synchronization to the fulfillment of child rights protection in the settlement of criminal cases

The quality of protection for children should have the same degree or degree as protection for adults because everyone has the same position before the law. According to Arif Gosita, child protection is an effort that supports the implementation of the rights and obligations of the child himself. Therefore, a child who acquires and maintains the right to grow and develop in a balanced and positive life means to be treated fairly and avoid the threat of harm. Child protection efforts can be a legal action that has legal consequences, thus preventing the child from arbitrary parental actions

The judicial process against children often loses its essence, namely as a mechanism that must end to protect the best interests of the child. Child criminal justice is often a process that is only oriented to formal law enforcement and not oriented towards the interests of the child.

In the Restorative Justice Theory, the process of resolving unlawful acts that occur is done by bringing victims and perpetrators (suspects) together sitting in one meeting to jointly talk. In the meeting, the mediator gave the opportunity on the part of the perpetrator to give a clear picture of the actions he had taken. Restorative justice is a process in which all parties involved in a particular crime together solve the problem of how to deal with the consequences in the future.

In the development of criminal law, there has been a paradigm shift in the philosophy of child criminal justice, which initially was retributive justice, then turned into rehabilitation, then the latter became restorative justice. The transfer of the settlement of children's cases out of the formal channels of the judiciary through diversions regulated in the international instruments of the child carries juridical implications for Indonesia to accommodate the provisions of diversion in the legislation of the child in Indonesia. In realizing the concept of Diversi as an instrument in restorative justice in the Child Criminal Justice System based on Law No. 11 of 2012, namely the settlement of criminal cases involving perpetrators, victims, families of perpetrators/families of victims, and other related parties to jointly seek a fair solution by emphasizing the restoration of the original state and not retaliation.

The handling of child cases in conflict with the law that puts the best interests of the child first is far from expected. The government has issued a special regulation governing the protection of the rights of children dealing with the law, such as Law No.3 of 1997 on Child Courts then changed to Law No. 11 of 2012 on The Criminal Justice System of Children or Law No. 23 of 2002 on Child Protection even the government has ratified the Child Rights Convention (KHA) by issuing Presidential Decree No. 36 dated August 25, 1990, and signed the Beijing Rules agreement, but it turns out that the provisions in the regulation are not the best

solution to the settlement of children's cases facing the law.

Law No. 11 of 2012 on The Criminal Justice System of Children effective from July 31, 2014, aims to maintain the dignity and dignity of children with a restorative justice approach, a child is entitled to special protection, especially the protection of the law in the criminal justice system. Therefore, the Children's Criminal Justice System does not only emphasize the sentencing of criminal sanctions for children who commit crimes but also focused on the idea that the sanctions are intended as a means of realizing the welfare of the child perpetrators of such crimes. This is in line to organize the Criminal Justice System of Children desired by the international world.

The criminal justice system specifically for children certainly has a special purpose for the future interests of children and society in which contained the principles of restorative justice. Article 1 point (6) of Law No. 11 of 2012 concerning the Child Criminal Justice System states, restorative justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other parties concerned to jointly seek a fair settlement by emphasizing the restoration of the original situation, and not retaliation. In the Criminal Justice System of Children as referred to in Paragraph (2) letter a and letter b must be attempted diversion. Diversion is the transfer of the settlement of a child's case from the criminal justice process to a process outside of criminal justice. The diversionary approach in restorative justice stipulated in Law No. 11 of 2012 on the Child Criminal Justice System is a breakthrough that is not known in the conventional Criminal Justice System.

In 2011, the number of children facing the law amounted to 695 children, then in 2012 it increased to 1,413 and in 2013 to 1,428 cases. That number continued to rise to 2,208 cases in 2014, and as of July 2015, there were 403 cases of children facing the law.

Events that are often highlighted both through print and electronic media in the Child Criminal Justice System when children have to face the law in the judicial process are not only present in big cities, but have penetrated districts/cities. This also happens in the jurisdiction of South Sulawesi, especially institutions and institutions related to the process of the Child Criminal Justice System such as the Police, Prosecutors, District Court, Advocates, and Legal Aid Institutions as well as the Correctional Center.

One of the cases of children who conflict with the law is Alif Shahdan (15 yrs) and his father, Adnan Achmad is threatened with a sentence of seven years in prison. Both are suspects in the case of the teacher abuse of the subjects of Architecture SMKN 2 Makassar, Darul. MA (15) and his father, Adnan Achmad were charged with Article 170 of the Criminal Code concerning assault with the threat of 7 years in prison

The presence of children in detention and correctional institutions together with adults puts children at risk of becoming victims of various acts of violence. Therefore, it takes considerate attention and strong efforts to minimize the harm that can be suffered by children who are forced to face legal proceedings in the criminal justice system.

On July 30, 2012, the House of Representatives passed Law No. 11 of 2012 on the Child Criminal Justice System that replaces the Children's Court Law, two years since it was enacted that will come into force on July 30, 2014. The Children's Criminal Justice System Law has adopted the Decision of the Constitutional Court No. 1/PUU-VIII/2010 by giving the understanding of children who conflict with the Law as children who have been 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing crimes (Article 1 number 3 of the Children's Criminal Justice System Law).

The birth of the Child Criminal Justice System Law provides edification related to

the protection of children in Indonesia. This law introduces the concept of diversion that aims to protect children who conflict with the law, children who are victims of criminal acts, and society in general as a form of transfer of settlement of child cases from the judicial process to the process outside the criminal justice to realize restorative justice.

In 2015, Government Regulation No. 65 of 2015 concerning Guidelines for The Implementation of Diversion and Handling of Children Who Are Not Yet 12 (Twelve) Years Old is a necessity in the framework of the implementation of Law No. 11 of 2012 on The Criminal Justice System of Children

Following up on the Law of the Criminal Justice System of Children and Government Regulation No. 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Who Are Not Yet 12 (Twelve) Years Old, within the scope of the Prosecutor's Office issued Regulation of the Attorney General of the Republic of Indonesia Number Per-006/A/J.A/04/2015 concerning Guidelines for The Implementation of Diversion at the Prosecution Level. Meanwhile, the Supreme Court issued Regulation of the Supreme Court of the Republic of Indonesia No. 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Child Criminal Justice System.

The Children's Criminal Justice System Law came into force two years after the date of its enactment, namely July 30, 2012, as mentioned in the Closing Provisions (Article 108 of the Child Criminal Justice System Law). This means that the Children's Criminal Justice System Law came into force on July 31, 2014.

Crimes that occur today in the community are not only adult perpetrators, even the tendency of the perpetrator is still classified as the age of children. Therefore, various efforts to prevent and counter child delinquency continue to be carried out. One of the government's efforts in preventing and

tackling delinquency is by organizing the juvenile justice system through Law No. 11 of 2012 on the Child Criminal Justice System (hereinafter referred to as the Child Criminal Justice System Law) to realize a judiciary that truly guarantees the protection of the best interests of children who conflict with the law as the successor of the nation.

A child is at high risk of being violated by his/her human rights when it comes to being involved in the criminal justice system. Thus, it would be better if the diversion is applied in the handling of child problems that conflict with the law. The fact that criminal justice against children, perpetrators of criminal acts through the criminal justice system poses more harm than is beneficial to the child. This is because the court will stigmatize the child for his actions, so it is better to avoid him out of the criminal justice system.

The purpose of the implementation of diversion for children include:

- a. To avoid the child from detention;
- b. To avoid labeling children as criminals;
- c. To prevent the repetition of crimes committed by children, so that the child is responsible for his actions;
- d. To make the necessary interventions for victims and children without having to go through a formal process, and keep the child away from the negative influences and implications of the judicial process.

Meanwhile, restorative justice is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other parties concerned to jointly seek a fair solution by emphasizing the restoration of the original situation, and not retaliation.

A diversion program can be a restorative form of justice if:

1. Encourage the child to take responsibility for his or her actions;

2. Provide opportunities for the child to compensate for the mistakes made by doing good for the victim;
3. Provide opportunities for the victim to participate in the process;
4. Provide opportunities for the child to be able to maintain a relationship with the family;
5. Provide opportunities for reconciliation and healing in communities harmed by crime.

The main principle of the implementation of diversion is persuasive action or nonpenal approach (outside of criminal law) and provides an opportunity for someone to correct the mistake. One example of the importance of diversion policy is because of the high number of children who enter criminal justice and are sentenced to prison. Diversion is done with the reason to give opportunities to lawbreakers, especially children to be good people back through nonformal channels by involving community resources.

Diversion seeks to provide justice to the case of children who have already committed crimes to law enforcement officials. There are three types of diversion program implementation: According to Peter C.Kratcoski in Hengky Kurniawan there are three types of concepts of implementation of diversion program implementation, namely:

1. Implementation of social control orientation, i.e. law enforcement officials hand over perpetrators in the responsibility of supervision or observation of the community, with a duty to approval or warning given. The perpetrator accepts responsibility for his actions and is not expected a second chance for the perpetrator by the community.
2. Social service orientation, which is to carry out the function to supervise, interfere, improve and provide services to perpetrators and their families. The community can

interfere with the family of the perpetrator to provide repairs or services.

3. Towards the process of restorative justice or negotiation (balanced or restorative justice orientation), namely protecting the community, giving the perpetrators a direct responsibility to the victim and the community by making a mutual agreement between the victim and the community. The implementation of all relevant parties is brought together to reach an agreement on actions on the perpetrators.

The concept of diversion as an instrument in restorative justice based on Law No. 11 of 2012 on the Child Criminal Justice System is the transfer of the settlement of child cases that conflict with the law from the criminal justice process to persons outside the judiciary by involving perpetrators, victims of the victim's family and the victim's family and other related parties to jointly seek a fair settlement by emphasizing recovery in the original state and not retaliation.

Diversion also has the purpose that the child avoids the negative effects of criminal application. Diversion also has the essence of ensuring the child grows and develops. Thus, it can also be said that basically diversion has relevance to the purpose of funding for children. In general, the purpose of criminalization consists of efforts to protect the community on the one hand and protect (perpetrators) on the other.

Criminal settlement through diversion is intended to realize to the perpetrator that the crime committed is not justified and has harmed the other party. Therefore, if the diversion is successfully agreed upon by the parties concerned, especially the victims at the level of investigation (Polres) then the child (perpetrator) will immediately obtain the restoration of his rights. Conversely, if it has not been successfully diversion will be continued at the level of investigation (Prosecutor), and if it remains unsuccessful diversion will be continued until the court.

The implementation of diversion in the Police no later than 30 (thirty) days (Article 29 Paragraph (2) of the Child Criminal Justice System Law), as well as in the Prosecutor's Office no later than 30 (thirty) days (Article 42 Paragraph (2) of the Child Criminal Justice System Law), from the next in the Court no later than 30 (thirty) days (Article 52 Paragraph (3) of the Criminal Justice System Law of The Child).

The implementation of diversion involves all law enforcement officials from any line. Diversions are implemented at all levels of the criminal justice process. The process starts from the application of an agency or institution that first reported a crime or the victim himself who considered the diversion. There are differences of views in each issue that is handled depending on the officer's point of view in determining the decision, but the essence of the concept of diversion is to shift the child from the formal to informal process.

One of the important conditions in the implementation of diversion, namely the confession or declaration of the guilt of the perpetrator and his willingness to be diversionary. This diversion effort is not just a settlement outside the formal legal process for crimes committed by children as mentioned in Article 6 Letter b of the Children's Criminal Justice System. One of the purposes of diversion is to instill a sense of responsibility in the child. Moreover, the diversion effort is an effort to learn and recover children as perpetrators of criminal acts. The absence of confession/declaration of guilt from the perpetrator of a criminal act is an encouragement for formal legal proceedings for a criminal offense.

The implementation of diversion is motivated by the desire to avoid negative effects on the soul and development of the child by his involvement with the criminal justice system. The application of this diversion prioritizes the effort to protect children from imprisonment.

Efforts to resolve problems against children who conflict with the law should not always use formal legal channels considering a child can be said to be a person who cannot act legally, this is because a person is considered immature and his actions can not be legally accounted for. Therefore, the settlement can be reached with various alternatives, one of which is by using the concept of the restorative justice model approach.

It relates to diversion, in Islamic teachings, in QS Ash-Shura (42):40 and QS An. Nur (24):44 In principle Allah likes every forgiving and forgiving person in addressing the faults or evils of others. So herewith the diversionary settlement there is a possibility of the values of forgiveness of the victim because the settlement is resolved by prioritizing the way of deliberation between the victim's family and the community. The basic idea of diversion or transfer is to avoid the negative effect of conventional examination of child criminal justice on the child, both the negative effects of the judicial process and the negative effects of stigma (evil stamp) of the judicial process, then the examination is covenantally transferred to the child

V. Conclusion

Based on the results of the research that the authors have reviewed in the previous chapter, it can be concluded that:

1. Diversion is one of the alternatives in the settlement of child criminal cases that conflict with the law, by trying to remove the stigma against children as perpetrators of criminal acts even though the child conflicts with the law, but still prioritizes the best interests of the child in realizing welfare for the child.
2. Diversion is one form of settlement of child criminal cases in Indonesia as stipulated in the SPPA Law. Although it is regulated in written regulations, the existence of diversion among law enforcement officials is still an issue, because the diversion process has not

been strictly regulated about the mechanisms that must be implemented, so it is necessary to understand and apply well by law enforcement officials to be properly actualized.

3. The application of diversion to children facing the law in the child justice system is the implementation of a system in restorative justice to provide justice and legal protection to children who conflict with the law without neglecting the criminal liability of the child. Diversion is not an attempt at peace between a child who conflicts with the law and the victim or his family but a form of criminalization of a child who conflicts with the law in a nonformal manner. The implementation of the diversion that the implementation of diversion in restorative justice in the Child Criminal Justice System is the transfer of the settlement of a child's case from the criminal justice process to a process outside of a fair criminal justice with an emphasis on reinstatement in its original state, and not a retaliatory one. Also, diversion is a form of education-based funding for children.

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