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# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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## RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE

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### ABSTRACT

*A paradigm of punishment for children in Juvenile Criminal Justice System has been changing form retributive approach toward restorative justice approach.. Diversion is used as an instrument of restorative justice implementation, Diversion plays dominant role to fix the crime that has done by children. However, not all children have the right to receive diversion. There are the requirements to be applied. Article 7 (2) Law Number 11 of 2012 of Juvenile Criminal Justice System, establish the requirements are under 7 years imprisonment, and not a repetition. The requirements are not reflecting the theory of justice. Children who are threatened by imprisonment over 7 years would not have the right to get diversion. Then, success rate for implementation of diversion is low, it caused by law enforcer can not establish good communication among the parties. In addition, the implementation of diversion is taken place at the police station has contributed as factors of failure of the diversion.*

*Framework in this study is the diversion has become the rights of every child in Juvenile Criminal Justice System, and definition of the diversion should be able to create a paradigm of restorative justice approach in the juvenile criminal justice system. The research method u in this study used doctrinal research method or normative research that study baout law which is drafted and developed by the basis of the doctrine.*

*Based on the study that has been done, the application of diversion based on Law No, 11 of 2012 of Juvenile Criminal Justice System Children is unable to reflect the values of justice, it caused by the requirements, where the approach of restorative justice reflects the principle of justice, as intended by Aristotle in the theory of distributive justice and corrective justice.*

*The conclusion of this research are: First, the protection of children in accommodated in the Law No. 11/2012 of Juvenile Criminal Justice System, but the concepts could not provide the protection in a holistic manner. Secondly, these obstacles (in implementation of diversion) because of culture (retributive), although the juvenile criminal justice system has adobted teh restorative approach. Third, reconstruction of diversion must be built by the constructing diversion concept paradigm, so every child without exception has the rights to get diversion.*

**Keyword: Diversion Concept, Child Protection, Juvenile Cryminal Justice System**

## **A. Background of the Study**

The Law Number 11 of 2012, about Child Criminal Justice System, formulated diversion as a shift for settling children disputes from the criminal justice process to a process outside of the court. Children crime prevention efforts with non penal approach is a form of prevention without the use of criminal law in a way to influence public perceptions of the crime, so that diversion or restorative justice is an alternative form of settlement of criminal acts directed towards informal settlement by engaging all parties involved in the offenses which were occurred.

The successful implementation of diversion depends heavily on law enforcement policy, namely the police, prosecutors, and court (judge), or similar agencies, who has the ability to socialize diversion destination itself because the implementation of diversion is done at the beginning of the criminal justice process in every level.

Diversion aims to break the vicious cycle of stigmatization, violence, humiliation, and reduce social ties among the perpetrators, and not least to avoid the possibility of emerging of "school of crime", and reduce the risk of recidivism, avoiding more expensive legal fees, as well as helping to integrate the perpetrators.

Based on the perspective of the best interests of children in conflict with law and a child as victims is a key consideration, therefore the handling efforts are not done in the spirit of retaliation actions but in the spirit of awareness.

In the dimension of justice and expediency nature of diversion, if it is seen from the provisions of Article 7 paragraph (2) letter a of Law SPPA which determines diversion implemented in terms of "a criminal offense committed is punishable by imprisonment under the 7 (seven) years", and not a repetition is naturally ambiguous, the former of SPPA Law had discriminatory namely by implementing different treatments to children whom faced the

law, which should be thoughts must give priority to the best interests of children to justice and legal expediency because everyone has the same rights before the law.

For the implementation of the SPPA Law particularly diversion mechanism in Court, then the Supreme Court has published Regulation (Perma) Number 4 of 2014 Concerning on Diversion Guidelines in Children Criminal Justice System, in order to meet the legal vacuum, the law enforcement, for the sake of justice dimensions (*gerechtigheid*) and benefits (*zweckmassigkeit*). In Article 3 stated "Children Judge shall seek diversion in the case of a child accused of committing a criminal offense which is punishable by imprisonment of less than 7 (seven) years and is charged also with the criminal offense which is punishable by imprisonment of 7 (seven) years in the form of the *subsidiaritas* indictment, alternative, cumulative and combination (*composite*).

The Supreme Court has acted progressively to protect children who faced with the law through accommodating, extending and flexing diversion provisions which normatively regulated in SPPA Law where in Article 7 paragraph (2) letter a of SPPA Law does not allow it to be treated to a child who commits an offense which the penalty is more than seven (7) years in prison and repetition.

In the field research results within the period of one year since the SPPA Law No.11 of 2012, which became effective in August 2014, the number of children cases in North Sumatra Police, Medan State Attorney and the Medan District Court, looks pretty much, but from the entire cases of the children which successfully diverse were very few in number, each below 10 percent. This happens because they were influenced by internal factors and external factors as well as supporting facilities such as the place where the diversion was performed. Saat ini tempat diversi dilakukan di Kantor Polisi, Kantor Kejaksaan dan Kantor Pengadilan Negeri, yang belum mempunyai ruangan khusus untuk diversi yang bernuansa kekeluargaan, Today the site of the diversion performed in the Police station, Prosecutor's

Office and District Court Office, which have not had a special room for the diversion which has family nuance, whereas the place of diversion has very important role to establish communication among those who are involved. Based on the background above, the writer can take the problem as follows: How is the reconstruction of the diversion concept on the legal protection for children in conflict with the law based on the values of justice?

## **B. The Research Findings**

1. The concept of diversion currently which applies to the children is not providing legal protection for children in a holistic manner either at the level of investigation, prosecution and at the court level. The provisions of Article 7 paragraph (2) of Law No. 11 of 2012 give the limits to acts which the criminal threat is under 7 years and not a repetition of criminal acts. While the penalty of over 7 years and repetition, diversion efforts are not allowed to do. This gives the impression that the legal protection efforts toward children in conflict with the law do not fully adhere to the principle of non-discrimination and do not uphold the values of justice in the juvenile justice system.
2. The weaknesses in the implementation of the concept of diversion as a legal protection efforts toward children in conflict with the law, are due to several factors, namely:
  - a. Punishing cultural factors that have become a culture in every law enforcement in Indonesia, with the objective of sentencing which oriented to the deterrent effect, and in the Indonesian criminal law known as the maximum penalty.
  - b. Factors of Lack of Communication and Places can hinder the success of the implementation of diversion.
  - c. Factors of Constitutional Court Decision No. 110 / PUU-X / 2012 which states that Article 96, 100 and 101 of Law No. 11 of 2012, namely the provision of criminal sanctions for law enforcement which does not carry out diversion has been canceled,

thus Constitutional Court decision provides the freedom for law enforcement to carry out diversion or not.

Basically in some countries such as Australia, Japan, the Netherlands, China, the United States, there are no exceptions to the children who committed a criminal act to be done a diversion, but based on the age of the perpetrator which categorized as a child. Unlike in Indonesia, the provisions of Article 7 (2) of Act 11 of 2012 give the exceptions to children who commit offenses minimum sentence of seven years and / or recurrence of crime.

3. The definition of diversion concept and the implementation of diversion rules on the level of investigation, prosecution up to the court, there is still a shortage of justice aspects, because of the restrictions namely a diversion can only be done at certain criminal acts, while for the case which the threat of criminal cases is over seven years, the criminalization will be implemented.

Based on consideration of the principles of justice, and the purpose of criminalization, it is necessary to reconstruct the concept a diversion in the juvenile justice system, where the diversion concept criteria grants all rights to the children in conflict with the law, to be able to do a diversion, not least in the case of 7 (seven) years penalty treat and repetition. The concept a diversion must embrace the principle of non-discrimination, and its implementation is done by the principles of justice, where every child in conflict with the law to the threat of penalty over seven (7) years and a repetition has the same rights as child in conflict with the law to a penalty under 7 years old and not a repetition.

The reconstruction value is the concept a diversion on the inequality law protection for all children who commit criminal acts, they should be given the same law protection regardless the threat of punishment they did and the repetition of criminal acts.

Juridical Reconstruction: the reconstruction by revising the provisions of Article 7 (2) of Law No. 11 Year 2012 on Child Criminal Justice System, because the protection to all who are categorized children is not limited to criminal offenses under 7 years and repetition, becomes any criminal offense, regardless of minimum penalties, because basically the implementation of a diversion is based on values of justice that does not make the act as orientation, but its orientation is the perpetrators, as the following table.

**Table 1 Reconstruction of Article 7 Paragraph (2) of Law No. 11 of 2012**

| <b>The contents of Article 7 Paragraph (2) before the Reconstruction</b>  | <b>The weaknesses</b>   | <b>Article contents before the Reconstruction</b>   |
|---|---|---|
| <p>Diversi referred to paragraph (1) shall be implemented in the case of criminal offenses committed:</p> <p><i>a. Subject to imprisonment under 7 years and</i></p> <p><i>b. <b>It is not a repetition of criminal acts.</b></i></p> | <ul style="list-style-type: none"> <li>- There is a discrimination in law protection toward children who commit criminal acts;</li> <li>- There is a difference in diversion treatment based on the penalties;</li> <li>- There is diversion restriction only to children who commit criminal acts with penalty of under 7 years and not a repetition of crime;</li> <li>- It is not realizing the goal a diversion namely restoring relations between the perpetrator and the victim.</li> </ul> | <p><i>Diversion referred to paragraph (1) shall be implemented without distinguishing the threat of criminal acts committed or a repetition of criminal acts.</i></p> |

**Table 2 The Reconstruction of Structure and Culture Law**

| No | <b>Sub system before reconstructed</b>     | <b>The Weaknesses</b>   | <b>Sub system after reconstructed</b>   |
|----|--|---|---|
| 1  | Structure: police, prosecutors and courts. | <ul style="list-style-type: none"> <li>- The abilities and skills of law enforcement agencies in establishing communication with the parties involved are still weak.</li> <li>- There is no special place which can hinder the success of implementation of a diversion;</li> <li>- A child gets stigmatized as if he</li> </ul> | <ul style="list-style-type: none"> <li>- Certification to the law enforcement officers who handle the cases of children.</li> <li>- Diversion is done in a separate building with the police department, prosecutor's office and the court which may be facilitated by the ministry of</li> </ul> |

|   |   |  |  |
|---|---|--|--|
|   |   | is punished for his actions, if he is processed at the police station, at the office prosecutor and in the court.  | social / social services, thus the nuances are more friendly and comfortable, and protected by not publishing it.  |
| 2 | Law enforcement which does not implement a diversion is not sanctioned, according to the rules of Constitutional Court No. 110 / PUU-X / 2012 which canceled Article 96, 100 and 101 of Law No. 11 of 2012 on criminal sanctions. | <ul style="list-style-type: none"> <li>- It does not give a sanction to the law enforcement which does not carry out the diversion.</li> <li>- It gives freedom for law enforcement to carry out or not carry out a diversion.</li> </ul>  | - The provisions of Article 96, 100 and 101 of Law No. 11 of 2012 should be applied so that the implementation a diversion can be completely implemented by law enforcement. |
| 3 | Punishing Culture by law enforcement is as deterrent effect.  | <ul style="list-style-type: none"> <li>- It does not guarantee that a child will not repeat the act of a crime;</li> <li>- There is no guarantee a child will behave better after serving the sentence;</li> <li>- It does not guarantee that the relationship between offender and victim comes back better.</li> </ul> | - The active role of local leaders in the process of a diversion, so punishing culture by law enforcement as deterrent effect can be avoided.                                |

Based on the Reconstruction Commentary above, the researcher can summarize the Reconstruction of Diversion Concept in Protection Children in Conflict with the Law Based on the Justice Value as follows:

**Table 3. Reconstruction of Diversion Concept in Protecting Children, who in Conflict with the Law, Based on the Value Justice**

| No. | Subject                        | Commentary   |
|-----|--------------------------------|--|
| 1.  | The Basic of Reconstruction    | Integrating the wisdom of local knowledge of the fifth principle with the international wisdom concerning on the law protection to the children in Australia, Japan, the Netherlands, China, the United States and other countries which are not limiting the law protection on the basis of the threat of penalties and repetition. |
| 2.  | The Paradigm of Reconstruction | Constructivism Paradigm gives law protection that is not discriminatory  |
| 3.  | The Reconstructed Value        | The equal treatment of law protection for all children who committed a crime, regardless of the threat of penalty for the act and the repetition of criminal acts  |
| 4.  | The Reconstruction of          | <i>Diversion referred to in paragraph (1) shall be</i>   |



|    |   |   |
|----|---|---|
|    | Article 7 Paragraph (2) of Law No. 11 of 2012 | <i>implemented without distinguishing the threat of penalty toward the committed crime or a repetition of criminal acts.</i>            |
| 5. | The Objective of Reconstruction               | Gives the justice for all children who commit criminal acts without seeing the threat of penalties and the repetition of criminal acts. |

### C. Conclusion

Based on the above discussion, the researcher can provide the conclusions as follows:  
 Reconstruction of value: the diversion concept on the inequality law protection for all children who commit criminal acts should be given with equal law protection regardless of the threat of punishment for the acts and the repetition of criminal acts.

Juridical Reconstruction: the reconstruction by revising the provisions of Article 7 paragraph (2) of Law No. 11 of 2012 concerning on Juvenile Criminal Justice System, because the protection to all who are categorized children is not limited to threat of penalty under 7 years and repetition, becomes any criminal offense, regardless of the minimal threat, because the true implementation of a diversion is based on values of justice that does not make the act as orientation, but the orientation is the perpetrator itself. Thus the provisions will be stated as follows:

Article 7 paragraph (2) of Law No. 11 of 2012 (Before reconstructed)

*Diversion referred to in paragraph (1) shall be implemented in the case of criminal offense committed:*

- a. *Subject to imprisonment under 7 years and*
- b. *Is not a repetition of criminal act*

Article 7 paragraph (2) of Law No. 11 of 2012 (after reconstructed)

*Diversion referred to paragraph (1) shall be implemented without distinguishing the threat of criminal acts committed or a repetition of criminal acts.*

## **D. Suggestions**

1. In the application of the diversion concept, there should be application of the principle of justice and the principle of non-discrimination as protection efforts toward children in conflict with the law.
2. Implementation of the diversion concept must have the proper emphasis on the success of the implementation of the diversion at all levels ranging from investigation, prosecution until the court. However, the more expected efforts are the success on the stage of investigation, thus there will be no any case handed over to the prosecution up to the court.
3. The provision of child-friendly place, needs to be done by the government, due to the efforts of child protection begins from the provision of adequate space, either as a place for the implementation of a diversion as well as a place for the child detention when it is done.
4. Training to law enforcements in an effort to implement restorative justice, thus if they handle juvenile criminal cases, the approach is no longer Punishing culture, but the improvement culture.

## **E. The Implication of the study**

### **1. Theoretical Implication**

The concept a diversion in this dissertation raises constructivism on the inequality law protection for all children who commit criminal acts, which is restricted by the threat of penalty for his actions and the repetition of criminal acts.

The Reconstruction of the value is to provide the equal law protection regardless of the threat of punishment for the acts and repetition criminal acts then this value is based on the values of justice, thus the theory that arises in this dissertation is "The Theory of Elimination of restrictions on Diversion Against All Children".

Diversion Paradigm changes in the juvenile criminal justice system is expected to change the concept of the protection of children in conflict with law holistically. In concept, a diversion provides guidelines and forms of treatment toward children in conflict with the law, in order to guarantee the protective measure which reflects in the principle of restorative justice. The diversion concept based on the value of justice is non-discrimination, thus considers every children in conflict with law have the same rights to get a diversion.

## **2. Practical Implications**

- 1) Emphasizing the diversion concept on problem solving through discussion among the expected parties, thus restorative justice and ultimum remedium can be implemented correctly.
- 2) The diversion concept has an emphasis on the success of a diversion in the deliberations at the level of the investigation, in which it is important to create a good communication in constructing a diversion agreement among the involved parties.
- 3) Government and Parliament should immediately revise Article 7 paragraph (2) of Law No. 11 of 2012 concerning on the Juvenile Criminal Justice System so that the elimination of diversion restrictions for all children can be done, thus this diversion will be based on the value of justice.

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