

Implementation of Diversion Effort Towards Children Abused Narcotics Activate Restorative Justice



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ABSTRACT :The implementation of diversion efforts is a concept of a legal protection for children not only for children who abuse narcotics to realize restorative justice but the implementation of diversion efforts in narcotics crimes committed by children will have little chance of success due to differences in the views of the guidelines or asynchronous between the SPPA Law and Perma No. 4 2014 concerning Guidelines for the Implementation of Diversion is a diversion process in the case of narcotics crimes which are considered a crime without victims, which can only be carried out by investigators and, the need for guidelines for understanding between law enforcers on the diversion system in order to create restorative justice as legal protection for children in conflict with the law

KEYWORDS: effort, diversion, restorative justice

A. INTRODUCTION

Children are an inseparable part of human survival and the sustainability of a nation and state, therefore in the Indonesian constitution it is clear that children have a strategic role, it is explicitly stated that the state guarantees the rights of every child to survival, growth and development. , protection from violence and discrimination, said Alfitra². The author agrees with alfitra above apart from that indeed every child needs to have equal opportunities in the eyes of the law besides that there is equal opportunity to progress and develop physically, mentally, and socially. It also needs efforts given by the state to fortify to provide support for the fulfillment of freedom, especially legal guarantees..

Talking about legal guarantees for Indonesian children, in fact, if we look at and reflect on Article 28B of the 1945 Constitution of the Republic of Indonesia, it needs to be followed up by making government policies aimed at protecting children, where the principle of legal protection is currently in accordance with the Convention on the Rights of the Child. as ratified by the government with Presidential Decree No. 36/1990 on Ratification of the convention on the Right of the Child.

However, child delinquency every year always increases, this is marked by the rise of children who have legal problems, where the phenomenon of increasing criminal behavior committed by children does not seem to be directly proportional to the age of the perpetrator, for example, related to narcotics abuse is increasing day by day in the jurisdiction city of Depok, look at the example of the case against a child with the initials RP, who is still 17 years old proven to be a victim of Narcotics Abuse class 1 for himself and then sentenced to prison for 1 year at the Special Child Development Institute.

The author considers that diversion should be applied to children's cases, it should be successful, not even child perpetrators and the public prosecutor appealed to the West Java High Court and the Answerarat High Court granted the appeal of the two, which stated that they strengthened the Depok District Court's decision, which means that they remain in prison for 1 year in prison. Child Special Guidance Institution. Talking about the case of RP children, then we relate it to Perma Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, which appears to fill the legal vacuum contained in the SPPA Law which does not regulate or explain the application of diversion to alternative charges. in that case the judge or other law enforcement officers should be able to use Perma Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System for Diversion guidelines other than the SPPA Law. From the example of the settlement of the case, it can be seen that there is still disagreement between law enforcement officers in the application of diversion. Diversion should be done to keep children's rights awake and protected.

That in the case of a Child committing a Narcotics Crime which violates Article 127 paragraph (1) letter a of Law no. 35 of 2009 concerning Narcotics with the threat of a criminal sentence of 4 (four) years, thus against children who commit criminal acts of narcotics abusers who violate Article 127 paragraph (1) letter a of Law no. 35 of 2009 concerning Narcotics, diversion must be carried out even though in this case the crime committed by children has no victims. This has been regulated in Article 9 paragraph

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² *Alfitra, Juvenile Justice Procedural Law, Jakarta, Wade Group, 2019, page.1*

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(2) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, "The Diversion Agreement must obtain the approval of the victim and/or the family of the victim's child and the willingness of the child and his family, except for:

- a. a criminal act in the form of a violation;
- b. light criminal act;
- c. crime without victims; or
- d. the value of the victim's loss is not more than the value of the local provincial minimum wage.³

Reflecting on the concept of child protection, the question arises how is the legal protection for RP children? not necessarily that this can be fulfilled by imposing a crime against the perpetrator, this kind of thing does not provide protection and respect for the interests of the victim and the perpetrator which is only a conventional mechanism that is based on the establishment of a formal criminal process (criminal justice system) without seeing the reality in society, without looking at the interests of the community, and without seeing the benefits in society. An adequate introduction in promoting the concept of Restorative Justice in the Criminal Justice System process in Indonesia⁴.

Actually, restorative justice according to Eva Achjani Zulfa and Indriyanto Seno Adji is not a new concept because the concept of customary law in Indonesia as a forum for customary justice institutions also has a concept that can be described as the root of restorative justice. The characteristics of customary law in each region are generally very supportive of the application of restorative justice. This can be seen from the general characteristics of Indonesian customary law, views on customary violations/customary offenses as well as the models and solutions offered.⁵

B. FORMULATION OF THE PROBLEM

Based on the background of the study above, the authors formulate that the substance is how the form of diversion is carried out for children in narcotics abuse, then how to determine the success of the diversion of understanding between law enforcement officers towards victimless diversion?

C. RESEARCH METHODS

In this study, the author uses a normative juridical approach and an empirical juridical approach.

1. The normative juridical approach is an approach by examining the rules, norms, rules, which are related to the paper to be studied. This approach is intended to collect various kinds of laws and regulations, theories and literature that are closely related to the problem to be studied.
2. The empirical approach is a research approach by researching and collecting primary data obtained directly through research on the object of research by observing court decisions and interview studies regarding the problems to be discussed in this study. specifically with literature review and sociological studies. Primary legal materials, namely binding legal materials consisting of: (1) the Criminal Procedure Code (KUHP); (2) the Criminal Code (KUHP); (3) Law Number 35 of 2009 concerning Narcotics; (4) Law no. 11 of 2012 concerning the Juvenile Criminal Justice System; (5) Perma Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System. Secondary legal materials consist of books and legal theories that discuss the concept of diversion.

D. DISCUSSION

Minors According to Positive Law

Eko Prasetyo and Suparman have explained "In accordance with article 45 of the Criminal Code: in the case of criminal prosecution of a minor for committing an act before the age of sixteen the judge can determine: ordering that the guilty be returned to his parents, guardian or caretaker, without criminal or ordering that the guilty be handed over to the government without any punishment, if the act constitutes a crime or one of the offenses under articles 489,490,492, 496, 497, 503-505, 514, 517-519, 526,532,536 and 540 and two years have not elapsed since found guilty of committing a crime or one of the violations mentioned above, where the verdict has become final or imposes a sentence on the guilty. Article 45 in this Criminal Code has been set aside or not enforced by the promulgation of Law N0 3 of 1997 and has been replaced by Law No. 11 of 2012."⁶

While the age of the child in another case, a child who is 15 years old according to Article 171 of the Criminal Procedure Code has been able to testify as a witness under oath with all legal consequences for his oath and testimony. However, when faced

³ Article 127 Paragraph (1) Letter A Law no. 35 of 2009 concerning Narcotics with the Threat of Criminal Punishment for 4 (Four) Years Thus Against Children Who Do Criminal Acts of Narcotics Abusers Who Violate Article 127 Paragraph (1) Letter A Law no. 35 of 2009 concerning Narcotics Mandatory Diversion Even though in this case the crime committed by children has no victims

⁴ Alfitra, *Application of Restorative Justice Against Criminals Perpetrated by Minors in the Indonesian Criminal Law System and Alfitra Islamic Law*, Vol.16.,2017, page. 163.

⁵ Eva Achjani Zulfa and Indriyanto Seno Adji, *Shifting the Criminal Paradigm, (Badnung: Lubuk Agung, 2011)*, page. 67.

⁶ Eko Prasetyo and Suparman, *Women in Rape Discourse*, PKBI Yogyakarta 1999, page. 29

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with the Child Protection Act, a person aged 15 years must be treated properly as a child who is not yet an adult⁷ Meanwhile, Bambang's opinion is different which is "What is even more contradictory is if the provisions in Article 171 of the Criminal Procedure Code are linked to the provisions of Article 153 Paragraph (5) of the Criminal Procedure Code that the Chief Judge of the trial can determine that children who have not reached the age of seventeen are not allowed to attend the trial"⁸

The Juvenile Criminal Justice System law defines⁹ minors as children who are 12 years old but not yet 18 years old, and distinguish children who are involved in a criminal act in three categories:

- a) Children who are perpetrators of criminal acts (Article 1 point 3 of the SPPA Law);
- b) Children who are victims of criminal acts (Child Victims) (Article 1 point 4 of the SPPA Law); and
- c) Children who are witnesses to criminal acts (Child Witness) (Article 1 number 5 of the SPPA Law) Previously, the Juvenile Court Law did not distinguish the categories of child victims and child witnesses. Consequently, children of victims and children of witnesses do not get legal protection. This has resulted in many crimes being unresolved or even unreported because children tend to be afraid of facing the criminal justice system.

Diversion of Settlement of Children in Conflict with the Law in the Context of Narcotics

Article 1 point 3 of the SPPA Law stipulates that a child in conflict with the law, hereinafter referred to as a child, is a child who is 12 years old but not yet 18 years old who is suspected of committing a crime. The article provides protection for children who are in conflict with the law based on their age limit¹⁰. Actually, in the implementation of diversion in Indonesia, there are conditions that are used as guidelines by law enforcement officials. The diversion requirements are stated in Article 8 of the SPPA Law:

1. The diversion process is carried out through deliberation involving children and their parents/guardians, community advisors, and professional social workers based on a Restorative Justice approach.
2. If necessary, the 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. Propriety, decency, and public order.

In addition, it is also contained in Article 9 of the SPPA Law, there are also provisions regarding the implementation of diversion as follows:

1. Investigators, Public Prosecutors, and Judges in conducting Diversion must consider:
 - a) Categories of criminal acts.
 - b) Age of the child.
 - c) Results of community research from the Bapas.
 - d) Family and community environment support.
2. The Diversion Agreement must obtain the consent of the victim and/or the family of the Child Victim as well as the willingness of the Child and his/her family, except for:
 - a) A criminal act in the form of a violation.
 - b) Minor crime.
 - c) Crime without victims.
 - d) The value of the victim's loss is not more than the value of the local provincial minimum wage.

According to Irwan, the criteria for criminal acts involving children as perpetrators "that must be resolved using the diversion principle approach are as follows:

1. The category of criminal acts that are punishable by criminal sanctions of up to 1 year must be prioritized for diversion. Criminal acts that are punishable by criminal sanctions of more than 1 year to 5 years may be considered for diversion. All cases of theft must seek the application of diversion unless it causes or causes harm related to body and soul.
2. Taking into account the age of the perpetrator, the younger the age of the perpetrator, the more urgently needed to apply the diversion principle.
3. The results of the research from BAPAS, if it is found that the motivating factor for a child to be involved in a criminal case is a factor that is beyond the control of the child, the application of the diversion principle is increasingly needed.
4. Losses caused by criminal acts of children, if the consequences are material and not related to a person's body and life, the application of diversion is increasingly needed.
5. The level of public unrest caused by the actions of children.
6. Consent of the victim/family.

⁷ Drafting Team, *Complete Book of Criminal Code and Criminal Procedure Code*, Jakarta, Diva Press, page. 227

⁸ Bambang Waluyo, *Criminal and Criminal*, Jakarta: Sinar Grafika, 2008, page. 78

⁹ Alfitra, *Application of Restorative Justice against Criminals Perpetrated by Minors in the Indonesian Criminal Law System and Islamic Law*, *Ibid*, page. 134

¹⁰ Marlina, *Juvenile Criminal Justice in Indonesia Development of the Concept of Diversion and Restorative Justice*, Refika Aditama, Bandung, 2009, page. 67

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7. Willingness of the perpetrator and his family.
8. In the event that a child commits a crime together with an adult, the adult must be legally processed according to the usual procedure."¹¹.

Narcotics crime is one of the criminal acts that are often associated with very high threats. This can refer to Article 7 paragraph (2) of the SPPA Law which stipulates that criminal acts that are punishable by more than 7 years in prison cannot be diverted. Meanwhile, according to Article 3 of the Supreme Court Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, it stipulates that child judges are obliged to seek diversion in the event that a child is accused of committing a crime punishable by imprisonment for under 7 years. Children who should be protected and free from legal bondage, law enforcers, families, and the community are obliged to seek a settlement process outside the court, namely through Diversion based on a Restorative Justice approach.

The introduction of Restorative Justice according to Said Karim "in the Indonesian legal system is still partial and not comprehensive, which is spread in various regulatory provisions as well as several practices that have emerged. The application of Restorative Justice is also seen in several law enforcement policies. Meanwhile Hadisuprpto emphasized his belief that restorative justice is the ideal model for juvenile justice in the future."¹² In line with this thought, this is solely related to the protection of children in the juvenile justice system, which is regulated by a number of international conventions and national laws and regulations. Legal protection and laws and regulations governing the understanding of children cannot be separated from the ability of children to be responsible for their actions¹³.

The judicial process cannot be separated from the purpose and rationale of juvenile justice: namely realizing child welfare as an integral part of social welfare. Sometimes in a trial there is a court decision that is considered unfair and provides protection for children¹⁴. In fact, the Court's decision is the main portrait of how the law in Indonesia works when it comes to punishment for children. The judge's decision is a reflection of the values of justice, ultimate truth, human rights, mastery of law or facts in an established, qualified and factual manner, as well as visualization of ethics, mentality and morality of the judge himself.¹⁵

In terms of law enforcement, the Prosecutor's Office has a clear position in its role in handling children in conflict with the law. The Prosecutor's Office in an integrated criminal justice system is one of the subsystems, where the Prosecutor's Office has a role to carry out the prosecution process¹⁶. According to Article 1 point 7 of the Criminal Procedure Code, "prosecution" is the action of the Public Prosecutor to delegate a criminal case to the competent district court in matters and according to the method regulated in this law with a request that it be examined and decided by a judge in a court session. In addition to Article 137 of the Criminal Procedure Code, it states, "The Public Prosecutor has the authority to prosecute anyone accused of committing a crime by delegating the case to the court. So the authority to determine whether to sue or not is given to the Prosecutor (vide Article 139 of the Criminal Procedure Code in conjunction with Article 2 paragraph (1) of Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia)".

The Attorney General's Office also reissued the Regulation of the Attorney General of the Republic of Indonesia Number: PER-006/A/JA/04/2015 concerning Guidelines for Implementing Diversion at the Prosecution Level. The basis for consideration by the Attorney General's Office in issuing the Regulation of the Attorney General of the Republic of Indonesia concerning Guidelines for Implementing Diversion at the Prosecution Level are:

- a. that the handling of cases of children in conflict with the law must truly guarantee the protection of the best interests of children and must aim at the creation of Restorative Justice, both for children and child victims;
- b. that in order to create Restorative Justice, before moving on to the judicial process at the level of prosecution, the Public Prosecutor is obliged to seek Diversion, in connection with the implementation of these obligations, it is necessary to have regulations governing procedures for the implementation of Diversion which are standard, standard and binding for all Public Prosecutors, in order to optimize the implementation of the duties of the Prosecutor's Office. The Republic of Indonesia is in the process of handling cases of children in conflict with the law;
- c. that the implementation of the Diversion provisions at the prosecution level as regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System needs to be further regulated on the procedures for its implementation;

¹¹ Irwan, *The Problems of Implementing Diversion Against Children Perpetrators of Narcotics Crime*, LEX Renaissance Number: 3 VOL. 5 JULY 2020: 525-538

¹² Said Karim, *Papers Presented in an Overview of the Juvenile Criminal Justice System, at a Seminar at the Ministry of Law and Human Rights of the Republic of Indonesia*, 2015

¹³ Syamsudin Muchtar, *Reformulation of the Sanction System for Children in the Perspective of Criminal Law Reform*, Dissertation, Postgraduate Programs, Unhas, Makasar 2012, page. 78.

¹⁴ Barda Nawawi Arief, *Anthology of Criminal Law*, page. 111.

¹⁵ Lilik Mulyadi, *Judge's Decision in Criminal Procedure*, Bandung: Citra Aditya Bakti, 2007, page. 119.

¹⁶ Gregorius Hermawan Kristyanto, *The Function of the Prosecutor's Office in Realizing Restorative Justice in Handling Children Facing the Law in Indonesia*, Jurnal Surya Kencana Dua: Dynamics of Legal and Justice Issues Vol. 5 Numbers 1 July 2018, page. 470

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d. that based on the considerations as referred to in letters a, b and c, it is necessary to stipulate a Regulation of the Attorney General concerning Guidelines for the Implementation of Diversion at the Prosecution Level¹⁷

In addition to the above regulations, we should note that Law Number 11 of 2012 concerning the Juvenile Criminal Justice System requires every law enforcement officer, be it the police, prosecutors and judges, to diversify cases of crimes committed by children.

This is confirmed in Article 7 paragraph (1) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System "at the level of investigation, prosecution and examination of children's cases in district courts, diversion must be sought". The text of this article can be interpreted that in cases committed by children, law enforcers are required to carry out diversion efforts with the aim that the child's case does not continue to the level of examination in court to sentencing, but strives to restore it to its original condition because it is related to the condition and condition of the child. The mental development of children who are still unstable.

Implementing Diversion Efforts for Narcotics Crimes in Children Perspective Perma Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Justice System in Decision Analysis Number: 27/PID.Sus-Anak/2020/PT.BDG

The concept in the version according to Marlina "regarding the implementation of diversion is motivated by the desire to avoid negative effects on the soul and development of children by being involved with the criminal justice system. This diversion effort or idea of diversion is the best solution that can be used as a formula in resolving several cases involving children as perpetrators. criminal act. The authority to carry out diversion is from law enforcement officers at each level of examination, namely at the level of investigation, prosecution and examination of children's cases in the district court as contained in Article 7 of Law Number 11 of 2012 concerning the Juvenile Justice Criminal System (UU SPPA). . Specifically at the prosecution level, juvenile criminal justice procedures are regulated in Chapter III Part Four Article 41 and Article 42 of the SPPA Law.¹⁸

Diversion can influence and shift the perspective of our law enforcers from being positivist and rigid to progressive and compromising, this can be seen in the collaborative efforts between law enforcement agencies, in line with the shift in perspective R. Wiyono "gives a view of granting authority to law enforcement officers. law to take policy actions in dealing with or resolving the problem of child offenders by not taking formal steps, including stopping or continuing or releasing from the criminal justice process or returning or submitting to the community and other forms of social service activities.¹⁹

The concept of diversion is actually expected to be in line with the explanation above, but the concept of diversion is based on the fact that the criminal justice process against children does not fulfill more legal protection for children, it can be seen in cases of children using narcotics who are still serving a prison sentence even though previously attempted diversion was carried out first. Then get a recommendation from the integrated assessment team of the national narcotics agency of the Republic of Indonesia DKI Jakarta Province with the Number: REKOM/59/X/TAT/HK.04/2020.BNNP DKI. Decide and provide recommendations to continue the legal process while still considering the unlawful acts committed by the suspect.

The results of the minutes of diversion efforts are that the child/parents admit and are aware of all their mistakes and promise not to repeat their actions, so that the I/children and/parents hope to be given the opportunity to improve themselves by serving a sentence outside prison, while the II / The Public Prosecutor continues to request that the legal process be carried out so that Party I and Party II do not agree to settle the child by diversion so that it is declared unsuccessful.

On that basis, if we look closely, it is in line with the reflection of Irwan's thoughts. "Article 7 paragraph (2) of the SPPA Law stipulates that: a crime punishable by up to 7 years in prison cannot be applied for diversion. Meanwhile, according to Article 3 of the Supreme Court Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, it stipulates that child judges are obliged to seek diversion in the event that a child is accused of committing a crime punishable by imprisonment for under 7 years and also charged with a criminal offense punishable by with imprisonment of 7 years or more in the form of a subsidiary, alternative, cumulative or combination (combined) indictment. These two regulations become out of sync in managing a problem. This is an obstacle in resolving narcotics crime cases committed by minors. Child judges are more guided by the SPPA Law than Perma Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System. The Juvenile Judge did this because he saw that other law enforcers used the SPPA Law more. The SPPA Law is hierarchically considered to be the highest even though Perma Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System is valid, which also applies to other law enforcement officers."²⁰

¹⁷ Consideration Points, *Regulation of the Attorney General of the Republic of Indonesia concerning Guidelines for Implementing Diversion at the Prosecution Level*, Number 006 of 2015

¹⁸ Marlina, *Juvenile Criminal Justice in Indonesia Development of the Concept of Diversion and Restorative Justice*, Refika Aditama, Bandung, 2009, page. 198

¹⁹ R. Wiyono, *Child Criminal Justice System in Indonesia*, Sinar Grafika, Jakarta, 2016, page. 47.

²⁰ Irwan, *The Problems of Implementing Diversion Against Children Perpetrators of Narcotics Crime*, LEX Renaissance NO. 3 VOL. 5 JULY 2020: 525-538

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The author, after describing the problem of obstacles to the application of diversion in narcotics crimes committed by children, apart from differences in the views of the guidelines or the incompatibility between the SPPA Law and Perma Number 4 of 2014 concerning Guidelines for the Implementation of Diversion, is a diversion process in the case of narcotics crimes which are considered a crime without victims. can only be carried out by investigators, in this case only the police can carry out the diversion process. Article 9 of the SPPA Law stipulates that diversion must consider the crime, where narcotics crime is a type of crime without victims. Article 10 of the SPPA Law also stipulates that criminal acts that fall into the type of narcotics crime can only be diverted by investigators, in this case the police are allowed to diversify narcotics crimes.

E. CLOSING

Based on the above research on the implementation of diversion efforts against children who use narcotics in decision number: decision Number: 27/PID.Sus- Anak/2020/PT.BDG. First, the application of diversion efforts in narcotics crimes committed by children will always fail due to differences in the views of the guidelines or the incompatibility between the SPPA Law and Perma Number 4 of 2014 concerning Guidelines for Implementing Diversion. victims can only be carried out by investigators, in this case only the police can carry out the diversion process, resulting in diversion not being intended for criminal acts that are punishable by imprisonment of more than 7 years such as murder, rape, narcotics, terrorism and other criminal acts. produce Restorative Justice. the second is to determine the success and understanding between law enforcers in carrying out and seeking Diversion at the prosecution level by compiling Guidelines for Implementing Diversion at the Prosecution Level, so that the implementation of the Diversion provisions at the prosecution level as regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System needs to be further details on how to implement it.

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