

Diversion Formulation for the Repetition of Crimes Done by Children

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Abstract

The purpose of this research is to study and analyze and formulate diversion arrangements for repetition of crimes committed by children that reflect the principle of protection for children in the future. This research is a normative legal research, which was done by researching library material, which was secondary data. The approach taken was the statute approach and the comparative approach. Based on the results of the study could be concluded as follows: based on an analysis of international conventions on children, as well as national legislation, then make comparisons with the countries of Thailand, Norway and the Philippines, and guided by the Indonesian ideology namely Pancasila then offered diversion regulations which are regulated in Article 7 of Law No. 11 of 2012 concerning the Criminal Justice System of the Child will be formulated as article 7: (1) At the level of investigation, prosecution, and examination of cases of children in the district court Diversion must be sought. (2) For criminal acts with a threat of more than 7 years, then diversion is not required.

Keywords: Diversion, Repetition, Child Protection.

1. Introduction

Children must be dealt with uniquely in contrast to adults. Along these lines, the worldview of the taking care of model that applies through the Juvenile Court Law is the same as that of adults, with *the Retributive Justice* model, in particular, the discipline as the primary decision or countering for the crime that has been submitted. This model is improper, the inconsistency depends on three considerations: *first*, the explanation behind the child's characteristics. The Child Protection Act notices to develop and grow ideally, both physically rationally and socially, and be honorable. So the child is an individual who still needs to develop and create in all aspects, with the goal that the child has not possessed the capacity to decide the correct decision of activity. *Second*, the explanation behind the eventual fate of the child. Children who are sentenced as named and disparaged after discipline make it troublesome for the child's mental and social development in the future. *Third*, reestablishing relations between Children in conflict with the law, victims and the community (Law No. 23 of 2002 concerning Child Protection).

Juvenile Delinquency or children in conflict with the law fundamentally do not comprehend or are not completely mindful of what they have done. This is on account of in the adolescent phase (*adolescent*). The child experiences a progress procedure in which potential anti-social behavior is joined by a great deal of change and disarray that influences adolescent lose control (*adolescent*), touchy enthusiastic control becomes a boomerang for him. This will be a perilous danger if left without legitimate supervision by all gatherings, the indications of child delinquency will be activities that prompt criminal acts (Wagiati Soetedjo and Melani, 2013).

Theoretically, the imprisonment is not just eliminated autonomy for people, however, can likewise cause pessimistic impacts, even an imprisonment can make individuals who are punished to be more malicious in the wake of leaving jail. Muladi said that imprisonment caused dehumanization, the danger of imprisonment, and making a "bad stamp" (stigma). Involvement in the Penitentiary is exceptionally perilous and impacts detainees, it is usually troublesome for detainees to conform to the law after they leave the restorative institution. *The American Correctional Association* expressed in 1959 that imprisonment carried out exclusively base on criminal perspectives ended up producing a larger number of criminals than prevent crime (Sri Sutatiek, 2012).

The best advantages for children who are in the conflict with the law ought to be a benchmark for giving criminal authorizations. The arrangement of criminal assents for children in the conflict with the law decides the future of the child. The arrangement of criminal authorizes that are not suitable for children in conflict with the law will interfere with the child's development and advancement. Not just the awful impacts that will be experienced by children who are confronting the law if imprisonment is forced, the violence becomes the wrong effect gotten by the child who is in the conflict with the law in an exceptional prison for children. This is a result of 34 Provinces in Indonesia, there are 20 Special Penitentiaries for Children (Tya Eka Yulianti, 2015). There are still 14 provinces that do not have a Child-Based Development Organization. Thus, children in the conflict with the law will be joined with adult prisoners. Along these lines, the potential for violence for children in the conflict with the law will increase.

Article 7 number (2) point b of Law No. 11 of 2012 concerning the Criminal Justice System of Children

demonstrates an alternate treatment (discrimination), the equality before the law should be felt by each person in a nation (Petrus CKL Bello, 2013), in light of the fact that that is a sign of the insurance of the country against natives his nation. Redundancy of criminal acts carried out by children (recidivism) in Law No. 11 of 2012 concerning Child Criminal Justice System is not allowed to be expanded. In the event that you see the clarification in Article 7 number (2) point b of Law No. 11 of 2012 concerning the Criminal Justice System of Children above, there is a development of the significance of redundancy of criminal acts (recidivist). That is a child whose criminal activity has been finished through diversion, then he perpetrates a criminal act, then the child has been classified as a repeating criminal act (recidivist) and has no privilege to acquire preoccupation in the endeavor to determine his criminal demonstration. It does not reflect a protection for children in conflict with the law.

When the 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 a special child development institution (LPKA), but when the child returns to the neighborhood that is not conducive to child development, then the child will be difficult to be 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 finished serving his sentence, and he returned to the street, of course, the possibility of the child who lived on the street had committed a crime, was very large. As stated by Edwin Shuterland that *Criminal behavior is learned. Negatively, this means that criminal behavior is not inherited* (Rose Giallombardo, 1972). Malicious behavior can be learned, so if the child's environment is filled with acts of violence, it is difficult to access a better life then the potential for children to repeat their speech actions is very high.

Inconsistencies occur if the purpose of diversion is to prevent children from restorative justice and justice processes, and the results of diversion that are considered to educate children, are limited by the possibility of children repeating a crime. It must be comprehended that recidivism completed by children is influenced by several factors, ranging from initial problems of growth, personal characteristics that remain stable from small, the surrounding social and economic environment, in an age vulnerable to delinquency, delinquency records and response from the justice system (Erasmus AT Napitupulu, 2015).

These factors cannot be completely charged to children. All parties with an enthusiasm for children have a big role in rehashing criminal acts committed by children. The child's factor of rehashing a crime must also be seen from the point of view of the success of the Diversion beforehand or the success of coaching for children who rehashing the crime. By this rule, it can be ascertained that imprisonment seems to be the main choice of Law No. 11 of 2012 concerning the Criminal Justice System of Children.

2. Objectives

For studying analyze and reformulate the regulation of diversion for the redundancy of criminal acts committed by children which reflects the principle of protection in the future.

3. Methods

This study used normative legal research methods through a legislative approach, historical approach, comparative approach. The legal material was 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

Appreciation of the rights inherent in children should be prioritized consistently, places and personalities in advancing the principles of non-discrimination; the best advantages for children; right to live; sustainability and development, regard for children's opinions, it cannot be negotiable to dependably accompany these children (Laurensius Arliman S, 2016).

The future of a country is determined by the way the country maintains the future of its young generation. In the event both the policies and actions of a country in safeguarding the nation's children, then the country's future will be guaranteed good. On the other hand, if the state is bad and not serious policies and actions are to protect the children of their nation, then the destruction of the country is only a matter of time (Gorda AAA. Ngr. Tini Rusmini, 2017).

Diversion as a process for resolving child criminal cases including perpetrators, victims, families of perpetrators/victims, and other related parties. Then, exchanged to the process of solving criminal cases based on a restorative justice approach (Law No. 11 of 2012 concerning the Criminal Justice System of Children), to jointly overcome, resolve the legal conflicts faced by children to be better, provide solutions, reconciliation, reassuring the heart or resolving child criminal matters becomes a solution by prioritizing (*the best interests of the child*), not creating retribution (Bunadi Hidayati, 2017). Diversion is an effort to create peace between victims and *juvenile delinquent*.

International conventions provide the basis that diversion is an effort given to children who are in conflict with the law (*juvenile delinquent*) in order to maintain the bad stigma in the criminal justice system, the following will mention the comparison of international conventions governing diversion:

Table 1. Comparison of International Conventions on Diversity

International Provisions	Legal basis	Conversion provisions			Types of Violations / Crimes		Institutions / Offices Tackling the Diverse Implementation		
		Efforts to deal with children in conflict with the law without using the judicial process	Power to not continue the process	Reference to divert children from the criminal justice system	Not specified	Minor violations / small cases	Police, prosecutors, and other law enforcement	Other law enforcers	Not specified
<i>CRC</i>	Article 40.3 point b	✓			✓				✓
<i>The Beijing Rule</i>	Rule 11 & 17.4		✓			✓	✓		
<i>The Riyadh Guide Lines</i>	Rule 56 and 58		✓	✓	✓			✓	
<i>The Tokyo Rule</i>	Rule 5			✓		✓	✓		
United Nations Rules for the Protection of Juveniles Deprived of their Liberty	Rule 1 and rule 2		✓			✓	✓		

This table examines diversions regulated in the International Child Conventions.

In the CRC provisions, it is not given the type of violation or criminal act that can be expanded is determined, this provision also does not mention the institution authorized to carry out diversion. The provisions of *The Beijing Rules* mention conditions for diversion, namely minor violations or minor cases. The provisions of *The Riyadh Guide Lines* did not mention the conditions for diversion. The provisions of *The Tokyo Rules* also mention diversion is only sought for minor violations or small cases.

From the international provisions governing diversion, it can be inferred that these rules prioritize problem - solving through diversion efforts. Considering that various adverse effects will be endured by ABH if it has to be processed through a litigation process. As mentioned in *article 40.3 CRC, rule 11 of The Beijing Rules, rule 5 of Tokyo Rules and rule 56 of the Riyadh Guidelines*.

Another finding from international provisions is there are differences regarding the conditions given so that diversion efforts can be given, for example, such as the *CRC* and *The Riyadh Guidelines* do not mention the conditions for attempted diversion, while *The Beijing Rule* and *Tokyo Rule* mention diversions are carried out for minor violations. However, these international provisions make it clear that further arrangements will be adjusted to the provisions of the law in force in the countries of each participant.

Regarding the repetition of criminal acts (recidivist), there are countries that do not require children as a recidivist. Thailand and Norway are countries that do not include children as a recidivist. Both countries expressed recidivist is only intended for someone aged over 17 and 18 years. It means the two countries provide protection for children who are in conflict with the law so that they are not given additional penalties for committing a crime. The following will be displayed in a table on the comparison of the regulation of repetition of crimes between the countries of Indonesia, Thailand, and Norway.

Table 2. Comparison of Regulations for Criminal Repetition Between Indonesia, Norway, and Thailand.

Country	Indonesia	Thailand	Norway
Basic Criminal Defenders	Article 486, 487, and 488, For repetition of crime plus one third.	Article 94 of the Thai Criminal Code, There is no weighting basis for the repetition of crimes that have not reached the age of 17 years.	Article 61 of the Norwegian Criminal Code, There is no weighting basis for the repetition of crimes that have not reached the age of 18 years.

This table examines the comparison of residual requirements between Indonesia, Norway, and Thailand.

Provisions in Article 61 of the Norwegian Criminal Code and Article 94 of the Thai Criminal Code have in common, namely that repetition of criminal acts is only given to perpetrators of crimes that repeat crimes with ages above 18 years and over 17 years. It implies for children who conduct criminal acts, it cannot be classified as a repeat of a criminal act (recidivist). It is distinctive of what is regulated in Indonesia, in the Indonesian Criminal Code Articles 486, 487 and 488 express the repetition of criminal acts (recidivist) is the basis of criminal charges, it is plus one third and this is generally applicable, not only imposed on adult criminals but also children who are in conflict with the law.

Bentham said that benefit is the main goal of the law. This benefit is defined as happiness. So whether the law is good or not, depends on whether the law gives happiness to humans or not. Therefore, the task of law is to

deliver humans to the happiness of most of the people (Muhammad Erwin, 2016).

The criminal justice system of children must provide benefits for children in conflict with the law, the diversion requirements for repetition of crimes committed by children do not reflect that. With diversion restrictions for the repetition of criminal acts committed by children, this will be the basis for the criminal weight of the child. It has been explained above the causes of children committing crimes through a criminology approach, that many factors encourage children to commit crimes, by understanding the factors behind the child to commit crime that until repeating his actions, then it should be an important consideration in order to the diversion requirements for repetition criminal acts committed by children must be abolished.

The Philippines is one of the countries that do not provide diversion requirements. The country only provides diversification at each level of examination based on the weight of the remainder of the criminal threat committed by the *juvenile delinquent*. The following will be presented in a comparison table of diversion arrangements between Indonesia and Philippines.

Table 3. Comparison of the Differences between Indonesia and Philippines.

	Indonesia	Philippines
Law and Regulation	No. 11 of 2012 concerning SPPA	<i>Juvenile Justice and Welfare Act of 2006 (Republic Act No. 9344) of Philippines</i>
Age	12-18 Years	7-16 Years
Diversity Requirements in Each Country	Diversity requirements for each diversified country cannot be pursued for: 1. a criminal act whose threat is under 7 years and; 2. not recidivism (Article 7 number (2) point b)	For all types of criminal acts (Section 23)
Restorative justice Approach	Executed at every level of examination except for the value of casualty loss is no more than the local UMP and minor criminal offense (Article 9 number (2))	Executed at each level of examination (<i>Section 23</i>)

This table examines the comparison of diversion arrangements between Indonesia and the Philippines.

From the table above, you can see the similarities and differences between the two countries. The equation is that both countries have included diversion efforts for ABH. The two countries have also adopted the model of *restorative justice* as a model that is carried out in conjunction with diversion efforts. Then, the difference is that there are differences in the arrangement of age, conditions for obtaining diversion, and also about the model of the *restorative justice* approach.

The Philippines is enhancing for all criminal acts committed by children, and uses *the restorative justice* approach for all criminal acts and uses *the restorative justice* approach in the diversion process. It means the country involves the perpetrators, victims, families of perpetrators and victims and other parties relating to a criminal act that occurs to reach an agreement and settlement in each diversion process without sorting out the crimes committed (Marlina, 2010). The Philippines actually applies restorative justice in the diversion process. While the table that explains the implementation of diversion in Indonesia is very different. Indonesia provides certain conditions for diversion.

Regarding children who are in conflict with the law (ABH), it is important to make arrangements that support the growth of ABH. In formulating the rules governing ABH, aspects of protection must be considered. As mentioned in chapter IV, understanding the nature of child protection. The essence of child protection is:

1. The principle of non-discrimination (*non-discrimination*)
2. The principle of the best interests for children (*the best inter-child of the child*)
3. The principle of children's rights to live, survive and develop (*the right to life, survival, and development*)
4. The principle of respecting the views of children.

These four principles must be the basis for legal protection for children who must be reflected in the SPPA Law. However, these four principles have not been fully reflected in Law No. 11 of 2012 concerning the Criminal Justice System of Children. This is seen in Article 7 number 2 point b of Law No. 11 of 2012 concerning the Criminal Justice System of the Child which still provides diversionary provisions, which stated that ABH who had made repetitions of recidivist could not be attempted diversion. Article 7 number point b of Law No. 11 of 2012 concerning the Criminal Justice System of Children appears to violate the principle of non-discrimination and also the best interests of children.

The criminal law policy also covers the policy of reforming criminal law (*penal reform*). Criminal law reform essentially means an effort to orient and reform criminal law in accordance with the central values of

Indonesian socio-political, socio-economic, socioeconomic and sociocultural values that underline social policies, criminal policies, and law enforcement policies in Indonesia. In short, it can be said that the reform of criminal law essentially must be taken with a policy-oriented approach (*policy-oriented approach*) and at the same time approach oriented by value (*value-oriented approach*) (Barda Nawawi Arif, 2010).

Policy approaches in criminal law reform above include:

- a. As part of social policy, essentially the reform of criminal law is part of an effort to overcome social problems (including humanitarian issues) in order to achieve/support national goals (community welfare and so on);
- b. As part of the criminal policy, the reform of criminal law is essentially a part of community protection efforts.
- c. As part of the law enforcement policy, the reform of criminal law is essentially a part of the effort to renew the legal substance in order to make law enforcement more effective (Barda Nawawi Arif, 2010).

Crime countermeasures with criminal law policy, including 3 (three) stages, namely;

1. Formulation stage (legislative policy);
2. Application stage (judicial policy);
3. The execution phase (executive policy).

The formulation stage is the stage of law enforcement in conceptual while the application stage and execution stage has entered the law enforcement stage in concrete. The discussion of this dissertation will focus on the formulation stage or formulation policy. The formulation policy stage is the initial stage and becomes the basis for the concrete process for subsequent criminal law enforcement, namely the application and execution stages. The existence of this formulation stage shows that efforts to prevent and overcome crime are also the duties and obligations of lawmakers, not just the duty of law enforcement officers. Moreover, this formulation stage is the most strategic stage, because errors in this stage can hamper prevention and mitigation at the application and execution stages.

As explained above, efforts to overcome crime by criminal law policy include 3 (three) stages, namely; Formulation stage (legislative policy); Application stage (judicial policy); and execution phase (executive policy).

This study used the Formulation stage as an effort to overcome crime with a criminal law policy. To be able to formulate diversion rules for repetition of crimes committed by children that can reflect the principle of child protection, the formulation stage is used. Article 7 of Law No. 11 of 2012 concerning the previous Child Criminal Justice System as follows:

Article 7

- (1) At the level of investigation, prosecution and examination of cases of children in the district court
Diversion must be sought.
- (2) Diversion, as referred to in number (1) is carried out in the case of a crime committed:
 - a. threatened with imprisonment under 7 (seven) years; and
 - b. not a repetition of a crime.

Based on an analysis of international conventions on children, as well as national legislation, then comparing the countries of Thailand, Norway and the Philippines, diversion regulations are offered as stipulated in Article 7 of Law No. 11 of 2012 concerning the Child Criminal Justice System will be formulated as follows:

Article 7:

1. At the level of investigation, prosecution, and examination of cases of children in the district court
Diversion must be sought.
2. For criminal acts with a threat of more than 7 years, diversion is not required.

Do not provide diversion requirements for repetition of criminal acts committed by children, this will be a good rarity in legal protection efforts for criminal repetition committed by children. When a child has a residual status, this is a great moral freedom for the child. And this can be a trigger for the child to commit the next crime. Richard L. Lundman said that "arrest action is the beginning of the labeling process" (Richard J. Lundman, 1993). Therefore, all actions that can be taken to prevent children from the adverse effects of correctional institutions and the negative stigma of the process must always be carried out and strived to save the future of the nation's children.

5. Conclusion

Based on an analysis of international conventions on children, as well as national legislation, then make comparisons with the countries of Thailand, Norway, the Philippines, and based on the Indonesian ideology of Pancasila, the diversion rules are offered as regulated in Article 7 of Law No. 11 of 2012 concerning the Child Criminal Justice System will be formulated as follows:

Article 7

1. At the level of investigation, prosecution, and examination of cases of children in the district court Diversion must be sought.
2. For criminal acts with a threat of more than 7 years, diversion is not required.

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