

# 6 ADALAH

Buletin Hukum & Keadilan

## Diversion Policy for Child Victims of Drug Abuse in Indonesia: A Normative Juridical Analysis

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### **Abstract:**

*Children represent the future generation and must be granted special legal protection, particularly when they come into conflict with the law. In cases of drug abuse, children often occupy a complex position, not only as perpetrators of criminal acts but also as victims of social environment influences, family conditions, peer pressure, and exploitation by other parties. This study examines whether the mechanism for implementing diversion for children involved in narcotics offenses is in accordance with the objectives of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and Law Number 35 of 2009 concerning Narcotics in Indonesia. Furthermore, it analyzes Indonesia's criminal law policy regarding the application of diversion in addressing juvenile drug-related offenses. This research employs a normative juridical method with a descriptive-analytical*

*approach, focusing on statutory regulations and legal principles relevant to juvenile justice and drug abuse cases. The findings indicate that children involved in drug abuse should primarily undergo rehabilitation as a form of guidance and recovery rather than be subjected to punitive sanctions. Imposing criminal penalties on children is considered disproportionate, as child drug users are essentially victims of illicit drug trafficking, especially given their vulnerable age. Judicial considerations in deciding such cases include juridical aspects such as the prosecutor's indictment, criminal charges, witness testimonies, the defendant's statements, and evidence presented in court, as well as non-juridical aspects, including aggravating and mitigating circumstances. Therefore, diversion policies play a crucial role in ensuring that the best interests of the child are upheld, emphasizing restorative justice and rehabilitation over punishment in handling juvenile narcotics cases.*

**Keywords:** *Diversion Policy; Child Victims; Drug Abuse; Juvenile Justice System; Rehabilitation.*

## A. INTRODUCTION

The drug problem in Indonesia is still something urgent and complex. In the last decade, this problem has become rampant. It is evidenced by the significant increase in the number of drug abusers or addicts, along with the increasing disclosure of drug crime cases. The Indonesian people, even the world community, in general, are currently facing a very worrying situation due to the rampant use of various types of drugs illegally. This concern is further sharpened due to the rampant illicit circulation of narcotics that has spread to all levels of society, including among the younger generation. This will greatly affect the life of the nation and state in the future. Therefore, there needs to be appropriate legal measures against drug abuse among the younger generation.<sup>1</sup>

Children are a gift or entrust that Allah gives to every parent, who is attached to the dignity and dignity as a whole human being who is also the shoot, potential,

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<sup>1</sup> Ibrahim Nainggolan, *Correctional Institutions in Carrying Out Rehabilitation for Narcotics Inmates*, *EduTech Journal: Journal of Education and Social Sciences* Vol. 5 No. 2 (2019), p. 140

<sup>2</sup> Sudarto in Setya Wahyudi, *"The Implementation of the Idea of Diversion in the Reform of the Juvenile Justice System in Indonesia"*, (Yogyakarta: Genta Publishing, 2011), p. 47

and successor of the young generation to the ideals of the nation's struggle, has a strategic role and has special characteristics and characteristics that ensure the continuity of the existence of the nation and state in the future. Every child, in addition to being obliged to receive formal education such as school, is also obliged to receive moral education, so that later they can grow into figures that are useful for the nation and state. This is in accordance with the provisions of *the Convention on the Rights of the Child* which was ratified by the Indonesian government through Presidential Decree Number 36 of 1990, then outlined in Law Number 4 of 1979 concerning Child Welfare, Law Number 23 of 2002 concerning Child Protection which has been amended by Law Number 35 of 2014, Law Number 11 of 2012 concerning the Child Criminal Justice System, all of which state the general principles of child protection, namely non-discrimination, the best interests of children, survival and development of children, and respect for children's participation.

Those who actively use narcotics without rights or against the law, they are precisely referred to as 'abuse' (Articles 1 to 15 of Law No. 35 of 2009 concerning Narcotics). Abuses are subject to Article 127 of Law Number 35 of 2009. They are threatened with a maximum prison sentence of four years if they use Class I narcotics for themselves. If evidence and other evidence

are obtained that support the application of Article 112 or 114 or other articles, it is possible that the abuser can also be subject to criminal articles other than Article 127. As is known in criminal law, there are generally two types of sanctions, namely criminal law sanctions, which broadly include punishment and treatment. According to Sudarto (1979), the difference between criminal and action is as follows:

"Crime is retribution (retribution) for the wrongdoing of the maker, while action is for the protection of society and for the guidance or care of the maker. So dogmatically speaking, the crime is for a person who is normal in spirit, for a person who can be responsible, because a person who is not able to be responsible has no fault, and a person who has no fault cannot be punished. That person can be subject to action."

To handle cases of narcotics abuse, the government has legislated to establish Law Number 9 of 1976 concerning Narcotics, which has been replaced by Law 22 of 1997 concerning Narcotics, which has now been replaced by Law Number 35 of 2009 (hereinafter written the Narcotics Law). This law is an effort by the government to overcome the problem of narcotics, but the Narcotics Law does not specifically regulate the provisions of criminal sanctions for children. In general, a

child who commits a narcotics crime as a narcotics user is a person who uses or abuses narcotics for himself, which in the Narcotics Law is referred to as a narcotics abuser. Furthermore, regarding the age limit for children who commit criminal acts, it has been regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter written the SPPA Law).

The Convention on the Rights of the Child, as ratified by the government of the Republic of Indonesia with Presidential Decree No. 36 of 1990 concerning the Ratification of the *Convention on the Rights of the Child*, regulates the principle of legal protection of children who conflict with the law. According to Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, Article 1 paragraph (1) states that a child is a person who is not yet 18 (eighteen) years old, including a child who is still in the womb. Cases involving children as perpetrators of criminal acts are a different phenomenon from adult criminal offenders. Children as perpetrators of criminal acts who are sentenced to be fostered in the Children's Correctional Institution need to receive special treatment in serving their sentences. Cases of criminal acts involving minors have occurred very often recently, one of which is the abuse of narcotics.

Based on the results of research by the Jakarta

Community Care Foundation (KELIMA), which stated that drug users in Indonesia in 2016 reached 5 million people. In addition, according to data from the Directorate General of Corrections at the Ministry of Law and Human Rights of the Republic of Indonesia until September 2017, 55,650 people were incarcerated in community institutions (LP) and State Detention Centers (Rutan), consisting of 30,644 dealers and 25,006 abusers, of which around 5,000 users were children. The existence of Law of the Republic of Indonesia No. 22 of 1997 did not, in fact, reduce narcotics crimes. The prison sentences given to drug abusers do not deter, nor do they make them free from dependence.<sup>2</sup>

This is because narcotics abusers who should receive treatment do not receive rehabilitation, so it is difficult for them to escape the desire to use narcotics. In addition, with the inclusion of narcotics abusers in prison, they will interact with dealers and retailers. This is, of course, an uncondusive environment and allows them to later become dealers. Individuals who become drug abusers can become dependent because, indeed, narcotics have addictive properties. If, in serving their sentence, the detention room is united with dealers,

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<sup>2</sup> Mohammad Taufik Makarao, et al., *Child Protection Law and the Elimination of Domestic Violence*, Jakarta: Rineka Cipta, 2013, p. 62

retailers, and other criminals, it will result in unwanted things, and the purpose of imposing punishment, which is to make a deterrent, will not be achieved.

This condition eventually led to the issuance of Law of the Republic of Indonesia No. 35 of 2009 and SEMA No. 4 of 2010, which ordered to provide medical rehabilitation and social rehabilitation for drug abusers. This is intended so that narcotics abusers no longer have a dependence on narcotics and subsequently do not use them again. There is a clear difference between narcotics abusers, which can be proven through the assessment process or testing of narcotics users, which shows whether there is a high dependence on narcotics or vice versa. This is as referred to in Law No. 35 of 2009, which was later clarified by the Circular Letter of the Supreme Court of the Republic of Indonesia (SEMA RI) No. 4 of 2010.

Judges who handle cases of drug abusers should be required to be honest and try their best for the defendant. The power of judges is in the trunk of the 1945 Constitution, Chapter IX, Article 24 and Article 25. "The judiciary is an independent power, which means that it is independent of the influence of government power. In this regard, there must be a guarantee in the law about the position of judges related to narcotics. On March 16, 2009, a meeting was held between the

leadership of the Supreme Court (MA) and BNN, which finally yielded concrete results. At the closed-door meeting, the Supreme Court was represented by the Chairman of the Supreme Court, Harifin A Tumpa, the Deputy Chairman of Supervision, Djoko Sarwoko, and the Supreme Court Justice Artidjo Alkostar, while from the BNN, including the Chief Executive of the Gorries Mere Daily, Kapusgakum Arif Sumarwoto. "The meeting discussed the issue of judges' verdicts that were handed down to narcotics users".

Supreme Court Circular Letter No. 4 of 2010 concerning Placing Drug Users in Therapy and Rehabilitation Institutions. In the SEMA, there are instructions for every judge in the district court and high court in handling narcotics cases. Harifin asked that the judges, as much as possible, not rush to sentence convicted drug abusers to prison. Instead, they can be sent to a Therapy or Rehabilitation Home. This Supreme Court directive is not without basis. Law No. 5 of 1997 concerning Psychotropics and Law No. 35 of 2009 concerning Narcotics regulate it. Article 103 paragraph (1) of Law no. 35 of 2009 concerning Narcotics states that the judge who examines the case of a narcotics addict can decide to order the person concerned to undergo treatment and/or treatment if the perpetrator is proven guilty. The period in this rehabilitation home must also be counted as the period of serving the sentence. If the

narcotics addict is not found guilty, the judge can also issue a determination ordering the narcotics addict to be sent to a rehabilitation home.

BNN guarantees that narcotics users and dealers will be treated differently in the legal process. BNN has an assessment team that will determine whether a narcotics user can be convicted or receive rehabilitation. According to Eryan, BNN has an integrated assessment team that determines whether a person is an addict or not. The team consists of doctors, psychiatrists, and psychologists who have competence regarding narcotics. In addition, the team is also equipped with a legal team consisting of police investigators and prosecutors. Then it involves the Correctional Agency from the Ministry of Law and Human Rights. As an illustration, based on the data revealed about drug cases at the South Jakarta Police Station in 2017, it is known that there are 21 cases. There are 11 cases whose status is that narcotics abusers are not dealers or couriers.

However, in reality, not all individuals who become drug abusers receive rehabilitation. In that year, 108 cases of narcotics were obtained, 20 cases of psychotropic drugs, and 106 cases of liquor. Based on data revealed in drug abuse cases in 2017, it is known that there were 108 cases. There were 38 cases whose status was that the user was not a dealer or a courier. It is

the same as in previous years, although the perpetrators of narcotics abuse are not all rehabilitated, but are included in correctional institutions. For example, in cases decided in court, for example, at the South Jakarta District Court with number: 153/Pid.Sus/2015/PN. Jakarta, with the defendant RSA, 21 years old. With evidence carrying 9 (nine) pieces of white plastic straws, 4 (four) gas matches, 1 (one) pack of Sampoerna Mild cigarettes containing 3 (three) small plastic clips filled with shabu laboratory code 009180/T/04/2015, 1 (one) glass pipette. RSA was filed for trial by the public prosecutor with the first alternative charge of violating Article 112 paragraph (1) of Law of the Republic of Indonesia No.35 of 2009 concerning narcotics or Article 127 paragraph (1) letter a of Law of the Republic of Indonesia No.35 of 2009. As a class I narcotics abuser for himself and by the judge's decision, in prison for 3 (three) years and 6 (six) months. In this case, there was no mention of the weight of the confiscated shabbat, because there was only evidence of used plastic shabu residue. The difference is with the case decided at the Depok District Court with the number: 285/Pid.Sus/2016/PN. Dpk with the defendant H.H, 19 years old, with evidence of one small plastic clip containing transparent crystals suspected of shabu weighing 0.24 grams given the Lab code 007692/T/03/2016 was submitted to trial by the public prosecutor with the first alternative charge of violating article 112 paragraph (1) of Law of the Republic

of Indonesia No.35 of 2009 concerning narcotics or article 127 paragraph (1) letter a of Law of the Republic of Indonesia No.35 of 2009. and finally, with the decision of the judge to impose a sentence with an order to carry out legal action in the form of medical and social rehabilitation for 6 (six) months at the Social Rehabilitation Center. The handling of perpetrators of narcotics abuse crimes in Indonesia still differs in the sentencing of the sentence.<sup>3</sup>

There are still perpetrators of narcotics abuse crimes who have been sentenced to prison and placed in Correctional Institutions (Prisons), and some have been sentenced to undergo rehabilitation. Criminal acts and types of crimes that can be sentenced have been regulated in such a way, but it is possible that there may be differences in the judge's decision on similar criminal acts or criminal acts that have the same qualifications. The difference in determining the crime in practice is the result of the fact that the acts faced by the criminal judge show differences and that among the judges themselves, there is a difference of opinion regarding the assessment

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<sup>3</sup> *Qualifications of Abusers, Perpetrators of Victims of Narcotics Abuse in the Implementation of Law No.*

*35 of 2009 concerning Narcotics," in <http://www.kompasiana.com>, accessed December 22, 2019.*

of the data in the same or comparable cases. Judges in imposing their sentences must pay attention to the principles of criminal imposition seen from a written juridical perspective and unwritten principles, so that the sentencing of the criminal is complex. The difference in criminal verdicts, both directly and indirectly, also has an impact on society, namely that people tend to become skeptical and apathetic towards the law.

From some of the examples above, in the case of drug abusers, many judges' decisions still apply criminal sanctions, namely in the form of imposition of a child prison sentence. The criminal justice system is closely related to the criminal legislation itself, both material criminal law and formal criminal law. Currently, the regulation on diversion has been regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, where in Article 11 it is explained that:

The results of the Diversion agreement can take the form of, among others:

- a. peace with or without compensation;
- b. handover back to parents/guardians;
- c. participation in education or training in an educational institution or LPKS for a maximum of 3 (three) months; or

d. community services. Then regulations

Diversion is one of the alternatives in accordance with various international legal conventions. Article 1, number 7 of Law No. 11 of 2012 concerning the Child Criminal Justice System, specifically for children's cases, there is a mechanism to transfer the settlement of cases from the criminal justice process to the process outside the criminal court, which is called Diversion, which aims to divert the perpetrators of narcotics abuse from the judicial process to the social process. This change can be done with various considerations from the judiciary to foster the child, which is entrusted to the parents, the Social Service, and the government. For children who are perpetrators of narcotics abuse, diversion must be sought by paying attention to Article 127 of Law Number 35 of 2009 concerning Narcotics. Article 127 paragraph (1) letter a of Law Number 35 of 2009 concerning Narcotics states that every abuser of class I narcotics for himself is sentenced to a maximum of 4 years in prison and is required to undergo medical and social rehabilitation, or can be returned to his parents for fostering and education.

At the level of investigation, prosecution, and examination of children's cases in the district court, diversion must be sought as mentioned in Article 7 of Law Number 11 of 2012 concerning the Juvenile Criminal

Justice System. Diversion is only carried out in the event that the criminal act is committed: a) threatened with imprisonment for less than 7 (seven) years; and does not constitute a repetition of a criminal act. Diversion is carried out at every level of decision-making, both at the police, prosecutor, and court levels<sup>10</sup>. Diversion aims to provide the best for children, without sacrificing the interests of the community and upholding justice. In addition, to re-educate and improve children's attitudes and behaviors so that they can abandon the bad behavior that they have been exhibiting.

## **RESULTS AND DISCUSSION**

**B. The mechanism for the implementation of Diversion for children of narcotics offenders is in accordance with the objectives of Law No. 11 of 2012 concerning the Child Criminal Justice System and Law No. 35 of 2009 concerning Narcotics in Indonesia.**

The application of diversion to children of narcotics offenders essentially implements the principles of **child protection and restorative justice** as stipulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (hereinafter referred to as the SPPA Law). Diversion is a legal instrument that transfers the settlement of children's cases from the formal criminal

justice process to an out-of-court settlement with a deliberation and recovery approach.

According to Article 1 number 7 of the SPPA Law, diversion is the transfer of the settlement of children's cases from the criminal justice process to processes outside the criminal justice system. Furthermore, Article 6 of the SPPA Law emphasizes that the purpose of diversion includes achieving peace, resolving cases outside the judicial process, preventing children from deprivation of independence, encouraging community participation, and instilling responsibility to children. From the perspective of child criminal law, this purpose shows that the state views children who are facing the law not solely as perpetrators of criminal acts, but as legal subjects who are still in the stage of psychological and social development, so that they need special protection.

As stated by **Marlina**, diversion is a form of legal protection for children that aims to prevent children from the negative effects of the criminal justice process, especially social stigma and labeling as prisoners.<sup>1</sup>

Thus, in narcotics cases, the application of diversion becomes very relevant, especially if the child is an **abuser, victim of abuse, or addict**, not as part of a

narcotics illicit trafficking network. In addition, the SPPA Law in Article 7 paragraph (1) emphasizes that at the level of investigation, prosecution, and examination in court, diversion **must be pursued**. This provision shows the imperative nature of the application of diversion in the juvenile criminal justice system.

According to **Barda Nawawi Arief**, criminal law policy against children must be oriented towards coaching and education, not retribution, because the main purpose of juvenile criminalization is social rehabilitation. This opinion is in line with the application of diversion in narcotics cases, where children are often victims of environmental influences, social pressures, and exploitation by adults.

In terms of Law Number 35 of 2009 concerning Narcotics, the approach to abusers, especially children<sup>4</sup>, focuses more on **medical rehabilitation and social rehabilitation**. Article 54 emphasizes that narcotics addicts and victims of narcotics abuse are obliged to undergo medical and social rehabilitation.

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<sup>4</sup> Gordon Bazemore and Mara Schiff, *Juvenile Justice Reform and Restorative Justice : Building Theory and Policy from Practice*, Willan Publishing, Oregon, 2005, p. 5. Also quoted by Dewi DS and A. Syukur Fatahilah, *Penal Mediation: The Application of Restorative Justice in Indonesian Children's Courts*, Indie Publishing, Depok, 2011, p.4. 136 Margarita Ze

This shows that there is a normative conformity between the SPPA Law and the Narcotics Law, because both prioritize **recovery** rather than punishment. In practice, the results of diversion agreements can be in the form of medical and psychosocial rehabilitation, return to parents, education and training, and community services.

According to **Setya Wahyudi**, the concept of diversion is the embodiment of restorative justice, which places the settlement of children's cases on efforts to restore social relations, the best interests of children, and the prevention of recidivism. Therefore, the application of diversion to children who commit narcotics crimes is in accordance with the objectives of the two laws, namely:

1. **Protect the rights and future of children.**
2. **Avoiding children from criminal stigmatization;**
3. **realizing rehabilitation and social reintegration;**
4. **Make prison sentences the ultimate remedy.**

However, the application of diversion must still pay attention to the provisions of Article 7 paragraph (2)

of the SPPA Law, which can only be carried out if the criminal threat is under 7 (seven) years and not a repetition of the criminal act. Thus, if the child is proven to be a narcotics dealer or courier with a criminal threat of more than 7 years old, then the application of diversion is limited.

Based on this description, it can be analyzed that the mechanism for implementing diversion for children of narcotics offenders is basically in accordance with the legal objectives stipulated in the SPPA Law and the Narcotics Law, especially in the aspects of child protection and rehabilitation.

### **C. Modern Relative/Utilitarian Theory**

The theory of the purpose of modern punishment is also known as **the relative theory** or utilitarian theory. This theory views that crime is not solely a punishment for the mistakes of the perpetrator, but must have a purpose that is useful for society and the perpetrator. In contrast to the absolute theory that focuses on retribution, the theory of relative puts crime as a social instrument to achieve the benefit of the law (utility). The essence of this theory is that a person is punished **so that** the crime does not recur, both by the same perpetrator and by society in general, where criminal acts are always

closely tied to values, structures and society itself. Therefore, even though humans strive to destroy criminal acts, these crimes will not be possible to be destroyed but only minimized in intensity. As Mardjono Reksodiputro said, criminal acts cannot be eliminated in society at all, but can only be abolished to the limit of tolerance. This is because not all human needs can be met perfectly, humans also tend to have different interests from one another. However, criminal acts also cannot be allowed to grow and develop in society because they can cause damage and disturbance to social order. And before using criminal acts as a tool, an understanding of the tool itself is needed. Understanding crime as a tool is very important to help understand whether with these tools the goals that have been determined can be achieved.

This theory emphasizes that punishment is imposed solely in retribution for the crime committed. Punishment is considered a form of justice, in which the perpetrator must pay for his actions. In this view, punishment does not consider any other benefit than retribution itself. Figures such as Immanuel Kant called punishment a "moral obligation" that must be carried out for the sake of justice. Where the criminal law system, punishment is one of the main instruments used to uphold justice and maintain social order. The

punishment imposed on the perpetrator of a criminal act not only serves as a form of sanction, but also has a broader and deeper purpose. Punishment is designed to have a certain effect, both to the perpetrator, the victim, and society as a whole. Thus, the modern theory of the purpose of punishment (relative/utilitarian theory) places crime as a means to achieve social benefits through the prevention, coaching, and rehabilitation of perpetrators. In the context of crimes committed by children, especially narcotics abuse, this theory is a very relevant foundation because its orientation is not retribution, but rather the improvement of behavior and the protection of the child's future. Therefore, the application of diversion and rehabilitation is more in line with the goals of modern punishment than the imposition of prison sentences.<sup>5</sup>

Barda Nawawi Arief stated that imprisonment not only results in the deprivation of freedom, but also causes negative consequences for matters related to the deprivation of freedom itself. These negative consequences include the deprivation of a person's normal sexual life, so that homosexual relations and masturbation often occur among convicts. The deprivation of a person's freedom also means the deprivation of the freedom of business of that person which can have serious consequences for the serious life

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<sup>5</sup> *Kuat Puji Prayitno, Application of the Concept of Restorative Justice in Indonesian Judiciary, Genta Publishing, Yogyakarta, 2012, p. 414.*

of the socio-economic life of his family. Moreover, the prison sentence is said to provide a bad stamp (stigma) that will continue to be carried even though the person concerned is no longer committing a crime. Another consequence that is also often highlighted is that the prison experience can cause degradation or a decrease in the degree and self-esteem of humans.

Basically, there are differences of opinion in the purpose of the crime, but there is one thing that cannot be denied, namely that crime is one of the means to prevent crime and improve the convict, not necessarily after being free, it will become conscious, guilt or regret arise, and even after being free, it can even be that after freedom there will be a grudge which means that the lightness of a crime is not a guarantee to be aware of the mistakes that have been committed. The basic principles put forward by the theory of the purpose of punishment. As stated by Muladi, which divides the theory of punishment into 3 groups, namely:

- a. Absolute Theory views that punishment is retribution for wrongs that have been committed so that it is oriented towards the deed and lies in the occurrence of the crime itself. This theory puts forward that sanctions in criminal law are imposed solely because people have committed a crime which is an absolute consequence that must

exist as a retribution to the person who committed the crime so that the sanction aims to satisfy the demands of justice

- b. Teleological Theory (purpose) views that punishment is not a retribution for the mistakes of the perpetrator but a means of achieving a useful goal to protect society towards the welfare of the community. Sanctions are emphasized on the goal, which is to prevent people from committing crimes. Therefore, it is not aimed at absolute satisfaction of justice. From this theory emerges the purpose of punishment as a means of prevention, both special prevention aimed at the perpetrator and special prevention aimed at the community. The relative theory is based on 3 (three) main goals of criminality, namely preventive, deterrence, and reformative. The preventive goal is to protect the community by placing the perpetrator of crime apart from the community. The purpose of deterrence (fear) is to create a fear of committing crimes that can be distinguished for individuals, the public, and the long term.
- c. Teleological Retributive Theory, this theory views that the purpose of punishment is plural, because it combines teleological (purpose) and retributive

principles as a whole. This theory has a dual pattern, where punishment is seen as a moral criticism in answering wrong actions. Meanwhile, its teleological character lies in the idea that the purpose of moral criticism is a reform or change in the behavior of the convict in the future.

**D. The diversion mechanism of Indonesia's criminal law policy related to the implementation of diversion for children of narcotics offenders is associated with efforts to counter narcotics crimes**

The diversion mechanism for children of narcotics offenders in Indonesia is regulated as an effort to overcome restorative justice-based crimes, which aims to shift the settlement of children's cases from formal justice to non-judicial processes. This is mainly regulated in Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA Law), which emphasizes protection, rehabilitation, and the best interests of children.<sup>6</sup>

According to Sudikno Mertokusumo, a judge's decision is a statement that the judge, as an authorized official, pronounces in court and aims to end or resolve a case or dispute between the parties. The decision is

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<sup>6</sup> *Eva Achjani Zulfa, Restorative Justice in Indonesia (Study on the Possibility of Applying Restorative Justice Approach in Criminal Law Enforcement Practice), Dissertation, University of Indonesia, 2009, p. 180-183.*

demanded for justice and what is important and determines is the facts or events, the legal rule is a tool. So in the judge's decision that needs to be considered is the legal consideration. So that it has an objective reason and has legal force. So that the decision cannot be changed again. Court decision as an objective process in accordance with the scientific principles of law that can be tested by anyone during the test based on the scientific principles of law. The process of making court decisions is considered objective, because every judge in making decisions is based on the evidentiary process that is tested objectively and open to the public. In Article 1 point 11 of the Criminal Procedure Code, it is stated that a court decision is a judge's statement pronounced in an open court session, which can be in the form of a criminal conviction or free or free from all lawsuits in the case and in the manner regulated in the Law.

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System changes the view that criminalization should be the last resort for children who face the law, so that the approach to punishment has changed. The Law on the Juvenile Criminal Justice System prioritizes the retributive justice criminal model. The retributive justice criminal model is restoration to the original condition and criminalization as the last resort so that other methods outside the court are prioritized. One of them is by diversion, namely the transfer of the

settlement of children's cases from the process in the criminal court to the process outside the criminal court.

Diversion is the most appropriate way out so that children are not brought to court. Therefore, this diversion must be the obligation of the police in every handling, be it at the level of investigation, prosecution, and examination of cases in court. In Law Number 11 of 2012 concerning the Child Criminal Justice System, it is mandatory for every law enforcement officer, be it the police, prosecutors and judges to diversion into criminal cases committed by children.

Based on "*best practices*", the application of diversion and sanctions of actions in various countries shows a level of success in reducing the number of narcotics use. In many countries, such as the United Kingdom, Australia, and Portugal which were then followed by several other countries in Europe and America. The legal system has placed narcotics and drug users (Narko) as victims ("*drug addicts*") not as perpetrators because they are seen as people who are mentally or psychologically ill more than just *brain diseases* ("*brain diseases*") who fall into. Breakthroughs in handling this problem in several countries were carried out with out-of-court settlements, in addition to being more accommodating in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which

changed the view that punishment should be the last resort for children who are facing the law, so that the approach to punishment also changed. The Law on the Juvenile Criminal Justice System prioritizes the retributive justice criminal model. The retributive justice criminal model is the restoration to the original condition and criminalization as the last resort so that other methods outside the court are prioritized. One of them is by diversion, namely the transfer of the settlement of children's cases from the process in the criminal court to the process outside the criminal court. Diversion is the most appropriate way out so that the child is not brought to court. Therefore, this diversion must be the obligation of the police in every handling, be it at the level of investigation, prosecution, and examination of cases in court.

Basically, criminal law policy in drug control in Indonesia has been carried out for a long time. It began with the enactment of the Narcotics Ordinance (Verdoovende Middelen Ordonnantie, Stbl.1927No.278 jo. No.536). This ordinance was then replaced by Law No. 9 of 1976 concerning Narcotics. Furthermore, this law was changed to Law No. 22 of 1997 concerning Narcotics until the emergence of Law No. 35 of 2009 as the latest update of the law on Narcotics. The use of criminal law as a means of coping with narcotics abuse carried out by children is essentially a dilemmatic choice. Considering

that criminal justice as a means of coping with narcotics abuse carried out by children often presents itself (procedural justice). So that the results are often unsatisfactory and clearly ignore the interests and welfare of children. So that the results are often unsatisfactory and clearly ignore the interests and welfare of children The concept of diversion is based on the fact that the criminal justice process faced by perpetrators of criminal acts through the criminal justice system causes more harm than good. The basic reason is that the court will give face-to-face stigmatization for the actions carried out such as children are considered evil, so it is better to avoid them outside the criminal justice system.

The application of action sanctions as a preventive effort to reduce the number of direct narcotics use is also an effort to counter narcotics against children of narcotics offenders. Sanctions in the form of return to parents are an effort to counter narcotics against children of narcotics offenders because:

- a. Parents as part of society have a role in supporting national development, including their role in efforts to eradicate threats to children of narcotics offenders from the dangers of narcotics. Therefore, proactive steps that can be taken, through:

- 1) family environment;
  - 2) residential environment;
  - 3) work environment. However, these strategic steps are a form of collective concern for narcotics countermeasures that must be carried out for the safety and existence of the nation to welcome a brighter future. A person's deviant behavior is closely related to external factors, such as the social environment in which they operate. In many cases, children of drug offenders become users because of the family environment that is very close to narcotics, for example, one or both parents, and even their peers consume narcotics. This condition triggers indirectly, so that the child becomes an active user.
- b. The lack of parental attention to <sup>7</sup>children has implications for the inhibition of the maximum educational process in the family. This is one of the obstacles to the intensity of communication between them and creates a very long gap between parents' expectations and children's behavior. Informal

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<sup>7</sup> Munir Fuady, *Modern Legal State Theory (Rechtstaat)*, Bandung, Refika Aditama, 2009, p. 3-4

education for children in the family environment greatly determines the direction and level of success of children, Continuous parental participation is very important in creating a strong mental model in children.

- c. The high number of narcotics users among children is largely due to their lack of knowledge about narcotics. This is triggered by the non-ongoing process of transforming knowledge from family to child. Therefore, narcotics education is an effort to save the younger generation from continuous exposure to consuming narcotics. Health *promotion* efforts need to be encouraged, especially among adolescents, efforts to minimize the adverse effects and deaths due to narcotics abuse. Narcotics education is expected to be able to change the realm of knowledge, attitudes, and behavior for the younger generation to no longer consume narcotics.

### **Theory in the Version**

Conceptually, **diversion** is the transfer of the settlement of juvenile criminal cases from the formal judicial process to the settlement process outside the criminal court. In the context of juvenile criminal law in Indonesia, this concept is affirmed in **Article 1 number 7 of Law Number 11 of 2012 concerning the Juvenile**

**Criminal Justice System (SPPA)**, namely: "Diversion is the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system." Theoretically, diversion is born from criticism of the penal system that is **retributive** (retributive), especially when applied to children. Children are seen as subjects who are still in the stage of psychological, social, and moral development, so their handling cannot be equated with adult perpetrators. Thus, the diversion theory places criminal law as the **ultimate remedium**, namely the last resort, while the settlement of coaching and recovery is the top priority.

Diversion in essence also has the purpose of avoiding children and the negative impact of criminal application. Diversion also has the essence of ensuring that children grow and develop both physically and mentally. Viewed theoretically from the concept of the purpose of punishment, the transfer of judicial processes and processes to non-judicial processes for children who abuse narcotics will be seen in its relevance. In general, the purpose of punishment essentially consists of efforts to protect the community on the one hand and protect individuals (perpetrators) on the other.<sup>2</sup> The relevance of the transfer of judicial processes and processes to non-judicial processes in overcoming narcotics abuse by children to the two main aspects of the purpose of punishment, namely the aspect of community protection

and the aspect of individual protection can be explained as follows:

- a. With this diversion, children will be avoided and the application of criminal law which in many theories has been postulated as one of the criminogenic factors. The negative impact of the application of criminal law, including on children, will give birth to stigmatization and dehumanization which can actually be a criminogenic factor. Thus, avoiding children and the application of criminal law (depenalization) can actually avoid the existence of criminogenic factors, it also means avoiding children and the possibility of becoming evil again (recidivism), therefore it also means avoiding society and the possibility of becoming victims of crime.
- b. With the diversion/transfer, it will also provide two benefits at once to the individual child. First, with the transfer, the child will still be able to communicate with his environment, so that the child no longer needs to do social rehabilitation after the crime occurs. Second, with the transfer, the child will also avoid the possibility of negative effects of imprisonment which is often

In its development, criminal law also needs to pay attention to the victims of crime. The orientation of criminal law that only tends to the issue of acts (criminal) and perpetrators (*daad-dader strafrecht*) has given birth to a construction of criminal law that does not respect the victim. In fact, in the context, children as people who abuse narcotics, they cannot be solely seen as perpetrators, but they must also be seen as victims who need priority alleviation from their dependence on narcotics. The transfer of the process from judicial to non-judicial processes is also very relevant to the philosophy of punishment that is generally adhered to, namely the philosophy of coaching (*philosophy treatment*).

Thus, the transfer of the process from judicial to non-judicial processes also has relevance to the conceptual transformation in the criminal and penal system that occurs in the world in general<sup>8</sup> and the conception of retribution towards the conception of reform. Through efforts to diversion the behavior of children who deviate or commit crimes, it is hoped that a better settlement can be carried out, without ignoring the interests and welfare of children, and appropriate actions can be taken in accordance with the needs and interests of children. This diversion policy is the best solution that can be used as a formula in resolving several cases

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<sup>8</sup> *Lilik Mulyadi, Op.Cit, p. 150.*

involving children as perpetrators of criminal acts, especially in handling children who abuse narcotics. So that it will be more appropriate in determining the actions (treatment) that need to be applied to them. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System changes the view that punishment should be the last resort for children who face the law, so that the approach to punishment has changed. The Law on the Children's Criminal Justice System prioritizes the retributive justice penal model. The retributive justice penalization model is the restoration to the original condition and punishment as the last resort so that other methods outside the court are prioritized. One of them is by diversion, namely the transfer of the settlement of children's cases from the process in the criminal court to the process outside the criminal court. Diversion is the most appropriate way out so that the child is not brought to court. Therefore, this diversion must be the obligation of the police in every handling, be it at the level of investigation, prosecution, and examination of cases in court. Law Number 11 of 2012 concerning the Child Criminal Justice System requires every law enforcement officer, be it the police, prosecutors and judges to diversion into criminal cases committed by children

## E. CONCLUSION

Based on the results of the study, the implementation of diversion mechanisms for children involved in narcotics offenses in Indonesia has, in principle, been aligned with the objectives of the legal framework, particularly Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and Law Number 35 of 2009 concerning Narcotics. Diversion is mandated at every stage of the juvenile justice process: investigation, prosecution, and trial, provided that statutory requirements are fulfilled. Its primary aim is to resolve cases outside formal judicial proceedings, promote reconciliation, prevent deprivation of liberty, and instill responsibility in children. In the context of narcotics abuse, children are not merely offenders but also victims who require legal protection, guidance, and rehabilitation. Therefore, the integration of diversion with medical and social rehabilitation reflects the rehabilitative orientation of narcotics law.

Furthermore, diversion serves not only as a procedural mechanism but also as a substantive instrument of child protection within the Indonesian legal system. The application of diversion in narcotics cases emphasizes a restorative justice approach rather than punitive measures, recognizing that children are often influenced by environmental, social, and exploitative factors. Consequently, imprisonment should

be regarded as a last resort (*ultimum remedium*), while rehabilitation, supervision, and social reintegration should be prioritized. In this regard, diversion contributes to preventing recidivism and safeguarding the future of children. Overall, its application is consistent with the broader objectives of national criminal law policy, including the protection of society, the protection of children, and the promotion of humane and proportionate justice.

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