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RESEARCH ARTICLE / REVIEW ARTICLE

The Diversion Completion Based on Law Number 11 of 2012 Concerning the Juvenile Criminal Justice System from the Perspective of Islamic Law

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Abstract: This study aims to implement the diversion in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System in the Court of Bengkalis Regency and the perspective of Islamic law. This type of research is normative research. Data collection methods employed interviews and documentation. The data analysis technique used qualitative analysis. The results of the study indicate that the implementation of diversion according to the perspective of Islamic law regarding the diversion of Juvenile cases based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, among others, in Islamic law, there is no normative evidence regarding criminal sanctions, especially in the form of imprisonment for children. This is because Criminal punishment sanctions for children in Islam are ta'dib (education) which is regulated by the waliyul amri (leader).

Keywords: Diversion, juvenile criminal justice, islamic law

1. Introduction

Crimes committed by children before reaching the age of 18 years old and brought to a court even if the child surpasses the age of 18 years but has not yet reached the age of 21 years (Article 20 of the Republic of Indonesia Law Number 11 of 2012 concerning the Juvenile Criminal Justice System) (Habibi, 2021; Wardi, 2021). The handling of criminal cases involving children differs from the handling of cases involving adults. Handling these children in such cases is specific and regulated by separate rules and regulations. Understanding of the process of handling Juvenile cases, may still be lacking among certain segments of the community, who do not understand the treatment, especially children in legal conflict, receives preferential treatment or the children cannot be punished, which is not entirely accurate. It is important to note that the process of handling Juvenile cases is regulated specifically (Fahlevi, 2018; Hardiansyah, 2020).

The Juvenile justice system is the entire process of resolving cases of children facing the law starting from the investigation stage to the guidance stage after undergoing a criminal process based on protection, justice, non-discrimination, the best interests of the child, respect for children, child survival and development, proportionate, deprivation of liberty, punishment as a last resort, and avoidance of reprisals (*vide* Article 1 Number 1 and Article 2 of the Republic of Indonesia Law Number 11 of 2012 concerning the Juvenile Criminal Justice System) (Haryaningsih & Hariyati, 2021; Nugroho et al., 2020).

The Government's policy related to the Juvenile justice issue aims to protect children against the law. The first reason is for special protection, namely legal protection in the justice system, and the second is a law that specifically regulates about Juvenile justice. In addition,



Law Number 3 of 1997 concerning Juvenile Court is currently replaced by Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (Ansori, 2014; Subarsyah, 2021).

Thus, the development, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System has experienced many changes, including in terms of the definition of children being broader and leading to the criminal justice system. Through an institutional perspective, there are institutions that can guarantee children's rights in experiencing the justice system. From a standpoint principle, it is also clear that children's rights are upheld in the law (Mahmud, 2019; Satya Prema et al., 2020; Wisnu Wardhana & Taruno Muryanto, 2019).

Implementing the new law, namely Law Number 11 of 2012, can serve as a basis for implementing the criminal justice system in Indonesia for children, not only through imprisonment but also through the implementation of Restorative Justice, which is more appropriate. According to the Islamic law, children those who commit criminal acts will not be subject to criminal responsibility either *hudud* punishment, *qishbas/diyat* or *ta'zir*. Punishment for children who are guilty in the perspective of Islam is borne by their parents, because they are obliged to educate their children to be the good people. If a child becomes a criminal, it means that the parents do not carry out their obligations properly, then it is the parents who bear the consequences and being sanctioned for their negligence (Adam, 2018).

Supreme Court regulations (*Perma*) regulate mediation (diversion) for children who are in conflict with the law. As much as possible, children should be spared from criminal proceedings to save their future. Supreme Court Regulation Number 4 of 2014 is an implementation guide of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Article 7 of the Law states that at the level of investigation, prosecution, and examination of children cases in district courts is mandatory to seek diversion. Paragraph 2 is mentioned:

Diversion as referred to in paragraph 1 is carried out in the event that a crime is committed by:

- a. Punished with imprisonment of up to 7 years, and
- b. Not a repetition of a crime

Cases that should preferably not result in imprisonment are in the following lists:

- a. Ordinary theft, the maximum penalty is 5 years (Article 362 of the Criminal Code). Example: stealing flip-flops in Palu.
- b. Aggravated theft, the maximum penalty is 7 years (Article 363 of the Criminal Code). Example: stealing duck in Purbalingga.
- c. Petty theft, a maximum penalty of 3 months (Article 364 of the Criminal Code). Article 365 of the Criminal Code, which involves theft with violence, cannot be diverted due to the maximum penalty is 9 years; 12 years in prison; or even death. For example: robbery, motor vehicle using letter keys
- d. Fights that do not result in serious injury or death. (Article 170 paragraphs 1 and 2 of the Criminal Code). As for brawls that result in serious injury or death are not subject to diversion because the threats are 9 and 12 years in prison (Article 170 paragraph 2, the second Criminal Code).

If the mediation fails, then a new criminal trial will be held for the child. Unfortunately, the government has not created the SPPA Government Regulation (PP) until now. Based on the problems above, the author will recognize about:

- a. How is Diversion implemented in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System?
- b. What is the legal perspective of Islamic law regarding the implementation of Diversion based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System?

2. Literature Review

2.1. *Children According to the Law*

According to Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, it is stated that a child is a person who is under 18 (eighteen) years old, including children who are still in the womb (Restoratif et al., 2014).

A child is both a trust and blessing from Almighty God, whose dignity, status, and rights as human being must be upheld. Children's human rights are part of human rights contained in the 1945 Constitution and the United Nations Convention on the Rights of the Child. Regarding national and state life, children are the nation's future and the next generation of the nation's ideals. Every child has the right to survival, growth, and development to participate, and to be protected from acts of violence and discrimination, as well as civil rights and freedom (Restorative et al., 2014).

Even though Law Number 39 of 1999 concerning Human Rights has included children's rights, the implementation of the obligations and responsibilities of parents, families, communities, government, and the state to protect children still requires a law regarding child protection as a basis of jurisdiction for the implementation of these obligations and responsibilities. Thus, the formation of this law is based on the consideration that child protection in all its aspects refers to the part of national development activities, especially in advancing the life of the nation and state (Restoratif et al., 2014).

Parents, families, and communities are responsible for maintaining these human rights in accordance with the obligations imposed by law. Likewise, in the framework of implementing child protection, the state and government are responsible for providing facilities and accessibility for children, especially in ensuring optimal and directed growth and development.

This law emphasizes that the responsibilities of parents, families, communities, government and the state are a series of activities carried out continuously to protect children's rights. These series of activities must be sustainable and directed to ensure the growth and development of children, both physically, mentally, spiritually and socially. This action is intended to create the best life for children who are expected to be potential successors to the nation, tough, have nationalism imbued with noble morals and Pancasila values, and are strong-willed to maintain the unity and integrity of the nation and state.

Child protection efforts need to be implemented as early as possible, from the fetus in the womb until the child is 18 (eighteen) years old. Starting from the concept of child protection that is complete and comprehensive, this law places the obligation to provide protection to children based on existing human rights.

Child protection aims to guarantee the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with human dignity, and receive protection from violence and discrimination for the realization of quality, noble, and prosperous Indonesian children. Every child has the right to live, grow, develop, and participate fairly in accordance with human dignity, and receive protection from violence and discrimination.

Every child has the right to know and be raised by their parents. Every child has the right to receive education and teaching in the context of personal development and the intellectual growth according to his interests and talents. Parents are obliged and responsible for:

- a. Caring for, nurturing, educating, and protecting children;
- b. Developing children according to their abilities, talents and interests; and
- c. Preventing the occurrence of marriage at the age of children.

The government is obliged to provide basic education for at least 9 (nine) years for all children. The state, government, family, and parents are obliged to provide the widest opportunity for children to obtain education.

2.2. *Child Protection Law*

Law Number 35 of 2014 is an amendment to Law Number 23 of 2002 concerning Child Protection, emphasizes the need for increasing criminal sanctions and fines for perpetrators of crimes against children, especially for sexual crimes which aim to provide a deterrent effects and encourages concrete steps to restore the physical, psychological, and social of the children.

There is a child protection law in Law Number 35 of 2014, with the following considerations (Restorative et al., 2014) :

- 1) The Unitary State of the Republic of Indonesia guarantees the welfare of each citizen, including the protection of children's rights as the human rights.
- 2) Children are a mandate and a gift from Almighty God, to whom dignity and worth as a whole human being.
- 3) Children are buds, potentials and the younger generation to continue the ideals of the nation, have a strategic role and special characteristics that guarantee the continued existence of the nation and state in the future.
- 4) For every child to be able to assume these responsibilities in the future, he or she needs to get the widest possible opportunity to grow and develop optimally, both physically, mentally and socially, and have a noble character. It is necessary to make efforts to protect and realize the child's welfare by providing guarantees towards the fulfillment of their rights and the existence of treatment without discrimination.
- 5) In order to realize the protection and welfare of children, institutional support, and laws and regulations are needed that can guarantee implementation.
- 6) As a law, it only regulates certain matters regarding children and specifically does not regulate all aspects related to child protection

2.3. *Islamic Perspective of Juvenile Justice Law*

Children are the mandate of Allah SWT who are born into this world in a state of nature and purity. As the younger generation, children are the successors to the aspirations of the nation's struggle and human resources for national development. In order to achieve maximum physical, mental and spiritual development, a child needs special guidance and attention, especially their parents.

Children's human rights are part of human rights contained in the 1945 Constitution and the United Nations (UN) Convention on the Rights of the Child, ratified on November 20, 1989. Article 16 paragraph (2) of the Convention states that: Children have the right to legal protection on such disturbances or attacks. Furthermore, Article 37 (a and b) of the Convention states that no child shall be subjected to persecution, or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release can be imposed for offenses committed by persons under the age of eighteen (Article 37 letter a).

The legal rules for children who commit criminal acts in Indonesia have actually been regulated in the Criminal Code (*KUHPP*), namely Articles 45, 46 and 47. However, these articles were declared no longer valid with the issuance of Law Number 3 of 2007 concerning Juvenile Court which was later refined through Law Number 11 of 2012 concerning the Juvenile Justice System. Therefore, if a child commits a crime, he or she will be legally processed based on the law.

Law Number 11 of 2012 concerning the Juvenile Justice System prioritizes diversion programs in the form of *restorative justice* in terms of prosecuting children who are proven to have committed crimes. Regarding the punishment rules for minors in Law Number 11 of 2012 as

contained in Article 71 paragraphs (1) and (2) in the form of principal crimes consisting of warning sentences, punishments with conditions: guiding outside institutions, community service, and supervision. Furthermore, job training, guiding in institutions, and imprisonment. Then, additional punishment consists of deprivation of profits derived from criminal acts or fulfillment of customary obligations.

According to Islamic law, a child who commits a crime will not be subject to criminal responsibility either *hudud* punishment, *qisas/diyat* or *ta'zir*. Their parents bear punishment for children who are guilty in Islam, because parents are obliged to educate their children to be good people. If a child becomes a criminal, it means that the parents do not carry out their obligations properly. Then, the parents who bear the consequences are being sanctioned for their negligence.

The provisions in Islamic law mentioned that there is no legal responsibility for a child until he reaches the age of puberty. The *qadhi* (judge) only has the right to reprimand his mistakes or set some restrictions that will improve and prevent future mistakes (Abdulrahman: 2015). If a child steals or even kills, they cannot be subject to any punishment. In fact, Wahbah Zuhaili, in his book of *al-Fiqh al-Islamiy*, notes that the status of the child's actions, in the category of *fiqh*, does not include criminal acts (*jinayah*).

Those who behave according to their bad desires and follow their deviant character, will submit to the commands of their reckless desires and elevate themselves to the status of a deity. Such people are the most misguided (Daud: 2001)

3. Research Methods and Materials

This type of research is normative research. This legal research method functions to see law in a real sense and how law works in society (Nana: 2009). This research approach employed an empirical legal approach. This research examined people in the relationship between applicable laws. The empirical legal research method is sociological legal research. It can be indicated that legal research is taken from facts that exist in a society, legal entity, or government agency.

The subject in this study is the Bengkalis Regency Court. Meanwhile, the object in this study is the Republic of Indonesia Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

Based on the data that has been successfully collected both primary and secondary data, a conclusion can be drawn for analysis process. The data analysis used qualitative analysis, in which data that were not in the form of numbers. Therefore, it does not use statistical formulas but judges based on logic and was described in the form of sentences and then connected with laws and regulations, opinions of scholars and related parties, as well as the logic of the authors.

4. Results and Discussion

Legal protection for children can be carried out as an effort to protect the law on various freedoms and children's human rights. Protection of children also includes interests related to the welfare of children. The protection of children in conflict with the law (*ABH*) is a joint responsibility of law enforcement officials. Not only children as perpetrators but also children who become victims and witnesses.

The Juvenile justice system or other laws and regulations relating to handling *ABH*, however, prioritize peace over the formal legal process which came into two years after the *SPPA* Law was promulgated on August 1, 2014 (Article 108 of Law Number 11 of 2012).

The Indonesian Criminal Law System has entered a new chapter in its development. One form of renewal that exists in Indonesian Criminal Law is the regulation of criminal law in the perspective and achievement of justice to repair and restore conditions after events and criminal justice processes, or known as restorative justice which is different from retributive

justice (emphasizing justice on retribution) and restitutive justice (emphasizing justice on compensation).

When viewed from the development of criminal law science and the nature of modern punishment, it has introduced and developed the *Doer-Victims* relationship approach. It is a new approach that has replaced the action or "*daad-dader strafrecht*".

Legal experts have introduced a formula for justice, especially in upholding human rights. There are three aspects of the approach to building a legal system in the context of modernization and legal renewal, namely in terms of structure and also substance and culture, which all of which are feasible to run in an effective manner, integral, simultaneous, and parallel forms (Ansori, 2004).

Children are part of citizens who must be protected because they are the nation's generation that will continue the leadership of the Indonesian nation. Besides being obliged to receive formal education such as schooling, child is also required to receive moral education so that they can grow into useful figures for the nation and state.

Mrs. Asyura Tri Rahmadhani, A.Md, AB, as a civil law officer, also explained that the provisions of the Convention on the Rights of the Child which the Indonesian government ratified through Presidential Decree Number 36 of 1990, are also set forth in the Law Number 4 of 1979 concerning Child Welfare and Law Number 23 of 2002 concerning Child Protection and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, all of which put forward the general principles of child protection, namely non-discrimination, the best interests of the child, survival and growth, as well as respect for children's participation (Darmika, 2018; Munawar et al., 2020).

PERMA's important point is that Judges are required to resolve the *ABH* issues with the Diversion procedure which is a legal procedure that is still very new to the criminal law system and reform in Indonesia. Besides, this PERMA also contains procedures for implementing diversion which as the basis for Judges in the completion of Juvenile crimes. Considering that, there is no regulation that contains special procedural law for diversion of the Juvenile Criminal Justice System. (Heriyanto et al., 2022)

Punishment rules for minors in Law Number 11 of 2012 as contained in Article 71 paragraphs (1) and (2) in the form of principal crimes consisting of warning sentences, punishments with conditions: guiding outside institutions, community service, and supervision. Furthermore, job training, guiding in institutions, and imprisonment. Then, additional punishment consists of deprivation of profits derived from criminal acts or fulfillment of customary obligations (Hrp et al., 2021; Iman, 2021; Munawar et al., 2020).

Islamic Criminal Law does not limit disciplinary sanctions that allow it to be carried out on a child and is left to the *Waliyul Amri* (government) in order to determine the punishment for a child. However, there are some Fiqh experts who stated that reprimands and beatings are part of disciplinary sanctions or *ta'dib*. *Waliyul amri* or the government can choose punishments for children according to the place and era in which they are. Such as punishment of reprimands and spanking, placing children who commit crimes into correctional or educational institutions, and so on. When it comes to criminalizing children in Indonesia, one of the most important things is to fulfill a sense of justice for children who have violated the law. One of the approaches used in Juvenile justice is the Restorative Justice System (RIS), which is a sociocultural approach and not a normative one (Iman, 2021).

The concept of restorative justice is implemented to criminal prosecution of children in Indonesia because there are similarities and differences between the two legal systems. The equation are as follows:

- a. Equally determine the criminal acts committed by children according to the principle of legality

- b. Both concern to the concept of restorative justice in trying cases of children who have committed crimes.
- c. Equally reduce the sentence on children who are proven to have committed a crime.
- d. Not prioritize punishment in convicting children.
- e. Determine the factor of reason and factor as a condition of being able to be responsible.
- f. Provide teaching and direction to children who commit criminal acts.

While the differences are:

- a) Legal basis

Positive law is based on the Criminal Code Articles 44, 45, 46, and 47 and Law Number 11 of 2012 concerning the Juvenile Justice System, while Islamic law is based on the *Al-Qur'an*, *Hadith*, *Ijma'*, and *Itihad* judges.

- b) Child age limit

According to positive law, a child is a person who is 12 years old and under 18 years old. Meanwhile, the age of a child in Islam is puberty, that is, a boy when he has had a wet dream (dreaming) and a woman when she has menstruated. However, if both up to the age of 15 (fifteen) years have not experienced wet dreaming or menstruation, they can be held criminally responsible.

- c) Alternative punishment.

The definition of a child in positive law is a person who is 12 years old and under 18 years old, within these limits, a child is subject to criminal liability. In the event that a child under the age of 12 (twelve) is suspected of having committed a crime, investigators, social counselors and professional social workers will hand over to their parents/guardians or include them in educational, guiding, and mentoring programs. Children who are 12 years old and under 18 years old will be subject to criminal liability. The prison sentence that can be imposed on a child is half of the maximum sentence of imprisonment for an adult and 10 (ten) years in prison if the crime is punishable by death or life imprisonment (Mujiaka, 2022).

According to Islamic law, there is no normative argument regarding criminal sanctions, especially in the form of imprisonment, because criminal sanctions on children in Islam are *ta'dib* (educated) which are handed over to the *waliyul amri* (leader).

5. Conclusion

Implementation of Diversion is carried out based on Law Number 11 of 2012 concerning Law Number 11 of 2012, where criminal justice for children under the ages (12 - 18 years) is completed from the criminal justice to process outside the criminal justice. All parties involved in a crime work together in overcoming problems to better create an obligation in family decisions by involving victims, children, and the community to find solutions to improve, reconcile and reassure the heart that does not create revenge. The perspective of Islamic law regarding the diversion of settlement of child cases (diversion) based on Law Number 11 of 2012 concerning the Juvenile Criminal Justice System includes that there is no normative argument regarding criminal sanctions in Islamic law, even imprisonment, because criminal sanctions on children in Islam are *ta 'dib* (educated) which is handed over to the *waliyul amri* (leader).

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