

## Diversions in the Form of Protection of Human Rights

Arhjayati Rahim<sup>1</sup>

<sup>1</sup> Sultan Amai Gorontalo State Islamic Institute of Gorontalo, Gorontalo-Indonesia, arhjayantirahim23@gmail.com

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### ABSTRACT

Crimes committed by children in Indonesia has reached its peak it signified the increasing rate of crimes committed by children. A dilemma when it comes to handling the perpetrators of crimes committed by children, on the other hand, children are vulnerable creatures and tend not to be accountable as a result of his actions, on the other hand, the child has committed a criminal offense that harms others. That many regulations that have been published to address the issue. The most recent is the Law No. 11 the Year 2012 on child criminal justice system, which emphasizes the process of diversion in solving criminal cases involving children. Diversion destination is clear in Act No. 11 of 2012 concerning juvenile justice system Article 6 of diversion aims: Achieving peace victims and children, Resolving cases of children outside the judicial process, Protects children from the deprivation of liberty, Encouraging people to participate, Instill a sense of responsibility answer to this Child. Hal accordance with the principle of the fulfillment of children's rights. So in this paper will discuss setting How Diversion Law as a form of Human Rights Protection. The existence of a diversion process in some cases of child crime that must be sought, it is hoped that in the future it will provide ideal and comprehensive protection for handling cases of children facing the law so that the fulfillment of children's rights both as victims and perpetrators can be carried out effectively and lead to fulfillment human rights because the truth is that human rights are inherent rights and exist in every human being and must be protected by the state

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### 1. INTRODUCTION

Criminal cases involving children both in the context of criminals and victims have not become alien to the people in our country of the Republic of Indonesia, even some cases involving children in this case both as perpetrators and victims are still categorized as children. This situation is a dilemma because on the one hand the actions they carry out are actions that clearly violate the provisions of criminal law and when the formulations in the articles in the criminal law are fulfilled, the child must automatically deal with the law itself, on the other hand when seeing the nature of

children, children are creatures that are vulnerable both physically and mentally so that when they do something most of them cannot think of the consequences.

Children are entrusted from the Almighty God and are extraordinary gifts, so it is a responsibility to care for and educate them so that later they can grow and develop well. The forerunner of a nation will begin with youth and youth, while young men and women will be born of children, the earlier a student is and prepared carefully both physically and mentally, the stronger the successor of a nation. The process of fostering children can be started in a family life that is peaceful and prosperous in birth and spirit<sup>1</sup>

Child growth and development is important to note so that one day the child can grow and develop into a fully human in the sense of having a physical, physical and mental balance, of course, this can not be separated from the moral system and environment where the child grows and develops. Given that children are creatures that are still vulnerable both in terms of physical and mental aspects, we need a law that accommodates this, because dealing with the legal system will result in pressure on children who in fact are still vulnerable.

Steven Allen stated that more than 4,000 Indonesian children were submitted to the court each year for minor crimes such as theft.<sup>2</sup> Throughout 2000, it was noted in the criminal statistics of the police that there were more than 11,344 children suspected of being perpetrators of criminal offenses. From January to May 2002, found 4,325 child detainees in detention centers and prisons throughout Indonesia. According to the Director General of Corrections, Ministry of Law and Human Rights during 2008 there were 4,301 prisoners and child detainees, with details of child prisoners (2,282 children) and child custody (2,019 children).<sup>3</sup>

The emphasis on giving diversion can also be a benchmark and a form of professionalism from law enforcement officers at every level because when they are negligent or do not seek diversion at all they will be subject to administrative and criminal sanctions, in order to realize minimum protection of child rights law enforcement officials should have prepared all of them are both substance and technical in nature so that the implementation can be carried out optimally. However, the child remains a child, with all the armpits that are independent they really need love. They need protection and affection from the surrounding adults.<sup>4</sup>

## **2. METHOD**

This study uses the Normative research method, with a legal approach. The types and sources of data in this paper consist of Primary Data, namely data obtained directly through the questionnaire method and direct interviews with samples, secondary data, namely data obtained from library studies, documents, and legislation.

Data processing and analysis basically depend on the type of data Analysis techniques Primary and secondary data obtained through this research activity will be

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<sup>1</sup> Mulyadi Alrianto Tadjuddin, Yuldiana Zesa Aziz. (2018). Protection of Papuan Native Children Conflicting with Law through a Restorative Justice Approach. *Musamus Law Review*, 1(1), pp. 1-20

<sup>2</sup> Purniati. (2005). *Analisis Situasi Sistem Peradilan Anak (Justice System) di Indonesia*, Jakarta : UNICEF, pp,I

<sup>3</sup> <http://ditjenpas.go.id/article/article.php?id=152> : 15 April 2015

<sup>4</sup> Nashriana. (2011). *Perlindungan Hukum Pidana Bagi Anak di Indonesia*, Jakarta : PT.Raja Persada, pp.13

analyzed qualitatively and sharpened the analysis, then processed and presented in a descriptive manner by describing, describing and explaining according to the issues raised and reviewed in this research.

### **3. RESULTS AND DISCUSSION**

#### **3.1. Human rights**

Humans are the most perfect creatures and given the noblest position before God Almighty, human beings are equipped with physical and mental perfection and grace in the form of thoughts and reason so that they can distinguish between good and bad this is the ideal concept of humans. Privileges of man are rights inherent in him where such rights cannot be disturbed and sued by anyone because it is a gift from God Almighty and attached to each human being which is commonly known as human rights.

Indonesia is still included in the list of countries violating human rights (HAM) as Amnesty International released.<sup>5</sup> Human rights originated from French, namely *Droit de l'homme*, which when translated in Indonesian meant human rights, in Dutch known as *mensenrechten* while in the language of Human rights, the variety of the above terms with a differently indicates that there is the recognition of the existence of human rights regardless of national differences, the language of the religious fund race.

Human rights mean the rights inherent in human dignity as the creation of God Almighty or basic rights whose principles as a gift of God, based on the above opinion clearly explains that these rights are inherent gifts at birth after each human being.<sup>6</sup>

#### **3.2. Understanding of Children**

Before too much confusion about children, it is necessary to know the meaning of the word Child itself. In accordance with the translation of the large Indonesian Language Dictionary the child is the second descendant but based on the provisions of the law there is a category specifically regarding the age limit in defining the child and sadness when seeing the boundary there is no uniformity in sharing the rules about setting the age limit of children, as an illustration, the authors cite the following:

1. Law No. 1 of 1974 concerning Marriage, requires a marriage age of 16 years for women and 19 years for men
2. Law No.4 of 1979 concerning Child Welfare defines a 21-year-old child and has never married
3. Law No. 3/1997 concerning the Child Court defines a child as a person who in a criminal case is eight years old, but has not reached 18 years and has never married
4. Law No. 39 of 1999 concerning Human Rights states that a child is someone who is not yet 18 years old and has never married
5. Law No. 13 of 2003 concerning employment allows the age of working 15 years
6. Law No. 20 of 2003 concerning the National Education system imposes a 9-year compulsory education that is connoted to children aged 7 to 15 years.<sup>7</sup>

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<sup>5</sup> Imanuel Marthen Dumais, Muhadar, Marwati Riza. (2018). The Right of Suspects to Obtain Legal Aid at Criminal Investigation. *Musamus Law Review*, 1(1), pp. 53-62

<sup>6</sup> Ramdlong naning. (1983). *Hak Asasi Manusia di Indonesia*. Lembaga Kriminologi Indonesia, Jakarta. pp. 8.

The definition of children dealing with or in conflict with law is in Article 1 paragraph 3, in this article states that the child in question is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years who is suspected of committing a crime. So, it should be said that when a child is faced with a law, it should not be at risk for the effects of retaliation or focus on sanctions given but must take into account the rights of the child.

### **3.3. Children's Rights in Law**

Children are unique creatures who basically can carry out their own activities but their development is also very influenced by the environment in which they grow and develop. In fact, children cannot protect themselves from various types of actions that cause mental, physical, social harm in various areas of life and livelihood.

Children must be helped by others in protecting themselves, given the situation and conditions, especially in the implementation of juvenile justice that is foreign to themselves.<sup>8</sup> Human rights mean the rights inherent in human dignity as the creation of God Almighty or basic rights whose principles as a gift of God, based on the above opinion clearly explains that these rights are inherent gifts at birth after each human being.<sup>9</sup>

Indonesia has also ratified several Conventions on the Rights of the Child based on Presidential Decree No. 36 of 1990 concerning the ratification of the Conventions on The Rights of the Child, which in the convention classifies children's rights into 4 (four) categories, namely:

1. The Right of Survival
  - a. The right to get the name and nationality since birth;
  - b. The right to live with their parents unless this is not in accordance with their best interests;
  - c. State's obligation to protect children from all forms of abuse (abuse);
  - d. The rights of disabled children to obtain specialty care, education and training;
  - e. The right to enjoy adequate living standards and parental responsibilities, the state's obligation to fulfill them;
  - f. Children's rights to education and state obligations to ensure that basic education is provided free of charge and is compulsory;
  - g. Children's rights to protection from drug abuse and narcotics;
  - h. Children's rights to the protection of sexual exploitation and abuse including prostitution and involvement in pornography;
  - i. It is the state's obligation to peddle all efforts to prevent sales, smuggling, and kidnapping of children.
2. The Right to Develop
  - a. Prohibition of child discrimination;
  - b. Prohibition of child exploitation;
  - c. Critical conditions and child emergencies.

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<sup>7</sup> M. Nasir Jamil. (2013). Anak Bukan untuk Dihukum catatan Pembahasan UU Sistem Peradilan Pidana Anak (UU-SPPA). Jakarta : Sinar Grafika, pp.11

<sup>8</sup> Maidin Gultom. (2010). Perlindungan Hukum Terhadap Anak dalam Sistem Peradilan Pidana Anak di Indonesia. Bandung :PT. Refika Aditama, pp.12

<sup>9</sup> Ramdlong Naning. (1983). Hak Asasi Manusia di Indonesia. Jakarta : Lembaga Kriminologi Indonesia, pp. 8

3. The Right to Protection
  - a. The Right To Information;
  - b. The Right To Education;
  - c. The Right To Play And Recreation;
  - d. The right to participate in cultural activities;
  - e. The right to freedom of thought and religion;
  - f. Right to personality development;
  - g. The right to obtain an identity;
  - h. The right to get health and physical;
  - i. The right to be heard;
  - j. Right to / over the family.
4. The Right to Participation:
  - a. The right of the child to argue and get consideration for his opinion;
  - b. Children's rights to obtain and obtain information and expression;
  - c. The right of children to associate and establish relationships to join;
  - d. Children's rights to obtain access to information that is appropriate and protected from unhealthy information;
  - e. The right to obtain information about the Convention on the Rights of the Child.<sup>10</sup>

The enthusiasm to protect the nation's next generation has been demonstrated by various regulations that promote the fulfillment and protection of children's rights, with the aim of creating a conducive situation for child development so that it becomes the next generation of superior, moral and dignified nation that emphasizes on optimizing the enforcement of human rights.

### 3.4. Principles of Child Protection

The development of human rights enforcement has received this top priority as proven that human rights have also become a priority in law enforcement, concerning this matter especially the problem of law enforcement involving children in it both as perpetrators and victims. The regulation, which is specific to child protection, also focuses on the enforcement of human rights and even the most recent regulation, namely Law No. 11 of 2012 concerning the Child Criminal Justice System, has provided new solutions and breakthroughs in handling child criminal cases, new concepts offered is the use of diversion that must be sought by law enforcers at each level in handling child criminal cases.

Diversion is the transfer of the settlement of child cases from the judicial process to the process outside criminal justice (Law No. 11 of 2012 concerning the Child criminal justice system article 1 point 7), while according to Mariana Diversion is an action or treatment to divert or place the perpetrators of child crime get out of the criminal justice system.<sup>11</sup> According to historical analysis (Europe and America), it turns out that the interference of the court in the lives of children and families is always aimed at overcoming bad conditions, such as child crime, neglect, and exploitation of children.<sup>12</sup>

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<sup>10</sup> Setya Wahyudi. (2011). *Implementasi Ide Diversi Dalam Pembaruan Sistem Peradilan Anak di Indonesia*. Yogyakarta : Genta Publishing. pp 23-24

<sup>11</sup> <http://doktermarlina.htm> Marlina, accessed on 15 October 2014

<sup>12</sup> Sudarto. (1981). *Kapita Selekta Hukum Pidana*. Alumni. Bandung. pp. 130

The concept of diversion is the granting of authority to child law enforcers, after proper consideration, law enforcers will take policy actions in dealing with or resolving problems of child offenders by not taking a formal path, including stopping or not continuing / releasing from the criminal justice process or return / submit to the community and other forms of social service activities, such as surrender to parents / guardians, social development, giving warnings / advice / counseling, imposing fines or providing compensation to victims.

Attention to children certainly needs to get more optimal attention, because children are immature individuals both physically mental and social. Conditions that are very vulnerable, dependent and developing, children compared to adults are more at risk of acts of exploitation, violence, and neglect.<sup>13</sup>

Differentiation of child treatment is more intended to provide protection and protection for children in welcoming their long-term future and to give children the opportunity to go through counseling to get their identity to be independent, responsible and useful for themselves, their families, nations, and countries.<sup>14</sup>

### **3.5. Definition of Diversion**

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<sup>13</sup> Ima Sulistiawati. (2004). *Pengertian Konvensi Anak*. Harapan Prima. Jakarta. pp.46

<sup>14</sup> Wagiati Suted. (2006). *Hukum Pidana Anak*. Refika. Bandung., pp. 29.

<sup>15</sup> <http://doktermarlina.htm> Marlina, accessed on 15 October 2014

<sup>16</sup> Sudarto. (1981). *Kapita Selekta Hukum Pidana*. Alumni. Bandung. pp. 130

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### **3.6. Purpose of Diversion**

The purpose of the introduction of diversion in the latest regulations on the juvenile justice system is essential to protect children from things that could harm them during their examination process based on existing legal regulations, considering the complexity and protocol of the criminal justice system that can make children burden. then the concept of diversion is a solution to avoid the child from the situation.

It is clearly seen in Law number 11 of 2012 concerning the juvenile article 6 version of the judicial system aimed at:

- a. Achieve peace between victims and children
- b. Complete child cases outside the court process
- c. Avoid children from deprivation of independence
- d. Encourage the community to participate
- e. Instill a sense of responsibility to children

Interesting from the concept of diversion in the law above is that the word "must be sought" makes diversion a matter that must be observed and implemented for law enforcement in every level of inspection because when law enforcers do not seek diversion, sanctions will be imposed on them both administrative and criminal. This can be seen in Law No.11 of 2012 concerning the juvenile justice system 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 paragraph (1), is carried out in the event of a criminal offense committed:
  - a. Threatened with imprisonment under 7 (seven) years; and
  - b. Not a criminal repetition

The article above clearly limits the provision of diversion efforts to cases involving children, namely under seven years and not repetition, so that when the act committed by a child is punishable by a sentence of more than seven years and or repetition, diversion efforts cannot be given.

Enforcement and fulfillment of children's rights in the law do need to be considered but do not forget the real main goal of child development, namely the moral revitalization of children facing the law, moral and mental improvement is very important for the survival of life and growth of the child. by children cannot be separated from the conflict of morality that exists within the child and the community where he lives. Legal morality as a human tool is thus a guide to bringing human life to be better in individual and social life.<sup>19</sup>

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<sup>17</sup> Ima Sulistiawati. (2004). *Pengertian Konvensi Anak*. Harapan Prima. Jakarta. Pp..46

<sup>18</sup> Wagiati Suted. (2006). *Hukum Pidana Anak*. Refika. Bandung., pp. 29.

<sup>19</sup> Jeffry Alexander Ch. Likadja. (2015).Memaknai "Hukum Negara (Law Through State) dalam Bingkai " Negara Hukum (Rechstaat)". *Hasanuddin Law Review. 1(1),* pp. 83

#### 4. CONCLUSION

Breakthroughs carried out in the form of regulations specifically in handling child crimes in the form of Diversion are clearly a positive step in efforts to resolve criminal acts committed by children. The diversion process regulated in Law No. 11 of 2012 concerning the Child Criminal Justice System has the spirit of solving child criminal problems that are required with a spirit of kinship and leads to a win-win solution and the balance of interests between the perpetrator and the victim and the diversion process will minimize the potential of children to undergo a criminal process that leads to deprivation of independence, so that with this process the fulfillment of children's rights during the legal process can be provided optimally as a form of protection of the human rights inherent in the child. The fulfillment of children's rights must be considered because the child is the successor of the nation that must be protected in various aspects of his life, even in the position of him as a criminal offender without forgetting the procedure that must be applied to him as a result of the violations which he put forward. and protection of their human rights.

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