



Implementation of diversion as the settlement of child criminal cases in the perspective of Islamic law

Muhammad Arafat^{1*}, Asmuni²

^{1,2} Faculty of Ilmu Agama Islam Master Program, University Islam Indonesia, Daerah Istimewa Yogyakarta, Indonesia

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ABSTRACT

This research settles child crime culprits. This study uses descriptive analysis to find law enforcement authorities' diversion of child perpetrators' criminal activities, assess Law Number 11 of 2012's effectiveness, and examine Islamic law's perspective on diversion and its efficacy in settling child offender cases in Indonesia. This study found that since Law no. 11 of 2012 on the Juvenile Criminal Justice System (SPPA Law) was passed, many parties have hoped for a model of a criminal justice system that is more particular to children in Indonesia and better. As-Sulh in Islamic law and diversion in positive law. Islamic law does not criminalize children, but the leader can impose ta'dib (learning) punishments. Thus, tranquility or diversion is stressed while dealing with law-breaking youth. Juvenile crime management in Indonesia and Islamic law follows the notion of legality and emphasizing the child's interests through diversion and restorative justice.

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Corresponding Author:

Muhammad Arafat,
Faculty of Ilmu Agama Islam, Master Program,
University Islam Indonesia,
Kaliurang Street Number.Km. 14.5 , Krawitan, Umbulmartani, Ngemplak Sub-district, Sleman Regency,
Daerah Istimewa Yogyakarta, 55584, Indonesia.
Email: Muh.Arafat1@gmail.com

1. INTRODUCTION

As we know, teenagers are part of the younger generation who are social forces and play a vital role in the development of the nation and state. In the hands of this young generation lies the future that will make the country brighter and will become a leader who aims to build better days. As the next generation of the struggle of the Indonesian people who have the right and obligation to participate in the development of the Indonesian nation and state. In this case, the younger generations are teenagers and children who are under 18 years of age (Mukdin & Heryanti, 2020).

Adolescence does not last forever because age will always increase over time; youth itself has a vulnerable period from 12 years - 21 years, according to some experts. In Indonesia, laws have been regulated regarding this matter, but in the law, there is no word for youth; only children and adults are known. Law number 23 of 2003 concerning child protection article 1 states that "a child is someone who is not yet 18 years old, including children who are still in the womb." Adolescence is a very crucial age because of children. Those who start to grow up as teenagers will find their identity. In this case, parents and education play a significant role in building the characteristics of children so that they become the next generation of the nation and not the other way around. Not a few teenagers in Indonesia are exposed to criminal cases due to inappropriate upbringing or promiscuity left by their parents without supervision.

Children are unique individuals and have their characteristics, so more attitudes and attention are needed to deal with children. The factors that exist in growing a child are very influential in his life, especially for his future, because these factors will polish a child's character (Surabangsa & Arifin, 2022). In this modern era, the behavior of some children is often out of control from parental supervision; this happens because access to information worldwide is effortless with very rapid technological developments, namely through smartphones and the internet. Not infrequently, we also see various information on criminal acts on television stations or online media, which report that "one of the perpetrators is a minor." This is very sad because the perpetrators of child crimes commit crimes to seek pleasure, and sometimes only those try it or are invited by friends.

Based on data from the Regional Planning, Research and Development Agency (BAPPEDA) Yogyakarta Province, the total criminal cases in 2021-2022 totaled 7,362 (seven thousand three hundred and sixty-two), and among these cases, approximately 20-30% were minors as a perpetrator. (bappeda.jogjapro.go.id, 2022) The criminal acts that are rife today are committed mainly by children, namely "glitches." Based on DIY police data some time ago, it was noted that there had been a "glitch" case with 102 perpetrators, of which around 80 people or about 79% were students or minors (Assa, 2019).

In Indonesia, laws regarding children have been regulated in Law number 23 of 2003 concerning Child Protection and Law Number 11 of 2012 concerning the Juvenile Justice System. The difference between the SPA Law and the previous Law is regarding Diversion, which is intended to avoid and distance children from the judicial process to prevent prejudice against children who conflict with the Law and are also expected to be able to return to their typical social environment (Mahendra, 2022).

Diversion is a legal settlement regulated in the SPA Law without having to go through a judicial process by promoting peace between the two parties. This is in line with Islamic Law and Jurisprudence because it is done for the benefit and also for the future of the child, based on Allah's word in the Qur'an Surah Hujurat verse 9: "Meaning: And if two groups of those believe that they are fighting, you should make peace between them! But if one violates the Covenant against the other, let the one who violates the Covenant be fought until he recedes to God's commands. If He receded, reconcile between the two according to justice, and be fair; Verily, Allah loves those who act justly."

This is also based on the words of Rasulullah Sallahu 'alaihi wasallam: Meaning: From Sahal bin Sa'ad Radhiyallahu and that the people of Quba' had fought to the point of throwing stones at each other, Rasulullah Sallallahu 'alaihi wasallam was informed about the incident, so he said: Let's go to reconcile them. The fiqh rule related to the above problem is al-Dhararu Yuzalu (harm must be eliminated).

Based on the word of Allah and the words of the Prophet, and the principles of fiqh above, we can learn that all forms of disputes and violations of the Law can be resolved through the mechanisms of forgiving institutions and deliberations between the disputants. The concept of punishing children will still be based on the criteria of criminal responsibility (al-mas'uli-ya al-jinaiyyah), namely: the existence of an act that is prohibited, of their own free will, and the maker knows the consequences of what he has done. Meanwhile, in Islam, there are reasons for forgiving, which are the basis for abolishing a person's punishment. These reasons include coercion (ikrah), drunkenness, madness, and immaturity. This research is necessary because children have different characteristics, so each child must also be treated differently, so the rights of each child must be considered, as the child's survival in the future. We must also consider the best interests of the child. The purpose of punishment in Islam is focused on corrective goals as the primary goal and rehabilitation goals, and diversion goals. However, until now, the form and model of Diversion in Islamic criminal Law have not been regulated in detail and unequivocally; therefore, a new and deeper ijtihad is needed.

2. RESEARCH METHOD

The research method used in this article is a descriptive analysis method (Sugiyono, 2017) to find diversion carried out by law enforcement officials in criminal acts of child perpetrators and also to see the effectiveness of Law Number 11 of 2012 and see the perspective of Islamic law on the

implementation of diversion and its efficacy in resolving cases of child offenders in the territory of Indonesia.

3. RESULTS AND DISCUSSIONS

The results in this study indicate that since the issuance of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA Law), it is hoped that there will be a model of a criminal justice system that is more specific to children in Indonesia and also make it even better. Hence, it is not surprising that many parties give hope for the birth of the SPPA Law (Mukdin & Heryanti, 2020). Initially, juvenile criminal justice was accommodated in Law no. 3 of 1997 concerning Juvenile Courts. This law aims to protect children if they have to deal with the law and eliminate negative prejudice against children who conflict with the law. However, in reality, this law could not protect children who disagreed with the law because the mindset of law enforcement officials and also the majority of society at that time was "every criminal case must be resolved in the realm of punishment," even though the losses from the case were relatively small or cases it is a misdemeanor crime. Juvenile criminal justice currently aims to provide the best rights for children without having to sacrifice the interests of the whole society and also without having to sacrifice the upholding of justice. This juvenile justice trial is also commonly referred to as a young trial with the duty and authority to conduct examinations, decide cases, and settle child cases by the provisions of the applicable juvenile justice law.

Article 1 point 1 of the SPPA Law stipulates that: "The Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving a sentence." Furthermore, Article 16 of the SPPA Law stipulates: "Provisions for proceedings in the Criminal Procedure Code also apply in juvenile criminal justice procedures, unless otherwise provided for in this Law." Juvenile justice exists to educate and improve the nature and behavior of children so that these children can leave lousy behavior that makes them entangled in the law. There is a very close relationship between the Juvenile Justice Law and the Child Welfare Law because both of them have the same goal, namely so that children can be guided and rehabilitated and also so that children can be re-socialized for their behavior for the sake of children's welfare in the future.

Before the promulgation of Law no. 11 of 2012 concerning the Juvenile Criminal Justice System, there were thoughts underlying the settlement of juvenile criminal cases outside the court, or it can be said to be an alternative effort. The effort itself is restorative justice which places juvenile justice outside the court. This means that juvenile justice is carried out outside the court involving several people, including parents, community leaders, BAPAS, and law enforcement officials, as well as victims if there are victims who are harmed. As the author has said, this aims to protect the mentality of children who are worried that they will become traumatized throughout their lives and also to eliminate negative prejudice against these children (Mahendra, 2022). The SPPA Law itself regulates diversion, namely the transfer of settlement of child criminal cases from the court process to processes outside the court. Based on the law, diversion efforts in juvenile justice are also required, including investigations and prosecutions of juvenile crimes carried out by the provisions of this legislation. So based on the two articles above, children who are dealing with the law in the judicial process are carried out outside the formal court environment as in the adult judicial process. The process carried out in juvenile crimes must be by the laws of the juvenile justice system, both in terms of investigation, investigation, and prosecution.

The purpose of diversion is so that child perpetrators and victims can reconcile, settle cases out of court, prevent children from being deprived of independence, and encourage parents always to supervise children and give children a greater sense of responsibility (Sosiawan, 2016). However, based on the provisions of the law governing diversion, diversion can be carried out if the threat of a crime is committed by a child under seven years of age and is not a repetition of a crime. It should also be noted that in carrying out the diversion of children who conflict with the law, we must consider various aspects, namely the crime committed, age, research results from BAPAS, and also approval from the willingness of children, victims, and also guardians who will be taken into consideration by investigators in attempts to divert children (Hirdayadi & Susanti, 2018; Setyorini et al., 2020; Triwati & Kridasaksana, 2021).

The agreement to carry out diversion in an effort to settle child crimes out of court in the form of "violations, misdemeanors, victimless crimes, or the value of the loss suffered by the victim does not exceed the local provincial minimum wage" as stipulated in article 9 of the Law SPPA paragraph (2) can be carried out by investigators together with the perpetrators and their families, as well as involving community leaders (Diputra et al., 2016). So the authors are of the opinion that in resolving criminal cases of children through diversion, an agreement from the victim or parents/guardians of the victim is required as stated in Article 9 of the SPPA Law paragraph (2). Islamic law itself regulates matters relating to criminal acts or what we are familiar with the term Jarimah. In carrying out the legal process to resolve an issue of Islamic law itself will hold deliberations before entering into the legal process of a case (Hidayat et al., 2021) This is done so that a case can be resolved properly and fairly without harming the victim and eliminating the deterrent effect on the perpetrator. The objectives of Jarimah itself are:

1. Punishment carried out as a form of retaliation (Al-Jaza)
2. Punishment is carried out as a form of prevention
2. Restoration or repair (Al-Islah)
3. Restorative, and
4. Atonement of Sins (At-Takfir)

So based on this, Islamic criminal law is intended to protect the soul, mind, property, and also offspring. Therefore, Jarimah is important for society so that it is hoped that the perpetrators of criminal acts will not repeat their mistakes and are also expected as a preventive measure so that other people do not take the same action. As has been explained in the description above regarding diversion in positive law, in Islamic law there is also something that resembles this which is called the terms As-Sulh and Tahkim. Pengertian As-Sulh is "an attempt to reconcile disputing parties, quarreling, grudges, and hostility in defending rights, so with this effort, it is hoped that the parties' disputes can be resolved properly." As stated by Wahba Zuhayly in his book *Al-Fiqh Al-Islami wa Adillatuhu*, As-Sulh is a contract that ends all forms of quarrels (Al-Zuhaili, 2011).'

The basis of As-Sulh is the word of Allah in Q.S: Hujurat verse 10: Meaning: Indeed, the believers are brothers, so make peace between your two brothers (who are in dispute) and fear Allah so that you may receive mercy. The compatibility between Positive Law and Islamic Law regarding diversion, as described above, can be seen based on its orientation, where recreation in positive law and As-Sulh in Islamic law are both Victim Oriented. However, there are also differences between the two concepts, which we can see in article 7 of the SPPA Law paragraph (2), which states that the obligation to divert children can be carried out if the threat of a crime is under seven years old and is not a repetition. So we can conclude that diversion in positive law can be applied based on the periodization of criminal penalties. Whereas in Islamic law, the application of As-Shulh can be used based on the categorization of criminal acts, such as the hudud category, which includes "adultery, qadzaf, khamar, Maisie, sariqah, Arabah, and also rebellion which has been determined by law in the Qur'an and As-Sunnah, then As-Shulh clearly cannot be applied. Meanwhile, if we relate the problem above to the rules of fiqh, then the power that fits the situation above is al-dhararu yuzalu (harm must be eliminated). This means that we have to think about the future of children who have the potential to bring harm if they have to face the law and what is most concerning is when they have to be behind bars; of course, this will shake their minds, so that it is feared that in the future they might do something the same or even worse, and there will be negative prejudice about the child in society, and this will affect not only the child but also those closest to them, especially their parents. Therefore, based on these fiqh rules, diversion is highly recommended and in line with these rules to eliminate harm to children in the future.

The category of children in Islamic law itself is someone who is not yet mature and not based on age, so when the child is caught in a criminal law, the child is not given the same punishment as an adult. Abdul Qadir 'Audah argues that there are three categories of human beings, namely (1) humans who are not yet able to think, in this case are children who are not yet mature or said to be not yet mumayyiz, the age range in this period is from the birth of a person to the age of seven years (2) humans who are able to think but are still weak, the age range in this period is 7 to 15 years or at least until the child reaches puberty, and (3) humans who are able to think perfectly, the age range in this category is 15 years and over (Rafid & Saidah, 2018).

As for the Child in positive law itself based on Law no. 3 of 1997 concerning juvenile justice in article 5 it is explained that children are divided into three, children aged 7 years and under cannot be punished and taught, then children aged 8-15 years can be taught but the law cannot be applied to the child, and finally, children aged 15 years and over, punishment and teaching can be applied (Aryaputra et al., 2019; Tumbel, 2015). Thus children in Islamic law and also children under 15 years of age in positive law do not have to be punished but are given guidance and learning so they don't repeat the same mistakes (R Wiyono, 2022).

Based on the explanation above, the authors argue that there is a correlation between positive law and Islamic law in dealing with juvenile crimes in the process of resolution. In positive law, the reference is Law no. 11 of 2012 concerning the Juvenile Criminal Justice System in an outline states that children who are in conflict with the law do not have to be punished but can use other alternatives in solving these problems, namely through diversion. It is the same with Islamic law which states that children who commit crimes cannot be subject to criminal law. This is based on the word of Allah in surah Al-Baqarah: 178: Meaning: "O you who believe, qisas is obligatory upon you with respect to those who are killed; freemen with freemen, slaves with servants, and women with women. So whoever gets forgiveness from his brother, let the one who is forgiven pay a diyat to the one who forgives in a good way. That is a relief from your Lord and a mercy. Whoever exceeds the limit after that, then for him a very painful punishment. Overall the explanation above, the authors conclude that indeed in the process of implementing diversion and As-Shulh differ in terms of application of age, but the two alternative settlements for these crimes agree that when children face the law, they do not have to be subject to punishment, but what is more The main thing is to be given teaching and training, as well as to perform social services to the community. This is also in line with the rule that says "al-dhararu yuzalu (harm must be eliminated) in order to avoid trauma that will be experienced by children so that it will have an impact on their future and also eliminate negative prejudice in their social environment both for themselves and those around them.

Positive law and Islamic law have the same principles for resolving child criminal cases because both have the same concept of justice, namely both have the concept of restorative justice, in which the concept aims to provide lessons and teaching to children who are in conflict with the law. not giving revenge. The concept in positive law is diversion and in Islamic law is As-Sulh. Thus, applying diversion or As-shulh in juvenile crimes to resolve cases is critical, both in positive and Islamic law, because this is done to find the best solution for child offenders and victims. In their application, the two concepts are expected to be able to provide a sense of justice for perpetrators and victims. Halim thinks that four primary reasons give rise to diversion in the justice system in Indonesia, namely:

1. Philosophical basis

It can be said that this diversion is in harmony with the values embodied in the importance of Pancasila, the one and only God, just and civilized humanity, Indonesian unity, democracy led by wisdom in representative, deliberative policies, and also social justice for all Indonesian people.

2. Sociological Basis

The existence of social factors that cause children to commit crimes, such as the impact of globalization, the development of science and technology, and even the influence of family supervision, dramatically influences the growth and development of children and the association of children, which has a negative impact. This needs to be overcome by involving several components of the family and society. The interaction between society members and social factors is a handling paradigm.

3. Juridical Basis

The juridical basis for establishing diversion is Article 28 paragraph (2) of the 1945 Constitution, Law no. 3 of 1999 concerning Human Rights, and Law no. 23 of 2002 regarding Juvenile Courts, in which the applicable provisions still consider aspects of children who conflict with the law. Guarantees for forms of child protection are also essential factors in formulating diversion articles.

4. Psychopolitical Basis of Society

Diversion is accommodated by taking into account several factors from the environment, one of which is by considering the results of the meeting with the opinion of the Commission III of the DPR with several related parties such as the Police, Prosecutors' Office, and also the Judiciary, besides that it cannot be separated from the role of child monitoring institutions. So with the community's involvement, the legal product of Law no. 11 of 2012, which accommodates this diversion, can be realized.

Based on the points above, it can be said that diversion is in line with Pancasila values in the first precept, namely Belief in One Almighty God. This lousy luck contained religious values contained in every spiritual teaching in Indonesia. As for Islam itself, we can find it in the Qur'an Surah Asy-Syu'ara verse 40 and the Qur'an Surah An-Nur verse 44. In these two verses, it is explained that Allah loves those who forgive and are tolerant in responding to the wrongs done by others to him.

Meaning: "And the recompense of an evil is an appropriate crime, but whoever forgives and does good (to those who do evil), the reward is from Allah. Truly, He does not like the wrongdoers." (Q.S Ash-Syu'ara: 40). Meaning: "God replaces the night and the day. Indeed, in that, there must be a lesson for those who have (sharp) vision. (Q.S An-nur: 44). The two verses above are references in Islamic Law for the application of diversion or As-shulh in the juvenile justice system if we look at it from a philosophical point of view in Pancasila which is contained in the Precepts of Belief in One Almighty God. This is because in diversion there are also values of forgiveness because the process is carried out by deliberating with the perpetrator or victim, parents, community leaders, and also law enforcement officials. As explained in the description above, the fiqh scholars have regulated this matter even though in a broad sense it is categorized in the rules of fiqh (Qawaid Fiqhiyyah), namely Al-dhararu Yuzalu (harm must be eliminated) which is one of the main rules in the rules of fiqh. In the rules reflect maqasid al-shariah al'ammah (general purpose of sharia), namely realizing the benefit of humanity. Because if there is no harm then benefit will be present. This rule is based on the words of the Prophet sallallaahu 'alaihi wasallam": "There should be no dharar and also dhirar". (Narrated by Bukhari).

In this hadith it means that there may not be dharar in any form either towards oneself or against others and also do not repay dharar to others with the same dharar. This means that we are required to eliminate every existing dharar. This is in line with the application of diversion in the juvenile justice system which brings benefits to children who are in conflict with the law, because this safeguards the future of the child and also keeps negative prejudice against the child and his family which is feared will cause various problems in mental health (mental). health). In Islamic law itself this diversion has existed since long before there was diversion in the juvenile justice system in Indonesia, in Islamic law it is known as the word As-Shulh, which means all forms of efforts to reconcile parties who have disputes, quarrels, grudges, and also those who hostile, then with this effort it is hoped that existing disputes can be resolved properly. Wahbah Zuhayly mentions that As-Shulh is "a contract to end all forms of quarrels and disputes". From all the explanations that the author conveyed above, Islamic law does not recognize criminal sanctions against children, but the sanctions given to children are ta'dib (learning) whose affairs are left to the leader. Thus it is clear that the handling of children who are in conflict with the law is prioritized by promoting As-shulh peace or diversion. Judging from the criminal law system that applies in Indonesia and also the existing criminal law in Islamic law, the handling of juvenile crimes has similarities which lie in the principle of legality and also prioritizes the interests of the child by prioritizing restorative justice through diversion. The difference between the two laws lies in the legal basis as well as imprisonment. Then diversion is an alternative legal step in resolving criminal cases against children without having to go through a formal criminal process by using a restorative justice approach that involves various interested parties as explained in the description above.

4. CONCLUSION

Based on the explanation that has been conveyed by the author above, the author concludes that in the process of criminal cases against child offenders, several things need to be considered, namely: "1. Applicable laws, 2. Government regulations, 3. Children's rights, 4. Position of children, and, 5. Community perceptions of children after the completion of the law that has been passed by children.

So in this case law enforcement officials must consider various existing aspects so that children who are dealing with the law do not lose their rights. So with regard to this matter in Indonesia it has been regulated in Law no. 11 of 2012 concerning the Juvenile Criminal Justice System which in Article 5 paragraph (3) regulates diversion, namely the settlement of criminal cases of children outside the court through mediation and deliberation involving various interested parties. In Islamic law itself, diversion has been known for a long time, diversion is known as AsShulh which means "all forms of efforts to reconcile parties who have disputes, quarrels, grudges, and are also hostile," so with this effort it is hoped that existing disputes can be resolved properly. . Wahbah Zuhayly mentions that As-Shulh is "a contract to end all forms of quarrels and disputes". Positive law and Islamic law have the same principles for resolving child criminal cases because both have the same concept of justice, namely both have the concept of restorative justice, in which the concept aims to provide lessons and teaching to children who are in conflict with the law. not giving revenge. The concept in positive law is diversion and in Islamic law is As-Sulh. From all the explanations that the author conveyed above, the author concludes that Islamic law does not recognize criminal sanctions against children, but the sanctions given to children are ta'dib (learning) whose affairs are left to the leader. Thus it is clear that the handling of children who are in conflict with the law is prioritized by promoting As-shulh peace or diversion. Judging from the criminal law system that applies in Indonesia and also the existing criminal law in Islamic law, the handling of juvenile crimes has similarities which lie in the principle of legality and also prioritizes the interests of the child by prioritizing restorative justice through diversion. The difference between the two laws lies in the legal basis as well as imprisonment. Therefore the application of diversion is an alternative legal step in resolving criminal cases against children without having to go through formal criminal proceedings by using a restorative justice approach involving various interested parties as explained in the description above.

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