

# COUNTERPRODUCTIVE OF DIVERSION FOR CHILDREN IN CONFLICT WITH THE LAW: THE CONTEXT OF LEGAL IMPOSITION FROM THE PERSPECTIVE OF ISLAMIC LAW

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**Abstract** - Children are the second generation or first generation. Children who violate the law, especially those related to narcotics or commit criminal acts, are greatly influenced by several other factors outside of themselves. To protect children from the influence of the formal processes of the criminal justice system, human thoughts or legal and humanitarian experts arise to make formal rules for the act of expelling children who break the law or commit criminal acts from the criminal justice process by providing other alternatives that are considered better for children. namely diversion. Meanwhile, Islam provides strict sanctions in the form of ta'zir for drug abusers. This research will use qualitative research that aims to understand a phenomenon that is happening which is observed by researchers. This research was conducted at Polres Parepare because it handles cases of child drug offenders. By means of interviews, observation and documentation. The results of the study show that diversion arrangements to direct narcotics offenders to the future. ). In the analysis of fiqh jinayah, the provisions of Islamic law concerning sanctions for perpetrators of narcotics crimes are minors, in Islamic law, children who are not yet mature, if they commit an act against the law, must be subject to had or ta'zir. I r sanctioned. Because he is not yet (adult) and does not know the rights and obligations in Islam. The fuqaha have agreed that a child who has not reached the age of puberty is not obligatory. Punishment is imposed, if the child commits a sinful act.

**Keywords:** Diversion, Drugs, Fiqh Jinayah, Children

## INTRODUCTION

Not only in large cities, but also in minor towns such as Parepare City and Pangkajenne City, Sidenreng Rappang, Pinrang City, and a number of other cities in South Sulawesi, child crime has become more difficult to control in recent years. The crime is committed not only by adults, but also by minors who serve as couriers in the distribution of illegal substances. The use of children as couriers in the dissemination of narcotics can be detrimental to their future because they lack interest in education and can suffer physical and mental harm. Crimes involving narcotics necessitate a specialised approach, particularly in the case of juvenile offenders (Febrianto, 2019).

Problems in children's lives are issues that require special consideration in the face of grievous challenges posed by the increasing accessibility of information and technology to children. Families, communities, and the government must place the utmost importance on the current state of children, which is extremely troubling. This context demonstrates that the current state of children's welfare is far below expectations and the minimum standard, such that many children are victims of crime and adult exploitation, including becoming drug transporters. Not a few children engage in deviant behaviour, such as delinquency leading to drug-related crimes, he added.

The urgency of the mandate for the application of Article 1 number 7 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System in relation to diversion is the transfer of child cases from the criminal justice process to processes outside the criminal justice process. The purpose of the enactment of Law Number 11 of 2012 is to affirm Indonesia's commitment to child protection and to introduce the concept of diversion for children in conflict with the law. In order to realise restorative justice, children who are victims of criminal acts and society as a whole must transfer the resolution of juvenile cases from the criminal justice system to processes outside of the criminal justice system.



In addition, Law No. 11 of 2012 seeks to establish a judicial system that genuinely protects the best interests of children in conflict with the law.

One of the most common crimes conducted by children in Parepare City and Sidenreng Rappang City is drug addiction, in addition to being a courier. Children perpetrate crimes because their parents are not supervising them. In addition, an unhealthy social environment is a major contributor to the fact that minors commit drug crimes. According to the data, 92.6% of users received their first dose of medication from acquaintances, and nearly 80% received it for free. According to the Special Child Development Institute, the number of minors committing criminal acts has increased from year to year. Relatedly, appropriate handling is required so as not to harm the child's future. Referring to Law No. 11 of 2012 regarding juvenile justice, it is possible to apply essential principles exemplified by the existence of an article mandating diversion in the juvenile criminal justice system referred to in paragraph (2), letters a and b.

Children as perpetrators of narcotics offences are still viewed as having a weak social reality in law enforcement regarding diversion. Several District Courts in South Sulawesi have found that the enforcement of juvenile diversion in narcotics crime cases is still ineffective. In a few District Courts, decisions on cases involving minors convicted of narcotics offences through diversion as a transfer of settlement to the criminal justice system are still scarce. On the other hand, obstacles exist in the implementation of diversion in cases of narcotics crime.

Comparing previous studies that investigated alternative solutions to the diversion of narcotics abuse in children (Dwijayanti, 2017; Handayani, 2018; Sepud, 2017), this study examined diversion efforts in children who are perpetrators of narcotics abuse. Subsequent studies on law enforcement against drug abuse by children (Archimada, 2021; Hidayat et al., 2021; Imran et al., 2020; Johar et al., 2020; Novitasari & Rochaeti, 2021; Sari, 2019).

## **METHOD**

This research falls into the category of qualitative descriptive research since its primary objectives are to describe, analyze, and interpret the subjects that were investigated through the use of documentation, interviews, and observations. This research is a field research (field research). Field research is research that is conducted on an event that actually occurred. There are many applications for this qualitative approach. First, dealing with reality makes it easier to adapt qualitative methods. Second, the nature of the relationship between the researcher and the respondent is clearly demonstrated by this approach. Third, this approach is more adaptive and sensitive to various sharpenings of shared influence on the pattern.

Finding, evaluating, and compiling the data needed for this research can be done through philosophical methods. The normative juridical approach is a method used to study the human body in a certain way, such as through the process of analyzing theories, concepts, and patterns of human behavior that are relevant to this research. The philosophical approach is a method used to study the human body in a certain way, such as through the process of analyzing theories, concepts, and patterns of human behavior that are relevant to this research.

## **RESULT AND DISCUSSION**

### **1. Counterproductive to the Application of Diversion to Children Against the Law**

The application of diversion to children in conflict with the law, as outlined in Article 1 number 7 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, transfers the resolution of child cases from the criminal justice system to processes outside the criminal justice system. The purpose of the Juvenile Criminal Justice System is to protect children's liberties, particularly when they are confronted with the law. The law contains guidelines for assisting juvenile offenders and minor victims of crime. Moreover, society in general is a form of diversion within the context of administering justice, which seeks to restore a just situation and resolve child problems outside of the criminal justice system. The objective of the Juvenile Criminal Justice System is to establish a legal system that effectively safeguards the best interests of minors before the law.



Specifically, the regulation of the application of diversion can be studied in the minds of judges at the Sungguminasa District Court, as it is stated in Perma Number 4 of 2014 that at the stage of examining cases for children dealing with the law is mandatory, as stated in article 3: "child judges are required to seek diversion in the case of a child accused of committing a crime punishable by imprisonment for less than seven years and also charged with a crime punishable by imprisonment for less than three After receiving an appointment decree from the Chief Justice of the District Court, the juvenile judge is required to issue a diversion determination, in accordance with Article 4, paragraphs 1, 2, and 3, which state that in diversion, the judge acts as a facilitator whose responsibility is to direct the course of diversion. Article 5 paragraph 4 requires the diversion facilitator to attend to the child facing the law regarding the charge, and all diversion agreements are detailed in the facilitator's report, in this case to the child judge in article 6 (Syahbuddin, 2022). In the opinion of the judge at the Watampone District Court, the application of diversion in all cases involving children facing the law, whether as perpetrators, victims, or witnesses, is governed by Law No. 11 of 2012, except for those that are not specifically regulated, in which case it refers to the Book of Laws. The Criminal Law Act (KUHP) stipulates that trials in cases involving children confronting the law are conducted behind closed doors and that judges and social workers such as legal advisors are not permitted to wear gowns. At the Selayar District Court, the implementation of Law No. 11 of 2012 has been proceeding smoothly, and many judges have attended SPPA training to obtain certificates as minor judges from the Legal and Judicial Research and Development Agency of the Supreme Court of the Republic of Indonesia. It was further explained that the implementation of Perma No. 4 of 2014 has also been successful in the Selayar District Court, with many minors successfully diverted at the investigation, prosecution, and court levels (Nurkauzar, 2022).

The District Court Judge in Sungguminasa, who had previously served as a judge in the Mojokerto District Court, was successful in resolving cases involving minors in conflict with the law through diversion. In the following explanation that the application of Law No.11 of 2012 at the Sungguminasa District Court has been implemented since the promulgation of Law No.11 of 2012 concerning the Juvenile Criminal Justice System, which consists of 108 articles, it is shown that the Chairperson of the Sungguminasa District Court has appointed a judge who is already certified as a juvenile judge in every child case. Implementation of Permit No. 4 of 2014 for Diversion Implementation Guidelines in SPPA. After the Chairperson of the Sungguminasa District Court appointed a juvenile judge to hear the child's case, the juvenile judge reviewed the file and was required to make a diversion determination for the first time if there was a victim. Perma Diversion must be accompanied by conditions (paragraph 2 of article 7) if a sentence of less than seven years is imposed and the offence is not a repeat offence. And the diversion agreement must procure the victim's and/or the victim's child's family's consent and the child's and his family's willingness. The objective of diversion, as stated in Article 6 of Law No. 11 of 2012, is to establish harmony between the victim and the child. Resolving child cases outside of the court system, preventing children from being deprived of independence, encouraging community participation, and imparting in children a sense of responsibility (Yenny, 2022).

The difficulty of judges in sustaining the diversion of each child as a perpetrator of a crime necessitates that diversion be sought at the level of investigation, prosecution, and examination of child cases in district courts. However, if the district court has attempted diversion and the minor victim has refused diversion, then the diversion cannot be carried out, and the juvenile judge submits the case to the court's chief. The child judge then establishes a trial date so that the child's case will be tried based on the judge's difficulties with diversion efforts. The diversion that I carried out while on duty at the Mojokerto District Court was successful, despite the fact that it was difficult to provide an explanation and understanding, especially for the parents of the victim's child, but praise God, the diversion was successful and the juvenile judge made a diversion agreement that was signed by the parties (Yenny, 2022).

In the opinion of the judge of the Mamuju District Court, the application of Law Number 11 of 2012 in the District Court has been proceeding in accordance with the principles of the Juvenile Criminal Justice system outlined in Article 2 of Law Number 11 of 2012. The rights of children in Law Number

11 of 2012 have been implemented in accordance with the best interests of the child and the prevention of negative stigma in children's cases. The most important context for enforcement is deliberation on diversion, as stipulated in Law No. 11 of 2012 and Perma No. 4 of 2014, Article 1 paragraph 1: deliberation between the parties involving children and their parents/guardians, victims and/or their parents/guardians, counsellors community members, social workers, professionals, community representatives, and other parties to reach a diversion agreement through a restorative justice approach (Nurleli, 2022).

The difficulty for justices in enforcing diversion stems from the absence of consensus during deliberations, which causes diversion to fail. Another difficulty is the age of the child who commits a crime; in some cases, a child under the age of 18 is capable of committing severe crimes, such as assault resulting in serious bodily injury or murder. Regardless of the child's role in the incident, it is appropriate for the child not to be able to do it, even though the child is able to do it. This raises the question "why is the child able to do that" or "is it still appropriate for a child who is not yet 18 years old to be called a child when his actions are like adults" (Nurleli, 2022).

Referring to the opinions of some District Court justices, enforcement of diversion remains extremely weak. In this context, it is difficult for the parties concerned in the enforcement of diversion from children in conflict with the law to reach a deliberative agreement. Therefore, it is crucial that justices are directly involved in establishing communication and providing parties with conflict resolution solutions so that cases do not always have to be resolved through trial.

District Court data tracing enables the evaluation of diversion enforcement weaknesses. As shown in the table, various crimes against minors can be found in the decisions of judges in several District Courts.

Table 1

District Court	Types of Crimes for ABH Children in 2020				
	Narcotics	Theft	persecution	sexual	Unpublish
PN Sungguminasa	4	4	2	5	25
PN Watampone	1	2	1	1	
PN Sidenreng Rappang	7	2	1	2	
Pinrang District Court	1	1	2	-	
Parepare PN	-	-	-	-	

Table 2

District Court	Types of Crimes for ABH Children in 2021				
	Narcotics	Theft	persecution	sexual	Decision
PN Sungguminasa	5	2	9	-	16
PN Watampone	-	-	2	2	Unpublish 9
PN Sidenreng Rappang	5	1	-	2	
Pinrang District Court	1	2	-	-	
Parepare PN	-	-	-	-	

Table 2

District Court	Decision on the Types of Crimes of ABH Children in 2022				
	Narcotics	Theft	persecution	sexual	Decision
PN Sungguminasa	4	3	2	3	
PN Watampone	-	3	1	3	
PN Sidenreng Rappang	2	2	2	4	Diversion
Pinrang District Court	1	1	-	-	
Parepare PN	-	-	1 diversion	-	



The main principle of implementing diversion is persuasive action or a non-penal approach and provides an opportunity for someone to correct mistakes. With an approach like this, it is hoped that there will be no more torture, coercion or acts of violence against children. This is the main objective of implementing diversion. Through diversion, the law can be upheld without committing violent and painful acts by giving someone the opportunity to correct their mistakes without going through criminal penalties by the state which has full authority (Hambali, 2019) .

The diversion process is basically an attempt to divert from the criminal justice process to amicable settlement, which is basically the soul of the Indonesian nation, to resolve problems in a family way to reach consensus. The connection with diversion is the adherence to the principle of deliberation for consensus in every decision making in the framework of settling criminal cases committed by children. Deliberation for consensus is a process of discussing issues in sitting together by involving related parties in order to reach a mutual agreement. Deliberation for consensus is carried out as a way to get decisions that are mutually beneficial to both parties so that no party is harmed. With deliberation for consensus, it is hoped that two or several parties with different opinions will not continue to fight and find a middle ground. Therefore, in the process of deliberation for consensus, humility and self-sincere are needed and rid of each other's ego. In social life, deliberation for consensus has several direct benefits, namely as follows: 1. Deliberation for consensus is the right way to overcome various disagreements. 2. Deliberation for consensus has the opportunity to reduce the use of violence in fighting for interests. 3. Deliberation for consensus has the potential to avoid and overcome the possibility of conflict (Ratomi, 2013) .

This culture of deliberation for consensus has a philosophical and theological foundation that leads to restoring the dignity of all parties involved, replacing conflict situations with peace (silaturahmi principle), eliminating blasphemy with forgiveness, stopping suing and blaming wrong (principle of mutual forgiveness and begging for forgiveness). to God). The desired clarification is not through the court table, but through the peace and negotiation table (the principle of deliberation). Settlement of cases through deliberations is directed at harmonization or harmony in society and does not exacerbate the situation, by maintaining an atmosphere of peace as much as possible. This is certainly in line with several principles attached to the concept of diversion, for example: 1. The concept of diversion aims to create peace between the perpetrator and the victim by providing compensation or by apologizing and it is considered that there is no conflict anymore, as well as a request for regret and the perpetrator will not repeat his evil deeds. 2. Diversion programs can be in the form of; enough with the provision of warnings, skills development, guidance or counseling (giving advice). 3. Cases where diversion is carried out are usually cases that are not serious and do not endanger the community, and there is a close relationship between the perpetrator and the victim (Ratomi, 2013) .

## **2. The Application of Diversion in Children Against the Law**

As a result of a search of the Supreme Court directory, various types of narcotics, theft, abuse, and sexual offences were discovered in cases involving minors facing the law in South Sulawesi. This was determined by analysing the decisions of judges in five District Courts. After tracing the decisions of judges from five District Courts, it reveals that children incur a large number of crimes. From 2020, 2021, and 2022, it will be difficult to reduce all crimes, according to data on minors in conflict with the law, such as the Sungguminasa District Court, which recorded 8 decisions in narcotics crimes and 7 decisions in theft crimes, and the Watampone District Court, which recorded 7 decisions in theft crimes.

The effectiveness of applying diversion to minors in conflict with the law in several cases at the Sungguminasa District Court, including the traffic accident case 18/Pid Sus-Anak/2022/PN Sgm and the prosecution case 4/Pidsus-Anak/2023/PN Sgm. The application of diversion to juveniles charged with drug offences at the Sidrap District Court in case number 16/Pid.Sus/2022/PN Sdr and wagering offences at the Pinrang District Court in case number 24/Pid.Sus/2023/PN Pin.

A form of protection for children in conflict with the law is the modification of the diversion model, which aims to avoid and distance children from the formal legal process so that stigmatisation of children who break the law can be avoided and children can be reintegrated into society.



Consequently, participation from all stakeholders is required for this to occur. This process must aim to provide children and victims with restorative justice. Restorative justice is a process in which all parties involved in a particular crime work together to solve problems and make a commitment to improve conditions involving victims, children, and communities in seeking solutions for improvement, reconciliation, and peace of mind that are not necessarily motivated by retaliation (Hambali, 2019). The implementation of diversion is based on the condition of the child in order to prevent negative effects, particularly on the child's soul and development, which are conceivable if criminal cases are resolved through the criminal justice system. Children who are suspected of committing a crime can be dealt with without a prosecution, thereby protecting their human rights and preventing them from being labelled as mischievous.

The main principle of implementing diversion is persuasion or a non-punitive approach, which affords offenders the chance to correct their errors. With this approach, it is anticipated that children will no longer be subjected to torture, coercion, or acts of violence. This is the primary objective of diversion implementation. Through diversion, the law can be upheld without the use of violence and suffering by allowing offenders to correct their mistakes without undergoing criminal punishments imposed by a state with complete authority (Hambali, 2019).

The diversion process is an endeavour to divert from the criminal justice system to amicable settlement, which is the essence of the Indonesian nation, in order to resolve problems in a family-oriented manner and reach consensus. The connection to diversion is adherence to the principle of deliberation for consensus in every decision-making process within the context of resolving juvenile criminal cases. Deliberation for consensus is the process of discussing issues while seated with related parties in order to reach a consensus. Consensus-based deliberation is used to reach decisions that are mutually beneficial to both parties so that neither party is injured. With consensus-seeking deliberation, it is anticipated that two or more parties with differing opinions will not continue to fight and will instead find a middle ground. Therefore, in the process of reaching a consensus, contrition and self-sincerity are required, along with a lack of ego. In social life, deliberation for consensus has the following direct benefits: 1. Deliberation aimed at achieving consensus is the best method for resolving various disagreements. 2. The pursuit of consensus has the potential to reduce the use of violence in conflicts over competing interests. 3. (Ratomi, 2013) Deliberation for consensus has the potential to prevent and surmount the possibility of conflict.

This culture of deliberation for consensus has a philosophical and theological basis that leads to the restoration of the dignity of all parties involved, the replacement of conflict situations with peace (*silaturahmi* principle), the eradication of blasphemy through forgiveness, and the cessation of suing and blaming wrongdoing (principle of mutual forgiveness and begging for forgiveness). to God). The preferred method of elucidation is not the courtroom, but the peace and negotiation table (the principle of deliberation). The purpose of resolving disputes through deliberations is to promote social harmony and to avoid aggravating the situation by preserving as much peace as possible. This is consistent with several principles associated with the concept of diversion, including: 1. The concept of diversion aims to establish peace between the perpetrator and the victim by compensating them or apologising, and it is believed that there is no longer any conflict, as well as a request for remorse, and that the perpetrator will not repeat his criminal acts. 2. Diversion programmes may consist of the provision of warnings, the development of skills, guidance or counselling (giving advice). 3. Cases that are diverted are typically minor, do not pose a threat to the community, and involve a close relationship between the perpetrator and the victim (Ratomi, 2013).

After the enactment of Law No. 11 of 2012 and Perma No. 4 of 2014, the District Court's enforcement of diversion in resolving cases of minors in conflict with the law does not always proceed smoothly. Failure to enforce diversion can be exacerbated by the legal factor itself, which is limited to the implementation of the law. In this instance, the statutory factor appears to play a significant role in the failure of this diversion process. The absence of diversion implementation regulations has become a distinct impediment to this procedure's execution. The implementation of new diversion is governed by a Supreme Court Regulation that applies to court-level diversion processes. In the meantime, implementation becomes the policy of each entity's leadership at the investigation and prosecution



levels. Consequently, there is no conventional reference that can be used as a benchmark. In the absence of standards, there are no benchmarks for the accomplishments that must be accomplished to achieve success. The unclear meaning of the terms in the law appears to play a role in determining the effectiveness of diversion. In Article 7 paragraph (2) letter an of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, it is stated that diversion is implemented when the crime committed is punishable by less than seven years in prison. The meaning of the "threat" of punishment is not clarified. As is generally recognised, the gathering of evidence occurs during trial examinations. Therefore, with regard to illicit acts committed in conjunction with threats (Prahanela & Purwadi, 2016).

Obviously, the associated punishment can only be determined through a court hearing. This implies that efforts to divert must always be made, as threats of punishment against minors can only be determined through legal proceedings. In the meantime, at the stages of investigation, investigation, pre-prosecution, indictment, and prosecution, criminal acts are only alleged. In this instance, investigation-level diversion was not conducted. Interviews with Public Prosecutor Heru Prasetyo revealed that investigators did not pursue diversion because, according to their findings, Sidik's child violated Article 363 paragraph (1) of the Criminal Code, which carries a maximum penalty of seven years, not less than seven years as required by the diversion provisions. .Despite the child's behaviour, it should not be viewed in a single article frame. However, based on the public prosecutor's indictment, the child's actions also satisfy the elements of section 362 jo 56 of the Criminal Code, where the conduct is punishable by a maximum of five years minus one-third, thereby satisfying the requirements for diversion. This is also the basis for the Public Prosecutor's Office of the Karanganyar District Prosecutor's Office to divert children, in addition to the research findings of the Correctional Centre, which also recommends diversion in the form of not carrying out detention and handing children over to social institutions for fostering. Unfortunately, Karanganyar Resort Police investigators did not make this endeavour because the diversion provision lacked a clear interpretation (Prahanela & Purwadi, 2016).

Concerning the quality of law enforcement, particularly in the domain of diversion implementation, it appears that weaknesses have been identified that have a significant impact on the success of diversion law enforcement. In the preceding explanation regarding the failure of diversion, the guardian of the child and the victim arises in the cooperative factor as a facilitator who is none other than the law enforcement officer. In order for a process to be successful, it is expected that the facilitator will be able to provide counselling, input, and perspectives to convince the parties to reach an agreement. Obviously, in order to provide input, the facilitator must have specialised knowledge in his discipline. This expertise can be refined through training in alternative dispute resolution. Alternative Dispute Resolution is a concept that encompasses various forms of dispute resolution outside of the judicial procedure through legal means, based on a consensus approach or not. According to interviews with investigators and public prosecutors, diversion-authorized members have never received or been included in certified facilitator training. This is significant because the facilitator plays a significant role in the diversion discussions (Prahanela & Purwadi, 2016).

Although efforts have been made, law enforcement officials have not fully implemented this diversion. This is due to a combination of factors. On the basis of the results of the author's interview with Bripda Siti Hajar Rahmat, the investigator for the Women and Children Services of the Gowa Police, he stated that one of the obstacles to the implementation of diversion was the lack of time allowed by law for law enforcement to pursue diversion. Due to the fact that the law only allows investigators thirty (30) days to pursue diversion. Nonetheless, in the jurisdiction of the Gowa Police, a number of locations are still quite distant from the Police, so additional time is required. In addition, it is difficult to summon witnesses and victims because they are not always present at the appointed time. Sometimes being late is a major hindrance for us. In addition, the Gowa Police conducts very few juvenile investigations, so the large number of cases involving children is a significant obstacle. The solution is to maximise the efficiency of time so as not to exceed the legal time limit. In what follows, the author describes the obstacles investigators face when attempting to implement diversion within the jurisdiction of the Gowa Police: 1) Factors of Legal Substance Law



Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU-SPPA) provides a legitimate legal basis for each of these agencies to carry out diversion efforts. Officials in these agencies, beginning with investigators, prosecutors, and judges, carry out institutional diversion initiatives. The existence of the Law on the Juvenile Criminal Justice System serves as a guideline for all agencies, in this case, investigators at the police, public prosecutors at the attorney general's office, and justices at the court, in their efforts to divert juvenile criminal cases. This document serves as a resource for law enforcement officials so that they are institutionally prepared to implement diversion initiatives at every stage of the criminal justice system. This readiness will influence the efficacy of the mediation process as a concept of diversion to realise restorative justice for children as both offenders and victims of crime. However, in accordance with Article 15 of the SSPA Law, the Diversion Process must be completed within a maximum of 30 (thirty) days of the Diversion's commencement. This poses a problem for the Women and Children Services of the Gowa Police, whose jurisdiction is so vast that it takes longer to complete this diversion. In addition, according to the testimony of Women and Children Services investigators, when summoning perpetrators, victims, and their families, they are sometimes required to contact repeatedly due to legal time constraints. The Juvenile Criminal Justice system has a considerable impact on the implementation of this diversion. 2) Factors Relating to the Legal Structure In addition to elements of the law, the implementation of diversion efforts in cases involving minors requires human resources from law enforcement officials who are authorised to carry out these diversion efforts. Human resources unquestionably play a role in the law enforcement process and the readiness of police agencies, prosecutors, and courts to pursue diversion. Regarding the efficiency of the application and implementation of diversion at the Gowa Police, it is clear that law enforcement personnel play a crucial role in carrying out diversion initiatives. This indicates that the diversion effort will not be executed and will be successful if the Women and Children Service Satreskrim of the Gowa Police is implemented. And the diversion effort will be successful if the investigators possess the knowledge and skills necessary to seek accord during the diversion procedure. To increase the knowledge and skills of law enforcement officers, it is necessary to direct their knowledge and skills in various ways. The paucity of investigators serving women and children is a further factor impeding the implementation of this diversion (Burhan, 2019).

In practise within the jurisdiction of the Gowa Resort Police, where environmental factors play a significant role, the majority of children do not socialise or socialise in the appropriate environment. These children do not associate or socialise with other children, and they even tend to socialise or socialise with more mature individuals. Where the role of parents is essential, the majority of these children report that when their parents are at work or away from the home, they are able to socialise and socialise freely, even crossing boundaries. It should also be noted that appropriate childcare in the jurisdiction of the Gowa Resort Police is almost deemed suboptimal in situations where children interact with one another. After a child has committed a crime, the role of the community, in this instance the offender, the victim, and their family, hinders the ability of investigators to implement diversion programmes. There are still many victims' families, especially when diversion is about to be implemented, who do not want peace because they have not forgiven the perpetrator's actions. In addition, victims and their families typically want compensation for their losses, so the implementation of diversion can take longer than expected. Therefore, the investigator, as the mediator, must explain thoroughly to the parties so that they can reach a peace agreement. The government and police must socialise the diversion system as an alternative to resolving juvenile criminal cases, keeping in mind that parental awareness is still low. This socialisation can be accomplished by raising awareness that this diversion is for all children, not just a select few. In addition, the investigator should speak with the perpetrator child first, so that during the mediation process, he does not offend the victim or his family, and so that the desire to engage in diversion remains. If the perpetrator continues to attack the victim for reasons that the victim cannot tolerate, it is completely understandable if the victim does not wish to engage in diversion. Therefore, it must be arranged in such a way that the victim desires to be diverted until the Minutes are drafted (Burhan, 2019).





Difficulties in carrying out diversion, sometimes one of the parties does not want to carry out diversion, for example, the victim/child victim does not want to make peace with the child, threats are charged against children over 7 years old and the child has committed the crime again, sometimes community leaders who are invited to attend diversion are not present, and there is still a shortage of Social Workers and PK in remote areas.

Two factors support the philosophy of dealing with juvenile offenders: 1. Considered not to have completely comprehended their errors, it is appropriate for children to receive reduced sentences and/or punishments that differ from those imposed on adults. 2. Compared to adults, it is believed that children are simpler to nurture, educate, and make aware of improper behaviour. Thus, it is preferable if illicit child abuse is not permitted.

Children who repeatedly commit criminal acts, both in the same crime and in other crimes, are another factor that judges view as a barrier to the application of diversion. Moreover, minors who are convicted of serious crimes and sentenced to more than seven years in prison are incarcerated. The victims and their families are opposed to peace. In addition to the comprehension of victims and victims' families regarding diversion, many still do not comprehend, so it is the judge's (facilitator's) responsibility to educate them. If a region lacks social assistance and the perpetrator's actions make it difficult for the victim and the community to absolve him, social assistance should be provided

### 3. Legal Imposition of Children in Islamic Law

Islamic law covers a very broad aspect, starting from the rules concerning the relationship between the human person and his God and the rules for playing with fellow human beings themselves. One of these scopes is Islamic criminal law which in the fiqh tradition is referred to as jarimah or jinayah, which terminologically means a criminal act or delict that is prohibited by the shari'ah and is punishable by punishment for violators. <sup>9</sup> One of the principles in Islamic shari'ah is someone who is not responsible except for the finger that he has done himself and however is not responsible for the actions of other people's finger.

The meaning of criminal responsibility (al-Mas'uliyah al-Jinā'iyah) itself in Islamic law is the imposition of a person with the results (results) of an act that he did voluntarily, where he knows the intentions and consequences of his actions. This responsibility must be upheld for three things, namely: 1. There was a prohibited act 2. It was done voluntarily 3. The creator knew the consequences of the act. The three things mentioned above must be fulfilled, so that if one of them is not fulfilled then there is no criminal responsibility. From these three conditions it can be seen that criminal responsibility is imposed on someone other than children<sup>15</sup> until he reaches the age of puberty, a person who is mentally ill (insane), is in a state of sleep or is forced.

The factor that results in criminal liability is immorality, namely carrying out actions that are prohibited by the Shari'ah or the attitude of not doing what is required by the Shari'at. Regarding punishment for children, legislation in the field of civil law for children is far more adequate than in the field of criminal law for children. Children who have not reached the age of 18 or have never been married are under the authority of their parents as long as they are not deprived of their authority. The parents represent the child regarding legal actions inside and outside the courthouse. In a positive criminal law system, criminal responsibility is closely related to mistakes and unlawful acts. So that a person gets a sentence depending on two things, namely:<sup>19</sup> a. Objective element, that is, there must be an element against the law. b. Subjective element, namely the perpetrator must have an element of error in the form of intentional and or negligence. According to Pompe, as quoted by Martiman Projohamidjojo, the elements of toerekenbaarheid (accountability), are: a. The ability to think (psychis) in the maker that allows the maker to control his mind and determine his will. b. And because of that, can understand the meaning and consequences of his actions. c. And because of that also, the maker determines his will in accordance with his opinion (about meaning and consequences). Satochid Kartanegara stated that toerekeningsvatbaarheid or being accountable is about the state of a person's soul, while toerekenbaarheid (accountability) is about actions related to the perpetrator or maker. In the case of a criminal penalty on a positive criminal sentence, criminal penalties for children are determined by Law no. 3 of 1997 concerning Juvenile Justice whose



sentence is determined by half of the maximum sentence committed by an adult. As for the imposition of life imprisonment and death penalty are not treated against children. The difference in treatment and punishment is intended to better protect and protect children so that they can face a long future. This difference is also intended to provide opportunities for children so that through coaching they will gain their identity.

to become human beings who are independent, responsible and useful for the family and society. Regarding sanctions against children, they are determined based on age differences, that is, for children aged 8 to 12 years they are only subject to mere actions, for example being returned to their parents, placed in social organizations, or handed over to the state. As for children who are over the age of 12 to 18 years are subject to punishment. For the sake of protecting children, cases of naughty children must be tried at the Juvenile Court which is under the General Court environment. Thus the judicial process for naughty children from the time they are arrested, detained, tried, and further coaching must be handled by special officials who really understand child problems. Islamic law has clear rules regarding the position of children in Islam, which is a "trust" that must be guarded by both parents. It is also their responsibility to educate them so that they behave as directed by religion. If there are deviations in a child's behavior, Islam under certain circumstances still makes concessions. As implied in a hadith which states the "innocence" (raf ul qalam) of a child until he reaches puberty, is marked by the emergence of "dreams" (ihtilam) in men and menstruation for women. If a child steals, or even kills, he cannot be subject to any punishment. In fact, Wahbah Zuhaili, in his book *al-Fiqh al-Islamiy*, notes that the status of the child's actions, in the category of fiqh, does not include criminal acts (jinayah). In Islamic criminal law, criminal responsibility can be erased because of certain reasons, both related to the actions of the perpetrator of the crime and causes related to the circumstances of the offender. Like a crime committed under coercion, there will be no prosecution for this matter as long as it is proven true, then a crime committed by a person in an unconscious state such as delirium, even though he looks alert, he is still asleep. So legally he is not responsible, as well as crimes committed by someone who is still a child and someone who is insane or has a nervous breakdown (Hermawati, 2015) .

Cannot be sued to be sentenced because a child cannot be said to be legally capable. Article 45 of the Criminal Code states that: "In the case of criminal prosecution of a minor for committing an act before the age of sixteen, the judge can determine: order that the guilty person be returned to his parents, guardian or caretaker, without any punishment. 17 Article 45 of the Criminal Code can be understood that children who are still minors cannot be criminally prosecuted. The point is that it cannot be subject to criminal law sanctions. In principle, criminal law is aimed at adults who, in positive law terms, are called legally competent. Likewise in the Islamic legal system which provides different treatment to children who are caught in criminal acts (jarimah).

In Islamic law, legal imposition is only applied to people who are aqil baligh (mukallaf). Indications of people who have reached the age of puberty: First, the perfection of a child at the age of 15 years. Second, the child in question has had dreams of having sex. Third, it's menstruation for girls. If one of these indications occurs in a child, then the child in this condition has moved on to adulthood and can be subject to syara' law khitob (imposition) because the child is considered aqil-baligh. Based on this description, it can be concluded that criminal responsibility for minors is erased. Both in Indonesian criminal law and in Islamic criminal law, criminal sanctions cannot be imposed on a child. Children get special treatment unlike most adults. In Islamic criminal law, the loss of criminal responsibility for children is caused by a child who has not received the imposition of shari'ah law until he becomes amukallaf. Islamic criminal law makes a criminal act imperfect if it is committed by a minor or not reaching puberty. In the formulation of criminal acts (jarimah), it is required that the perpetrator must be held criminally responsible (al-masuliyah al-jinaiyyah), as a moral element (rukun adaby) of a crime. The moral element (rukun adaby) is called criminal responsibility<sup>18</sup>. The point is that the maker of a finger or the maker of a crime or delict must be a person who can be held accountable for his actions. Therefore a finger maker must be someone who can understand the law, understand the contents of the burden, and be able to accept the burden. People who are



assumed to have these criteria are people who are mukallaf, because they are the only ones who are exposed to khitab (calling/imposition) or taklif (Ropei, 2020) .

Accountability in Islamic criminal law is upheld on three bases namely; 1. Doing things that are prohibited Doing things that are really prohibited by the texts, as explained in the previous chapter, that there is no crime and accountability if there is no prohibition on the texts, both the Al-Qur'an and Al-Hadith. As the rule of fiqh: 4 لاجر يمة ولاعقبة بلا النص. Meaning: "There is no crime and accountability if there is no prohibition of the text". 2. Done voluntarily One of the main rules in Islamic criminal law is knowing that the act he is doing is something that is prohibited. the crime. 3. The perpetrator knows the consequences of the act. In criminal liability it is required that the perpetrator really knows the consequences of the act that has been committed and is ready to bear all the consequences. The perfection of thinking has encouraged humans to know the consequences caused by their actions. Therefore, the imposition of punishment can be imposed on the perpetrators of criminal acts. Based on the provisions above, those who can be subject to criminal liability in Islamic criminal law are only those who receive taklif or impositions, they are what are referred to in fiqh terminology asmukallaf. 6 If there are all three of the above, then there is also criminal responsibility. With thus these three things are elements of criminal responsibility in Islamic criminal law. Criminal responsibility is only imposed on people who are intelligent, mature, and self-willed. If one of the three elements of accountability is not fulfilled, then there is no criminal responsibility for it. Because a person who is not intelligent is not a person who knows and is not a person who has choices. Similarly, a person who has not yet matured cannot be said that his knowledge and choices are perfect. Therefore, there is no responsibility towards children, madmen, imbecile (Umar & Zias, 2017) .

Accountability in Islamic criminal law is upheld on three bases namely; 1. Doing things that are prohibited Doing things that are really prohibited by the texts, as explained in the previous chapter, that there is no crime and accountability if there is no prohibition on the texts, both the Al-Qur'an and Al-Hadith. As the rule of fiqh: 4 لاجر يمة ولاعقبة بلا النص. Meaning: "There is no crime and accountability if there is no prohibition of the text". 2. Done voluntarily One of the main rules in Islamic criminal law is knowing that the act he is doing is something that is prohibited. the crime. 3. The perpetrator knows the consequences of the act. In criminal liability it is required that the perpetrator really knows the consequences of the act that has been committed and is ready to bear all the consequences. The perfection of thinking has encouraged humans to know the consequences caused by their actions. Therefore, the imposition of punishment can be imposed on the perpetrators of criminal acts. Based on the provisions above, those who can be subject to criminal liability in Islamic criminal law are only those who receive taklif or impositions, they are what are referred to in fiqh terminology asmukallaf. 6 If there are all three of the above, then there is also criminal responsibility. With thus these three things are elements of criminal responsibility in Islamic criminal law. Criminal responsibility is only imposed on people who are intelligent, mature, and self-willed. If one of the three elements of accountability is not fulfilled, then there is no criminal responsibility for it. Because a person who is not intelligent is not a person who knows and is not a person who has choices. Similarly, a person who has not yet matured cannot be said that his knowledge and choices are perfect. Therefore, there is no responsibility towards children, madmen, imbecile. Criminal responsibility in Islam can be upheld for 3 things, namely the first is the crime he committed. Second, the perpetrator or maker knows the consequences of the act. Third, that his actions are prohibited by law. As in the rules of fiqhiyah 42 ال حكم لفاعل العقل قبل ورود النص which means: "There is no law for the actions of people who have common sense before the Nash." The ability to do law in the minimum limit of a child is when entering the baligh period, because baligh is a sign of someone in the development of his intelligence and being able to distinguish between good and bad deeds and perfect his mind. Regarding maturity (baligh) as the imposition of religious obligations (taklîf) there are several opinions of scholars. Baligh consists of two types: First, baligh bi thabi'i, namely baligh which can be known from its behavior or signs, in this case the sign of puberty can be known through visible and clearly visible signs, namely: i. Dream intercourse for men, ii. Menstruation or the arrival of menstruation for women, iii. Voice change, iv. Grow armpits, v. Growing hair around the genitals.



Second, *baligh bi sinni*, namely *baligh* by stipulating age provisions, if by nature there are no visible signs of puberty, then for the sake of legal certainty this *baligh* is determined by stipulating age. As for the determination of maturity at this age, there are differences of opinion among the scholars (Damanik, 2020) .

Criminal law policies in resolving child cases can be seen from the Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System, namely the process of resolving cases of children who commit crimes through diversion and restorative justice. Law Number 11 of 2012 must always be pursued in every process of examining a child case, or in other words the diversion process is an inseparable part of the criminal justice system. Diversion is carried out if the act committed is punishable by imprisonment for under 7 (seven) years, and is not a repetition of the crime. Seeing the principles of child protection, especially the principle of prioritizing the best interests of children, a process of resolving child cases outside the criminal mechanism or commonly called diversion is needed, because correctional institutions are not a way to solve children's problems and precisely in correctional institutions prone to violations of human rights. children (Sani, 2015) . Sanctions or punishments in Islamic criminal law are called *'iqāb* (singular form while the plural form is *'uqūbah*) which means torture or retribution for crime. Meanwhile, according to Abu Zahrah, punishment is torture for the perpetrator of the crime as a reward for him and that punishment is a *syara'* stipulation in eliminating *mafsadah*, and eliminating *mafsadah* itself is a benefit. (Muhammad Abu Zahrah, 1974: 112). Children are a group that is not given punishment in Islam as long as they are immature. Adult indicators are having had wet dreams for boys and having menstruation for girls. Although some scholars of the school of thought also set an age limit for a person's maturity, such as Imam Syafi'ie in his book *al-Umm* as quoted by Chairuman and Suhrawardi revealed, if one has the age of 15 years for both men and women, except for men who have had sex or women who have menstruated before they reach the age of 15, they are considered adults. (Chairuman Pasaribu and Suhrawardi K. Lubis, 2004: 10). According to Abdul Qadir Audah, children who are not yet of legal age are only subject to *ta'dibi*, namely punishment that is instructive in nature and does not affect the child's psyche. A child cannot be said to be a recidivist if he repeats the same act because *ta'dibi* is not considered a form of punishment. (Abdul Qadir Audah, 2008:257). Islamic Criminal Law does not limit disciplinary sanctions that allow it to be carried out on a child and is left to the *Waliyul Amri* (government) to determine the punishment for a child. However, there are some *fiqh* experts who say that reprimands and beatings are part of disciplinary sanctions or *ta'dib*. *Waliyul amri* or the government can choose punishments for children according to the place and era in which they are. Such as punishment of reprimands and spanking, placing children who commit crimes in correctional or educational institutions, and so on. When it comes to criminalizing children in Indonesia, one of the most important principles is to fulfill a sense of justice for children who have violated the law. (Sani, 2015)

## CONCLUSION

The Juvenile Criminal Justice System aims to protect children's rights in court by transferring cases from the criminal justice system to non-criminal justice processes. Child judges are required to seek diversion in the case of a child accused of committing a crime punishable by imprisonment for less than seven years and charged with a crime punishable by imprisonment for less than three. Diversion agreements are detailed in the facilitator's report to the child judge. The application of diversion in all cases involving children facing the law is governed by Law No. 11 of 2012, except for those that are not specifically regulated. At the Selayar District Court, the implementation of Law No. 11 of 2012 has been proceeding smoothly and many judges have attended SPPA training to obtain certificates as minor judges.

Perma No. 4 of 2014 has also been successful in the Selayar District Court, with many minors successfully diverted at the investigation, prosecution, and court levels. The objective of diversion is to establish harmony between the victim and the child, resolving child cases outside of the court system, preventing children from being deprived of independence, encouraging community participation, and imparting in children a sense of responsibility. If the district court has attempted

diversion and the minor victim has refused diversion, the juvenile judge submits the case to the court's chief and sets a trial date.

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