

Reformulation of Diversion Regulations as a Justice-Based Child Protection Effort

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Abstract. *The juvenile criminal justice system in Indonesia affirms the protection of children's rights through a restorative justice approach and the use of diversion mechanisms as regulated in the Juvenile Criminal Justice System Law (UU SPPA) and Supreme Court Regulation (PERMA) No. 4 of 2014. However, its implementation still faces obstacles due to the limitation that diversion may only be applied to offenses carrying a penalty of less than seven years. This restriction prevents child offenders involved in crimes with higher penalties (such as in the Ambon statutory rape case) from obtaining access to non-formal settlement mechanisms, thereby exposing them to psychological pressure, social stigma, and outcomes that contradict the principle of the best interests of the child and child protection standards under the Convention on the Rights of the Child. The purpose of this study is to identify and analyze the current diversion regulations as a child protection measure, to evaluate their weaknesses, and to formulate a justice-based reformulation of diversion regulations to strengthen child protection. The approach method used in the preparation of this thesis is Normative Legal Research. The specification of this study is descriptive-analytical. The theories employed include the Theory of Legal Protection, the Legal System Theory, and the Theory of Justice. The results of this study are as follows: (1) Diversion regulations provide a foundation for child protection through a restorative approach; however, limiting diversion based on the severity of the criminal penalty binds law enforcement officials to formal restrictions without allowing them to consider the child's circumstances comprehensively. This is evident in the Ambon case, where the offender was still subjected to formal judicial proceedings because the applicable sentence exceeded seven years, resulting in the failure to achieve educational, restorative, and stigma-prevention goals. (2) Although diversion regulations under the Juvenile Criminal Justice System Law (UU SPPA) are intended to protect children, they still contain weaknesses in terms of substance, structure, and legal culture, which hinder their optimal implementation. Rigid normative limitations, inadequate capacity and coordination among law enforcement officers, and a strong retributive mindset in society prevent the realization of restorative resolutions that align with children's developmental needs. (3) Reformulating diversion is necessary because the current normative restrictions—permitting diversion only for offenses punishable by less than seven years—are inconsistent with the principles of justice, non-discrimination, and the best interests of the child. Expanding the scope of diversion to prioritize recovery*

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and guidance will ensure that the law functions not merely according to its text, but also by considering children's social and psychological conditions and their future, thereby ensuring truly just and meaningful protection.

Keywords: *Child Protection; Criminal Offenses; Diversion.*

1. Introduction

The Republic of Indonesia has firmly established itself as a state based on law as stated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia (UUD 1945). The concept of a state based on law (*rechtstaat*) means that all aspects of the implementation of national and state life must be based on applicable law, not solely on the basis of power.¹ This principle demands the supremacy of law, equality before the law, and protection of human rights. The law is the primary instrument for achieving order, justice, and legal certainty for all citizens without exception.²

One form of human rights protection within the framework of a state based on the rule of law is reflected in Article 28B Paragraph (2) of the 1945 Constitution, which states that "Every child has the right to survive, grow, and develop and has the right to protection from violence and discrimination." This provision emphasizes that the state has a constitutional obligation to guarantee children's rights in full. This protection includes legal, social, and psychological aspects, so that every law enforcement process against children must consider the principle of the best interests of the child.³

Children are part of the nation's citizens who must receive protection, because they are the next generation of the nation who in the future will continue the leadership of Indonesia. In addition to receiving formal education in schools, children also need to receive moral education so they can develop into individuals who are useful to the nation and state. This is in line with the provisions of the Convention on the Rights of the Child or the Convention on the Rights of the Child which has been ratified by the Indonesian government through Presidential Decree Number 36 of 1990. The principles of child protection are then outlined in various laws and regulations, including Law Number 4 of 1979 concerning Child Welfare, Law Number 35 of 2014 amending Law Number 23 of 2002 concerning Child Protection, and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA). All of these regulations emphasize four main principles of child protection, namely non-discrimination, the best interests of the child, survival and development, and respect for child participation.⁴

Childhood is a special period because it is at this stage that a child's personality begins to form. The success or failure experienced by a child during this period will greatly affect his or her future. Children need protection as regulated in Article 1 Number 2 of Law Number 35 of 2014 concerning Child Protection, which explains that, "Child Protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination."

2. Research Methods

The approach used in this research is normative legal research. This approach is a legal research method conducted through the review of library materials or secondary data alone.

¹Rokilah Rokilah, Dynamics of the Indonesian Legal State: Between *Rechtsstaat* and Rule of Law, Nurani Hukum, Vol. 2, No. 1, 2020, p. 12-22.

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Normative legal research positions law as a system of norms, encompassing principles, norms, and rules derived from statutory regulations, court decisions, agreements, and the doctrines or teachings of legal experts.⁵

3. Results and Discussion

3.1. Current Diversion Regulations as Child Protection Efforts

Diversion was first introduced as a term in a report on the implementation of juvenile justice delivered by the President of the Australian Criminal Commission in the United States in 1960. However, practices resembling diversion had actually been implemented long before that, marked by the establishment of children's courts before the 19th century as a form of diversion from the formal criminal justice system, as well as the existence of police cautioning powers.⁶

The idea of diversion was introduced in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) through UN General Assembly Resolution 40/33 of November 29, 1985. Provisions regarding diversion are contained in Rules 11.1, 11.2, and Rule 17.4. The main idea is to prevent children from the negative impacts of conventional criminal justice processes, both in the form of psychological pressure during the examination process and the stigma of being a criminal. To that end, the examination is diverted from the formal channel to an alternative resolution mechanism through a diversion program. Diversion is the diversion of the resolution of cases of children suspected of committing certain crimes from the formal criminal process to a peaceful settlement between the perpetrator and the victim, the implementation of which is facilitated by the family, community, Community Guidance, Police, Prosecutors, or Judges.⁷

The constitutional basis for child protection through the diversion mechanism in Indonesia is rooted in the principle of a state based on law as stated in Article 1 Paragraph (3) of the 1945 Constitution, which places law as the basis for state administration, including the state's obligation to guarantee human rights without discrimination.⁸ One of the rights that receives special attention is the rights of children, as stated in Article 28B Paragraph (2) of the 1945 Constitution which states that "Every child has the right to survive, grow and develop and has

²Bintang Mandala Karyudi and Nuril Firdausiah, Implementation of the Supremacy of Law in Law Enforcement in Indonesia, *Lex Et Lustitia*, Vol. 1, No. 2, 2024, p. 86-98.

³Rifki Septiawan Ibrahim, Children's Civil Rights from the Perspective of Law Number 35 of 2014 concerning Child Protection, *Lex Privatum*, Vol. 6, No. 2, 2018, pp. 75-88

⁴Hasnah Aziz, Legal Protection for Children in Obtaining a Birth Certificate Based on Child Protection Principles, *Lex Jurnalica*, Vol. 15, no. 1, 2018, p. 56.

⁵Nanda Dwi Rizkia and Hardi Fardiansyah, *Legal Research Methods (Normative and Empirical)*, Widina Publisher, Bandung, 2023, p. 8

⁶Marlina, *Introduction to the Concept of Diversion and Restorative Justice*, USU Press, Medan, 2010, p. 4

⁷M. Nasir Jamil, *Children Are Not to be Punished*, Discussion Notes on the Child Criminal Justice System Law (UU SPPA), 2nd Edition, Sinar Grafika, Jakarta, 2013, p. 137.

⁸Auliya Khasanofa et al., *Restorative Justice as a Manifestation of Human Rights Protection in the Indonesian Constitutional System*, *National Multidisciplinary Sciences*, Vol. 4, No. 3, 2025, p. 19-26.

the right to protection from violence and discrimination." This basic norm forms a constitutional obligation that all policies, including the juvenile criminal justice system, must be designed to guarantee the protection and welfare of children. The constitutional mandate emphasizes that children in conflict with the law should not be treated like adult criminals, but rather as individuals who require special protection, guidance, and the opportunity to improve themselves. This principle is in line with the doctrine of a modern state of law which demands respect for human rights, proportionality, and humanistic and just legal treatment.⁹

The diversion regulations in Indonesia arose from the realization that children in conflict with the law cannot be treated the same as adult criminals. As global thinking on child protection evolved, Indonesia began adopting a more humane approach oriented toward recovery, rather than retribution. Prior to the enactment of the Juvenile Criminal Justice System Law (UU SPPA), the diversion mechanism lacked a clear legal basis and relied heavily on the initiative of law enforcement officials. This situation changed when the government introduced specific regulations integrating restorative justice principles into the juvenile justice system.

The concept of diversion, which later became part of Indonesian positive law, was influenced by international instruments, particularly the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, or Beijing Rules. This instrument emphasizes that children should be processed through different mechanisms than adults and, to the extent possible, should be kept out of the formal justice process. In addition to the Beijing Rules, the Convention on the Rights of the Child (CRC) also provides a normative basis for Indonesia to prioritize children's best interests through diversion mechanisms.¹⁰

Article 11 of the Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) contains a number of basic principles regarding the application of diversion as follows:¹¹

1. Diversion is carried out by taking into account appropriate conditions, namely giving authority to law enforcement officers (Police, Prosecutors, Judges, and other related institutions) to handle violations committed by children without going through a formal judicial process.
2. The authority to implement diversion lies with law enforcement officials such as the police, prosecutors, judges, and other institutions handling child cases, and is

⁹Rini Fitriani, The Role of Child Protection Organizers in Protecting and Fulfilling Children's Rights, *Samudra Keadilan Law Journal*, Vol. 11, No. 2, 2016, p. 250-358.

¹⁰Galih Dwi Anggara et al., *Legal Protection Regulations for Children as Perpetrators of Criminal Acts in International Legal Instruments*, NEM Publisher, Pekalongan, 2023, p. 9

¹¹Nur Muhammad et al., *Implementation of the Principles of Child Rights Protection in the Juvenile Criminal Justice System (A Study of the Role of the Prosecutor's Office in the Implementation of Diversion)*, *JSHI: Jurnal Syariah Hukum Islam*, Vol. 2, No. 1, 2023, p. 1-52.

implemented based on their respective policies in accordance with the criteria applicable in the national legal system and in line with the principles of The Beijing Rules.

3. Diversion is implemented with the consent of the child and their parents or guardians. However, the decision to implement diversion remains with the authorized official after an assessment and review of the diversion request.

The principle of the best interest of the child is the main foundation in child protection which must be prioritized in every legal action concerning children. This principle is stated in Article 3 Paragraph (1) of the Convention on the Rights of the Child (CRC), which emphasizes that the best interests of the child must be the primary consideration in all actions taken by state institutions and other institutions. Indonesia has ratified the CRC through Presidential Decree Number 36 of 1990, so that this principle has become part of the binding national legal system. Law Number 35 of 2014 concerning Child Protection, specifically in Articles 4, 16 and 59.¹²

Article 4 states that, "Every child has the right to live, grow, develop and participate fairly in accordance with human dignity and honor, and to receive protection from violence and discrimination."

Article 16 states that:

- (1) Every child has the right to protection from being subjected to abuse, torture or inhumane punishment.
- (2) Every child has the right to obtain freedom in accordance with the law.
- (3) The arrest, detention or imprisonment of a child shall only be carried out in accordance with applicable law and may only be carried out as a last resort.

Article 59 confirms the state's obligation to provide special protection to children, including children in conflict with the law, which reads as follows:

- (1) The Government, Regional Governments and other state institutions are obliged and responsible for providing Special Protection to Children.
- (2) Special Protection for Children as referred to in Paragraph (1) is provided to:
 - a. Children in emergency situations;
 - b. Children in conflict with the law;

¹²Faisal Riza and Fauzi Anshari Sibarani, *The Principle of the Best Interest of the Child in the Juvenile Justice Process*, UMSU Press, Medan, 2021, p. 12

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- c. Children from minority and isolated groups;
- d. Children who are exploited economically and/or sexually;
- e. Children who are victims of abuse of narcotics, alcohol, psychotropics and other addictive substances;
- f. Children who are victims of pornography;
- g. Children with HIV/AIDS;
- h. Children who are victims of kidnapping, sale and/or trafficking;
- i. Children who are victims of physical and/or psychological violence;
- j. Child victims of sexual crimes;
- k. Child victims of terrorist networks;
- l. Children with Disabilities;
- m. Child victims of abuse and neglect;
- n. Children with deviant social behavior; and
- o. Children who are victims of stigmatization from labeling related to their parents' conditions

Diversion is a direct implementation of this principle because it aims to prevent children from the formal justice process which can cause trauma, stigma, and psychological disorders that hinder their development.

3.2. Weaknesses of Diversion Regulations as a Child Protection Effort

Diversion regulations in the Juvenile Criminal Justice System are essentially designed to provide maximum protection for children in conflict with the law. However, their implementation still leaves a number of weaknesses that prevent the primary objectives of diversion, namely avoiding children from the formal justice process, preventing stigmatization, and restoring social relationships, from being fully achieved. Lawrence M. Friedman's theory of the legal system, which includes weaknesses in legal substance, legal structure, and legal culture, diversion regulations have not functioned optimally as an instrument for child protection. Discussion of these weaknesses in diversion regulations is

important to assess the extent to which the current legal system is able to provide justice and adequate protection for children as vulnerable legal subjects.¹³

a. Weaknesses in Legal Substance

Every criminal case must be resolved through a series of processes within the criminal justice system, including cases involving children. The purpose of the Juvenile Criminal Justice System in the Child Protection and Child Protection Law is not explicitly stated, but it can be understood from the General Explanation of the Law, namely that the core of its regulations lies in the implementation of Restorative Justice and Diversion, designed to distance children from the judicial process so that they avoid stigmatization and can return to their social environment properly. Implementation of this requires the support of all parties so that the process undertaken truly results in Restorative Justice for both children and victims.

Restorative Justice is regulated in Article 5 of the Juvenile Justice System Law, which states that the Juvenile Criminal Justice System must prioritize a restorative justice approach, including:¹⁴

- a. Investigation and prosecution of child crimes are carried out in accordance with legislation, unless otherwise specified in this law;
- b. Child trials conducted by courts in the general judicial environment; and
- c. Guidance, mentoring, supervision and/or assistance during the process of carrying out criminal or criminal action and after serving the criminal or criminal action.

As stated in the International Convention on the Rights of the Child, which expressly states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of children shall be a primary consideration(in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, government agencies or legislative bodies, the best interests of the child shall be the primary consideration).¹⁵

¹³Hardianto Djanggi and Ramlah, Implementation of Legal Protection for Children through Diversion by Public Prosecutors, Journal of Lex Philosophy (JLP), Vol. 2, No. 1, 2021, pp. 48-63.

¹⁴Nurini Aprilianda, Protection of Child Victims of Sexual Violence Through a Restorative Justice Approach, Legal Arena, Vol. 10, No. 2, 2017, p. 309-332.

¹⁵Ni Ketut Wiratny, The Principle of the Best Interests of Children in Diversion in the Juvenile Criminal Justice System, Jurnal Ilmiah Raad Kertha, Vol 1, No. 1, 2018, p. 61-77.

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By prioritizing the best interests of the child, the SPPA developed a case resolution mechanism known as diversion. Diversion is the transfer of criminal proceedings from the criminal justice system to an out-of-court mechanism based on an agreement between the perpetrator, victim, the perpetrator's family, and the victim's family. Diversion is a solution to various challenges in handling children in conflict with the law today.

This term comes from the English word "diversion," meaning avoidance or diversion. Diversion is a step to move a case from formal to informal channels or to remove a child offender from the criminal justice process. Not all cases involving children must be resolved through the formal judicial process; instead, alternative solutions can be pursued that prioritize the principles of justice, the best interests of the child, and consider the rights and interests of the victim.¹⁶

According to the Child Protection and Juvenile Justice Act, the implementation of diversion is stipulated in Article 5 Paragraph (3) which stipulates that all stages in the Child Criminal Justice System (starting from investigation, prosecution, to trial) must strive for diversion. The implementation is carried out through deliberations involving the child and his/her parents or guardians, the victim and his/her parents or guardians, Community Guidance Officers, and Professional Social Workers, using the Restorative Justice approach as stipulated in Article 8 of the Child Protection and Juvenile Justice Act.

Diversion can be attempted from the investigation stage by the Juvenile Investigator in the Police, to the prosecution stage by the Juvenile Prosecutor in the District Attorney's Office, and finally to the examination in the District Court by the Juvenile Judge, provided all legal requirements are met. Although these efforts have been made by law enforcement, not every case involving a child in conflict with the law can be resolved through diversion. Various factors and obstacles prevent diversion efforts from always achieving the desired results.

Article 7 Paragraph (1) of the SPPA Law states that at the stages of investigation, prosecution, and examination of child cases in district courts, diversion must be attempted. This provision emphasizes that diversion is not merely a policy choice (discretion) of law enforcement officers, but rather a legal obligation that must be considered at every level of the judicial process.

This obligation is limited by Article 7 Paragraph (2) of the SPPA which states that diversion can only be carried out for criminal acts that are threatened with imprisonment of less than 7 (seven) years and are not a repetition of the crime. The law has placed diversion as a special instrument that can only be used in certain categories of cases, namely criminal acts that are not considered serious and are committed for the first time by a child.

The diversion regulations in the Child Protection and Child Protection Agency (SPPA) are not fully aligned with other laws concerning provisions that carry prison sentences (above 7 years), making them inadmissible for diversion, even though the characteristics of the act do

¹⁶Kristina Agustiani Sianturi, The Realization of Restorative Justice in the Juvenile Criminal Justice System Through Diversion, *De Lega Lata: Journal of Legal Studies*, Vol. 1, No. 1, 2016, p. 184-210.

not always reflect a serious crime when committed by a child. These formal limitations ignore the values of substantial justice and place the criminal penalty as the sole determinant of eligibility for diversion, without considering the context of the act, the child's maturity, environmental factors, or power relations within the case. When legal substance is rigid and does not allow for discretion by authorities, child protection becomes disproportionate and often does not align with the principle of the best interest of the child. This indicates that the substantive elements of the legal system are still not aligned with the goals of child protection.

4. Conclusion

Diversion regulations provide a crucial foundation for child protection through a restorative approach that places the child's needs at the center of case resolution. Although the framework is clear through the Child Protection Law (SPPA), the Child Protection Law (UU PKH), and the Supreme Court Regulation (PERMA), limiting diversion requirements based on potential criminal penalties remains problematic because they restrict authorities to formal boundaries, leaving no room for a more rational assessment of the child's situation. This situation was evident in the Ambon case, where both parties were juveniles but still had to undergo the full judicial process simply because the criminal penalty imposed under the article carried a sentence exceeding seven years. This situation demonstrates that the existing system does not fully provide space for more educational, restorative solutions, and prevents children from being burdened by the stigma of the judicial process, thus preventing the desired protection. Diversion regulations within the Juvenile Criminal Justice System are designed to provide adequate protection for children, but the existing regulations still have many weaknesses. Substantively, rigid limitations mean that diversion can only be applied to certain cases, preventing authorities from assessing the child's condition more realistically. Structurally, law enforcement agencies do not yet fully possess the understanding, coordination, and sensitivity to support a restorative approach. In terms of legal culture, society remains strongly influenced by a mindset of retaliation and stigma against child perpetrators, resulting in the rejection of many non-litigation solutions, even though they are more beneficial for children's development. These conditions demonstrate that diversion as a protection instrument has not functioned optimally because the legal system is unable to provide justice and align with the needs of children's development. Reformulation of diversion is necessary because current provisions still limit the scope of protection for children and are not in line with the principles of justice, non-discrimination, and the principle of the best interests of the child. Limiting diversion to crimes punishable by less than 7 (seven) years in prison prevents many children's cases from being resolved restoratively, even though recovery, dialogue, and guidance are far more relevant to their development. A justice-based approach demands that all children's cases be directed through the diversion mechanism before proceeding to the judicial process, so that the law works not only by following normative texts but also by considering the child's social, psychological, and future circumstances. This reformulation places restoration as the primary goal, correcting disharmony in norms, and restoring the function of the law to truly protect children as subjects who still have significant opportunities for change and development.

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