

# RENEWAL OF CRIMINAL LAW THROUGH THE DIVERSION PROCESS FOR CHILDREN IN CONFLICT WITH THE LAW TO ACHIEVE RESTORATIVE JUSTICE

*by* User 1143244244

---

**Submission date:** 05-Feb-2024 10:10PM (UTC-0500)

**Submission ID:** 2287551388

**File name:** 412ee4d3e312e3cf6f34a16b9-3143-Book\_Chapter\_prosiding-97-105.pdf (289.14K)

**Word count:** 2873

**Character count:** 15751

# RENEWAL OF CRIMINAL LAW THROUGH THE DIVERSION PROCESS FOR CHILDREN IN CONFLICT WITH THE LAW TO ACHIEVE RESTORATIVE JUSTICE

17  
Esther Masri

Fakultas Hukum, Universitas Bhayangkara, Jakarta Raya

16  
Program Studi Hukum Program Doktor, Universitas 17 Agustus 1945, Semarang

Email: esthermasri45@gmail.com

## ABSTRACT

The existence of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is a form of criminal law reform. In the Juvenile Criminal Justice System Act, it is expressly regulated regarding diversion and restorative justice to avoid children from the judicial process so that there is no stigma against children and it is hoped that children can return to their social environment naturally. This study uses a normative juridical research method with a statutory approach. The purpose of the study was to analyze the renewal of criminal law through the diversion process of children in conflict with the law in order to achieve restorative justice. In conclusion, the implementation of diversion with a restorative justice approach is a transfer of the settlement of children's cases from the criminal justice process to a process outside a fair criminal justice with an emphasis on restoring back to its original state and not being punitive.

**Keywords:** *Diversion, restorative justice, Juvenile Criminal Justice System.*

## A. INTRODUCTION

Children are the next generation of the nation who have dignity as whole human beings and are also entitled to education and decent treatment. The 1945 Constitution Article 28B paragraph (2) states that every child shall have the right to live, to grow and to develop, and shall have the right of protection from violence and discrimination. It is important to protect children from the negative influence resulting from the development of communication and

information technology. Additionally, the changes of lifestyle from parents can highly affect the behaviour and characteristics of their children. <sup>13</sup> The Convention on the Rights of the Child has been <sup>5</sup> ratified by the Government of the Republic of Indonesia as the basic principles of legal protection for children. The efforts to protect children's human rights themselves are related to the children's welfare. It is a shared responsibility by the society to protect children in conflict with the law. Data from the Direktorat Jenderal Permasiyarakatan shows that the increasing number of child cases is due to the use of narcotics, psychotropic substances and other crimes committed by children. One way to <sup>9</sup> foster children in conflict with the law is to increase <sup>5</sup> the awareness of the law order. Law Number 11 of 2012 on child <sup>18</sup> Juvenile Criminal Justice System guarantees the rights of children in conflict with the law starting from the investigation stage to the guidance stage after serving a sentence. The SPPA Law article 1 point 3 states that a <sup>18</sup> child in conflict with the law is a child who is 12 (twelve) years old but not yet 18 (eighteen) years old who is suspected of committing a crime from the level of investigation, prosecution and trial.

Prior to the enactment of SPPA, Law Number 3 of 1997, Juvenile Courts regulates the arrangements regarding juvenile justice, aimed at guarding and protecting children in conflict with the law by providing opportunities through coaching so that they can become independent, responsible and useful human beings for families and communities. However, in the implementation, children are treated as an object, and this violates the children's rights. Every child who is involved with the criminal justice system as a perpetrator has to be met with the principles of non-discrimination, survival and respect for the views of the child.

The existence of SPPA is a form of renewal of the criminal law against the Juvenile Court Law which brings changes to the child punishment system. SPPA regulates the substance of children's placement who undergo the judicial process at the Special Child Development Institution, not in a correctional institution. Prior to the existence of SPPA, the Juvenile Court Law guides the process of juvenile criminal justice in proceedings. With the renewal of the diversion regulation, which is a judicial process outside the formal court, the policy formulation relates to the authority of law enforcers in the investigation process, the prosecution process and the examination process in court. The regulation of diversion has an effect on the renewal of the criminal law enforcement system for children. In SPPA, there are strict arrangements regarding restorative justice and diversion to prevent children from

being judged so that they can avoid stigmatization of children who are in conflict with the law and are accepted back fairly by their social environment. In SPPA article 1 point 6 states that restorative justice is the settlement of criminal cases by involving the perpetrator or victim<sup>1</sup> and other related parties to jointly seek a fair solution by emphasizing restoration to its original state. In this case coaching is carried out with a child-friendly pattern, not with retaliation or punishment. This is what distinguishes the provisions in the Juvenile Court Law and SPPA in carrying out legal proceedings against children.

<sup>2</sup> Diversion is a term used to describe intervention approaches that redirect youths away from formal processing in the juvenile justice system, while still holding them accountable for their actions. SPPA regulates the obligation of law enforcers to seek diversion at all stages of the legal process. At the moment, diversion is considered to be the best and most effective way of solving child cases that is recognized internationally. At first, this thought came from children who deal with conflict because of several factors other than the children themselves such as society, education, family, friends, etc. Another reason of diversion is also to provide opportunities<sup>7</sup> for lawbreakers to become good people again through non-formal channels involving community resources. Diversion seeks to provide justice to children who have already committed a crime.

Diversion arrangements are expected to reduce the number of children who involve to the criminal justice process, resolve children's cases by prioritizing restorative justice and diversion, increase public participation in handling children in conflict with the law<sup>8</sup> and increase the role of advocates in child cases in court. There have been many criticisms over several weaknesses with the enactment of the Juvenile Court Law and because of that the Juvenile Court Law is no longer appropriate and should be reformed which then came Law<sup>5</sup> Number 11 of 2012 concerning the Juvenile Criminal Justice System. Based on this background, this author is interested in examining how criminal law reform is carried out through a diversion process for children who are in conflict with the law in order to achieve restorative justice?.

## B. RESEARCH METHODS

This author uses a normative juridical research method which is carried out by examining library materials by analyzing various statutory provisions. This research is descriptive-analytical which provides a detailed and systematic explanation of a situation and symptoms that are studied based on legislation.

## C. RESULT AND DISCUSSION

The rise in cases of violations of children's rights occurs in line with the increase in critical issues such as poverty, injustice, access to pornography, national disintegration, drug trafficking syndicates to violation cases that have not been disclosed to the public. The implementation of child protection in Indonesia must prioritize the roles of parents, family, community and government in one unified vision as an effort to make Indonesia becomes a child-friendly country.

The quality of protection for children should have equality to that of adults because everyone has the same position before the law. Arif Gosita states that child protection is an effort to support the implementation of children's rights and obligations. Therefore, a child who obtains and maintains the right to grow and develop positively will receive fair treatment and avoid harmful threats. Child protection in the form of a legal action that has legal consequences that can prevent children from parents arbitrary actions. The process of justice for children often loses its main meaning which is as a mechanism that must end in order to provide <sup>9</sup> the best interests of the child.

In <sup>8</sup> the theory of restorative justice, the process of resolving acts of violations of law that have occurred is carried out by bringing together both the perpetrators and victims. During the meeting, the mediator provides an opportunity for the perpetrators to provide a clear picture of the actions that have been taken. Restorative justice is a process of all parties involved in a particular crime sit together to solve the problem. In the development of criminal law, there has been a paradigm shift in the philosophy of juvenile justice, which initially was retributive justice which emphasized retaliation for perpetrators and changed to rehabilitation and finally to restorative justice which emphasized more on the recovery of

victims, perpetrators of crimes and society. The shifting of settlement in child cases outside the formal channels of justice through diversion stipulated in international children's instruments has juridical implications for Indonesia to accommodate the provisions of diversion in children's laws and regulations in Indonesia.

In order to create the concept of diversion as an instrument towards restorative justice for children based on SPPA, settlement of criminal cases <sup>1</sup> involves perpetrators, victims, families of perpetrators or families of victims and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliate towards perpetrators. Diversion is a form of protection for <sup>8</sup> children in conflict with the law. Settlement of child cases in the juvenile justice system since the enactment of SPPA is far more different from when the Juvenile Court Law was still in force. The Juvenile Court Law does not recognize the process of diverting the settlement of cases involving children (perpetrators) outside juvenile justice, which has so far gone through the trial process. When a child is processed both at the level of investigation, prosecution and when a child is examined at a district court, diversion must be carried out during this examination, although there are restrictions that diversion can be carried out for a sentence of less than 7 (seven) years and not a repetition of a crime.

Diversion in SPPA is one of the distinguishing features from the previous regulations. The concept of diversion itself in Indonesia is a new thing since the existence of SPPA. In carrying out SPPA, law enforcers are not the only one who obligate to participate, communities can also participate in child protection ranging from prevention to social reintegration of children so then this will not be the obligation of law enforcers but including the community is given the space and movement to actively participate in carrying out the orders of the law. Some examples of community participation during the implementation of the diversion process can be attended by community representatives (community leaders) and can provide opinions if requested by the facilitator during investigations, prosecutions and during proceedings in court. The application of diversion in SPPA brings good news for legal developments in Indonesia because diversion reduces children (perpetrators) to prison sentences and to aim at <sup>6</sup> achieving peace between victims and children, resolving child cases outside the judicial process, preventing children from being deprived of independence, and this to encourage the community to participate and embed a sense of responsibility towards

15 children. The implementation of restorative justice is to implement diversion in resolving cases of children who are in conflict with the law. The aim of establishing the Juvenile Criminal Justice system is as a form of criminal law renewal against the Juvenile Court Act, this is because the Juvenile Court Law uses a formal juridical approach that prioritizes retaliation and can have a negative impact on children in the form of stigma or labels that place children's status in society as ex-convict. This shows that so far the handling of juvenile offenders by law enforcement officials has been through the penal route that has been going on so far. Children who are involved in the criminal justice process receive bad treatment and even worse treatment than adults who are in the same situation. The majority of children who commit crimes experience acts of violence during the criminal justice process.

The diversion process is carried out through deliberations involving parents or the guardians of the child, social counselors and professional social workers. The restorative justice approach itself must be prioritized in every diversion process. The juvenile justice process will continue if 10 the diversion process does not result in an agreement. As long as the diversion process lasts until the implementation of the diversion agreement, social counselors are required to provide assistance, guidance and supervision. If 10 the diversion agreement is not implemented in accordance with the time specified, the social adviser must immediately report it to the responsible official, namely the direct superior of the official conducting the inspection. The process of restorative justice provides protection and opportunities for the perpetrators to be directly responsible to the victims as well as them to society. In practice, all related parties are brought together to reach an agreement on the actions of the perpetrator.

Diversion is a renewal of criminal law based on SPPA due to:

There is a legal vacuum in implementing a rule. SPPA still regulates in general regarding several provisions, therefore an implementing regulation is needed to comprehensively explain a rule in the law.

There are no rules that bind law enforcement officials as a whole, for example the Supreme Court has issued a Perma, however these technical rules only apply in the general court environment and problems arise if there are differences between diversion in the police, prosecutors and courts.

The juvenile justice system is a new system introduced in the criminal justice system in Indonesia. The absence of implementing regulations to make SPPA effective will have an impact on delays in implementing SPPA effectively which has an impact on threatening the rights and interests of children.

The application of diversion in child cases is a very decisive solution. The use of violence in carrying out diversion can make the implementation of diversion fail at every level. Officers must demonstrate the importance of obeying the law by using a persuasive approach and avoid arrest by using force and coercion while carrying out diversion. Diversion is important in the process of resolving child cases based on two factors which are children who are considered not to understand their mistakes so that a reduction in punishment is appropriate and that punishment for children must be differentiated from adults. The implementation of diversion must be in accordance with the main principles by taking persuasive actions to provide opportunities for children to fix their mistakes. The expected results by implementing diversion using a restorative justice approach are reducing the number of children who are arrested, detained and sentenced to prison, eliminating stigma and returning children to be fully human so that they are useful and accepted in society.

#### **D. CONCLUSION**

Diversion application is a renewal of criminal law for the realization of restorative justice by protecting and providing justice to children who are in conflict with the law <sup>14</sup> while still holding them accountable for their actions. Diversion is not <sup>3</sup> an attempt of reconciliation between the child (perpetrator) and the victim or their family, but a form of punishment against children who are in conflict with the law in an informal way. The implementation of diversion with a restorative justice approach is a transfer of the settlement of children's cases from the criminal justice process to a process outside a fair criminal justice with an emphasis on restoring back to its original state and not being punitive.



## **E. SUGGESTIONS**

Socialization and education regarding diversion and restorative justice to the community.

The government is expected to consistently provide diversion facilities and infrastructure in order to achieve guarantees of legal protection for children as the nation's successor and the diversion is carried out as well as possible with the permission of the families of the perpetrators and victims so that the implementation of diversion can create restorative justice. The important role of parents and families in providing education, supervision in shaping children's character so that children's rights are protected and not being neglected then there will be no more children dealing with the law.

## **F. REFERENCES**

Textbooks

Made Sepud, *Perlindungan Hukum Terhadap Anak Yang Berhadapan Dengan Hukum Melalui Diversi Dalam Sistem Peradilan Pidana anak*, (Surabaya: R.A. De. Rozarie, 2013).

Marlina, *Pengantar Konsep Diversi dan Restorative Justice Dalam Hukum Pidana*, (Medan: USU Press, 2010).

Marlina, *Peradilan Pidana Anak Di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, (Refika Adhitama, 2009).

Romli Artasasmita, *Kepenjaraan Dalam Suatu Bunga Rampai*, (Bandung: Armico, 1993).

Soerjono Soekanto, Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 2019).

#### Laws and Bills

Republik Indonesia, Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak.

#### Journal Articles

Koesno Adi, Kebijakan Kriminal dalam Sistem Peradilan Pidana yang Berorientasi pada Kepentingan Terbaik bagi Anak, Pidato pengukuhan Guru Besar dalam bidang Ilmu Hukum Universitas Brawijaya Malang, (Malang: Fakultas Hukum Brawijaya, 2009).

Nevey Varida Ariani, Undang-Undang Nomor 11 tahun 2012 Tentang Sistem Peradilan Pidana Anak Dalam Upaya Melindungi kepentingan Anak, Jurnal Media Hukum Vol. 21 No. 2 Juni 2014.

Syamsu Haling, Paisal Halim, Syamsiah Badruddin dan Hardianto Djanggih, Perlindungan Hak Asasi Anak Jalanan Dalam Bidang Pendidikan Menurut Hukum Nasional dan Konvensi Internasional, Jurnal Hukum dan Pembangunan, Vol. 48 Nomor. 2, April-Juni **2018**

# RENEWAL OF CRIMINAL LAW THROUGH THE DIVERSION PROCESS FOR CHILDREN IN CONFLICT WITH THE LAW TO ACHIEVE RESTORATIVE JUSTICE

## ORIGINALITY REPORT

13%

SIMILARITY INDEX

11%

INTERNET SOURCES

6%

PUBLICATIONS

5%

STUDENT PAPERS

## PRIMARY SOURCES

1	Submitted to Study Group Worldwide Student Paper	1%
2	Submitted to Sierra College Student Paper	1%
3	123dok.com Internet Source	1%
4	ijbel.com Internet Source	1%
5	digilib.uin-suka.ac.id Internet Source	1%
6	Submitted to Midwestern State University Student Paper	1%
7	www.ejournal.unmus.ac.id Internet Source	1%
8	khairulanwarhasibuan.blogspot.com Internet Source	1%
9	Susana Andi Meyrina. "Restorative Justice dalam Peradilan Anak Berdasarkan Undang-	1%

Undang No.11 Tahun 2012", Jurnal  
Penelitian Hukum De Jure, 2017

Publication

---

10	Indra Wijayanti, Elsa Rina Maya Toule, Sherly Adam. "Penyelesaian Perkara Tindak Pidana Penganiayaan Dengan Pelaku Anak Menurut Undang-Undang Nomor 11 Tahun 2012", PAMALI: Pattimura Magister Law Review, 2021 Publication	1 %
11	<a href="http://eprints.unmas.ac.id">eprints.unmas.ac.id</a> Internet Source	1 %
12	<a href="http://www.legal.isha.or.id">www.legal.isha.or.id</a> Internet Source	<1 %
13	<a href="http://findresearcher.sdu.dk">findresearcher.sdu.dk</a> Internet Source	<1 %
14	<a href="http://www.ojp.gov">www.ojp.gov</a> Internet Source	<1 %
15	Submitted to University of York Student Paper	<1 %
16	<a href="http://sister.untagsmg.ac.id">sister.untagsmg.ac.id</a> Internet Source	<1 %
17	<a href="http://ejournal.widyamataram.ac.id">ejournal.widyamataram.ac.id</a> Internet Source	<1 %
18	<a href="http://hukum.studentjournal.ub.ac.id">hukum.studentjournal.ub.ac.id</a> Internet Source	<1 %
19	<a href="http://digitalcommons.fiu.edu">digitalcommons.fiu.edu</a> Internet Source	

---

<1 %

---

Exclude quotes Off

Exclude matches Off

Exclude bibliography On