The 2nd Proceeding
“Indonesia Clean of Corruption in 2020”

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"

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RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW

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ABSTRACT

Children who do not abuse drugs merely as criminals, but as victims. Second, starting from the thought that children who abuse drugs are also victims, efforts to provide protection for children who abuse drugs is also a priority.

This study aims to determine the legal construction of the criminal prosecution against perpetrators of child abusers of narcotics, criminal prosecution against perpetrators of child abusers of narcotics, as well as the reconstruction of criminal law against perpetrators of child abusers of narcotic-based progressive law.

This study is normative, ie methods that describe or explain a fact systematically later analysis done legally with the linking of the data and facts obtained convictions related to child abusers of narcotics and associated with the legislation.

Reconstruction of sentencing child abusers of narcotics with the principle of diversion and restorative justice with due regard to the principle of the best interests of the child that is no crime to children, through the reconstruction of Article 127 paragraph (1) of Law No. 35 of 2009 by adding provisions stated in Article 127 paragraph (1) a, b, and c does not apply to child abusers of narcotics, and every child abusers of narcotics required to undergo medical rehabilitation. it can realize the decision imposing the rehabilitation of child abusers of narcotics as a punishment-based progressive law in realizing the restorative justice.

Law enforcement officials must work together and build a shared perception of the protection against child abusers of narcotics. The concept of diversion and restorative justice are two concepts which aims to find an alternative solution to the child offender drug abuse. The concept of diversion undertaken by maximizing the discretion possessed by law enforcement officials who handles children with problems with the law. The concept of restorative justice should be carried out with an understanding of the victim, the perpetrator, the victim's family and the family of the perpetrator and the community to work together to determine appropriate action against the medical rehabilitation of drug abusers of children.

Keywords: Punishment, the Child Abuse To Narcotics and Law Progressive
A. Background

Act No. 11 of 2012 on the Criminal Justice System Child is a form of protection of children in conflict with the law. These laws regulate explicitly about restorative justice (restorative justice) and versioned, which is intended to avoid and keep children out of the judicial process so as to avoid the stigmatization of children in conflict with the law and expected that children can get back into a natural social environment. Therefore it is very necessary participation of all parties in achieving these goals, which in turn can create a good restorative justice for children.

The use of criminal law as a means of tackling child abusers of narcotics by essence a selection dilemma. Given the criminal justice often displays itself only as a legal machinery that would only result in procedural justice (procedural justice). So the results are often unsatisfactory and ignore the interests of the welfare of children. Relating the treatment of children abusing drugs, the problem of juvenile criminal justice process or the criminal verdict is a stigma attached after completion of criminal proceedings. The increasing trend of drug abusers of children, encouraging efforts to address specifically in the field of criminal law children both formal and substantive.

In the perspective of criminal policy, crime prevention essentially a rational effort in tackling crime. As a rational effort included prevention abusers of narcotics, must start from a proper diagnosis in handling. Conceptually, crime prevention can be done either using the criminal justice (judicial) and outside the criminal justice (non-judicial). Efforts to shift from judicial process towards non-judicial process in the prevention of drug abusers of children, basically an effort to avoid child of the application of criminal law.

Narkotika child abusers can not be viewed solely as a criminal, but also to be seen as victims. This paradigmatic approach is intrinsically contradictory and thought that (the crime) drug abusers can be qualified as a crime victim whithout. Victims of crimes are drug abusers perpetrator himself, not others. Therefore, it is not in place when in the case of drug abusers is concerned only seen as perpetrators and are not seen as victims. The assertion of these issues relate considered very urgent measures to be taken in handling. The treatment of the offender to the treatment of victims is not the same. Understanding the position of the child in a criminal act is a measure of the accuracy see the treatment given to him. Affirmation of this issue is important to determine which drug should be administered. Whether it should be convicted, therefore only be regarded as perpetrators or even get rehabilitation because it is seen as a victim. With the accuracy of diagnosis, then the drug should be given to it will also be appropriate and effective.

Combating drug abusers by children by means of criminal law are found to be in place for the following reasons: First, as a means of crime prevention, criminal law is a drug that is oriented at tackling the aftermath of the crime. Thus, the criminal law is merely corrective and repressive. Such an approach can be tolerated when only oriented towards the offender. In fact, child abusers of narcotics not only as a criminal, but also the victims. Second, starting from ideas, child drug abusers are victims of child protection efforts is also a priority.

Handling of child abusers of drugs should be used in alternative ways of punishment with the principles of restorative justice. This principle aims to position the criminalization of children so that children can escape or heal a child from drug addiction by applying the principle of the best interests of the child (the best interest of the child) when he was dealing with the law. Criminalization narkotikan child abusers is not the only tool in order to improve the situation in the handling of child abusers of narcotics is through medical rehabilitation measures.

Punishment in the form of rehabilitation in Article 103 of Law No. 35 of 2009: Judges who hear cases addict can decide to order the treatment and / or treatment through
rehabilitation if the addict is proven guilty of narcotics, and the judge may set for order the treatment and / or treatment through rehabilitation if the addict is not proven ber

B. Justice Legal Perspective Progressive

In the legal system anywhere in the world, justice has always been the object of hunting, especially through the institution trial. Fairness is fundamental to the operation of a legal system. The legal system is in fact a structure or completeness to achieve the concept of justice that has been agreed.

Formulate the concept of justice in progressive legal thought is how to create substantive justice and not justice procedure. As a result of modern law that gives great attention to the aspects of the procedure, the law in Indonesia are faced with two choices between courts which emphasize a procedure or substance. Progressive justice is not justice but pressing on substantive justice procedures.

In order to make substantive justice as the core run in Indonesian courts, the Supreme Court plays a very important. As the pinnacle of the judiciary, he has the power to push (encourage) the courts and judges in this country to realize the progressive justice.

The statement that the law is for a man, in the sense that the law merely as a means to achieve a life that is fair, prosperous and happy, for humans. Therefore, according to the progressive legal thought, is not the purpose of human law, but the law is just a tool. So that justice will take precedence substantive than procedural justice, it is merely in order to show the law becomes a solution for the problems of humanity.

Satjipto Rahardjo quoted Taverne, Give me a good prosecutor and judge, then the regulation is bad though I could make a good decision. Prioritizes behavior (human) rather than legislation as a starting point the paradigm of law enforcement, will lead us to understand the law as a process and humanitarian projects.

C. The Value-Based Law Enforcement Fairness

The enforcement issue is a problem faced by every community. Although later every community with its own characteristics, may provide its own style of the problem within the framework of law enforcement. But every community has the same purpose, in order to achieve peace in society as a result of formal law enforcement.

Law enforcement should in principle benefit (utility) for society, but in addition, people also expect their law enforcement to achieve justice. Judge in adjusting legislation with concrete atmosphere for justice, truth and the rule of law should be able to make sense of the contents of the law and seek clarity in interpreting adapted to the reality, so that the law can apply concrete if faced with the event.

D. Approach Progressive Law Criminal Justice System In Children

<table>
<thead>
<tr>
<th>No</th>
<th>Identification</th>
<th>Progressive Approach outlook In Law Enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Assumption</td>
<td>The law for man, not man for the law; Law is not absolute and final institution but always in the process of becoming (law as a process, law in the making)</td>
</tr>
<tr>
<td>2</td>
<td>Purpose</td>
<td>Law enforcement to welfare and happiness of humankind</td>
</tr>
<tr>
<td>3</td>
<td>Spirit</td>
<td>Liberation of the types, ways of thinking, principles and theories that have been used in law enforcement; Liberation of the culture of the rule of law (administration of justice) felt to hamper the ruling and solve legal problems.</td>
</tr>
<tr>
<td>4</td>
<td>Progressivity</td>
<td>Law enforcement aimed at the welfare and happiness of humankind and therefore regard the law is always in the process of becoming (law in the making); Sensitive to changes that occur in the community at local, national and global; Rejecting the status quo when the cause of decadence, the atmosphere corps. and very detrimental to the interests of the people, giving rise to resistance and rebellion that led to the progressive interpretation of the law.</td>
</tr>
<tr>
<td>5</td>
<td>Character</td>
<td>Progressive law seeks to divert the focus of the study which was originally used to get to the behavior of optical laws; Consciously progressive legal presence in close association with humans and society, (the law responsive); Law is not viewed from the glass eyes of the law itself but viewed and judged by the social goals to be achieved and the effect of lead on the working of the law (the law of progressive sharing familiar with legal realism and sociological jurisprudence) Progressive law has a closeness with the theory of natural law because it cares for the things that meta Juridical, and has proximity to critical legal studies, but broader scope</td>
</tr>
</tbody>
</table>

Law enforcement criminal justice juvenile criminal law enforcement believes that juvenile justice is stressed in the interests of the child and not solely for the benefit of the juvenile justice law. Legislations juvenile justice system and not as an absolute and final law, but always in the process of becoming (law as a process, law in the making). Law enforcement juvenile justice system with a progressive approach aimed at the welfare and happiness of children.

Law enforcement in each time step examination process of children given the power to decide to stop the examination by the authority of its discretion, in the interests of child protection. Thus law enforcement action in accordance with the rule of law with a progressive approach, which saw law enforcement and social goals to be achieved and the effect of lead on the working of the law.

### E. Children As Narcotics Abuse Victims

In this study, children as drug users, namely those who are victims for crimes they have committed themselves that the typology of victims identified by the state and status of the victim.

Drug users on the one hand be regarded as criminals who should be punished for behaving contrary to the morals of humanity, acts or behavior that is strongly opposed by the public on the other hand, drug users as well as victims of a crime has the rights that have been mentioned above, despite the crimes they have committed themselves. Therefore, the users / addicts as victims are also eligible for protection in the form of medication and / or treatment through rehabilitation center facility.

### F. Comparison of Punishment Against Children in Different Countries

Restorative justice as an approach in solving the case of children are also being vigorous practiced by some countries such as New Zealand, Australia, which has included the concept of diversion into legislation juvenile justice in the country. Comparison of the implementation of diversion in the country of Indonesia, New Zealand, and Australia:
<table>
<thead>
<tr>
<th>Indonesia</th>
<th>New Zealand/ Selandia Baru</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Diversion in the juvenile criminal justice process: - Investigation - Prosecution - Courts</td>
<td>Diversion Outside the juvenile criminal justice process. Family Group Conferencing, which is negotiations between the victim and the perpetrator in the settlement of criminal acts in the community</td>
<td>The concept of diversion of children is not an alternative program, but a diversion to pull out of the justice system. Police Diversion, the Police as the first gate who deal with children in conflict with the law be followed to determine whether the judicial process or other informal actions.</td>
</tr>
</tbody>
</table>

G. Diversion and Restorative Justice For Protection Of Children Who in conflict with the Law In Juvenile Justice in Indonesia

Juvenile justice is a special court that handles juvenile criminal cases. Investigators Children, the Public Prosecutor of the Child, Judge Child, clerk of Correctional Kids is a unity that is included in a system called the Criminal Justice System Child (The Juvenile Justice System), aims to tackle delinquency, is also expected to provide protection to children who have problems with the law.

One solution in the treatment of children is a criminal offense justice restorative approach, implemented by means of Divert (diversion). Restorative justice is a process of settlement is done outside the criminal justice system (Criminal Justice System) involving victims, offenders, families of victims and perpetrators, the public and the parties concerned with a crime that happened to reach an agreement and settlement. Restorative justice is considered a way of thinking / new paradigm of looking at a crime committed by one. Restorative justice is a theory of justice that emphasizes the recovery of damages caused by a criminal act. The solution is considered the most good by bringing the parties together cooperatively to decide how to solve the problem.

H. Rehabilitation As Alternative Sanctions

Judging from the aspect maatregel (action) against the perpetrators of drug abusers is a way to secure the society and improve maker (abusers of narcotics), by way of forced treatment. Which means in the Act No. 35 of 2009 is rehabilitation. Performers abusers of narcotics for themselves in this regard is a narcotic addict is included self-victimizing victims are victims of crimes committed themselves (apparent victim) or a victimless crime. Victims of drug abuse is mutual victimization, namely the perpetrators of the victim is the perpetrator himself.

Treatment and care of drug addicts is done through a rehabilitation facility. Rehabilitation for drug addicts carried out with a view to restore and develop the physical, mental and social patient concerned. Rehabilitation is divided into two types, namely, medical rehabilitation and social rehabilitation. Medical rehabilitation of drug addicts held in the hospital held either by the government or the private sector appointed by the health minister. Nonetheless, shrimp legislation provides an opportunity for specific rehabilitation institution established by the community can do a medical rehabilitation drug addicts, the condition that an agreement with the Minister of Health.
I. Reconstruction of Article 127 of Law Number 35 Year 2009 Rehabilitation of Children Against Abuse of Narcotics Guna For Punishment Based Progressive Law

Act No. 35 of 2009 was a criminal law reform because more attention to the condition of the perpetrator abusers of narcotics addicts more precise sentenced to undergo rehabilitation of the prison sentence. Then issued SEMA Number 04 Year 2010 regarding the Placement Abuse Guna, Guna Abuse Victims and Narcotic Addicts in Rehabilitation Institute of Medical and Social Rehabilitation. SEMA issuing No. 07 of 2009 and No. 04 of 2010 SEMA is a technical guidance in applying the provisions of the law governing the sentencing terms of rehabilitation of drug addicts and victims of drug abusers.

Based on the reviews victimology, classifies drug addicts as self-victimizing the victims of his crime victims themselves, then, the most appropriate judge sentenced rehabilitation. Because addicts need to get treatment and / or care, and because he is a party who also suffered the loss of an evil that is evil abusers of narcotics. It is known in fact, judges in handling cases drug addicts have difficulty determining that a person is experiencing addiction / drug dependence because in the case files often are not accompanied by documentary evidence that states a person experiencing drug dependence. The difficulty is what makes the judges tend to impose a prison sentence instead of rehabilitation.

Based on the above, in order to realize the imposition verdict rehabilitation of child abusers of narcotics as a punishment-based progressive law in bringing about restorative justice and the application of criminal provisions as a measure of last resort, which has been a difficulty for judges, then the provisions of Article 127 of Law No. 35 of 2009 needs to do the reconstruction, which states:

Article 127
(1) Setiap Penyalah Guna:
   a. Narkotika golongan I bagi diri sendiri dipidana dengan pidana penjara paling lama 4 (empat) tahun;
   b. Narkotika golongan II bagi diri sendiri dipidana dengan pidana penjara paling lama 2 (dua) tahun; dan
   c. Narkotika golongan III bagi diri sendiri dipidana dengan pidana penjara paling lama 1 (satu) tahun.
   d. Ketentuan sebagaimana tersebut pada huruf a, b, dan c di atas tidak berlaku terhadap anak penyalah guna narkotika.

(2) Setiap anak penyalah guna narkotika wajib menjalani rehabilitasi medis:
   a. Narkotika golongan I bagi diri sendiri menjalani rehabilitasi paling singkat 1 (satu) tahun;
   b. Narkotika golongan II bagi diri sendiri menjalani rehabilitasi paling singkat 9 (sembilan) tahun;
   c. Narkotika golongan III bagi diri sendiri menjalani rehabilitasi paling cepat 6 (enam) tahun: atau
   d. Ketentuan sebagaimana tersebut pada huruf a, b, dan c di atas wajib memperhatikan keterangan ahli.

(3) Dalam memutus perkara sebagaimana dimaksud pada ayat (1) huruf a, b, dan c, hakim wajib memperhatikan ketentuan sebagaimana dimaksud dalam Pasal 54, Pasal 55, dan Pasal 103.

(4) Dalam hal penyalah guna sebagaimana dimaksud pada ayat (1) huruf a, b, dan c, dapat dibuktikan atau terbukti sebagai korban penyalah guna narkotika, penyalahguna tersebut wajib menjalani rehabilitasi medis dan rehabilitasi sosial.
## Reconstruction of Article 127 of Law Number 35 Year 2009

Rehabilitation of Children Against Abuse of Narcotics Guna As Punishment Yang Based Progressive Law

### Sebelum Rekostruksi

1. Setiap Penyalah Guna:
   a. Narkotika golongan I bagi diri sendiri dipidana dengan pidana penjara paling lama 4 (empat) tahun;
   b. Narkotika golongan II bagi diri sendiri dipidana dengan pidana penjara paling lama 2 (dua) tahun; dan
   c. Narkotika golongan III bagi diri sendiri dipidana dengan pidana penjara paling lama 1 (satu) tahun.


3. Dalam hal penyalah guna sebagaimana dimaksud pada ayat (1) dapat dibuktikan atau terbukti sebagai korban penyalah guna narkotika, penyalahguna tersebut wajib menjalani rehabilitasi medis dan rehabilitasi sosial.

### Hasil Rekonstruksi

1. Setiap Penyalah Guna:
   a. Narkotika golongan I bagi diri sendiri dipidana dengan pidana penjara paling lama 4 (empat) tahun;
   b. Narkotika golongan II bagi diri sendiri dipidana dengan pidana penjara paling lama 2 (dua) tahun; dan
   c. Narkotika golongan III bagi diri sendiri dipidana dengan pidana penjara paling lama 1 (satu) tahun.
   
   d. Ketentuan sebagaimana tersebut pada huruf a, b, dan c di atas tidak berlaku terhadap anak penyalah guna narkotika.

2. Setiap anak penyalah guna narkotika wajib menjalani rehabilitasi medis:
   a. Narkotika golongan I bagi diri sendiri menjalani rehabilitasi paling singkat 1 (satu) tahun;
   b. Narkotika golongan II bagi diri sendiri menjalani rehabilitasi paling singkat 9 (sembilan) tahun;
   c. Narkotika golongan III bagi diri sendiri menjalani rehabilitasi paling cepat 6 (enam) tahun: atau
   
   d. Ketentuan sebagaimana tersebut pada huruf a, b, dan c di atas wajib memperhatikan keterangan ahli.

3. Dalam memutus perkara sebagaimana dimaksud pada ayat (1) huruf a, b, dan c, hakim wajib memperhatikan ketentuan sebagaimana dimaksud dalam Pasal 54, Pasal 55, dan Pasal 103.

4. Dalam hal penyalah guna sebagaimana dimaksud pada ayat (1) huruf a, b, dan c, dapat dibuktikan atau terbukti sebagai korban penyalah guna narkotika, penyalahguna tersebut wajib menjalani rehabilitasi medis dan rehabilitasi sosial.

### J. Conclusion

Reconstruction of sentencing child abusers of narcotics with the principle of diversion and restorative justice with due regard to the principle of the best interests of the child that is no crime to children, through the reconstruction of Article 127 paragraph (1) of Law No. 35 of 2009 by adding provisions stated in Article 127 paragraph (1) letter a, b, and c does not...
apply to child abusers of narcotics, and every child abusers of narcotics required to undergo medical rehabilitation. It can realize the decision imposing the rehabilitation of child abusers of narcotics as a punishment-based progressive law in realizing the restorative justice.

Through the theory of restorative rehabilitation (returns to its original state through rehabilitation) with due regard to the principle of the best interests of the child are not criminal for children, researchers conducted a reconstruction of Article 127 paragraph (1) of Law No. 35 of 2009 by adding provisions stated in Article 127 paragraph (1) a, b, and c does not apply to child abusers of narcotics, and every child abusers of narcotics required to undergo medical rehabilitation. It can realize the decision imposing the rehabilitation of child abusers of narcotics as a punishment-based progressive law in realizing the restorative justice.
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