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Reformulation of Criminal Procedural Law Policies by Strengthening Diversion in Juvenile Criminal Cases in Indonesia

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Abstract

This research focuses on the elaboration of aspects of reformulation of criminal procedural law policies in juvenile criminal cases in Indonesia. This study uses juridical-normative methods in assessing the complexity of the urgency of strengthening diversion efforts in juvenile justice criminal cases in Indonesia. The rise of cases of bullying, abuse, and harassment that occurs in educational institutions, especially elementary and junior high schools, should be one of the common centers of attention and require immediate resolution. The latent problem that continues to cause casualties every year, must be solved through policy engineering, including reformulation of the criminal procedural law policy. For this reason, the approach used is also certainly different, by still providing opportunities or relief for perpetrators according to the actions they do. The results of this study show that changes and renewals in formulations are imperative in order to restore the terms of diversion to the value of restorative justice and the principles of the juvenile criminal justice system. The limitation of the diversion requirement under the threat of seven years will narrow the priority granting of diversion. For this reason, the application of diversion should be expanded to all types of juvenile criminal cases as the first way of settlement. Criminal settlement through the courts is still used, but as a last resort after diversion, the process is sought.

Keywords: *juvenile crime; diversion; renewal.*

Introduction

Criminal law enforcement is an absolute requirement that must be carried out competently and consequently for every state of law.¹ The British thinker A.V. Dicey has theorized since the 1950s that one of the main features of the rule of law is the principle of protection and respect for human rights. For this reason, criminal law, which in its teleological sense is a legal instrument in the protection of the life, body, property, and honor of every individual, becomes an inseparable element in the life of the nation.² Moreover, declarationally, the founding fathers of the Indonesian nation have determined themselves in Article 1 Paragraph (3) of the 1945 Constitution that "... *Indonesia is a country of law*".³

Nowadays, the legal spotlight on child abuse cases seems endless in media coverage in the country. The latent problem, which is deeply rooted as a 'negative culture' in today's society, has often reached limits beyond reasonableness.⁴ Bullying, or what is familiarly referred to as 'bullying' continues to haunt children, especially in educational institutions, a place that should be safe, comfortable, and awake. In fact, in some extremes, it has caused casualties.⁵

Since 2020, the Indonesian Child Protection Commission (KPAI) has recorded an increasing trend of child bullying cases from previous years. Until the second half of 2020, there were 119 reports of bullying cases.⁶ Meanwhile, the number of unreported cases is confirmed to be much higher. Like the iceberg phenomenon, 119 cases are just an emerging 'surface', while far more cases are below the surface trajectory and undetected.

Finally, a severe case of bullying, and at the same time marking the importance of policy reformulation, is the case that happened to F (11), a young elementary school student in Tasikmalaya who had to stretch his life due to severe depression after being bullied by 15 of his schoolmates to snag a cat and spread the footage on social media.⁷

Cases of bullying that are fatal are not the first time they have happened. In January, a junior high school student in Banyuwangi had to undergo surgery to cut his 4cm femur after being bullied and molested by his schoolmates. Meanwhile, in February, students at

¹ Clare McGlynn dan Kelly Johnson, "Criminalising Cyberflashing: Options for Law Reform," *The Journal of Criminal Law* 85, no. 3 (Juni 2021): 171–88, <https://doi.org/10.1177/0022018320972306>.

² Dylan Lino, "The Rule of Law and the Rule of Empire: A.V. Dicey in Imperial Context," *The Modern Law Review* 81, no. 5 (2018): 739–64, <https://doi.org/10.1111/1468-2230.12363>.

³ Eko Hidayat, "Perlindungan Hak Asasi Manusia Dalam Negara Hukum Indonesia," *ASAS: Jurnal Hukum Ekonomi Syariah* 8, no. 2 (2016), <https://doi.org/10.24042/asas.v8i2.1249>.

⁴ Yanuar Farida Wismayanti dkk., "Child sexual abuse in Indonesia: A systematic review of literature, law and policy," *Child Abuse & Neglect* 95 (2019), <https://doi.org/10.1016/j.chiabu.2019.104034>.

⁵ Suyadidan Issaura Dwi Selvi, "Online Learning and Child Abuse: The COVID-19 Pandemic Impact on Work and School from Home in Indonesia," *Heliyon* 8, no. 1 (Januari 2022): e08790, <https://doi.org/10.1016/j.heliyon.2022.e08790>.

⁶ "Child Protection Data Bank 2016-2020" (Komisi Perlindungan Anak Indonesia, 2021).

⁷ Muhammad Irfan Djazmuri dan Agung Putra Mulyana, "Fenomena Cyberbullying Pembiaran Juvenile Delinquency Dalam Teknologi Media Baru," *JISIP (Jurnal Ilmu Sosial dan Pendidikan)* 7, no. 1 (15 Januari 2023), <https://doi.org/10.58258/jisip.v7i1.4801>.

SMA Negeri 3 Unggul Palopo, had to receive medical treatment after being held captive, beaten, and molested by 5 perpetrators who were also his schoolmates. In the college environment, a student of the Indonesian Muslim University (UMI) died in a senate cadre held by senior victims. Similar cases have also occurred on various campuses before, and set a negative precedent in the practice of 'training' in the campus environment.⁸

The rise of cases of bullying, persecution, and harassment that occur in educational institutions, especially elementary and junior high schools should be one of the centers of common attention and require immediate resolution.⁹ Latent problems that continue to cause victims every year, must be resolved through policy engineering, including the reformulation of criminal procedural law policies. With regard to the background of these problems, the study in this paper focuses on elaborating aspects of criminal procedural law policy reformulation in juvenile criminal cases in Indonesia.

Method

The research method in this study is juridical-normative, by examining laws and regulations and legal positions in the problems brought.¹⁰ This study uses the concept of literature study, with additional literature on books, journals, and electronic media with solid and comprehensive data concretization to find the relevance of legislation to real conditions in the legal conception of handling bullying crimes and child protection law in Indonesia.¹¹

Result & Discussion

1. Legal Protection of Children

Legal protection is an act or effort to protect the entire community from the behavior of a person who can harm his legal interests, in order to create peace and public order while living life.¹² Legal protection is afforded to every subject of law, including *natural persons*, as well as *rechtsperson* to rights and obligations. In criminal law, this protection is provided to guarantee the security of the right to life (life), body, property and things, self-esteem and good name, as well as legal interests in morality and

⁸ Iyus Yosep dkk., "A Scoping Review of the Online Interventions by Nurses for Reducing Negative Impact of Bullying on Students," *Journal of Multidisciplinary Healthcare* Volume 16 (Maret 2023): 773–83, <https://doi.org/10.2147/JMDH.S406050>.

⁹ Djamzuri dan Mulyana, "Fenomena Cyberbullying Pembiaran Juvenile Delinquency Dalam Teknologi Media Baru."

¹⁰ Kormelius Benuf dan Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (2020): 20–33, <https://doi.org/10.14710/gk.2020.7504>.

¹¹ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: PT. RajaGrafindo Persada, 2003).

¹² Andri Yanto, *Hukum dan Ketertiban: Fragmen Pemikiran Tentang Paradigma Hukum dan Perkembangannya* (Yogyakarta: Megalitera, 2022).

honor.¹³ The instrumentation of criminal law, which is equipped with sanctions and binding for all legal subjects, is nothing but in an effort to guarantee the fulfillment of the elements of protection mentioned above.¹⁴

Bullying is an act of misappropriation and assault of personal honor, although in many other extremes it can be physical, psychic, mental, and honorary torture.¹⁵ Obviously, in the perspective of positive criminal law, bullying becomes a prohibited act and is threatened with criminality. The crime of bullying is contained as an inseparable part of the Criminal Code (KUHP) in Chapter XVI regarding humiliation, Chapter XX regarding persecution, Chapter V regarding crimes against public order, especially in Article 170, Article 311, Article 310 Paragraphs (1) and (2) and Article 351 of the Criminal Code. There is also legal protection for child victims of bullying which is regulated in Law No.35 of 2014 concerning Child Protection.¹⁶ In addition to these two regellings, the form of bullying carried out through cyberspace has also been regulated in Law No.19 of 2016 concerning Amendments to Law No.11 of 2016 concerning Electronic Information and Transactions (ITE Law).¹⁷

With these various provisions, normatively, efforts to protect child victims of bullying have been regulated with a comprehensive complexity of norms.¹⁸ The punishment of bullies also has a clear legal basis, although in its application it must deal with various other related provisions, for example the principle of diversion that limits the space for criminal law to move if the perpetrator is a minor according to the Juvenile Criminal Justice System Law.¹⁹

2. Diversion and Restorative Justice in Juvenile Crime

A child is any individual who is in the custody of a parent or guardian, a person who by law has not been considered an adult and has not been able to act.²⁰ Generally, in the case of criminal acts age can be a reason for criminal removal, which removes the

¹³ Hidayat, "Perlindungan Hak Asasi Manusia Dalam Negara Hukum Indonesia."

¹⁴ Faisal Faisal, Derita Prapti Rahayu, dan Yokotani Yokotani, "Criminal Sanctions' Reformulation in the Reclamation of the Mining Community," *Fiat Justisia: Jurnal Ilmu Hukum* 16, no. 1 (7 Juni 2022): 11–30, <https://doi.org/10.25041/fiatjustisia.v16no1.2222>.

¹⁵ Muhammad Fachri Said, "Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia," *JCH (Jurnal Cendekia Hukum)* 4, no. 1 (28 September 2018): 141, <https://doi.org/10.33760/jch.v4i1.97>.

¹⁶ Djamzuri dan Mulyana, "Fenomena Cyberbullying Pembiaran Juvenile Delinquency Dalam Teknologi Media Baru."

¹⁷ Sofia Hartati dkk., "Bullying Behavior in Early Childhood: Study at Early Childhood Education Institution in East Jakarta in Indonesia," *Talent Development* 12, no. 1 (2020): 55–63.

¹⁸ Laurensius Arliman dkk., "Cyber Bullying Against Children in Indonesia," *Proceedings of the first International Conference on Social Sciences, Humanities, Economics and Law*, 2018, <http://dx.doi.org/10.4108/eai.5-9-2018.2281372>.

¹⁹ Yul Emis, "Diversion And Restorative Justice In Case SettlementOf Juvenile Justice System In Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 10, no. 2 (2016), <http://dx.doi.org/10.30641/kebijakan.2016.V10.163-174>.

²⁰ Wismayanti dkk., "Child sexual abuse in Indonesia: A systematic review of literature, law and policy."

element of guilt, in particular regarding the ability to be responsible. However, it is undeniable that even a child can commit a serious and inexcusable crime only because of his age, for this reason, in the legal system in Indonesia the punishment of children is specifically regulated in Law No.11 of 2012 concerning the Juvenile Justice System which also contains various provisions related to child protection and is explained in more detail in Law No.35 of 2014 concerning Amendments to Law No.23 of 2002 concerning Child Protection.²¹

Legal protection efforts against criminal acts committed by children are supported by the principle of diversion.²² Diversion is the transfer of the settlement of a child's case from the criminal justice process out of the criminal process and resolved on a non-litigation basis. In this case, it is also necessary to note that there is a limit on diversion, which is related to criminal acts committed by children over the age of 12 years and threatened with a sentence of under 7 years in prison and not a repetition of criminal acts²³. The determination of the age of 12 years in is appropriate according to sociological studies, given that age a child has been considered stable or in Islamic law is considered to be *baligh*. Meanwhile, the 7-year threat limit is intended to classify serious criminal acts so that they are worthy of punishment.²⁴

The case of bullying experienced by F, in the perspective of criminal law cannot be directly subject to the provisions of Article 351 Paragraph (1) of the Criminal Code concerning persecution that causes the victim to die, because the material acts committed by the perpetrator do not directly cause death, but bullying by humiliating dignity and dignity and disseminating it in public. The provisions of the Articles that can be imposed are Articles 310 and 311 of the Criminal Code, with the threat of imprisonment for a maximum of 9 months. However, the judge's consideration may affect the criminal provisions, taking into account the material impact of the deceased victim.

For this reason, normatively, the enactment of diversion as an effort to protect the perpetrator depends on three conditions. First, criminal acts committed are punishable by imprisonment under 7 years. Second, it does not constitute a repetition of a criminal act. Third, it is carried out on children over the age of 12 years. In the event that one or more of the conditions of these conditions are not met, the perpetrator must be processed with a trial in the Juvenile Court.

In strengthening efforts to protect children, the juvenile justice system is implemented based on several important principles including the principles of protection, justice, non-discrimination, the best interests of the child, respect for children's opinions,

²¹ Abdurrahman Alhakim, "Diversion As A Legal Concept That Is Equitable For Children In Indonesia," *Mizan: Jurnal Ilmu Hukum* 11, no. 2 (14 Desember 2022): 147, <https://doi.org/10.32503/mizan.v11i2.3102>.

²² Emis, "Diversion And Restorative Justice In Case Settlement Of Juvenile Justice System In Indonesia."

²³ Ningtias, Dwi Rachma, Said Sampara, Hardianto Djanggih, *Diversi Sebagai Bentuk Penyelesaian Perkara Pidana Anak*, (Jurnal of Lex Generalis, Vol 1(5)). hal. 21.

²⁴ Ika Darmika, "Diversion and Restorative Justice in the Criminal Justice System of Children in Indonesia," *Ijtima' Iyya Journal of Muslim Society Research* 3, no. 2 (28 September 2018): 180–211, <https://doi.org/10.24090/ijtima'iyya.v3i2.1921>.

child survival and development, child development and guidance, proportional, deprivation of independence and punishment as a last resort, and avoidance of retaliation. Moreover, for children who face the law, children must receive labeling and rehabilitation protection under the Child Protection Act.²⁵

Various efforts to protect and punish children in Indonesia have actually fully shown the government's concern for the rights and obligations of children, although punishment is the last step (*ultimum remedium*), but it can still be done in terms of being out of its limits set out in the Law. This arrangement is very important to maintain stability in society and fulfill obligations towards child protection. Given that the child is a valuable next generation as a subject of future builders, legal protection and certainty must be carried out equilibrium in harmony with the material values of society and positive law.

Restorative justice is a concept of handling in criminal law that prioritizes the paradigm of recovery, and not retaliation²⁶. The material purpose of the concept of Restorative justice is to provide a substantial sense of satisfaction and justice, by means of bringing together the interests between the perpetrator and the victim in order to obtain an appropriate and favorable settlement for both parties. The concept of Restorative justice itself has basically been explicitly contained in the Juvenile Criminal Justice System Act, which applies the principle of diversion.²⁷

In general, the settlement of criminal cases can be done through two approaches, namely the litigation and non-litigation approaches.²⁸ The litigation approach applies criminal procedural law, with case cases resolved through judicial channels. Meanwhile, the non-litigation route or also known as the out-of-court route utilizes alternative settlement efforts by deliberation, mediation, or other means that can 'reconcile' between the interests of the perpetrator and the victim. The basic concept of Restorative justice encourages the achievement of a second alternative, which is to reach an agreement outside the green table.

Child criminal cases are a special form (*lex specialis*) at the level of criminal law, because they are carried out by a minor so that they have not been categorized as a capable legal subject (*naturalpersoon*). For this reason, the approach used is also certainly different, by still providing opportunities or relief for perpetrators according to the actions they do. The application of Restorative justice is an optimal instrument that can be used, because it still does not leave the responsibility of the perpetrator, but is also not

²⁵Bambang Tri Bawono, "Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia," *Jurnal Daulat Hukum* 3, no. 4 (2020), <http://dx.doi.org/10.30659/jdh.v3i4.13145>.

²⁶Ahmad Kamil, Fauzan, *Hukum Perlindungan dan Pengangkatan Anak di Indonesia*, (Jakarta: RajaGrafindo Persada, 2008)

²⁷Yuli Indarsih, "Application of Diversion for Children in Conflict with the Law: How Is the Criminal Justice System," *Journal of Law Science* 2, no. 1 (2020): 1–8, <https://iocscience.org/ejournal/index.php/JLS/article/view/1275>.

²⁸Darmika, "Diversion and Restorative Justice in the Criminal Justice System of Children in Indonesia."

burdensome as the nature of the retributive criminal is commonly imposed for adult offenders.²⁹

Some of the basic advantages of using RJ in handling cases of child abuse, are divided into the following points of mind.³⁰ First, two-way protection. Restorative justice prioritizes alternative solutions without imposing criminal penalties on the perpetrator, by utilizing efforts to recover losses suffered by victims. In the case of child abuse, this also provides a more certain protection effort, both to the victim and the perpetrator. In addition, because cases of bullying often arise from psychological factors, such as wrong care and a bad friendship environment, the existence of a Restorative justice mechanism also provides an opportunity for the perpetrator to improve his behavior.

Second, the restoration of victims' rights more optimally. Trauma and prolonged fear are the impacts of the follow-up that often arise after bullying. A victim of bullying tends to feel insecure, even when the perpetrator has been legally processed. This is because the concept of criminal is to punish the perpetrator, and does not linearly recover the material losses suffered by the victim, both psychic, mental, and self-confidence. For this reason, Restorative justice can be used as a meeting point, so that the perpetrator can admit the deed and apologize to the victim. Restorative justice can help victims of bullying recover better.

Third, the handling process is fast, substantive, and does not require convoluted procedures. Unlike litigation settlements that must meet various provisions of procedural law and court procedures that require time, costs, and long processes, restorative justice settlements can be carried out with a relatively faster process. Law enforcement, together with relevant agencies, such as the Indonesian Child Protection Commission, schools, parents, and children can be brought together for a joint settlement. This can facilitate the achievement of a sense of justice and recovery of losses.

Although, the concept of Restorative justice cannot be applied directly to all cases of bullying and criminal cases committed by children, but is also limited to applying based on the provisions in the SPPA Law, which only applies in the event that the child is over the age of 12 years, criminal acts with threats below 7 years, and do not constitute a repeat of a criminal act.

²⁹Rharve dkk., "Implementation of Diversion in General Prosecutor Levels on Children as Criminal Offenders According to Law No. 11 of 2012 on Juvenile Justice System," dalam *Proceedings of the International Conference on Law, Governance and Islamic Society (ICOLGIS 2019)* (International Conference on Law, Governance and Islamic Society (ICOLGIS 2019), Banda Aceh, Indonesia: Atlantis Press, 2020), <https://doi.org/10.2991/assehr.k.200306.202>.

³⁰Emis, "Diversion And Restorative Justice In Case SettlementOf Juvenile Justice System In Indonesia ."

3. Expansion of the Concept of Diversion

As explained in the previous discussion, the principle of diversion is a legal instrument that is made with the aim of keeping children away from punishment.³¹ This principle also obtains straightforward regulation through Article 7 Paragraph (2) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. However, not all cases can be resolved through diversion, but are limited to several basic requirements, namely diversion is carried out on children over 12 years of age, criminal acts are not threatened with a 7-year prison sentence, and are not a repeat crime.³² Meanwhile, cases that have been diverted can also be canceled and continued with punishment, according to Article 13 of the SPPA Law if;

- a. The diversion process does not result in agreement
- b. The diversion agreement is unenforceable

Thus, the process of diversion is very limited, and ultimately depends on the forgiving given by the victim's side. Meanwhile, for the perpetrator, the non-completion of the diversion can mean punishment. However, this is not the only problem. The more fundamental problem is the condition that a case can be resolved in a limitative diversion, so that for children who violate legal provisions outside the protection of diversion, for example in the event that the child is not yet 12 years old, the diversion becomes blunt (unusable).

For this reason, it is necessary to reformulate the criminal procedural law policy by establishing diversions on all types of child crimes, so that law enforcement officials in all child criminal cases can prioritize the use of diversion. This enforcement will provide better protection for each party, especially for perpetrators. As for victims, diversion is also a communication forum that can be established to resolve cases amicably without having to go through criminal courts and convictions.

4. The Imposition of Diversion on All Types of Child Crimes

Children should not receive severe punishments, especially until imprisonment considering that the impact is the verification of the child's future.³³ Indonesia as a country of law should pay special attention to child protection in accordance with the provisions of the 1945 Constitution of the Unitary State of the Republic of Indonesia formulated in Article 28 B paragraph (2). Indonesia, in implementing the Juvenile Criminal Justice System, has used Law Number 11 of 2012 concerning the Juvenile

³¹Oksidelfa Yanto dkk., "Legal Protection of the Rights of the Child Victims in Indonesian Juvenile Criminal Justice System," *Jurnal Yustika: Media Hukum Dan Keadilan* 23, no. 01 (10 September 2020): 24–35, <https://doi.org/10.24123/yustika.v23i01.2818>.

³²Bawono, "Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia."

³³Subarsyah Subarsyah dan Willya Achmad, "Restorative Justice in The Juvenile Justice System Against Juvenile Delinquency," *Pena Justisia* 22, no. 1 (2023), <http://dx.doi.org/10.31941/pj.v22i2.2368>.

Criminal Justice System as a form of renewal to the Children's Court Law, this is because in the Children's Courts, it uses a formal juridical approach by prioritizing retributive retributive.

Diversion is currently considered an internationally recognized process as the best and most effective means of resolution for Children's cases in conflict with the law.³⁴ In the implementation of Diversion there are several requirements related to its implementation which are regulated in Article 7 paragraph (2) and in Article 9 Paragraph (1) letter (a). In the provisions of both articles it is an indicator for law enforcement officials that the lower the criminal threat the higher the priority of diversion, and diversion is not intended to be carried out against perpetrators of serious criminal acts, such as murder, rape, drug dealers and terrorism, who are threatened with a sentence of more than 7 years.³⁵ Thus, the category of criminal acts is focused on the qualification of acts that have a serious evil nature. While there are not a few provisions of criminal regulations that formulate the formulation of threats of criminal categories that are categorized as not so serious. In fact, there are some criminal threats that are more than seven years old not in the category of criminal acts of murder, rape, drug dealers and terrorism. For example, Theft under Article 363 carries a maximum of seven years' imprisonment. The Category of Theft in Article 363 as an example is certainly not a category of serious criminal acts, but if referring to Article 7 paragraph 2, it cannot be a priority for diversion because the criminal threat is not below 7 (seven years). How is it possible, to achieve the basic idea of restorative justice in determining the priority of diversion if in Article 7 paragraph 2 specifies the conditions for diversion of criminal threats under 7 (seven) years.

Whereas as is well known, restorative justice emphasizes the process of reconciliation between the perpetrator and the victim in order to recover from the legal conflicts faced.³⁶ Thus, it is necessary to reformulate diversion in Article 7 paragraph (2) Letter (a) of the SPPA Law, because when the child commits a criminal act in any category the child is entitled to get a case settlement through the diversion process, in this case if a thought arises about how justice the victim gets contained in Article 9 paragraph (2). The juvenile criminal justice law enforcement system cannot be separated from its basic ideas, including the requirements for implementing diversion. The concept of the basic idea of the juvenile criminal justice system rests on 2 (two) main principles. First, the principles of the juvenile criminal justice system are implemented based on the principles of protection, justice, the best interests of the child, the survival and development of the child, deprivation of independence and punishment as a last resort, and the avoidance of reprisals. Second, the basic idea of the juvenile criminal justice system rests on the main value of restorative justice as the legal ideal of the SPPA Act.

³⁴ Lidya Rahmadani Hasibuan, "The Concept of Restorative Justice in the Juvenile Criminal Justice System: A Narrative Review of the Indonesian Context," *Scholars International Journal of Law, Crime and Justice* 5, no. 7 (19 Juli 2022): 263–72, <https://doi.org/10.36348/sijlcj.2022.v05i07.004>.

³⁵ Wismayanti dkk., "Child sexual abuse in Indonesia: A systematic review of literature, law and policy."

³⁶ Andri Yanto, *Hukum dan Manusia: Riwat Peralihan Homo Sapiens Hingga Homo Legalis* (Yogyakarta: Segap Pustaka, 2022).

Based on Article 1 paragraph (6) restorative justice is the basic idea where it is carried out in the form of diversion.³⁷

The diversion requirement referred to by Article 7 paragraph (2) of the SPPA Act is a bad formulation when viewed within the scope of criminal law. At least several opinions can be raised in this regard, firstly, the legal gap is shown between the norms of the diversion requirement (Article 7 paragraph 2) and the basic idea of the SPPA Law (Article 1 paragraph 6, Article 2, and Article 6). The absence of legal certainty with the occurrence of legal gaps. As expressed by Jan Michiel Otto in another dimension legal certainty is *sicherheit des rechts selbst*, that is, certainty about the rule of law itself.³⁸ The formulation of the diversion requirement regarding clauses not repetition of criminal acts has confusion when viewed in the study of criminal law and the principles of the criminal justice system (especially regarding *ultimum remedium*). This is inversely proportional to the basic idea of the SPPA Law in Article 2, the principles of the juvenile criminal justice system are carried out to pay attention to the best things for the child for the growth of the child's development, so that punishment and retaliation become the last means / instruments (*ultimum remedium*). The formulation of Article 7 paragraph 2 of the SPPA Law has distorted the basic idea of the juvenile criminal justice system as referred to by Article 1 paragraph 6, namely the value of restorative justice as a legal mind, as well as the principles of the juvenile criminal justice system which affirms the principle of *ultimum remedium* in Article 2.³⁹

Looking at the minutes of Article 7 Paragraph (2) Letter (a) of the SPPA Law, it can be seen in a debate that has been mentioned regarding this Diversion, it should take into account that one of the basic purposes of the existence of Diversion is to keep children away from the juvenile criminal justice system in order to avoid imprisonment, and if an agreement is found from both parties, it will be better of course with the payment of compensation that can be more beneficial for the victim, rather than the offender being sentenced to imprisonment. Indonesia as a state that has ratified the Convention on the Rights of the Child (KHA) should be placed as one of the sources of law in the formation of laws and regulations related to the Child.

Article 37 (b) of the KHA makes it clear that no child loses his freedom unlawfully and arbitrarily. In the arrest, detention or punishment of a child is adjusted to the Act and will be used only as a final step and for the shortest and most feasible period. this means that all children in Indonesia without exception have the right to get protection from the

³⁷Subarsyah dan Achmad, "Restorative Justice in The Juvenile Justice System Against Juvenile Delinquency."

³⁸Jan Michiel Otto, "Toward an Analytical Framework: Real Legal Certainty and its Explanatory Factors," dalam *Implementation of Law in the People's Republic of China*, II (BRILL, 2002), 23–34, https://doi.org/10.1163/9789004481183_006.

³⁹Bawono, "Restorative Justice Approach in Diversion System for Settlement of Criminal Cases for Children in Indonesia."

state, including children who face the law both in the position of perpetrators, victims, and witnesses.⁴⁰

In Law Number 35 of 2014 concerning amendments to Law number 23 of 2002 concerning Child Protection in Article 64 Letter (g) it is also stated that one of the things that is done to provide special protection for children facing the law is to avoid arrest, detention, or imprisonment except as a last resort and in the shortest time. From some of the explanations above, this is the urgency of reformulation of the establishment of Article 7 Paragraph (2) Letter (a) of the SPPA Law, where there should be a thought that in the event that a child facing the law must be pursued diversion without regard to his criminal threat, and none of the children who can be detained if the Diversion has not been pursued this is very appropriate because the Diversion is currently considered a process that has been recognized internationally as the best and most effective way of resolution for children's cases that conflict with the law as a form of application of child protection.

In other debates in formulating the diversion requirements, it will be safer if there are restrictions on the threat of imprisonment, because if further studied criminal acts whose criminal penalty is more than 7 (seven) years is a crime that is considered severe, or more serious. It is clearly seen that, the formulation of this Article ignores the provisions already explained above that deprivation of the child's freedom can be carried out as a last resort, in the principle of criminal law known as the principle of *ultimum remedium*, because the child is not allowed to solve his case using Diversion, but is directly included in the Juvenile Criminal Justice System which will certainly have a bad impact on the condition of the Child in the future.⁴¹

The purpose of establishing the Juvenile Criminal Justice System, as a form of renewal of the Juvenile Court Law, this is because in the Children's Courts, it uses a formal juridical approach by prioritizing retributive and there are facts from several studies that the criminal justice process can have a negative effect on children, namely the emergence of stigma or labels that place children's status in the middle of society as ex-convicts.⁴² The above phenomenon shows that the handling of child criminals by law enforcement officials through penal channels that have been ongoing, children involved in the criminal justice process have received poor treatment even in some ways have been treated worse than adults who are in the same situation. The majority of children who commit criminal acts experience violent acts during the criminal justice process.⁴³ The

⁴⁰Hendra Wahyudi, Umar Ma'ruf, dan R. Sugiharto Sugiharto, "The Efforts to Implement Diversion to Realize Restorative Justice for Children in Conflict with the Law in the Juvenile Criminal Justice System," *Law Development Journal* 4, no. 3 (16 Agustus 2022): 373, <https://doi.org/10.30659/ldj.4.3.373-380>.

⁴¹Emis, "Diversion And Restorative Justice In Case Settlement Of Juvenile Justice System In Indonesia."

⁴²Aniek Periani, Elly Kristiani Purwendah, dan Iskatrinah Iskatrinah, "Analysis of Learning Theory in Diversion Policy in the Case of Children in Conflict with the Law," dalam *Proceedings of the International Conference On Law, Economics, and Health (ICLEH 2022)*, ed. oleh Anggraeni Endah Kusumaningrum dkk., vol. 723, Advances in Social Science, Education and Humanities Research (Paris: Atlantis Press SARL, 2023), 210–22, https://doi.org/10.2991/978-2-38476-024-4_24.

⁴³Beniharmoni Harefa dan Vivi Ariyanti, "Legal Protection For Narcotics Abuser Children In The Juvenile Justice System In Indonesia," *International Journal of Business, Economics and Law* 12, no. 4 (2017).

Juvenile Criminal Justice Process often presents itself as a mechanism that is only oriented towards formal law enforcement and not oriented towards the interests of the child.

The use of criminal law policy theory at the reformulation stage to reformulate Article 7 paragraph (2) Letter (a) of the Juvenile Criminal Justice System Law, because this Article is considered inconsistent with the principle of child protection without discrimination that prioritizes child welfare, in this Article does not protect children who commit criminal acts with a criminal threat of more than 7 (seven) years. This certainly violates the provisions of the Constitution of the Unitary State of the Republic of Indonesia which states that everyone has the right to be able to obtain fair legal protection and equal legal treatment before the law. And contrary to Article 2 with the same Law, namely the SPPA Law. The reformulation made basically wants to apply the principle of child protection in Article 7 Paragraph (2) letter (a) so that all criminal acts committed by children can be pursued first to resolve cases through the Diversion process before the child is included in the formal criminal justice process. And it is hoped that there will be no more discrimination against the restrictions on application that are included as a condition of the implementation of diversion. Because in essence the law serves or protects everyone without discrimination.

Conclusion

The protection of victims and perpetrators in child crime cases is one of the important focuses for every country that seeks to enforce human rights, including in Indonesia. In the current positive legal regulation, the government seeks the protection of victims and perpetrators with the principle of diversion contained in Law No.11 of 2012 concerning SPPA and Law No.35 of 2014 concerning Amendments to Law No.23 of 2002 concerning Child Protection. In this arrangement, any child who commits a criminal offence with a threat of under 7 years in prison, is not a recurrence and is in the age range of 12-18 years, then the punishment is not carried out. In accordance with the principle of *ultimum remedium*, criminal is used as the last option for the settlement of juvenile criminal cases.

Legal protection efforts against criminal acts committed by children are supported by the principle of diversion. Diversion is the transfer of the settlement of a child's case from the criminal justice process out of the criminal process and resolved on a non-litigation basis. The process of diversion is very limited, and ultimately depends on the forgiving given by the victim. The more fundamental problem is the condition that a case can be solved in a limitative diversion. Reformulation of diversion requirements is an effort to rectify the implementation of diversion in accordance with the basic idea of the SPPA Law. Changes and renewals in formulations are imperative in order to restore the terms of diversion to the value of restorative justice and the principles of the juvenile criminal justice system. The limitation of the diversion requirement under the threat of

seven years will narrow the priority granting of diversion. For this reason, the application of diversion should be expanded to all types of juvenile criminal cases as the first way of settlement. Criminal settlement through the courts is still used, but as a last resort after diversion, the process is sought.

It is necessary to review the effectiveness of the implementation of the principle of diversion in the Juvenile Criminal Justice System Law and the Child Protection Law. The government needs to start discussions in order to include the principle of diversion in every child crime case as a way to resolve criminal cases, and make punishment a last resort without distinction in all cases. This will strengthen the sense of justice, expediency, and legal certainty of child protection in Indonesia.

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