

Legislative Ratios for Multiple Prohibitions for Residential Children Law No. 11 of 2012 on the Child Criminal Justice System

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Abstract

The purpose of this research is to study and analyze and find the ratio of legislation to prohibit diversion regulation for children. This research is a normative legal research, which is done by researching library material, which is secondary data. So the approach taken is the statute approach and the concept approach. This diversion is seen as providing protection for children. Based on the results of the study it can be concluded as follows: The ratio of legislation to formation Article 7 paragraph 2 point b Law No. 11 of 2012 concerning Children's Criminal Justice System is: (a) Diversion cannot be pursued because he has failed in the first diversion; (b) It has been agreed that recidivating funds for criminal acts with threats above 7 is not attempted diversion; (c) Diversion is proposed for minor cases; and (d) Diversion is sought for the first crime of the child.

Keywords: Diversity, recidivist, protection.

1. Introduction

Children are the next generation of nation and successor to the existing development struggle. In the life of the nation and state, the child is the future of the nation and the successor to the ideals of the nation, so that every child has the right to survival, participation, development, and growth, and has the right to protection from acts of violence and discrimination as well as civil and freedom rights (Explanation of Law Act No. 23 of 2002). Pancasila as the ideology of the Unitary State of the Republic of Indonesia is very concerned and appreciates the issue of justice. The issue of justice gets a position that is so urgent as a form of the realization of a just and civilized Humanitarian Precept and social justice for all Indonesians (Bambang Waluyo, 2011). Discrimination is a treatment that is very contrary to the values in the Indonesian ideology, namely Pancasila.

Protection of children is one of the responsibilities of the State. This is explained in Article 28B of the 1945 Constitution that the State guarantees that every child has the right to survival, growth, and development and has the right to obtain protection from discrimination and violence. Therefore, the handling of children who are in conflict with the law should not cause stigmatization or labeling and lack or even lack of guidance to them so that they break their hopes of becoming a useful youth for their nation (M. Nasir Djamil, 2013). Referring to this, it is important to agree on a model for handling children in conflict with the law.

The Children's Criminal Justice System Law provides a means of transferring the settlement of Child cases from the criminal justice process to a criminal justice process called diverse (Article 1 number 7 Act No. 11 of 2012 concerning the Criminal Justice System of the Child). Diversion is an effort provided by the State that aims to: obtain a peace agreement between the victim and the Child; completing Child cases outside the judicial process; avoiding Children from deprivation of liberty; encourage people to participate; and instill a sense of responsibility to the Child (Article 6 of Law No. 11 of 2012 concerning the Child Criminal Justice System).

One should be protected and guaranteed human rights as explained in Article 28D of the 1945 Constitution. Everyone has the right to recognition, guarantee, legal certainty and obtain protection, which is just and gets the same treatment before the law. In Article 2 of the Children's Criminal Justice System Law it is explained that the juvenile criminal justice system is carried out based on the principle:

- a. Protection;
- b. Justice;
- c. Non-discrimination;
- d. Best interests for children;
- e. Appreciation of children's opinions;
- f. Child survival and growth;

- g. Coaching and coaching children;
- h. Proportional;
- i. Deprivation of independence and punishment as a last resort; and
- j. Retaliation avoidance.

Article 2 of the Children's Criminal Justice System Law as the basis for carrying out the criminal justice system of children, so clearly provides the best protection for children, not discriminating against children, and providing justice for children. It is all done in order for the future of a child who is dealing with the law either as a child in conflict with the law, a child who is a witness of a crime or a child victimized by a crime is guaranteed for their future. Article 7 paragraph (1) of the Children's Criminal Justice System Law states that At the level of investigation, prosecution, or examination of the child case in the District Court is required to seek the Diversion. Then in verse (2) mention that the Diversion as meant in paragraph (1) shall be executed if the offense committed: a. be punished with imprisonment under 7 (seven) years, and b. is not a repetition of a crime.

Article 7 sub-article (2) sub b of the Children's Criminal Justice System Law states that the repatriation of child offenses cannot be obtained by the Diverse. Then in the elucidation of Article 7 paragraph (2) sub b Children's Criminal Justice System mentioned:

1. Repetition of the same crime
2. Repetition of offenses is not the same, and
3. Criminal acts settled through Diversion's efforts.

Discrimination is so clear in Article 7 paragraph (2) of the Children's Criminal Justice System Law, that equality in front of the law must be felt by every individual in a country (Petrus C. K. L. Bello, 2013). Because it is a manifestation of the protection of the State against its citizens. Children dealing with the law more than once (recidivism) in the Children's Criminal Justice System Law are not allowed to be diversified. If you see the explanation in Article 7 paragraph (2) of the sub-section of the Children's Criminal Justice System Law above, there will be an expansion of the meaning of recidivist. That is a child whose criminal action has been completed through diversion, if in the future he commits a criminal act, then the child is classified as recidivist and has no right to obtain diversion in the attempt to resolve his criminal act. Of course, this will make children who are in conflict with the law return to serving time in prison. When a child repeats a crime (re), what needs to be considered is the programs of diversion and the process of coaching in the correctional institution. This indicates that there is an error in coaching in the correctional institution. Not only that, the environment of the child must be the main concern. When a child in conflict with the law has been attempted diversion and then undergo a diversion program, or after the child in conflict with the law is serving his sentence in LPKA, however when the child returns to a neighborhood that is not conducive to child development, the child will be difficult to become better than before. For example, when a street child commits a criminal act, then it is processed and after that takes his sentence. When the child finishes his sentence, and he returns to the road, then, of course, the possibility of the street child committing a crime is very large. As stated by Edwin Shuterland that Criminal behavior is learned. Negatively, this means that criminal behavior isn't inherited (Frank E Hagan, 2013).

The child is the successor to the ideals of the nation, therefore everything that governs the child must be considered carefully and wisely. Especially for repetition of crimes committed by children. Herbert L. Packer mentions that (Herbert L. Packer, 1968):

1. *the criminal sanction is indispensable, we could not, now or in the foreseeable future, get along without it.*
2. *the criminal sanction is best available device are have for dealing with gross and immediate harm and threats of harm.*
3. *the criminal sanction is at once prime guarantor, used indiscriminately and coercively, it is threatener*

Referring to the opinion of Herbert L. Packer, it can be concluded that the use of criminal sanctions must be very careful. Because criminal sanctions can be a threat if used indiscriminately, let alone criminal sanctions against children in conflict with the law. It must be much more careful, therefore diversion is needed for the recidivating of children who have committed a crime.

Based on that, it is necessary to analyze what is the ratio of the legislation forming the Law No. 11 of 2012 concerning Children's Criminal Justice System prohibits diversion for the repetition of criminal acts committed by the Child and how the diversion arrangements for residual children in the future will reflect the principle of child protection.

2. Objectives

To study and analyze and find the ratio of regulation legislation prohibiting diversion for repetition of crimes committed by children and to analyze and reformulate the regulation of diversion for repetition of crimes committed by children that reflect the principle of protection in the future.

3. Methods

The writing of this research uses normative legal research methods through a legislative approach, historical approach, approach. The legal material is collected based on the theme of the issues that have been raised and then reviewed in depth. The results of the analysis are obtained by using legal logic, legal arguments and legal principles that will produce a conclusion in response to the formulation of the problem in this study.

4. Results And Discussion

To be able to find out the ratio of legislation from the establishment of Article 7 paragraph (2) letter b of the Children's Criminal Justice System Law, the Minutes of the Children's Criminal Justice System Law Article 7 of the Act (2) will be attached as follows:

First, an opinion that supports the repetition of a crime committed by a child is not entitled to a diversion:

1. The diversion, which is 7 years under the criminal act and is not a recidivism, was concerned with the recidivism. so, if the recidivist is yes we do not seek diversion because here they have done it at the time and it still has to be processed (Harkristuti Harkrisnowo, Minutes of Law No. 11 of 2012 concerning Child Criminal Justice System).
2. So when we discuss the matter of diversion, we have agreed on the category, if I am not mistaken, it may be for less than 7 years, then also not allowed to recidivism and that is our agreement. what became our problem at that time was why the diversion was only limited outside the court process, whether the child who had been sentenced had permanent legal force, the possibility of diversion was not opened, it could be after he entered "wow I apologize", so he did not spend time the sentence (Benny Kabur Harman, Minutes of Law No. 11 of 2012 concerning Child Criminal Justice System).
3. So countries but it is proposed to be lighter, be a murder case. Although there are also rape cases mediated in other countries such as Australia, there is a mediation rape, but we initially did not want the serious cases that used this diversion (Harkristuti Harkrisnowo, Minutes of Law No. 11 years) 2012 concerning Child Criminal Justice System).
4. Almost the big countries in the world for the decision of juvenile justice, indeed, for the first time he committed a crime, he never made a decision to go to prison, so if we are here for the first time, then the child has gone to prison, it means that in general, we are in conflict with justice in the international world, when there was none in America and Europe, the first sentence must be returned to his parents and under the supervision of a child counselor. Well, let's say we are here at the BPS or the BPKS if we are now the most important is a court decision. If the court verdict was just exemplified by a flip thief, then enough is returned to his parents under the counselor's control, then if he had thieved his sandals twice it might be tighter in control but still not put into the correctional facility or the LPAS that we call, still under parental supervision. It was only the third time, if he still did it, he just went to LPAS. Therefore, I have also requested clarification on how our Judge, whether our Judge in the first case is obliged to punish, if that is the case the legal system that we are making now for

juvenile justice has no progress, the same, (Nudirman Munir, Risalah Law No. 11 of 2012 concerning the Child Criminal Justice System).

Secondly, opinions that support recidivism must be sought diversion:

1. It does not need to be limited, meaning diversion as an initial effort, give him complete freedom and if we motivate and philosophy to maintain the child so that he is not convicted and coaching it, so indeed the tendency for inter-family agreement may be because it then involves a fight or murder, murder is certainly his family's business too and it seems to me that if the victim receives it sincerely, with certain compensation, for example, it might be more useful, than in prison there is no benefit for him, instead it increases the burden of the state, the victim also nothing to gain, so in this case maybe in the sense of not Arabic law, Islamic law about jihad and all kinds of things might be good in this case, so as an initial effort, it is strived to the maximum before, unless you find it yes it is okay (H. Ahmad Kurdi Moekri, Minutes of Law No. 11 in 2012 concerning the Child Criminal Justice System).
2. According to Mr. Nudirman 's proposal it does not need to be limited, even if there is a 7 - year threat, if it is peaceful, why not, so do not limit the outside of 7 years, 7 years continue to occur, I do not think it is necessary if he is a child in the capacity of children to do only the diversion effort, if it is finished, the legality is left by the court (H. Ahmad Kurdi Moekri, Minutes of Law No. 11 of 2012 concerning Child Criminal Justice System).
3. Recidivism, prison, diversion with very clear data if a child is imprisoned, there is a very high likelihood that he will become a recidivism, up to 80% of those in detention at Berkeley University in California. If that happens in other countries even though there is no data about Indonesia, why not happen the same as Indonesia. I think the condition of the year is child delinquency, about the same in the whole world and there is also evidence that the diversion and running programs actually reduce crime and recidivism. Means that actual diversion is far more effective than prison or traditional approaches.

The Philippines can be done in Indonesia where if there is no violence, no rape, no murder, other cases can diversify, do not have to diversify and in this diversion process, the victim is asked but proactively asked to be given an explanation why it is better for the sake of diversion victims, and for the best interests of children and countries most victims agree and want to participate, because the question is how to be compensated, not to want a formal process or want to go to jail.

Australia, there is New Zealand, there is Canada, there are Filipinos, everything is the same way, diversion must be done if there is no violence, if the child acknowledges the error and there is sufficient evidence, the process goes through family deliberation but family deliberation. In essence, there are children and families of the perpetrators and there are father, community leaders and this deliberation is open to victims. The victim is explained, given the opportunity, if you want to please, if there is no, what opinion is there, how compensation and opinions are always considered in the choice of options and compensation measures, but not the final decision of diversion or not diversion because it becomes a *brivest*, not restorative (Arosio Asnar, Minutes of Law No. 11 of 2012 concerning Children's Criminal Justice System).

The compositions of the Child Criminal Justice System Law Article 7 paragraph (2) letter b shows different opinions. There are those who support the diversion requirements there are also those who refuse. For those who support the diversionary requirement, it is argued that the repetition of criminal acts of the same kind or non-similar, indicates that diversion has failed. Therefore Juvenile delinquency no longer needs diversification. However, this does not reflect a protection contained in the 1945 Constitution of the Unitary State of the Republic of Indonesia. In Article 28b paragraph (2) it is explained that children have the right to survival, growth and development and the right to protection from violence and discrimination.

Analysis of Diversity Requirements with Normative Approaches and Theoretical Approaches

a. Normative Approach

The diversion requirements, especially for repetition of crimes committed by children of medicine which violate the principles in organizing the criminal justice system. This matter is regulated in Article 2 the right c of Law No. 11 of 2012 concerning Child Criminal Justice System. In the explanation of Article c, it is explained that what is meant by "non-discrimination" is the absence of different treatment based on ethnicity, religion, race, class, gender, ethnicity, culture and language, the legal status of the child, the order of birth of the child, and physical condition and / or mentally.

It is stated that these acts of discrimination are included from the child's legal status. This means that when the child has a status of having committed a crime, then when the child conducts a criminal act, then he still has the right to obtain his right in the criminal justice process, namely the right to diversion as stated in Article 7 paragraph (1) Law No. 11 of 2012 concerning Child Criminal Justice System, that diversion must be endeavored towards children.

Diversion is a form of legal protection for juvenile delinquency that must reflect the principles of protection that have been recognized by the world, namely:

- a. The principle of non-discrimination,
- b. The principle of best interests for children,
- c. The principle of children's rights to life, survival and development and
- d. The principle of respecting the views of children

The diversion requirements in Article 7 paragraph (2) point b are not in accordance with the principles of organizing a child criminal justice system and the principles of child protection.

b. Theoretical Approach

Diversion is currently considered a process that has been internationally recognized as the best and most effective way of dealing with children in conflict with the law. The idea of diversion initially arose because Juvenile delinquency was influenced by several other factors outside the juvenile delinquency's self, such as relationships, education, playmates and their environment. Therefore, some expert opinions will be elaborated regarding the causes of crimes committed by children:

1. Edwin Shuterland

Shuterland explains the process of crime committed by children as follows:

- a. *Criminal behavior is learned. Negatively, this means that criminal behavior is not inherited.*
- b. *Criminal behavior is learned in interaction with other persons in a process of communication. This communication is verbal in many respects but includes also "the communication of gesture.*
- c. *The principal part of the learning of criminal behavior occurs within intimate personal groups. Negatively, this means that the interpersonal agencies of communication, such as movies, and newspaper, plays a relatively unimportant part in the genesis of criminal behavior.*
- d. *When criminal behavior is learned, the learned includes (a) techniques of committing the crime, which are sometimes very complicated, sometimes very simple. (b) the specific direction of motives, drives, rationalizations, and attitudes.*
- e. *The specific direction of motives and drives is learned from definitions of the legal codes as favorable on favorable. In some societies, an individual is surrounded by person who invariably define the legal codes as rules to be observed, while in others he is surrounded by person whose definitions are favorable to the violation of the legal codes.*
- f. *A person becomes delinquent because of an excess of definitions favorable to violation of law over definitions unfavorable to violation of law.);*
- g. *Differential association may vary in frequency, duration, priority, and intensity.*
- h. *The process of learning criminal behavior by association with criminal and anti-criminal patterns involves all of the mechanisms that are involved in any other learning.*
- i. *While criminal behavior is an expression of general needs and values, it is not explained by those general needs and values since non-criminal behavior is an expression of the same needs and values (Rose Giallombardo, 1972).*

2. Robert Merton

Robert K. Merton, trying to see the relationship between certain stages of the social structure and delinquency behavior, he saw that certain stages of the social structure would foster a condition in which violations of social norms constitute a normal reaction (so as if there were circumstances without norms or anomies). In the theory of anomy, there are two elements that are used as a concern in studying various forms of delinquency behavior, namely the elements of social and cultural structure. Elements of culture produce goals which means the goals of entrenched interests, which include the framework of basic human aspirations, such as the urge to live. The goal is a form of unity and is based on the order of values in various levels of feeling and meaning. Whereas structural elements give rise to means that means that the existence of rules and ways of institutionalization that are institutionalized and accepted as means to achieve goals that have been entrenched in society (Lilik Mulyadi, 2014).

3. Albert K. Cohen

Albert K. Cohen (1955) in his book entitled *Delinkuen Boys, The Culture of The Gang*. The focus of his attention is on an understanding that delinquency behavior among young people, the lower class is a reflection of dissatisfaction with the norms and values of middle class groups and dominates the culture of society. Because existing social conditions are seen as an obstacle to their efforts to achieve life in accordance with the existing trends, thus encouraging young people in the lower class to experience cultural conflict, called frustration status. As a result, increasing the involvement of lower-class children in the activities of gangs and "*non-utilitarian, non-malicious and non negativistics*" deviant behavior (Albert K Cohen, 1955).

The agents of *delinkuen* are separate sub-cultural forms and impose a system of broad community values. He describes the sub-culture of something taken from larger cultural norms but then deflects in reverse and opposite. Delinquency behavior is justified by their cultural value system because the behavior is considered wrong by the larger cultural norms that make the classification of the sub-cultures of *delinkuen* become (Albert K Cohen, 1955):

a parent sub-culture – the negativistic subculture originally identified to delinquent boys; b. the conflict-oriented subculture – the culture of a large gang that engages in collective violence; c. the drug addict subculture – groups of youth whose lives revolve around the purchase sale, use of narcotics; d. semiprofessional theft – youths who engage in the theft or robbery of merchandise for the purpose of later sale and monetary gain; and e. middle class subculture – delinquent group that rise, because of the pressures of living in middle class environment.

R.A. Cloward and L.E. Ohlin put forward a theory called *Differential Opportunity System*. This theory suggests that irregularities in an urban area are a function of the differences in opportunities that children have to achieve, both legal and illegal goals. When the opportunity to obtain legal rights is blocked, criminal acts may occur, so that the tendency for involvement in narcotics use or by violence can also occur. Possible sub-cultures happened according to Cloward and Ohlin grouped into 3 (three) forms namely (Larry J. siegel & Joseph J Senna, 1988):

1. subculture crimes, forms of gang behavior intended for the benefit of fulfilling money or property;
2. subculture conflict, the form of a gang that seeks to find status using violence;
3. reiterates subculture, the form of a gang with characteristics of withdrawal from conventional goals and roles and then seeking escape by abusing drugs or narcotics or the like.

1. Ronald Akkers

Learning Theory (*Social Learning Theory*), developed by Ronald Akkers which is associated with child *delinquency*. The approach adheres to assumptions, that a person's behavior is influenced by learning experiences, community experiences accompanied by values and rewards in life in society (Ronald L. Akkers, 2000). In general, this theory holds that children will demonstrate their behavior on the basis of:

- a. reactions received from other parties (positive or negative),
- b. the behavior of adults who have a close relationship with them (especially parents), and
- c. the behavior they see on TV and in the cinema.

If a child observes aggressive behavior, for example, an adult slaps or hits another person during a fight, and if the child sees that aggressive behavior is permissible or brings gifts (praise), there will be a tendency for the child to react violently as long as he experiences a similar incident. Eventually, the child will master aggressive techniques and will be increasingly convinced that the use of violence will bring rewards. As a result, followers of this theory state that a child who grows up in a home environment where violence becomes a habit,

then the child will learn to believe that such behavior is acceptable and brings gifts or praise (Paulus Hadisuprpto, 2002).

2. Richard A. Cloward dan Lloyn Ohlin

The opportunity theory departs from the basic assumption, that there is a strong relationship between the environment of the child's life, the economic structure and the choice of behavior that is done next. Richard A. Cloward and Lloyn Ohlin argue that the emergence of *subculture delinkuen* and the forms of behavior that arise from it, depends on the opportunity, both the opportunity to comply with the norm and the opportunity to deviate from the norm. If the group of children (in their economic and environmental status) is blocked by the opportunity to comply with norms in order to achieve success in their lives, they will experience frustration (*frustration status*), their response in responding to frustration in their status, depends on the opening of the opportunity structure before them (Richard A. Cloward & Lloyn Ohlin, 1960).

The important thing to know is that children have several stages of development in their unique lives. This must be known by every party that carries out legal protection for children. in certain phases, children become very aggressive. The following will explain the phases experienced by children.

Child development consists of several growth phases that can be categorized based on the parallelism of the development of children's body with children's mental development. The classification is grouped into 3 (three) phases, the three phases are (Richard A. Cloward & Lloyn Ohlin, 1960):

1. The initial phase, this phase starts at the age of children 0 years to 7 (seven) years which can be referred to as childhood and mental development, development of body functions, development of emotional life, baby language and meaning of language for children, the first crucial period (*trozalter*) and the growth of early sexuality in children.
 - a. The second phase, this phase starts with the age of 7 to 14 years which is called childhood. In this second phase, classified into two periods, namely: The period of elementary school children starting from the age of 7-12 years is an intellectual period. This period is the initial learning period that begins with entering into a community outside the family, namely the school environment then observing the child and the life of the child's feelings, willingness and abilities in various kinds of potential, but are still stored or latency (hidden period).
 - b. Adolescence / pre-puberty or early puberty known as the *pueral* period. This period there is maturity of physical function which is characterized by the development of abundant physical energy, which causes the behavior of children to look rude, awkward, scandalous, impolite, wild, and others. In line with the growth of bodily functions, intellectual development also takes place very intensively so that interest in new knowledge and experience in the outside world is very large, especially the concrete, therefore puberty is referred to as pragmatic or small utility, where interest is directed at technical uses.
2. The third phase, this phase begins with the age of 7 to 14 years which is referred to as adolescence, in the true meaning of the puberty and *adolescent* phase, where there is a period of interconnection and the transition from child to adult. The period of puberty or adolescence is divided into 4 (four) phases, namely:
 - a. The first is the early period of puberty, also called puberty / pre-puberty.
 - b. The second is the negative phase, the second *trozalter*, the *verneinung* period.
 - c. The third is the actual Puberty period, this phase starts around the age of 14 years. Puberty in girls generally takes place earlier than in boys' puberty.
 - d. The fourth is the adolescence phase, this phase starts from around 17 years to around 19 to 21 years.

In this third phase which covers point three and four, during this period there are major changes. The major changes experienced by the child will have an impact on attitudes and actions towards more aggression so that in this period many children in action can be classified into actions that show the child's delinquency symptoms.

Children are part of the community where their rights must be protected. Children in the growth period are often faced with special situations, one of which is the child must deal with the law because his actions have violated the applicable provisions in society (Prima Astari, 2015). When a child commits a crime it does not

mean that the rights of the child are taken away. Children must still be given adequate legal protection for the child's future.

After knowing the causes of the child doing evil and also knowing the phase of the child's age which affects his behavior, we should be obliged to understand the child's condition and provide maximum legal protection. Especially for Juvenile delinquency who conduct repetition of criminal acts or residuals of children, adequate regulation is expected through diversion in order to create legal protection that reflects the principle of non-discrimination and the principle of best interests for children.

5. Conclusion

Based on the results in the discussion described above, the conclusions that can be raised to answer the formulation of the problem in this study are:

1. Ratio of legislation to form Article 7 paragraph 2 point b Law No. 11 of 2012 concerning Children's Criminal Justice System are:
 - a. Diversion cannot be pursued because he failed in the first diversion.
 - b. It has been agreed that recidivating of criminal acts with threats above 7 is not attempted diversion.
 - c. Diversion is proposed for minor cases.
 - d. Diversion is sought for the first crime of a child.

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