

CONTEXTUALIZING RESTORATIVE JUSTICE THROUGH DIVERSION MECHANISM: A STUDY OF INDONESIA'S JUVENILE JUSTICE SYSTEM

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Abstract

Implementation of restorative justice in the youth the criminal justice system in many countries has undergone its dynamics in the past few decades, including in Indonesia. The enactment of Indonesian Youth Criminal Justice System Law in mid-2014, which invalidates the 1997 Youth Court Law, became a significant point of youth criminal justice reformation in Indonesia. The new Law began to shift the retributive paradigm in the Youth Court Law, as the previous statutory basis for youth criminal justice in Indonesia, to restorative justice paradigm. The new Law introduces the Diversion mechanism as a means to implement the restorative justice approach. This article seeks to discuss how restorative justice can be contextualized through diversion mechanism, as well as to consider whether the new Indonesian youth criminal justice system utilises restorative justice in a marginalized, boutique, or tokenistic way. Furthermore, this article uses statutory and theoretical approaches to examine the contextualization of restorative justice through the diversion mechanism introduced in the new Youth Criminal Justice System Law.

Keyword: diversion, restorative justice, youth criminal justice system, criminal law, Indonesia

Abstrak

Penerapan keadilan restoratif dalam sistem peradilan pidana anak di berbagai negara telah mengalami dinamika tersendiri selama beberapa dekade terakhir, termasuk di Indonesia. Diundangkannya Undang-Undang tentang Sistem Peradilan Pidana Anak pada pertengahan 2014, yang membatalkan Undang-Undang tentang Pengadilan Anak 1997 menjadi poin penting dalam reformasi sistem peradilan anak di Indonesia. Undang-Undang baru tersebut mulai menggeser paradigma retributif dalam Undang-Undang Pengadilan Anak 1997 menjadi paradigma keadilan restoratif. Lebih lanjut, Undang-Undang Sistem Peradilan Pidana Anak memperkenalkan mekanisme diversi sebagai cara menerapkan pendekatan keadilan restoratif. Artikel ini mencoba membahas mengenai bagaimana keadilan restoratif dapat dikontekstualisasikan melalui mekanisme diversi, serta untuk memahami apakah Undang-Undang Sistem Peradilan Pidana yang baru menerapkan keadilan restoratif secara termarginalkan, simbolik dan tokenistik. Lebih lanjut, artikel ini menggunakan pendekatan undang-undang dan teoritis untuk menganalisis bagaimana sejatinya kontekstualisasi keadilan restoratif melalui mekanisme diversi yang diperkenalkan dalam Undang-Undang Sistem Peradilan Pidana Anak.

Keyword: diversi, keadilan restoratif, sistem peradilan pidana anak, hukum pidana, Indonesia

I. INTRODUCTION

Finding a suitable approach to manage children in conflict with the law has become one of the concerns in reforming the juvenile justice system in many countries around the world. According to Cuneen and White, greater attention is being given to the basic rights and well-being of young people.¹ This effort is in accordance with the *United Nations Convention on the Rights of the Child* (UNCRC) provision, which states that “in all actions taken in matters concerning children, the best interests of the child must be a primary consideration,”² especially in the context of the juvenile justice system.

In Indonesia, the reform of juvenile justice has taken a step forward after the enactment of *Law No. 11 of 2012 Concerning the Juvenile Justice System (Juvenile Justice System Law)*, which invalidates *Law No. 3 of 1997 Concerning the Juvenile Court (Juvenile Court Law)*. The new *Juvenile Justice System Law* began to shift the retributive paradigm in the *Juvenile Court Law* to restorative justice paradigm.³ The mechanism introduced to implement the restorative justice approach is diversion.⁴

Restorative practices in the criminal justice system have been adopted in nearly all countries around the world. However, “the idea has been too often marginalized into “boutique” or tokenistic “programs” rather than delivering the fundamental overhaul of criminal justice,” according to Maruna and Bazemore.⁵ Based on the preceding explanation, the present study aims to examine how the restorative justice concept can be contextualized through the diversion mechanism in Indonesia’s juvenile justice system. This study also aims to analyze whether adopting the restorative justice concept will have a significant impact on the reform of the country’s juvenile justice system.

The discussion in this paper is divided into three parts. First is the relationship between restorative justice and children to understand why restorative justice is important for children, especially for those in conflict with the law. Second, the author explains restorative justice in the context of Indonesia’s juvenile justice system. Third, the author discusses how restorative justice contextualized in the diversion mechanism.

By analyzing the statutory scheme of diversion in Indonesian laws and regulations, as well as its implementation, we can obtain an improved understanding of how the restorative justice concept is adopted and applied in the laws and regulations concerning juvenile justice. Therefore, a clear picture can also be obtained to determine whether Indonesia’s new juvenile justice system applies restorative justice in a marginalized, boutique, or tokenistic manner.

¹ See Jenny Barga, “Juvenile justice: responding to Australia’s children and young people in trouble with the law,” *ALRC Law Reform Journal* Issue 92 (2008): 28. See also Chris Cuneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (Oxford: Oxford University Press, 2007), p. vi.

² See *Convention on the Rights of the Child*, New York, 20 November 1989, *United Nations Treaty Series*, Vol. 1577, Art. 3.

³ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 5(1).

⁴ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. (3).

⁵ See Shadd Maruna, “Lessons for Justice Reinvestment from Restorative Justice and the Justice Model Experience: Some Tips for an 8-year-old Prodigy” *Criminology & Public Policy* Vol. 10 Issue 3 (2011): 667. See also Gordon Bazemore and Shadd Maruna, “Restorative justice in the reentry context: Building new theory and expanding the evidence base” *Victims & Offenders* Vol. 4 (2009): 375.

II. RELATIONSHIP BETWEEN RESTORATIVE JUSTICE AND CHILDREN

A. Brief Definition of Concept of Restorative Justice

Different views and approaches exist regarding the meaning of restorative justice. Some consider restorative justice as an activity, whereas others view it as an idea, philosophy, or way of thinking about crime and justice.⁶ Moreover, restorative justice is not easily defined because it encompasses various practices at different stages of the criminal process.⁷ In general, two views exist regarding the definition of restorative justice. The first is a “purist” definition that emphasizes the process, while the second is a “maximalist” definition that asserts the outcome.

Marshall and Daly are experts whose definitions of restorative justice are close to those of the “purist” model. Marshall defines restorative justice as “a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implication for the future.”⁸ Daly defines the concept as “a *contemporary justice mechanism* to address crime, disputes, and bounded community conflict.”⁹ By contrast, Bazemore and Walgrave define restorative justice in a “maximalist” model as “every action that is primarily oriented towards doing justice by repairing the harm that has been caused by crime.”¹⁰

The United Nations (UN) uses the term “restorative process,” which is defined as “any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party.”¹¹ Furthermore, the UN Children’s Fund defines restorative justice as an “approach in which the victim or survivor and offender, and in some cases other persons affected by a crime, participate actively together in the resolution of matters arising from the crime, generally with the help of a facilitator,”¹² based on the UN’s Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.

Another explanation regarding restorative justice presented by the UN Office on Drugs and Crime (UNODC) refers to a “process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.”¹³

⁶ See Kathleen Daly, “What is Restorative Justice? Fresh Answers to a Vexed Question” *Victims & Offenders* Vol. 11 (2016): 10.

⁷ See Kathleen Daly, “Restorative Justice: The Real Story” *Punishment & Society* Vol. 4 Issue 1 (January 2002): 57.

⁸ Tony Marshall, *Restorative Justice: An Overview* (London: Home Office. Research Development and Statistics Directorate, 1999), p. 5.

⁹ Daly, “What is Restorative ...”, *op.cit.*, p. 21. Daly clarify that “*justice mechanism*” in her definition means a *meeting (or a set of meetings) of people*, which can take place at all phases of the criminal process. She also said that “*bounded community conflict*” means to *exclude* civil war, state violence, etc. for which other justice mechanisms are appropriate.

¹⁰ See Gordon Bazemore and Lode Walgrave, “Restorative Justice Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform” in Gordon Bazemore and Lode Wargrave (eds.), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey, NY: Criminal Justice Press, 1999), p. 418. See also, Daly, “Restorative Justice: The ...”, *op.cit.*, p. 58.

¹¹ See United Nations, Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res. 2000/14, U.N. Doc E/2000/INF/2/Add.2 at 35 (2000).

¹² United Nations Children’s Fund, “Toolkit on Diversion and Alternatives to Detention,” https://www.unicef.org/tdad/index_56040.html, accessed December 16, 2019.

¹³ See United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York: United Nations, 2006), p. 6.

The UNODC added that participation of the parties is an essential part of the process to resolve the conflict and discuss the desired outcome between victims and offender.¹⁴

Moreover, Zehr conceptually distinguishes the restorative and retributive types of justice. Restorative justice views crime as a violation of people's rights and relationships, and focuses on the victim's needs and offender's responsibility for repairing harm. By contrast, retributive justice views crime as a violation of the law and the state, and focuses on how offenders obtain what they deserve.¹⁵ Zehr added that restorative justice involves victims, offenders, and community members in an effort to set things right, whereas retributive justice requires the state to determine guilt and impose punishment.¹⁶

Furthermore, Zehr identified the three pillars of restorative justice, namely, harm and needs (of victims and also of communities and offenders), obligations (of offenders and also of communities), and engagement of those who have a legitimate interest or stake in the offence and its resolution (victims, offenders, and community members).¹⁷ These three pillars are further elaborated into three fundamental principles of restorative justice.

The first principle is "crime is fundamentally a violation of people and interpersonal relationships,"¹⁸ which is divided into two subprinciples. The first is related to the victims and the community need of restoration, and the second is related to the participation of victims, offenders, and the affected communities.¹⁹

The second principle is "violations create obligations and liabilities,"²⁰ which is also divided into two subprinciples. The first subprinciple is related to the offenders' accountability, and the second is related to the community's obligations to victims, offenders, and the general welfare of its members.²¹

The third principle is "restorative justice seeks to heal and put right the wrongs."²² Zehr breaks down this principle into five subprinciples, summarized as follows²³:

First is related to the need of victims for information, validation, vindication, restitution, testimony, safety, and support. *Second* is the process of justice, which maximizes opportunities for exchange of information, participation, and dialogue between victim and offender. *Third* is related to addressing offenders' needs and competencies. *Fourth* is related to community participation. *Fifth* is related to the outcomes to repair the harm caused by the crime.

For the purpose of this article, the author mainly adopted Zehr's fundamental principles of restorative justice as the basis to analyze whether the laws and regulations concerning diversion and its implementation reflect the restorative justice concepts explained above.

¹⁴ *Ibid.*

¹⁵ See Howard Zehr, *A New Focus for Crime and Justice: Changing Lenses* (Ontario: Herald Press, 1990), p. 181. See also Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (Intercourse: Good Books, 2003), p. 19.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, p. 21.

¹⁸ See Howard Zehr and Harry Mika, "Fundamental Principles of Restorative Justice," in Zehr and Gohar, *ibid.*, p. 82.

¹⁹ *Ibid.*, p. 82-83.

²⁰ *Ibid.*, p. 83.

²¹ *Ibid.*, p. 83-84.

²² *Ibid.*, p. 85.

²³ *Ibid.*, p. 85-87.

B. Restorative Justice and Children

In general, children have different characteristics compared with adults in many aspects. such as psychological, emotional, and physical conditions, ways of thinking, and decision making. At the international level, the Preamble of the UNCRC states that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection.”²⁴ Furthermore, the UNCRC also encourages the state parties to consider the best interest of the child in all actions concerning children, including by courts of law,²⁵ and develop efforts to reintegrate every child who is alleged as, accused of, or recognized as having infringed the penal law, to society.²⁶

Another example of an international resolution concerning the handling of the child in conflict with the law is the Beijing Rules.²⁷ These rules encourage measures that involve all possible resources, including family, volunteers, and other community groups, to promote the well-being of the juvenile, with a view to reducing the need for intervention under the law, and humanely dealing with the juvenile in conflict with the law.²⁸ The Beijing Rules also mention that juvenile justice aims to emphasize the well-being of the juvenile and ensure the best interest of both parties.²⁹

As mentioned in the previous section, restorative justice offers a different approach to crime. Restorative justice focuses on repairing the harm caused by the crime and reintegration of offenders and victims, rather than determining guilt and imposing punishment on the offender.³⁰ Moreover, Bazemore mentioned that the restorative justice approach seeks to find common ground between the interests of the victim, offender, and community in a more user-friendly process.³¹

By considering children’s characteristics and rights set out in the international convention and rules mentioned above, we argue that children need to be treated differently from adults in the criminal justice context. Restorative justice may be the best possible approach in dealing with children in conflict with the law because this approach focuses on repairing the harm and reintegration of offenders and victims on the community rather than the guilt and punishment in the retributive approach.

Through the restorative justice approach, children in conflict with the law can be treated more humanely so that their rights set out in the international convention and rules can be fulfilled. This idea is related to King’s statement that restorative justice is a key aspect of the justice system’s response to juvenile crime,³² as well as Bazemore’s argument that restorative justice has emerged as a promising approach to juvenile crime, which focuses on repairing harm and rebuilding relationships.³³

²⁴ See *Convention on the Rights of the Child*, New York, 20 November 1989, *United Nations Treaty Series*, Vol. 1577, Preamble.

²⁵ *Ibid*, Art 3(1).

²⁶ *Ibid*, Art 40(1).

²⁷ *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’)*, General Assembly Resolution 40/33, 29 November 1985.

²⁸ *Ibid*, Art 1.3.

²⁹ *Ibid*, Art 5.1

³⁰ See e.g., Marshall, *op.cit.*, p. 5; Bazemore and Walgrave, *op.cit.*, p. 418; Daly, *op.cit.*, p. 58; Zehr and Gohar, *op.cit.*, p. 31.

³¹ Gordon Bazemore, “Young People, Trouble, and Crime: Restorative Justice as a Normative Theory of Informal Social Control and Social Support,” *Youth & Society* Vol. 33 Issue 2 (2001): 199.

³² Michael King, et al., *Non-Adversarial Justice* (Leichhardt: The Federation Press, 2009), p. 5.

³³ Bazemore, *op.cit.*, p. 199.

III. RESTORATIVE JUSTICE IN INDONESIA'S JUVENILE JUSTICE SYSTEM

A. Brief History of Indonesia's Juvenile Justice System

The protection of children has become a concern at the national and international levels, as proven by the adoption of *The Beijing Rules* by the UN General Assembly in 1985.³⁴ Followed by the adoption of UNCRC in 1989, which entered into force in 1990.³⁵ Indonesia ratified the Convention through *Presidential Decree No. 36 of 1990*.³⁶

In the Indonesian context, before the ratification of UNCRC, Indonesia already had certain provisions regarding children, especially in the criminal justice context. For instance, the *Indonesian Constitution* ensures that children are entitled to protection against violence and discrimination.³⁷ Moreover, the *Indonesian Criminal Code* provides alternatives in court proceedings that involve child defendants.³⁸ Other examples are the *Supreme Court Circular Letter No. 3 of 1959*, *Supreme Court Instruction No. M.A./Pem./048/1971*, and *Law No. 8 of 1981 concerning the Criminal Procedure Code*. These laws and regulations stated that the trial for a child is not open to the public, and if this requirement is not fulfilled, then the court decision will be null and void.³⁹ The trial should also be conducted by judges who have knowledge of the child's situation and concern for the child.⁴⁰

Furthermore, in 1997, Indonesia enacted the first Law that specifically regulated the child in the criminal justice context, which is the *Juvenile Court Law*,⁴¹ followed by the *Child Protection Law*⁴² in 2002, which regulated child protection in general. The *Juvenile Court Law* is supposed to provide protection to the child in conflict with the law (hereafter referred to as "the Child").⁴³ Instead, its implementation tends to position the child as an object and the treatment tends to be disadvantageous to

³⁴ *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, General Assembly Resolution 40/33, 29 November 1985.

³⁵ UNCRC adopted and opened for signature, ratification and accession in 20 November 1989, and entered into force in 2 September 1990, according to Article 49 of the Convention.

³⁶ Indonesia, *Keputusan Presiden tentang Pengesahan Convention on the Rights of the Child (Konvensi tentang Hak-Hak Anak) (Presidential Decree on the Ratification of the Convention on the Rights of the Child)*, Keputusan Presiden No. 36 Tahun 1990, LN No. 57 Tahun 1990 (Presidential Decree No. 36 of 1990, SG No. 57 of 1990).

³⁷ See the *1945 Constitution of the Republic of Indonesia*, Art. 28B(2).

³⁸ See Indonesia, *Kitab Undang-Undang Hukum Pidana (Criminal Code)*, UU No. 1 Tahun 1946 (Law No. 1 of 1946), Arts. 45, 46, and 47. This Law provides three alternatives. *Section 45* stated that the Court can order the child defendant to be returned to their parents or guardian without imposing a criminal sentence. *Section 46* mentioned that if the Court decides to order the defendant to be submitted to the Government, then the Court will place the child in the State Education House. *Section 47* states that the Court can impose a criminal sentence by reducing the maximum penalty by a third. However, these three provisions were *invalidated* by the enactment of *Juvenile Court Law* in 1997 as mentioned in *Section 67* of the *Juvenile Court Law*.

³⁹ See e.g., Indonesia, *Undang-Undang tentang Kitab Undang-Undang Hukum Acara Pidana (Law on Criminal Procedure Code)*, UU No. 8 Tahun 1981, LN. No. 76 Tahun 1981), Arts. 153(3) and (4).

⁴⁰ See e.g., *Supreme Court Instruction No. M.A./Pem./048/1971*, January 04, 1971.

⁴¹ Indonesia, *Undang-Undang tentang Pengadilan Anak (Law on Juvenile Court)*, UU No. 3 Tahun 1997, LN No. 3 Tahun 1997 (Law No. 3 of 1997, SG No. 3 Year 1997).

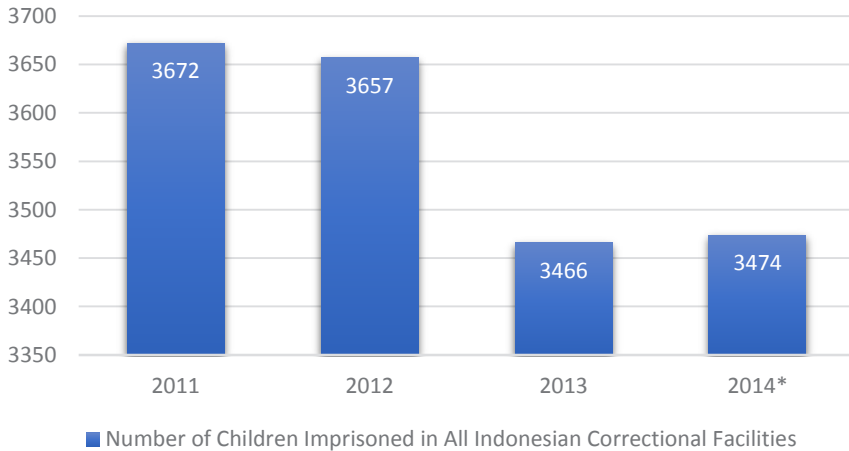
⁴² Indonesia, *Undang-Undang tentang Perlindungan Anak (Law on Child Protection)*, UU No. 23 Tahun 2002, LN No. 109 Tahun 2002 (Law No. 23 of 2002, SG No. 109 Year 2002).

⁴³ The Consideration of Juvenile Court Law stated that 'to carry out guidance and provide protection for children, it is necessary to support both institutional and legal instruments to be more adequate. Therefore, the provisions concerning the implementation of the juvenile court need to be specifically regulated'. See Indonesia, *Undang-Undang tentang Pengadilan Anak (Law on Juvenile Court)*, UU No. 3 Tahun 1997, LN No. 3 Tahun 1997 (Law No. 3 of 1997, SG No. 3 Year 1997), Consideration b.

children.⁴⁴ Most of the children have to undergo a formal criminal process that ends with criminal sentencing and imprisonment.

The following figure shows the available data from the Directorate General of Corrections, Ministry of Law and Human Rights, concerning the number of children imprisoned in all Indonesian correctional facilities before the *Juvenile Justice System Law* was enforced.⁴⁵

Figure 1. Number of Children Imprisoned in All Indonesian Correctional Facilities (January 2011–July 2014)



Source: Corrections Database System, Directorate General of Corrections, Indonesian Ministry of Law and Human Rights.

Although the figure shows a downward trend in the number of imprisoned children, the number exceeded 3,400 as of 2014.

Some cases, such as the Raju, AAL, and Telaumbanua cases, indicate the need to reform the juvenile justice system. The Raju case⁴⁶ is about a boy who was less than eight years old and was detained for assault after fighting with his schoolmate. He was placed in an adult detention house as he failed to appear before the Court despite being summoned three times by the prosecutor.⁴⁷ The public saw that the detention was excessive considering the child's age, and that he was too young to bear criminal responsibility.⁴⁸ Thereafter, the boy was found guilty but returned to his parents

⁴⁴ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), General Explanation.

⁴⁵ The *Law No. 11 of 12 concerning Juvenile Justice System entered into force in July 31, 2014.*

⁴⁶ See Diah Novianti, "Starting from a Request for Doctor's Treatment, Raju Case Becomes Rampant," <http://www.antaraneews.com/berita/1141214462/berawal-dari-permintaan-berobat-ke-dokter-kasus-raju-pun-merebak>, accessed May 17, 2019.

⁴⁷ The article indicates that there was no detention house for children in the concerned region. See *Ibid.*

⁴⁸ Later, the Constitutional Court held that **the minimum age for a child's criminal responsibility is raised from 8 to 12 years old**. See *Constitutional Court of the Republic of Indonesia, "Decision No. 1/PUU-VIII/2010 concerning Judicial Review of Law No. 3 of 1997 concerning Juvenile Court"*, p. 158.

without punishment.

The AAL case concerns a 15-year-old boy who was charged for stealing sandals in a policeman's boarding house. The boy was found guilty, but the Court freed him.⁴⁹ However, the decision itself became controversial because the sandals presented as evidence in the Court did not belong to the policeman, but the Court still gave a guilty verdict.⁵⁰ During the trial, many people and organizations concerned with children's issues carried out a movement called "1000 sandals to free AAL" to support AAL, which became the symbol of law enforcement injustice toward children.⁵¹

The latest significant case involving a child is the case of Yusman Telaumbanua, an underage boy from Nias who was sentenced to death for a murder he never committed.⁵² According to KontraS investigation, Telaumbanua's case is characterized by a legal defect.⁵³ Haris Azhar, the coordinator of KontraS, found many violations in the legal process that Telaumbanua went through, such as falsifying his age identity, threats to force him to confess, and the practice of torture.⁵⁴ Although he was ultimately released from the death sentence as his request for PK was granted by M.A., the case shows the overall defect in the criminal justice process, especially when dealing with a child. Furthermore, the case illustrates the importance of a right and just juvenile justice system to protect the rights of underage children in a criminal case, especially to prevent wrongful arrest of other children.

B. Emergence of Restorative Justice Idea in the Indonesia Juvenile Justice System

Several cases explained above are only a few of the many problems in the juvenile justice context. This fact was approved by the Legislature, as mentioned in the General Explanation of the *Juvenile Justice System Law*, that the implementation of the *Juvenile Court Law* tended to harm children and position them as objects.⁵⁵

The Legislature added that the *Juvenile Court Law* is no longer appropriate to the needs of the community and did not provide comprehensive protection to the Child.⁵⁶ Therefore, the paradigm in handling the Child should be changed by considering the role of the community, the Government, and other state agencies, which are responsible for improving the children's welfare and providing special protection to the Child.⁵⁷

Furthermore, considering that numerous problems arise in the juvenile justice system, in 2012, the Legislature enacted the *Juvenile Justice System Law*, which entered

⁴⁹ See Kathy Quiano, "Indonesian Boy Found Guilty, Freed Amid Sandals Furor," <http://edition.cnn.com/2012/01/05/world/asia/indonesia-sandals/index.html>, accessed May 17, 2019.

⁵⁰ *Ibid.*

⁵¹ The "1000 sandals movement" spread throughout Indonesia. The collected sandals were given to law enforcement agencies such as the police and the prosecutor's office as these agencies were believed to be the most responsible for bringing the cases to the Court.

⁵² See e.g., Restu Diantina Putri, "Death Sentence for the Talaumbanua Boy," <https://tirto.id/vonis-mati-untuk-bocah-telaumbanua-cKi5>, accessed December 16, 2019.

⁵³ *Ibid.*

⁵⁴ *Ibid.* See also Kartika Anggraeni, "Yusman Telaumbanua, the Story of Irregularities of the Death Penalty," <https://nasional.tempo.co/read/1028911/yusman-telaumbanua-kisah-kejanggalan-vonis-hukuman-mati/full&view=ok>, accessed December 16, 2019.

⁵⁵ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), General Explanation.

⁵⁶ See *Ibid.*

⁵⁷ *Ibid.*

into force on July 31, 2014. The most fundamental substance of this Law is the firm setting of restorative justice and diversion, which intends to keep the children away from the judicial process. Therefore, this approach can avoid the stigmatization of the Child and enable the child to return to the community.⁵⁸ The approach used in the new Law seems to move from retributive to restorative justice, as it also states that imprisonment is used as a last resort.⁵⁹

The General Explanation of the *Juvenile Justice System Law* also states that “Restorative Justice is a diversion process, which means that all parties involved in a particular crime, including victims, offenders, and community, are engaged in solving the problem and finding the best solutions to repair the harm.”⁶⁰ Furthermore, the General Explanation states that restorative justice in the new *Juvenile Justice System Law* is contextualized through a diversion mechanism.

Thus, it is expected that the new Law will enable a better fulfillment of children’s best interest in the criminal justice context and protect their rights as mentioned in the international and national rules. The next part examines whether the diversion mechanism introduced in the *Juvenile Justice Law* reflects the restorative justice principles mentioned above, and whether the Law applies restorative justice in a marginalized, boutique, or tokenistic manner.

IV. DIVERSION AS RESTORATIVE JUSTICE CONTEXTUALIZATION

A. Definition and Concept of Diversion

The *Juvenile Justice System Law* defines diversion as “redirecting the settlement of cases involving the Child from the criminal justice system to a process outside the criminal justice.”⁶¹ A child in conflict with the law (“the Child”) is a person who is 12 years old but not yet 18 years old, who is suspected of committing a crime.⁶² The definition is in accordance with those by Bynum and Thompson,⁶³ Mbambo,⁶⁴ and other provisions mentioned in *The Beijing Rules*⁶⁵ and UNCRC,⁶⁶ which emphasize the

⁵⁸ *Ibid.*

⁵⁹ Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 81(5).

⁶⁰ *Ibid.*

⁶¹ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 1(7).

⁶² See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 1(3).

⁶³ Bynum and Thompson define diversion as “An attempt to divert, or channel out, youthful offenders from the juvenile justice system.” See Jack E. Bynum and William E. Thompson, *Juvenile Delinquency: A Sociological Approach* (3rd Ed., Boston: Allyn and Bacon, 1996), p. 430.

⁶⁴ Mbambo stated that diversion is “the Channeling of children into appropriate reintegrative programmes where the intervention of the formal court system is not necessary.” See See Buyi Mbambo, “Diversion: A Central Feature of the New Child Justice System,” in Traggay Maepa (ed.), *Beyond Retribution: Prospects for Restorative Justice in South Africa* (Institute for Security Studies, 2005), p. 76.

⁶⁵ It stated that “wherever appropriate, consideration shall be given to dealing with young offenders without resorting to formal trial by the competent authority.” See *the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, General Assembly Resolution 40/33, November 29, 1985, Art. 11.1.

⁶⁶ Article 40(3)(b) stated that “Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings” See *Convention on the Rights of the Child*, New York, 20

minimization of the formal court intervention.

Conceptually, diversion is based on the premise that the courts may indirectly stigmatize some youth for having committed relatively petty acts that might best be handled outside the formal court process.⁶⁷ This view endorsed in the General Explanation of the *Juvenile Justice Law* is mentioned in the previous part.⁶⁸ It is also mentioned in Article 2 regarding principles used in the *Juvenile Justice System Law* that “deprivation of liberty and punishment [is] used as a last resort.”⁶⁹ The next section further discusses the statutory scheme of diversion.

B. Statutory Scheme of Diversion

The implementation of the diversion mechanism in Indonesia is primarily based on the *Juvenile Justice System Law* and its concerned regulations. Table 1 lists the laws and regulations concerning the diversion mechanism.

Table 1. Indonesian Laws and Regulations Concerning Diversion

Name of Law/Regulation	Explanation
Juvenile Justice System Law	Primary Basis of Diversion
Government Regulation No. 65 of 2015 on Guidelines for the Implementation of Diversion and Handling of Children Under 12 (Twelve)	Implementing Regulation of Article 15 and Article 21(6) of Juvenile Justice System Law
Government Regulation No. 9 of 2017 on Guidelines for Child Cases and Child Victim Register	Implementing Article 25(2) of Juvenile Justice System Law
Presidential Regulation No. 175 of 2014 on Integrated Education and Training for Law Enforcers and Concerned Parties regarding the Juvenile Justice System	Implementing Article 92(4) of Juvenile Justice System Law
Government Regulation No. 8 of 2017 on Procedure for Implementing Juvenile Justice System Coordination, Monitoring, Evaluation, and Reporting	Implementing Article 94 of Juvenile Justice System Law
Supreme Court Regulation No. 4 of 2014 on Guidelines for the Implementation of Diversion in Juvenile justice System	Implementing Regulation of Juvenile Justice System Law, especially in court proceeding phase
Attorney General Regulation No. 006/A/J.A/04/2015 on Guidelines for the Implementation of Diversion at Prosecution Phase	Implementing Regulation of Juvenile Justice System Law, especially in prosecution phase

Source: Processed by Author, 2019.

November 1989, *United Nations Treaty Series*, Vol. 1577, Art. 40(3)(b).

⁶⁷ See Shay Bilchick (adm.), “Diversion Programs: An Overview”, <https://www.ncjrs.gov/html/ojdp/9909-3/div.html>, accessed 21 May 2019.

⁶⁸ It stated that “Restorative Justice and Diversion intended to avoid the child from the court proceedings, so it can avoid the stigmatization of the child in conflict with the law and hopefully the child can fairly return to the community.” See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), General Explanation.

⁶⁹ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 2(i).

The implementation of diversion primarily refers to the provisions in Chapter II of the *Juvenile Justice System Law* and the *Government Regulation regarding Guidelines for the Implementation of Diversion*, as these laws and regulations have detailed provisions concerning diversion implementation in each phase of the juvenile justice process. However, the Supreme Court Regulation and Attorney General's Regulation mentioned above remain in effect as long as it is not contrary to the Law and Government Regulation.

Moreover, several implementing regulations are delegated from the *Juvenile Justice System Law* that are still unavailable, namely, Government Regulation on forms and procedures of execution of criminal judgment, Government Regulation on non-criminal punishment, and Presidential Regulation on the implementation of the rights of child victims and child witnesses.⁷⁰ According to ICJR, the absence of these implementing regulations affect the implementation of the diversion mechanism as it creates uncertainty and confusion that influence the willingness of law enforcers to implement non-penal punishment.⁷¹

Apart from the absence of several implementing regulations, the diversion mechanism principally aims to achieve reconciliation between the victims and offenders, resolve the cases outside the judicial process, prevent the Child from deprivation of liberty, encourage community participation, and instill a sense of responsibility in the Child.⁷² These objectives seem to reflect Zehr's three pillars of restorative justice,⁷³ and the fundamental principles of restorative justice, such as repairing harm,⁷⁴ offender obligations,⁷⁵ and community participation.⁷⁶

Furthermore, the diversion process is conducted through deliberation (*Musyawarah*), which involves the Child and his/her parents or guardians, victims and their parents or guardians, Social Counselors,⁷⁷ and Professional Social Workers,⁷⁸

⁷⁰ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Arts. 71(5), 82(4), and 90(2).

⁷¹ Institute for Criminal Justice Reform, *Hukuman Tanpa Penjara: Pengaturan, Pelaksanaan, dan Proyeksi Alternatif Pemidanaan Non Pemenjaraan di Indonesia* (Jakarta: Institute for Criminal Justice Reform, 2019), p. 85.

⁷² See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 6.

⁷³ The pillars are: *harm and needs, obligations, and engagement of those who have a legitimate interests or stake in the offence and its resolution*. See Zehr and Gohar, *op.cit.*, p. 21.

⁷⁴ See Zehr and Mika, *op.cit.* Principle 1.1 (victims and the community have been harmed and in need of restoration), Principle 2.1 (offenders' obligations are to make things right as much as possible), and Principle 3.5 (justice is mindful of the outcomes, intended, and unintended responses to crime and victimization).

⁷⁵ *Ibid.* See Principle 2.1 and Principle 3.3 (offenders' needs and competencies are addressed).

⁷⁶ *Ibid.* See Principle 1.1, Principle 1.2 (victims, offenders, and affected communities are the key stakeholders in justice), and Principle 3.4 (the justice process belongs to the community).

⁷⁷ Functional law enforcers that conduct community research, mentoring, supervision, and assisting the child in conflict with the law within and outside the criminal justice process. See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 1(13).

⁷⁸ A person who works in government or private agencies, and has the competence in the social work profession, as well as concern achieved from formal education, training, or practical experience in the social work area to carry out the task of service and handling social problems of children in conflict with the law. See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 1(14).

based on the restorative justice approach.⁷⁹ The deliberation can also involve community leaders, religious leaders, and teachers.⁸⁰ The process should consider the victims' interests, the welfare and responsibility of the Child, avoidance of negative stigma, avoidance of retaliation, harmony of community, as well as propriety, decency, and public order.⁸¹ The Social Counselors have a significant role in the diversion process because they not only assist the child within and outside the criminal justice process but also have a role in supervising the diversion process.⁸²

The Law seems to accommodate the key stakeholders⁸³ and allows broad participation of the community members in the diversion process, as the justice process draws from community resources, which eventually contribute to strengthening the community.⁸⁴ The deliberation can also empower the parties involved by maximizing the opportunities for exchange of information, participation, dialogue, and mutual consent of the parties involved.⁸⁵

Even though it is mandatory to conduct diversion in each criminal justice stage, diversion only applies to the offence that has an imprisonment penalty of less than seven years, and is not a repeat of a crime.⁸⁶ Thus, if a child is charged with an offence with a sentence of more than seven years imprisonment, or the act is a repeat of a crime, then diversion is not mandatory, but can still be sought as long as the parties agree.⁸⁷ Nevertheless, a major possibility is that diversion cannot be implemented if the parties do not agree to conduct the diversion.

Diversion is aimed for in all phases of juvenile justice (investigation, prosecution, and court proceedings).⁸⁸ If the diversion is not conducted even though the requirements are fulfilled, for the best interest of the child, Social Counselors can

⁷⁹ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 8(1).

⁸⁰ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 8(2) and Explanation of Art. 8(2). See also Indonesia, *Peraturan Pemerintah tentang Pedoman Pelaksanaan Diversi dan Penanganan Anak yang Belum Berumur 12 (Dua Belas) Tahun (Government Regulation on Guidelines for The Implementation of Diversion and Handling of Children Under Twelve)*, PP No. 65 Tahun 2015, LN. No. 194 Tahun 2015 (Government Regulation No. 65 of 2015, SG No. 194 Year 2015), Art. 15(4).

⁸¹ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 8(3).

⁸² See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 1(13). See also Indonesia, *Peraturan Pemerintah tentang Pedoman Pelaksanaan Diversi dan Penanganan Anak yang Belum Berumur 12 (Dua Belas) Tahun (Government Regulation on Guidelines for The Implementation of Diversion and Handling of Children Under Twelve)*, PP No. 65 Tahun 2015, LN. No. 194 Tahun 2015 (Government Regulation No. 65 of 2015, SG No. 194 Year 2015), Art. 4.

⁸³ See Zehr and Mika, *op.cit.* See Principle 1.2.

⁸⁴ *Ibid.* See Principle 3.4.

⁸⁵ *Ibid.* See Principle 3.2.

⁸⁶ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 7.

⁸⁷ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 9(2).

⁸⁸ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 7(1).

request the diversion process to the law enforcers.⁸⁹ A specified time limit exists for the diversion process, which is *no later than 30 days* from the date of diversion commencement in each phase of juvenile justice.⁹⁰ If the diversion in the investigation phase fails, then the investigators deliver the case file to the prosecutor for further action. It is also applied for diversion in the prosecution phase; if the process fails, then the case is forwarded to court proceeding.

The outcome of the diversion process is set forth in the form of the diversion agreement.⁹¹ The agreement is then submitted to the Court by the law enforcers in each phase to obtain the Court Order concerning the outcome of diversion.⁹² The Court Order is then delivered to the Social Counselors and law enforcers so that the investigator can issue the suspension of investigation or the prosecutor can issue the termination of the prosecution.⁹³ However, if the parties do not implement the diversion agreement, then the juvenile justice process will continue.⁹⁴

To date, the Juvenile Justice System Law has been judicially reviewed and decided by the Constitutional Court at least three times through Constitutional Court Decision No. 110/PUU-X/2012 (2012 Decision), Constitutional Court Decision No. 94/PUU-XIV/2016 (2016 Decision), and Constitutional Court Decision No. 68/PUU-XV/2017 (2017 Decision). However, these decisions do not allude to the concept of restorative justice, even though the applicant mentioned the relation between the submissions with restorative justice. Furthermore, the Constitutional Court stated the significance of the restorative justice approach in the juvenile justice system through the diversion mechanism and its relation to the constitutional rights of the children.⁹⁵

Based on the preceding explanation, the author highlights potential problems in the diversion implementation. In general, although the *Juvenile Justice System Law* explicitly endorsed the restorative justice approach, the Law does not fully implement the approach in its provisions. There still a tendency to use the formal criminal justice process in dealing with cases involving the Child, as evident in some restrictions in the process, such as requirements stated in Article 7,⁹⁶ and the time limit for the diversion

⁸⁹ See Indonesia, *Peraturan Pemerintah tentang Pedoman Pelaksanaan Diversi dan Penanganan Anak yang Belum Berumur 12 (Dua Belas) Tahun (Government Regulation on Guidelines for The Implementation of Diversion and Handling of Children Under Twelve)*, PP No. 65 Tahun 2015, LN. No. 194 Tahun 2015 (Government Regulation No. 65 of 2015, SG No. 194 Year 2015), Art. 4.

⁹⁰ See Indonesia, *Peraturan Pemerintah tentang Pedoman Pelaksanaan Diversi dan Penanganan Anak yang Belum Berumur 12 (Dua Belas) Tahun (Government Regulation on Guidelines for The Implementation of Diversion and Handling of Children Under Twelve)*, PP No. 65 Tahun 2015, LN. No. 194 Tahun 2015 (Government Regulation No. 65 of 2015, SG No. 194 Year 2015), Arts. 15(1), 33(1), and 51(1).

⁹¹ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Arts. 11 and 12(1).

⁹² See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Arts. 12(2), 12(3).

⁹³ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Arts. 12(4)-(5).

⁹⁴ See Indonesia, *Undang-Undang tentang Sistem Peradilan Pidana Anak (Law on Juvenile Justice System)*, UU No. 11 Tahun 2012, LN. No. 153 Tahun 2012 (Law Number 11 of 2012, SG No. 13 Year 2012), Art. 13(b).

⁹⁵ See e.g., Constitutional Court of the Republic of Indonesia, "*Decision No. 110/PUU-X/2012 concerning Judicial Review of Law No. 11 of 2012 on Juvenile Justice System*" (March 28, 2013), p. 118-120.

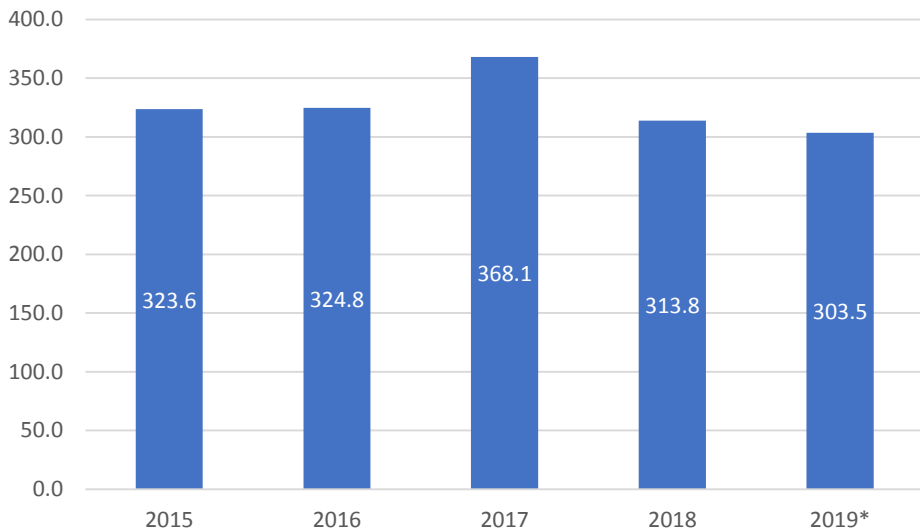
⁹⁶ The diversion *only applies to offences that have less than 7 years imprisonment penalty* and it is *not a repeat of a crime*.

process in each stage. Furthermore, if the diversion agreement is not implemented, then the case will continue in the formal criminal justice process.

C. Implementation of Diversion Mechanism

Based on the data from the Directorate General of Corrections,⁹⁷ the average number of successful diversion implementations from 2015 to 2019 shows a constant number. The highest average number of diversions was 368.1 in 2017 and the lowest was 303.5 in 2019. Furthermore, most of the cases involving children as offenders are persecution, sexual assault, and traffic accidents. However, a case related to persecution involved death in Sukabumi, and the case was successfully reconciled through diversion.⁹⁸ Figure 2 shows details of the average number of successful diversions in Indonesia from 2015 to 2019.

Figure 2. Average Number of Successful Diversions in Indonesia (2015–November 2019)⁹⁹



Source: Processed by author based on data from Corrections Database System, Directorate General of Corrections, Indonesian Ministry of Law and Human Rights, 2019.

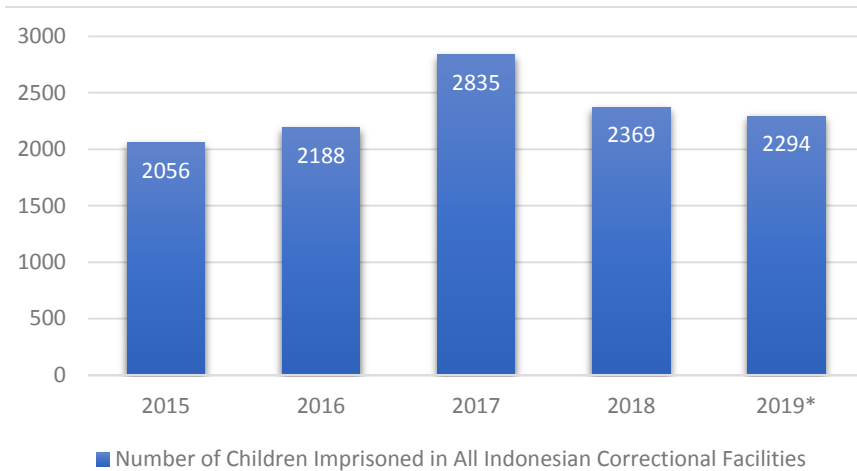
⁹⁷ For detailed information on the successful diversion implementation, see Directorate General of Corrections, Ministry of Law and Human Rights Republic of Indonesia, “Data Terakhir Klien Bimkemas Bapas Perkanwil,” <http://smlslap.ditjenpas.go.id/public/abp/current/monthly/year/2012/month/12>, accessed 16 December 2019.

⁹⁸ Budiyanto, “The Case of Elementary School Student Killed for Fighting Reconciled using Juvenile Justice System Law,” <http://regional.kompas.com/read/2017/08/15/20584701/kasus-siswa-sd-tewas-karena-berkelahi-gunakan-uu-sistem-peradilan-pidana>, accessed May 22, 2019.

⁹⁹ The data processed from Directorate General of Corrections on DAKT (*Diversi Anak kembali ke Orang Tua*) and DSOS (*Diversi Anak ke Panti Sosial atau lainnya*). See <http://smlslap.ditjenpas.go.id/>.

Moreover, articles published on the website of the Directorate General of Corrections indicate that the diversion mechanism continues to be conducted.¹⁰⁰ Nevertheless, the number of diversion mechanisms conducted is still far below the number of children who are imprisoned after undergoing the formal criminal justice process, as shown in Figure 3.

Figure 3. Number of Imprisoned Children in All Indonesian Correctional Facilities (2015-2019)¹⁰¹



Source: Corrections Database System, Directorate General of Corrections, Indonesian Ministry of Law and Human Rights.

After the Juvenile Justice System Law entered into force in mid-2014, the data from the Directorate General of Corrections surprisingly indicated an increase in the number of imprisoned children from 2,056 in December 2015 to 2,294 in November 2019. Even in 2017, the number reached 2,835. Compared with the average number of successful diversions shown in Figure 2, the number of successful diversions only reaches approximately 1/13th of the total number of children imprisoned. Moreover, based on the research conducted by the Institute for Criminal Justice Reform in 2019, from 304 cases of juvenile crime in DKI Jakarta, 268 children or 80% of the total cases are charged with imprisonment, and 259 children are sentenced with imprisonment.¹⁰² The use of alternative measures or punishment outside imprisonment has not been significantly used by the prosecutor or judge. Moreover, the sample used in the ICJR research shows 96% of criminal cases with penalty of more than seven years imprisonment.¹⁰³ Furthermore, ICJR also found the use of inappropriate detention for

¹⁰⁰ See articles concerning diversion implementation published by Directorate General of Corrections, Ministry of Law and Human Rights, Republic of Indonesia, <http://www.ditjenpas.go.id/?s=diversi>.

¹⁰¹ The data shown represent the number of children imprisoned as of December, except in 2019 where the latest data acquired by the author are from November 2019.

¹⁰² Institute for Criminal Justice Reform, *Anak dalam Ancaman Penjara: Potret Pelaksanaan UU SPPA 2018 (Riset pusutan peradilan Anak se-DKI Jakarta 2018)* (Jakarta: Institute for Criminal Justice Reform, 2019), pp. 15-16.

¹⁰³ *Ibid.*, p. 16.

children, who are placed in adult detention.¹⁰⁴

The problem in implementing diversion arises when the court deals with narcotics cases, in which the indictments are subsidiary, alternative, cumulative, or combination, between several articles that have a penalty of life imprisonment.¹⁰⁵ Moreover, many cases involve the possession of a sharp weapon, which mostly used articles with a penalty of 10 years imprisonment.¹⁰⁶ Based on the reported problems, as most cases deal with over seven years imprisonment, the diversion mechanism, which is not mandatory, cannot proceed as one of the parties did not agree to conduct diversion.

V. CONCLUSION

To sum up, the contextualization of restorative justice in the diversion mechanism can be viewed from two perspectives. **First** is normative perspective. As mentioned above, the spirit brought in the Juvenile Justice System Law is admirable. The new Law tries to shift from retributive to restorative justice approach through diversion as a primary mechanism to handle the Child and use imprisonment penalty as a last resort. Thus, the new mechanism aims to keep children away from the conventional criminal justice system. The diversion's objectives and schemes provided in the new Law seem to reflect Zehr's three pillars (harm and needs, obligations, and engagement of those who have a legitimate interest or stake in the offence and its resolution), and fundamental principles of restorative justice such as repairing harm, offender obligations, and community participation. However, the formal criminal justice process is still used, as shown by some restrictions in other provisions such as the time limit of diversion, and the requirements that the diversion shall apply to an offense with penalty of less than seven years imprisonment and in which the act is not a repeat of a crime.

Second is empirical perspective. The available data presented shows the number of successful diversions conducted from 2015 to 2019. However, the number is still far below the number of children who undertake the formal criminal justice process because the use of imprisonment penalty by prosecutors and judges is still fairly high. Furthermore, as mentioned, the reported problems in the implementation are mainly because the cases involving the Child as an offender were mostly serious crimes, and diversion cannot be conducted because one of the parties did not agree to proceed with diversion. Moreover, the absence of implementing regulations under the Juvenile Justice System Law also creates uncertainty and confusion in implementing diversion, which leads to the unwillingness of law enforcers to use diversion.

Finally, based on the data and analysis of the Juvenile Justice System Law provisions and its implementation, although the diversion mechanism seems to reflect the restorative justice principles, the new juvenile justice system still applies the restorative justice approach in a marginalized, boutique, and tokenistic manner. This condition is evident in the tendency to undertake the formal criminal justice process, especially if the case is related to serious crimes committed by children.

¹⁰⁴ See Institute for Criminal Justice Reform, "MP's Case in Palopo and the Challenge of Juvenile Justice System Law Implementation in Indonesia," <https://icjr.or.id/kasus-mp-di-palopo-dan-tantangan-implementasi-uu-sistem-peradilan-pidana-anak-indonesia/>, accessed 16 December 2019.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 17.

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