

THE IMPLEMENTATION OF DIVERSION AS A LEGAL PROTECTION  
EFFORTS FOR CHILDREN OF THE NARCOTICS CRIMINAL ACTORS

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**ABSTRACT:** Special protective measures for children contained in the Convention on the Rights of the Child which have been ratified into the Child Protection Act Number 23 of 2002 as amended in Act Number 35 of 2014 concerning Child Protection and the Law on the Criminal Justice System that requires children diversion or settlement of cases of children out of court is carried out as contained in article 7 paragraph (1) of Law Number 11 Year 2012 concerning the Juvenile Criminal System which reads "At the level of investigation, prosecution and examination of cases of Children in district courts must be pursued Diversi" aimed at to avoid imprisonment of children. But in practice Diversi efforts are ruled out in the settlement of cases when the child as a Narcotics offender is subject to Article 111 Jo 112 of Law Number 35 Year 2009 concerning Narcotics with the maximum penalty of 12 years in prison. Therefore the ideals of the birth of Law Number 11 of 2012 concerning the Juvenile Justice System are still far from what is expected. This article aims to find out how far the application of the diversion system is to resolve cases of narcotic crime committed by children. This research was conducted using the normative method and using secondary data sources. Based on this research it can be stated that diversion efforts have not been well implemented in the juvenile justice system in Indonesia.

**Keyword:** *Child, Diversion, Child Criminal Justice System, Narcotics*

## **INTRODUCTION**

Expansion in science, technology and lifestyle changes the affect of mindset and character of the children. Children who lack of the attention and affection of parents tend to be easily influenced by social interactions that are unhealthy and have a detrimental effect on the child itself, even today children easily become perpetrators or involved in criminal acts. When the child is suspected of committing a crime, the existing formal justice system ultimately places the child in prisoner status. Surely it has significant consequences in terms of child development. The child punishment is not so influential on changing the character of the child itself and tends to provide

space to repeat the crime that has been committed. Prisons often make children more professional in committing crimes.

Indonesia already has a Law on Child Protection Number 23 of 2002 which has been amended by Law Number 35 of 2014 and Law Number 11 of 2012 concerning the Criminal Justice System for Children. The Law on the Juvenile Justice System regulates the system of proceedings to prosecute children who are perpetrators of crime, this Act is a tangible manifestation of Indonesia's ratification of the Convention on the Rights of the Child which includes diversion or settlement efforts outside the court to resolve cases committed by children. In this era many children are also already involved with Narcotics, not only in big cities, this phenomenon has spread to the villages. Responding to the rise of narcotics crimes committed by children, it becomes interesting for writers to conduct research in order to find out more about how to apply Diversion according to Act Number 11 of 2012 concerning the Child Criminal Justice System against child narcotics offenders.

This research was conducted using the normative method and using secondary data sources from laws and related books. The writer's team used the Child Protection Act Number 23 of 2002, Act Number 35 of 2014 concerning Amendments to Act Number 23 of 2002 concerning Child Protection, Act Number 11 of 2012 concerning the Criminal Justice System for Children and books concerning the Juvenile Justice System, Act Number 35 of 2009 concerning Narcotics and books relating to the Juvenile Justice System, Diversity and Narcotics. Act Number 23 of 2002 concerning Child Protection in article 1 number 1 defines a child as someone who is not yet 18 (eighteen) years old, including children who are still in the womb. Child protection takes precedence in understanding the rights of children who must be protected because it naturally has weak substance. Understanding children in the field of criminal law raises positive legal aspects of the process of normalizing children from deviant behavior, for example as perpetrators of crime or criminal violations, to form personalities and responsibilities that ultimately the child is entitled to a decent welfare and a better future.

## **DISCUSSION**

### **The implementation of Diversity in Indonesia**

In an effort to promote the protection of children, the Criminal Justice System Act Number 11 of 2012 specifically regulates including the efforts of Diversion. According to article 1 number 7 of Act Number 11 Year 2012 concerning to the Criminal Justice System for Children, Diversion is the transfer of the settlement of a child case from the criminal justice process to the outside process of the criminal court. Diversion has a function for the children who are in conflict with the law are not stigmatized due to the judicial process that they undergo. Understanding diversion can be simply described as granting authority to law enforcement officials to take policy actions in dealing with the problem of child abuse.

The Implementation of diversion is motivated by the desire to avoid negative effects on the soul and development of children by their involvement with the criminal justice system. Diversity is a policy that is carried out to avoid perpetrators of the formal criminal justice system. In Article 7 paragraph 1 of Act Number 11 Year 2012 concerning the Juvenile Criminal System its explained that at the level of investigation, prosecution and inspection of cases of children in the District Court must be pursued in Diversion. This is expected to create a judiciary that truly guarantees

the best interests of the protection of children in conflict with the law. In addition to the Law above, there are a number of statutory provisions that are used as a reference in implementing diversion of children in conflict with the law, which are both International Regulations and National Regulations as follows:

#### 1. International Regulations

- 1) Convention on the Rights of the Child (Convention on the Rights of the Child);
- 2) UN Minimum Standards Regulations for the Administration of Juvenile Justice-Beijing Regulations (UN Minimum Standards Regulations for Children's Legislation-Beijing Regulations);
- 3) United Nations Regulations for the Protection of Non-Independent Youth (UN Regulations for the Protection of Deprived Children of Freedom);

#### 2. National Regulations

- 1) The Act of the Republic of Indonesia Number 2 of 2002 concerning the Police of the Republic of Indonesia;
- 2) The Act of the Republic of Indonesia Number 23 of 2002 concerning Child Protection;
- 3) The Act of the Republic of Indonesia Number 3 of 1997 concerning Juvenile Courts;
- 4) The Act of the Republic of Indonesia Number 11 Year 2012 concerning the Criminal Justice System for Children;
- 5) Secret Telegram (TR) of Kabareskrim Polri No.Pol .: TR / 1124 / XI / 2006 and Secret Telegram (TR) Kabareskrim Polri No. Pol .: TR / 395 / DIT.I / VI / 2008 which regulates Diversification at the Investigation level;
- 6) Regulation of the Attorney General of the Republic of Indonesia Number Per-006 / A / J.A / 04/2015 concerning Guidelines for the Implementation of Diversity at Prosecution Level;

Diversion is carried out to provide protection and rehabilitation to offenders in an effort to prevent children from becoming adult criminals. General explanation of Act Number 11 of 2012 concerning the Juvenile Criminal System which states that Restorative Justice is a diversification process, which means that all parties involved in a particular criminal act together overcome the problem and create an obligation for everything to become more both by involving victims, children and the community in finding solutions to repair, reconcile and reassure hearts that are not based on retaliation.

In article 6 of act No. 11 of 2012 concerning the Criminal Justice System for Children determines that the objectives of the diversification are:

1. Achieve peace between victims and children;
2. Resolving cases of children outside the judicial process;
3. Avoiding children from deprivation of independence;
4. Encouraging the community to participate;
5. Instilling a sense of responsibility to the child;

Every law enforcement apparatus, namely the Police, Attorney General's Office and the Court in carrying out the diversion task must have the same objectives as referred to in Article 6 of Act Number 11 Year 2012 concerning the Juvenile Justice System. These three components are incorporated in a forum which is often called the Criminal Justice System (Criminal Justice

System) must be able to run in synergy to build a legal system that provides a sense of justice and legal protection for children.

Article 8 of Act Number 11 Year 2012 Concerning the Criminal Justice System for Children determines the following conditions:

1. The Diversi process is carried out through deliberations involving children and their parents / guardians, Community Guidance and Professional Social Workers based on a Restorative Justice approach;
2. If necessary, deliberation as referred to in paragraph (1) may involve Social Welfare Workers and / or the community;
3. The Diversion Process must pay attention to:
  - a) The interests of the victim;
  - b) Child welfare and responsibility;
  - c) Avoidance of negative stigma;
  - d) Avoidance of retaliation;
  - e) Community harmony;
  - f) Decency, decency and public order;

There are several criteria of crime involving children as perpetrators that must be resolved with the diversion principle approach, namely:

1. The category of criminal acts that are threatened with criminal sanctions up to 1 (one) year must be prioritized to apply diversion, criminal acts that are threatened with criminal sanctions of above 1 (one) year up to 5 (five) years can be considered for diversion, all cases of theft must be attempted to apply diversion unless it causes or causes loss related to body and soul;
2. Paying attention to the age of the offender, the younger the offender is, the urgency of applying the principle of diversion is increasingly necessary;
3. The results of research from BAPAS, if found factors that encourage children involved in criminal cases are factors that are beyond the control of children, the urgency of the application of diversion is increasingly needed;
4. Losses incurred by child crime, if the consequences are material and are not related to a person's body and life, the urgency of applying diversion is increasingly necessary;
5. The level of public unrest caused by the actions of the child;
6. Victim / family consent;
7. Willingness of the offender and his family;
8. In the case of a child committing a crime together with an adult, then an adult must be prosecuted according to the usual procedure;

### **Legal Protection for Children**

In general, International Documents state that legal protection for children can be interpreted as an effort to protect the law against various freedoms and human rights as well as various interests relating to the welfare of children. Child protection in Indonesia is regulated in Law Number 35 Year 2014 Article 1 paragraph (2) which states that child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate

optimally in accordance with the dignity and human dignity and protection from violence and discrimination.

Act Number 4 of 1979 concerning Child Welfare in Article 2 paragraphs (3) and (4) explains that "children have the right to care and protection, both during pregnancy and after birth", "Children have the right to protection of the environment which can harm or hinder natural growth and development. Child protection is an area of national development. Protecting children is protecting humans. Physically, mentally and socially children need protection efforts to realize the welfare of children by providing guarantees for the fulfillment of the rights to realize the welfare of children by providing guarantees for the fulfillment of their rights and the existence of non-discriminatory treatment.

In Act Number 11 Year 2012 concerning the Child Criminal Justice System defines minors as children who are 12 years old but not yet 18 years old and distinguishes children who are involved in a crime in three categories:

- a) Article 1 number 3 of act Number 11 Year 2012 concerning the Criminal Justice System for Children states that a child in conflict with the law, hereinafter referred to as a child, is a child who is 12 (twelve) years old, but is not yet 18 (eighteen) years old who are suspected commit a crime;
- b) Article 1 number 4 of act Number 11 Year 2012 concerning the Juvenile Justice System states that children who are victims of criminal acts, hereinafter referred to as child victims, are children who are not yet 18 (eighteen) years of age who suffer physical, mental and / or economic losses. caused by a criminal offense;
- c) Article 1 number 5 of act Number 11 Year 2012 concerning the Criminal Justice System for Children states that a child who is a witness of a crime, hereinafter referred to as a witness, is a child who is not yet 18 (eighteen) years of age who can provide information for the purposes of investigation, prosecution and examination in a court of law concerning a criminal case which is heard, seen and / or experienced itself;

#### Diversity Against Children of Narcotics Criminals

Nowadays there are very many children involved in narcotics crime which can be categorized as internal and external factors. Internal factors that emit self-centered feelings, free will, mental turmoil and curiosity. While external factors include economic conditions, relationships, convenience, lack of supervision and displeasure with social conditions. Narcotics are abused so that it gives a very bad effect on the physical and mental health causes. Narcotics users will experience the effects of addiction so they have a desire to continue to be used. Narcotics users from among children will feel the same way, if it continues they will lose the period of receiving. Based on act Number 35 Year 2009 Regarding Narcotics, there are several articles of criminal provisions which often ensnare children as narcotics offenders, including:

1. Article 111 paragraph (1): "Any person who is without rights or violates the law of planting, maintaining, possessing, storing, controlling or providing Narcotics category I in the form of plants, shall be liable to a maximum of 4 (four) years imprisonment and the longest 12 (twelve) years and a minimum fine of Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah) ";

2. Article 112 paragraph (1): "Every person who is without rights or violates the law owns, keeps, controls or provides Narcotics of Group I is not a plant, shall be sentenced to a maximum imprisonment of 4 (four) years and a maximum of 12 (twelve) year and a fine of at least Rp. 800,000,000.00 (eight hundred million rupiah) and a maximum of Rp. 8,000,000,000.00 (eight billion rupiah);
3. Article 127 paragraph (1): "Every person who misuses:
  - a. Group I Narcotics shall be subject to a maximum jail sentence of 4 (four) years;
  - b. Narcotics of Group II for themselves shall be sentenced to a maximum imprisonment of 2 (two) years; and
  - c. Narcotics of Group III shall be sentenced themselves to a maximum imprisonment of 1 (one) year. "

In narcotics cases involving children as perpetrators, the application of the above articles is also applied. The phenomenon that occurs is that many children are convicted of being perpetrators of narcotics crime. Child criminal justice process or a criminal decision is a stigma attached to convicted of narcotics abuse after the completion of the criminal justice process. After the completion of the criminal justice process, children tend to increase narcotics abuse. So that the handling of narcotics misuse by children using criminal law in the form of punishment is not always appropriate. Criminalization is a treatment after the occurrence of a crime, whereas a child as a criminal offense requires protection and rehabilitation, so diversion efforts are needed to resolve cases involving children as perpetrators, including in narcotic crime. Relating to the children who are perpetrators of narcotics crime, that in this case the perpetrators and victims are the children themselves, according to the author's opinion, a restorative justice approach can be used to achieve diversion.

Article 7 Paragraph (2) of act Number 11 Year 2012 concerning the Juvenile Justice System, emphasizes that diversification is carried out in the event that a crime committed is threatened with imprisonment for less than 7 (seven) years and does not constitute a repeat of the criminal act. Based on that article, diversion can be made against children who commit Narcotics because Act No. 35/2009 concerning Narcotics regulates a minimum sentence of 4 (four) years in prison and the offender is not a recidivist. This effort certainly guarantees the legal protection of children as narcotics offenders to be able to be settled outside the judicial process and away from the criminal process. One of the parties who contributed to the diversion attempt was law enforcement. Based on the provisions of Article 9 of Law Number 11 Year 2012 concerning the Child Criminal Justice System which states that investigators, public prosecutors, and judges in conducting diversion must consider the categories of criminal acts, the age of the child, BAPAS research results as well as support from the family and community environment. This shows that in its implementation Diversi is based on the authority of law enforcement officers. Law enforcers must have a sense of responsibility both towards themselves, the community and to God Almighty to be able to seek diversion as a means of fostering and protecting children as well as the spirit contained in the Criminal Justice System Act of the Child.

## **Conclusion**

Diversion is a settlement of child cases which is carried out outside formal justice with the aim of avoiding the stigmatization of Children in Conflict with Law (ABH) and it is hoped that

children can return to the social environment naturally. Diversity has been regulated in act number 11 of 2011 concerning the Criminal Justice System for Children. Diversification of child offenders is carried out by the three components of the Indonesian criminal justice system, namely the Police at the investigation level, the Prosecutor's Office at the prosecution level and the Courts at the examination level at the trial in the hope of being able to provide legal protection to children.

## **SUGGESTION**

1. The family and community as children 's natural residence should actively participate in providing child protection by fulfilling the rights of children, protecting the interests of children and increasing supervision of the environment and children's playground in the hope that they can distance the child from being involved in a criminal act (Children in Face with Law / ABH).
2. The three components of the criminal justice system in Indonesia, namely the Police, Attorney General's Office and the Court, can increasingly synergize and always prioritize diversionary efforts in resolving criminal acts involving children so that legal protection against children is guaranteed.

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