

## DIVERSION IN THE PERSPECTIVE OF ISLAMIC LAW

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### ABSTRACT

This text discusses the importance of children as the hope of their parents, nation, and state for the future development of the country. It highlights that the behavior and character of children are often influenced by external factors such as social environment, leading to cases where children come into conflict with the law. The text also explores the different definitions of children in positive law, Islamic law, and the Convention on the Rights of the Child. It emphasizes the changes in the legal system for children in conflict with the law, focusing on the shift from treating children as objects to providing special protection and adopting restorative justice and diversion. The text also addresses the role of parents in guiding children and the need for their education to prevent legal violations. The research methodology used is library research and normative legal doctrinal research, focusing on restorative justice and diversion. The findings emphasize the importance of protecting the rights and interests of children in conflict with the law and the potential of restorative justice and diversion in addressing this issue. The text also compares the concepts of diversion in positive law and Islamic law, highlighting differences in the age of legal capacity and the types of criminal acts eligible for diversion. The implications of the study are significant for legal and social systems in providing effective protection and justice for children in conflict with the law.

***Keywords: Children, Restorative Justice, Legal Capacity, Protection***

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### A. INTRODUCTION

Children are hope for their parents, hope for their nation and country to continue the baton of state development which has qualities or characteristics that will guarantee the existence of a nation and state in the future. On the other hand, childhood is also a period of forming a person's individuality, personality and character so that his life has strength and ability and stands firmly in life. The development of their attitudes and behavior is often not based on themselves, but these changes occur as a result of external factors such as the social environment in which they usually socialize. It is not uncommon for some of them to initially appear good and not show the slightest sign of being a lawbreaker, but due to the bad influence of their social circle, they grow up to follow this. As a result, there will be many cases where children will face the law.

The meaning of children as defined in positive law and Islamic law has different meanings. In the language of positive law, children are described as immature people (minderjarig/underage people), minors or minors (minderjarig heid/inferiority), or as children under parental supervision (minderjarige ondervoering). Meanwhile, in Islamic law, what is defined as a child is someone who has not yet reached the age of puberty, which means that a person has not reached the age limit to be able to be held accountable for his or her actions before the law and legally. Meanwhile, in view of the Convention on the Rights of the Child/CRC, it is explained that children in conflict with the law are categorized as children in special situations (Children in Need of Special Protection/CNSP). Children categorized as CNSP are in Children Development/Early Childhood (CDEC) because they have needs that cannot be met, are vulnerable to violence, are outside the family context (under state control), and need restrictions and protection. certain.

Amendments to the Law on the Juvenile Justice System from Law no. 3 of 1997 to

Law no. 11 of 2012 is because in the implementation of the previous law, children in conflict with the law were positioned as objects, and their treatment tended to be detrimental to the children themselves. Based on this, it is necessary to change the system in handling children in conflict with the law, which is based on the functions and roles of society, government and institutions that have responsibilities and obligations in terms of children's welfare and are expected to be able to provide special protection to children in conflict. with the law.

The most basic essence contained in this Law is an explicit direction regarding Restorative Justice and Diversion which is aimed at making children undergo a legal process through non-litigation (outside of court) in order to eliminate the possibility of stigmatization of children. who are in conflict with the law in the hope that in the future they can return to socializing in their community properly. In achieving this, of course the role of all related parties is needed, from family, community and state.

Children here can be said to be a legal subject for existing law, Islam itself has also regulated completely and in detail regarding the legal subject itself, or what is referred to as mukallaf. Thus, a child who has fulfilled the requirements as mukallaf will receive the same treatment as adults in general before the law. This means that the child must be able to take full responsibility for whatever actions he commits.

Of course, there are many stages or conditions that must be met in order for a child to be said to be mukallaf. So parents as mentors for the child are responsible for providing good and correct teaching so that the child will not do things that are considered wrong according to the law. And if the parents are negligent in carrying out their duties as guides for the child, then the child still cannot be punished for his ignorance, or it could be said that the child here is a victim of the wrong teaching given by his parents.

Therefore, based on the explanation above, the author feels it is necessary to review the juvenile criminal justice process through diversion with a restorative justice approach from an Islamic perspective. With the background of this problem, the author is interested in studying this problem and describing it in a research entitled "DIVERSION IN THE PERSPECTIVE OF ISLAMIC LAW"

## **B. RESEARCH METHODS**

This research is library research which examines and analyzes written sources, the data of which is obtained from written sources such as books, scientific articles, journals, websites and other written sources which discuss and study around Restorative Justice and diversion.

The type of research used is descriptive research with a doctrinal normative legal research type related to diversion with a restorative justice approach in the juvenile criminal justice system.

## **C. DISCUSSION**

### **A. Children in Conflict with the Law**

Children are God's creation who are more socialized to the community and surrounding environment in order to grow. In this case, children are grouped into a lower social level than other groups with whom they interact at any time. This is caused by the many limitations that a child has in being able to interact with people who are much older than them.

Juridically, there are several definitions regarding children in Indonesian regulations, including:

1. Children according to law number 4 of 1979 concerning child crimes, a child is "a person who has not reached the age of 21 years and is not married"
2. Children according to law no. 3 of 1997 concerning juvenile courts, a child is "a person who in the case of a delinquent child has reached the age of 8 years but has not yet reached the age of 18 years and has never been married."
3. Children according to law no. 39 of 1999 concerning human rights, a child is "any person under 18 years of age and unmarried, including children who are still in the womb if this is in their interests."
4. Children according to law no. 23 of 2002 concerning child protection. A child is "a person who is not yet 18 years old, including children who are still in the womb."
5. Children according to law no. 11 of 2012 concerning the juvenile criminal justice system. A child is "a person who is 12 years old, but not yet 18 years old, who is suspected of committing a crime. According to civil law, Article 330 of the Civil Code states that immature people are those who have not reached the age of 21 and are not yet married."
6. Children according to law no. 1 of 1974 concerning marriage Article 7 paragraph 1 of law no. 1 of 1974 states "a man is only permitted to marry if he has reached the age of 16, deviations from this can only be requested for dispensation from the district court."
7. According to National Law, children are "a convention on children's rights (ratified by Presidential Decree No. 36 of 1990). "A child in this convention is any person under 18 years of age, unless based on the law applicable to children it is found that the age of majority has been reached earlier."

In the large Indonesian dictionary, there are several definitions of the word "child", namely: second offspring, small humans, small animals, small trees that grow on tubers or large tree clumps, people who come from or are born in (a country, region, etc.), people who belong to a certain occupational class, a small part, and smaller than others. This definition describes that a child is a human being who is still small and immature or immature.

Meanwhile, according to Herlina Apong, children who are in conflict with the law fall into two groups as follows:

- a. Those who are suspected, suspected, accused, or sentenced to a crime for committing a criminal act.
- b. Those who are victims of criminal acts or who see and/or hear the commission of a criminal act themselves.

From the opinion above, we can draw conclusions regarding what elements can cause a child to face the law, namely:

1. Criminal suspect, accused and sentenced.
2. Victims of legal violations by a person, group and/or institution.
3. Have witnessed the occurrence of a criminal act.

#### B. Diversion and Restorative Justice

##### a. Diversion

The word diversion comes from the word "diversion" in English, which means diversion, and was then absorbed into Indonesian to become the word diversion. In

terms of terms, there are several meanings or definitions regarding this diversion, namely as follows:

1. according to Jack E Bynum in his book *Jevenile Delinquency a Sociological Approach*, namely diversion is an attempt to divert, or channel out, youthful offenders from the juvenile system (Diversion is an action or treatment to divert or place juvenile offenders out of the criminal justice system ).
2. In Article 1 Paragraph 7 of Law Number 11 of 2012, it is explained that diversion is the transfer of the resolution of children's cases from the criminal justice process to a process outside criminal justice.

From the definitions above, we can draw a little from the main meaning of the term diversion. Namely, a process of transferring or moving the criminal justice system, in this case juvenile crimes, from formal channels to non-formal channels. The approach used in it is a restorative approach. Through the definition above, we can also see that not all juvenile crimes must be carried out through a formal process. However, there is also an alternative solution to the problem by using this concept in order to get the best solution for children who are in conflict with the law.

Diversion is based on the premise that the courts may indirectly stigmatize some youth for having committed relatively petty acts that might best be handled outside the formal court process. Diversion is based on the premise that courts may indirectly stigmatize some youth for having committed relatively minor acts that may be best dealt with outside the formal court process. This view is supported in the previous general explanation regarding children who were in conflict with the law previously.

For its implementation, article 5 of Law Number 12 of 2012 has thoroughly explained the process of implementing this diversion in detail, starting from the requirements to the parties involved. In this article it is written that efforts to resolve through diversion with a restorative justice approach must be carried out starting from the level of investigation, prosecution and examination of children's cases in district courts. If we look further, there are many words "mandatory" written in several articles which order us to carry out the diversion process. This indicates that the state really supports the implementation of this process in order to improve the social life of children who are in conflict with the law for the sake of the survival of the state and nation.

In article 7 paragraph 2 of Law Number. 12 of 2012 states that there are 2 conditions that require efforts to implement the diversion process in the juvenile justice process, namely:

1. Threatened with imprisonment for less than 7 (seven) years.
2. It is not a repetition of a criminal act.

This provision explains that, a child who commits a crime whose punishment is punishable by a prison sentence of more than 7 (seven) years and a child who commits a repeat crime does not have to undergo a diversion process. This is because criminal acts with a threat of more than 7 (seven) years are included in the category of serious criminal acts, as are those committed by children. The repetition of criminal acts by children proves that the aim of the diversion process was not successful, namely instilling a sense of responsibility in children who commit crimes to repeat their actions again. Therefore, this process is suspended for the two conditions above.

In article 8, it is explained that the Diversion Process is carried out through deliberation involving children and their parents/guardians, victims and/or their parents/guardians, community counselors, and professional social workers based on the Restorative Justice approach. From this verse we can state what elements must be involved in this diversion process so that it can be carried out, namely:

1. Children as perpetrators and their parents/guardians.
2. Victims of crimes and their parents/guardians.
3. Community mentor.
4. Professional social worker.
5. Restorative justice approach.

The application of the diversion concept will not be effective if it does not use recovery efforts with a restorative justice approach. However, what is very unfortunate in this case is that the application of the concept of diversion with a restorative justice approach can only be carried out if the threat of punishment carried out by the child who committed the crime is not more than 7 (seven) years old and is not a recidivist. In determining this, it is possible to have a subjective view.

It is clear that this phrase does not pay attention to the human and empathetic considerations involved in determining the law for children who commit crimes. Because, even though they have legal status as perpetrators, children who commit crimes in reality also become victims due to the bad influence of their surrounding environment which ultimately affects their thought patterns and reasoning in the child's growth and development.

Dunkel stated that there are at least six reasons that support and justify the practice of diversion:

1. Prevent negative stigmatization;
2. Promote educative rather than punitive measures;
3. Avoid disproportionate punishment;
4. Reducing (or limiting) court caseloads;
5. Reducing state intervention in juvenile delinquency;
6. Benefits of a lighter sentence.

#### b. Restorative Justice

Restorative Justice comes from the English term restoration, which means repair, recovery, or restoration, and the word justice, which means fairness. The word restorative, if interpreted as a noun, means medicine. Meanwhile, if the adjective is interpreted, eating means healing and refreshing. So, linguistically, the meaning of the word restorative justice is a justice system that repairs and heals. From the explanation above we can identify the meaning of restorative justice through several dimensions, namely, restoration is restoring the relationship between the victim and the perpetrator of the crime, healing is returning or covering all the victim's losses resulting from the actions of the perpetrator of the crime, and justice is individual justice.

Several meanings of restorative justice can be described as follows

1. Mariam Liebman simply defines Restorative justice "as a legal system that strives to restore the welfare of victims, perpetrators and communities damaged by crime, as well as to prevent further violations or criminal acts."
2. According to article 6 of Law no. 12 of 2012, what is meant by Restorative justice or restorative justice is the resolution of criminal cases by involving the perpetrator,

victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration back to its original condition, and not revenge.

From the definitions above, we can identify that there are several elements that must be fulfilled in the concept of restorative justice. These elements are as follows:

1. Settlement of criminal cases.
2. Parties involved; perpetrators, victims, families and society.
3. Recovery for all parties.

The concept of restorative justice in our justice system can be said to be relatively new. This concept has a quite different way of working, namely moving or diverting the formal criminal justice process to a non-formal criminal justice process as the best solution for dealing with children in conflict with the law by involving all parties involved in a particular criminal act, starting from the perpetrator, victims, families and communities. To realize law and justice appropriately, restorative justice is also carried out outside the official judicial process to resolve issues regarding how to overcome the consequences of crime, build reconciliation, and satisfy all parties as divers.

The concept of Restorative Justice is a theory that states that the criminal justice system is not designed to determine individuals who commit crimes. Law enforcers have adopted the concept of restorative justice to restore the victims' conditions. This concept also does not have the intention of preventing perpetrators from being punished for their actions. However, this concept plays a more important role in the recovery of victims as a result of the actions of the perpetrator of the crime.

Not all criminal cases can be resolved through restorative justice. Criminal cases that can be resolved through this process are minor crimes as regulated in articles 364, 373, 379, 384, 407 and 483 of the Criminal Code. The punishment given is a maximum imprisonment of three months and a maximum of Rp. 2.5 million rupiah. However, apart from the criminal acts mentioned above, resolving cases using restorative justice can also be applied to the following criminal cases:

1. Juvenile Crime
2. Narcotics Crime
3. Traffic Crimes
4. Information Crime and Electronic Transactions
5. Criminal Actions of Women in Conflict with the Law.

The application of restorative justice focuses on the process of obtaining justice that can restore. The intent is to restore not only the perpetrators of criminal acts, but also the victims and the community who were disturbed as a result of the criminal act.

#### C. Analysis

##### a. Mukallaf in Islam

In the books of fiqh or ushul fiqh, the term legal subject uses the terms mahkum 'alaih or mukallaf. Etymologically, mukallaf (مُكَلَّف) (tasydid lam) ism ma'ful from fi'il (كَالَفَ) (kallafa) (tasydid lam) or كَلْفَة (kalfah) means مُشَقَّة (masyaqqoh) namely heavy or difficult. This means that according to the language mukallaf is a person who is burdened with a responsibility or law. Meanwhile, in terms of terminology, amukallaf is a person who has attained maturity, is sensible, and to the point of preaching Islam, there are no obstacles for him such as coercion or negligence so that he understands the responsibilities that are imposed on him.



The basis of themukallaf is to refer to the word of Allah SWT. in surah al-Baqoroh verse 286;

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا

Allah does not burden a person but according to his ability. (Qs. Al-Baqoroh: 286).

From the verse above, which is the origin of taklif, it produces several views of ulama regarding the definition of taklif and mukallaf itself as stated previously and also several views on the conditions that must be fulfilled by mukallaf. quoted from the book Ushul Fiqh al-Islamiy by Doctor Wahbah al-Zuhaili regarding several requirements for mukallaf.

#### 1. Mukallaf is able to understand a taklif proposition.

This is stated because a taklif is khitob, and a khitob for people who do not understand is impossible. Because reason is a tool for understanding a taklif proposition. From these conditions several notes emerge;

- a. The purpose of understanding a taklif proposition is to be able to understand the meaning of the proposition perfectly, so that there is no record of making a taklif call based solely on a sense of trust and a sense of taqlid. So the lesson of an infidel, whether zimmi or harbi, is also the aim of the argument for taklif. Because they are able to understand the taklif arguments that Allah conveys. As stated by the Jumhur al-Fuqoha school of thought, every infidel is also someone who is subject to taklif.
- b. An insane person (al-majnun) and a child who has not yet mumayyiz are not the target of taklif because of their inability to understand the arguments of taklif. However, small children who are mumayyiz cannot be said to be able to understand the propositions of taklif perfectly, such as understanding the nature of Allah SWT.
- c. People who are crazy, such as people who forget, are drunk or sleep, are not the target of the burden of taklif until they wake up. The same thing as someone who is insane or majnun, scholars agree that he is not subject to the burden of taklif. Because of their condition when they lose consciousness, they cannot understand the proposition of taklif.

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"The pen has been lifted from three groups: from the crazy person until he wakes up, from the sleeping person until he wakes up, and from the child until he reaches maturity."

#### 2. Mukallaf must be an expert in taklif.

Ahliyah means Qudroh or power. Ahliyah can also be interpreted as appropriateness, namely the power to understand and carry out a taklif proposition as well as being worthy of being charged and carrying out an action in accordance with what is determined by the Shari'a. Ahliyah itself is produced from 2 main components, namely reason and understanding. Having reason is the basic ability to produce understanding. So fiqh scholars mention 2 general divisions in Ahliyah, namely Ahliyah al-Wujub and Ahliyatul al-Ada'.

##### a. Ahliyah al-Wujub (legal skills)

It is a legal capacity where a person is deemed to be able to receive the rights

they are entitled to, but not yet capable of being burdened with all obligations. Ushul fiqh scholars categorize Ahliyah al-wujub into 2 parts, namely Ahliyah al-wujub al-naqisoh and Ahliyah al-wujub al-kamilah.

Ahliyah al-Wujub al-Naqisoh is a legal skill where a person is deemed to be able to receive the rights they are entitled to, but is not yet capable of being burdened with an obligation. Like a fetus in a mother's stomach. Meanwhile Ahliyah al-wujub al-kamilah is legal skill where a person is judged to be able to receive rights and fulfill obligations. Ushul fiqh scholars group in this category a child who has been born into the world until he reaches maturity and is intelligent.

b. Ahliyah al-Ada' (ability to act)

It is appropriate for a person to be considered valid in all his words and actions, both positive and negative. So if he enters into an agreement or agreement, his actions will be deemed valid based on the existence of the law and can produce legal consequences. Then, if he performs acts of worship such as prayer, fasting, Hajj or other obligatory acts, then these acts are considered valid and he must fulfill his obligation to support his dependents. Ushul fiqh scholars also classify Ahliyah al-ada' into 2 types, namely Ahliyah al-ada' al-naqisoh and Ahliyah al-ada' al-kamilah.

Ahliyah al-ada' al-naqisoh, this Ahliyah covers the criteria for a person from the mumayyiz period to the puberty period. At this time, rights and obligations have been established for him that must be fulfilled. Ahliyah al-ada' al-naqisoh is specifically assigned to those who have stupidity or stupidity that has not yet led to loss of reason. It's just that they have a lack of reason. Like not being able to differentiate between right and wrong. Meanwhile, Ahliyah al-ada' al-Kamilah, will be realized when a person's reasoning is perfect, which is marked by his maturity in fulfilling his rights towards Allah SWT. and maturity as well as intelligence in fulfilling their rights towards other humans such as material transactions.

b. The Concept of Diversion in Islam

In the previous explanation we explained about diversion, children and alsomukallaf in Islam, from there we can see what the actual concept of diversion is from the perspective of Islamic law. There are two aspects that can be studied to see this, such as the age limit of children and criminal acts.

1. Child Age Limit

In the Indonesian constitution, there are many laws that explain the age limit for a child, but the definition that will be used in researching this issue is Law no. 11 of 2012 concerning the Juvenile Justice System which states that a child is "a person who is 12 years old, but not yet 18 years old who is suspected of committing a crime. According to civil law, Article 330 of the Civil Code states that immature people are those who have not reached the age of 21 and are not yet married."

Meanwhile, according to Herlina Apong, children who are in conflict with the law fall into two groups as follows:

- a. Those who are suspected, suspected, accused, or sentenced to a crime for committing a criminal act.
- b. Those who are victims of criminal acts or who see and/or hear the commission of a criminal act themselves.

With this it can be concluded that the age limit for being considered a child is



21 years and not being married, however, if before 21 years of age one is married, then one can no longer be said to be a child and will be treated equally before the law. Furthermore, as long as the child is still within the age range regulated in law, he is still entitled to the right to carry out diversion in a court of law.

Meanwhile, in Islamic law, a child can be said to be an adult when he reaches maturity. The word baligh specifically means when a child has reached the expert stage, that is, he has obtained the qualifications or power to understand and carry out a taklif proposition and is worthy to be charged and carry out an action in accordance with what is determined by the Shari'a. Thus, once a child reaches that stage, he no longer has the privilege of being forgiven for his mistakes, but he is obliged to take full responsibility for his own actions.

Legal competence will be realized when a person's reasoning is perfect, which is marked by his maturity in fulfilling his rights towards Allah SWT. and maturity as well as intelligence in fulfilling his rights towards other humans.

## 2. Types of Criminal Acts

In the concept of diversion, there are conditions that must be met before it is carried out, such as the elements and also the type of criminal act. As regulated in Law No. 11 of 2012 concerning the Juvenile Justice System 7 paragraph 2 states that there are 2 conditions that require efforts to implement the diversion process in the juvenile justice process, namely:

1. Threatened with imprisonment for less than 7 (seven) years.
2. It is not a repetition of a criminal act.

This means that the two conditions above state that criminal acts which carry a penalty of more than 7 years cannot be attempted for diversion in the process. Likewise, for children who have previously committed criminal acts or are said to be recidivists, no diversion process can be carried out for them.

Meanwhile, in Islamic law, the only person who can be punished for criminal acts committed is someone who has reached the expert level as amukallaf. This is required because if a person cannot be said to be mukallaf then Islamic law does not apply to him. It is said that a person is legally mukallaf when he has reached puberty, which in this case has been explained previously.

Thus, children who have not yet reached maturity, or who are said to be not yet mature. He is not subject to punishment for criminal acts he commits, regardless of the type of criminal act. As said in the Hadith narrated by Ahmad

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"The pen has been lifted from three groups: from the crazy until he wakes up, from the sleeping person until he wakes up, and from the child until he reaches maturity." It is clear that "a child is small until he reaches maturity" is one of the reasons why a person is free from being dependent on the Shari'a.

## D. CONCLUSION

When a child has committed these actions, his status will change to that of a child in conflict with the law. This change in status does not change the basis that he is still a child whose rights and interests need to be protected. So that he can return to being a good person and be accepted in his social environment. To define children in conflict with the law, it does not stop at

defining children as perpetrators, but also children as victims. However, children who are in conflict with the law must also receive protection to protect them from attitudes that are contrary to their best interests.

The diversion process through a restorative justice approach answers problems regarding protection for children in conflict with the law. What is meant by diversion is diverting the juvenile justice process from formal channels to non-formal channels that emphasize restorative justice rather than retributive justice. Basically, the concept of diversion has one important similarity with Islamic law, namely that both place children as the subject of their law. However, apart from these similarities, there are also differences that can be said to be quite striking so that the concept of diversion can be examined from two different points of view, in this case positive law and Islamic law.

The first difference lies in the age limit at which a child can be said to be legally competent. In positive law, a child can be said to be legally competent when he or she reaches the age of 21 years or is not married, whereas in Islamic law there is no definite limit to when a child can be said to be legally competent, but a barometer or limit is given which is called puberty. No matter how old the child is, if he has reached the stage where he can be considered mature, then he is legally competent

The second difference lies in the type of action. Positive law limits criminal acts that can be sought for diversion into 2 conditions, namely those that carry a sentence of less than 7 years and not being a recidivist. However, in Islamic law, there are no limits to criminal acts, but they are still limited by the word puberty so that the law can impose them on them.

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