

## Legal Politics on the Principle of Ultimum Remedium in the Context of Protection Recidivist Children

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### **Abstract**

The principle of juvenile criminal justice focuses more on protecting and rehabilitating children of criminals, because children have weaknesses compared to adults. Repeat crimes are not new in the law, because every time there is a crime, there will be a repetition of the crime. The last principle of settlement is an important concept in criminal law that emphasizes that the use of criminal law should only be carried out as a last resort in enforcing the law. This study is intended to explore how the juvenile criminal law policy in Indonesia provides protection for children who repeat crimes and how the latter principle as a last resort is applied in the handling of recidivism children in the juvenile criminal justice system in Indonesia. In this study, normative legal research methods are used with the Laws and Regulations approach and the Conceptual Approach. Literature relevant to the object of research becomes a source of legal material that provides a juridical descriptive analysis. Research and discussions show that the progressive application of the law in the restorative justice approach is the best for children in dealing with legal problems. In the case of recidivist children, the use of ultimum remedium is intended to avoid excessive punishment and focus more on rehabilitation and recovery.

**Keywords:** *Children; Recidivism; Ultimum Remedium Principle*

### **Introduction**

#### **1. Background**

The juvenile criminal justice system basically emphasizes more on the protection and rehabilitation of children involved in criminal acts, considering that children have limitations compared to adults, so children need attention and protection from the state. For children who have been involved in criminal acts, the necessary approach is to minimally intervene in the judiciary. Sanctions or severe punishments applied in criminal law are different from other laws, because criminal law relies on sanctions that can cause suffering to maintain rules and norms. This is the reason why criminal law should be considered the ultimum remedium or "last resort" that is only applied when sanctions from other laws

are ineffective or do not change the behavior of the perpetrator. Therefore, its use should be limited, and criminal law should be avoided if there are still other alternatives.<sup>1</sup>

Banyumas Regency is a city that is inseparable from the existence of criminal acts, especially those committed by children. Based on data obtained from the Level II Purwokerto Correctional Center (BAPAS), the number of children facing the law in the last five years has reached 600 (six hundred) children and based on data obtained from the Investigation and Criminal Unit of the Banyumas Regency Resort Police, the number of children who are recidivists is 3 (three) children while Banyumas Regency has entered the Child-Friendly Regency program which has just entered the first stage and has established the Children's Forum Banyumas.<sup>2</sup> The number of recidivist children is still relatively low, but as many as 3 (three) children have lost their future because children who repeat criminal acts have restrictions on the use of criminal law for children, as can be seen from the diversion arrangement for children who are in conflict with the law.

Residivism is not new in the legal system, because every time a crime occurs, there is also the possibility of repeating it. The repetition of a crime is often considered an indication of malicious intent. Bartolus states that crime and its repetition are seen as an extension of bad intentions (*Humanum est errare, diabolicum perseverare*), so that it can be concluded that the practice of repeating evil has existed for a long time, in proportion to the evil itself. Residivism can be interpreted as a repeat criminal act, where a person who has committed a criminal act, serves a sentence based on a judge's decision, and returns to society, then commits a crime again within a certain period of time.

Article 1 number 7 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System defines "Diversion" as the transfer of the settlement of children's cases from the criminal justice channel to the channel outside the criminal justice system. According to Article 7 paragraph (1) of the law, diversion must be pursued starting from the stage of investigation, prosecution, to examination in the district court. The criminal acts that can be diverted according to paragraph (2) are: 1. criminal acts with a threat of punishment of less than seven years; and 2. is not a repeat criminal act. Based on the application of Article 7 of Law Number 11 of 2012, diversion must be carried out if the criminal act committed is threatened with a sentence of less than seven years and is not a repeat act. Both of these conditions must be met; If one of the conditions is not met, then diversion is not mandatory.

The principle of *ultimum remedium* is a principle in the doctrine of criminal law which states that criminal law must be used as the last step in law enforcement.<sup>3</sup> This means that if a problem can be resolved through other means (such as family channels, negotiations, mediation, civil, or administrative law), then that route must be taken first. Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia recognizes and protects the rights of children, stating that every child has the right to survival, growth and development, and protection from violence and discrimination.

Children have distinctive characteristics and traits, as well as values and dignity as human beings. Therefore, their rights need to be fully protected, including in terms of legal protection. Children are considered vulnerable and need guidance, so protection from mentally mature adults is essential.

Law Number 11 of 2012 concerning the Juvenile Justice System regulates law enforcement specifically aimed at children involved in criminal acts, with the principle that prison sentences must be

<sup>1</sup> Fakhri Zulfahri, Legal Politics on the Principle of *Ultimum Remedium* in the Context of Child Protection of Drug Addicts, *Khazanah Hukum*, Vol. 3 (3), June 2021: 131

<sup>2</sup> Irma Alviana et al., Participation of the Banyumas Children's Forum in Realizing a Child-Friendly Regency in Banyumas Regency Reviewed from the Perspective of Multi Stakeholder Partnerships, *Journal of Decentralization and Public Policy*, Vol. 2 (2), September 2021, p. 278.

<sup>3</sup> Haritsa, The Application of Juvenile Criminal Sanctions to the Principle of *Ultimum Remedium* in the Juvenile Criminal Justice System in Gorontalo, *Legal Journal*, Vol. 5 (1), June 2021: 2-3

avoided except as a last resort (ultimum remedium). If a prison sentence is required, the maximum sentence for a child should be half of the maximum sentence applicable to adults.

This law also affirms the responsibility of the state, government, society, family, and parents in protecting children. However, there are still many children sentenced to prison, which shows that the application of the principle of ultimum remedium has not been effective. Criminalization is often the top option, while other alternatives are rarely considered, as reflected in the number of children detained by the Directorate General of Corrections.<sup>4</sup>

Based on the above background, it is necessary to study more deeply about the Legal Politics of the Principle of Ultimum Remedium in the Context of Recidivist Child Protection.

### **Problem Statement**

- a. How does the child criminal law policy in Indonesia provide protection for recidivist children?
- b. How is the principle of ultimum remedium applied in the handling of recidivist children in the juvenile criminal justice system in Indonesia?

### **Research Methods**

This research was conducted using normative legal research methods with Statutory Approach and Conceptual Approach. Legal materials are drawn from literature related to the research topic and will result in a descriptive analysis that is juridical in nature.

### **Result and Discussion**

#### **1.Children's Criminal Law Policy in Indonesia Provides Protection for Recidivist Children**

Criminal sanctions are a vital component of the implementation of the Juvenile Criminal Justice System that is desired during the process by law enforcement officials in all phases, not only focusing on the development and protection of children but also based on the principle of the interests of children.<sup>5</sup> Based on Article 28 B paragraph 2 of the 1945 Constitution, children have the right to live, grow, and be protected from violence and discrimination. Children involved in legal affairs must be given protection and must not be treated unfairly. The strengthening of the ratification of the international convention on the rights of the child was carried out through Presidential Decree Number 36 of 1990. The implementation of the SPPA Law No. 11 of 2012 to protect the rights of children in Indonesia by implementing diversion and restorative justice.

In fact, the implementation of the child abuse system is still not optimal, especially in the implementation of Law Number 11 of 2012 concerning the Child Criminal Justice System and Law Number 35 of 2014 concerning Child Protection which has not fully guaranteed the rights of children, especially those involved in legal matters. Considering that the main goal of juvenile justice is to achieve child welfare which is an important part of the welfare of society.<sup>6</sup> Recidivist children are children who have committed various criminal acts, both of the same type and of different sexes. In imposing sanctions

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<sup>4</sup> Nugraha, I., Rizki, M., Aulia, S. T., & Salsabila, S. S, Hypersexuality as a Form of Sexual Violence, *Cessie: Legal Scientific Journal*, Vol. 2(2), November 2023 : 65

<sup>5</sup> Siti Rahmah and Darmiwati, Juridical Review of Children of Recidivist Perpetrators Based on Law Number 23 of 2002 concerning Child Protection, *Das Sollen Journal*, Vol. 9 (1), June 2023 : 660

<sup>6</sup> Barda Nawawi Arief, *Law Enforcement Issues and Crime Prevention Policies*, Citra Aditya Bakti, Bandung, 2001, p. 19

on children who commit criminal acts, attention must be paid to the rights of children, including their future, so that sanctions can effectively prevent the recurrence of criminal acts. Children who violate the law in accordance with the provisions of the Juvenile Criminal Justice System Law cannot escape criminal punishment.

Childhood is a very vulnerable time to criminal behavior because during that time they are easily influenced by all kinds of desires and expectations without paying attention to the impact. Therefore, children have the right to special protection, especially in the legal system of the Juvenile Criminal Justice System Number 11 of 2012 which recognizes the value and dignity of children as God's creatures. Under the provisions of the juvenile justice and child protection law, children should be corrected rather than punished. Punishment of children must follow a dual-track system that balances prison sentences and sanctions. The criminal system is a legal provision related to criminal sanctions and criminal procedures.<sup>7</sup>

The first priority in punishing children must always be in the best interests of the child. According to Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, juvenile criminal justice is part of the jurisdiction in the general judicial environment. Although it functions as a special court, it is still subject to the jurisdiction of the ordinary courts. Article 59 of Law Number 35 of 2014 concerning Child Protection provides special provisions for children involved in legal problems based on Article 64 of the Law. This protection includes providing humane treatment according to the child's age, providing effective legal and other assistance, and ensuring impartiality in juvenile courts, which is objective, impartial, and conducted in a closed manner. This protection involves children involved in legal conflicts or victims of crime as part of the implementation of justice values in the juvenile criminal justice system in Indonesia.<sup>8</sup>

The *restorative justice* approach should also be applied to dealing with cases of recidivist children, as it is more oriented towards relationship recovery, understanding the root cause, and rehabilitation rather than just punishment. Restorative justice aims to understand the causes of children repeating criminal acts, such as environmental factors, family, trauma, or basic needs that are not met. The solutions offered not only punish children, but also empower them to improve themselves. This process can create a deeper sense of responsibility, as the child is involved in the recovery process, such as apologizing to the victim or providing social compensation (if possible). This approach also increases public awareness not to discriminate against recidivist children. Diversion regulated in the SPPA Law is part of the practice of *restorative justice*. For recidivist children, this process can be extended with community-based approaches, such as skills training programs, family counseling, or psychological rehabilitation.

The juvenile criminal justice system emphasizes age limits for children: if a child commits a crime before the age of 18 and is tried after the age of 18 but before the age of 21, he or she is still tried by the juvenile court. Article 21 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System ensures that investigators, community extension workers, and professional social workers will decide whether a child under the age of 12 is involved or should be suspected of being involved in a criminal act. : If a child under the age of 12 (twelve) years has committed or should be suspected of committing a criminal act, then investigators, community extension workers, and professional social workers will determine:

- a. Hand it back to parents/guardians; or
- b. Participating in education, coaching, and guidance programs in government agencies or LPKS in agencies that handle the field of social welfare, both at the central and regional levels, for a maximum of 6 (six) months.

<sup>7</sup> Siti Rahmah and Darmiwati, *Op.cit* 664

<sup>8</sup> Rajarif Syah Akbar Simatupang, The Implementation of the Juvenile Criminal Justice System in Indonesia Perspective on the Value of Justice, *Juridical Journal*, Vol. 11 (1), June 2024: 58

Classifying children according to age is very important because it will affect their cognitive development and determine how best to treat them.

The consequences of punishment for children are really worrying. Especially in the current prison situation in Indonesia, children are still often detained together with adults, which poses a risk of violence against children. This requires an awareness of how important it is to monitor and pay attention to children involved in legal matters. Applying progressive law in the concept of restorative justice is the best step to help children who are involved in legal issues.<sup>9</sup> In carrying out a fair transfer and restoration process in accordance with the law for children involved in crimes, including those who have returned to crime, it is important to continue to fight for their rights for a better future. Implement mediation, conciliation, and restitution simultaneously to reconcile the parties with the same means of settlement, so that children involved in legal problems must be avoided so as not to be involved in the course of the judicial process. Instead, the case is transferred outside the judicial process (non-litigation).

In fact, the implementation of the restorative justice approach is often difficult to apply to the case of recidivist children who commit serious crimes. Weak cross-sector coordination and lack of public understanding of this concept are additional challenges. In order for *restorative justice* to optimally touch the aspect of recidivist children, it is necessary to expand the scope of diversion even if the child has been a recidivist, with the note that the case is not included in the severe category. Raising public awareness about the importance of child recovery as part of preventing future crimes is also very important because the restorative approach will not work if the victim is unwilling to forgive.

## **2. Application of the Principle of Ultimum Remedium in the Handling of Recidivist Children in the Juvenile Criminal Justice System in Indonesia**

The term *ultimum remedium* in the imposition of criminal punishment indicates that criminal punishment should only be imposed as a last resort after other law enforcement efforts have been unsuccessful. It is important to understand the last position as the last solution so that there are no mistakes in applying this principle. The latter penalty is applied in terms of criminalization, not in the application of the law as a whole. Therefore, the authority to carry it out is in the hands of the judge, not in the hands of the police or prosecutors. The judge's legal considerations play an important role in applying this principle to the defendant in court, to determine whether the defendant will be subject to a criminal sentence or another punishment that is more appropriate to the criminal act charged. The imposition of criminal sanctions, including principal and additional crimes, is described in Article 10 of the Criminal Code. The main sanctions include the death penalty, imprisonment, imprisonment, and fines, while additional sanctions include the revocation of certain rights, the confiscation of certain goods, and the announcement of court decisions.<sup>10</sup>

The use of this last resort is a principle that must be followed in the juvenile justice process if diversion is unsuccessful. Law enforcement must strive to implement diversion throughout the investigation, prosecution, and court process. Failure to diversion during the investigation and prosecution stages will lead to the child being placed in the court's realm, where the judge has full authority to make decisions in accordance with the child's circumstances. It is hoped that the background of children involved in the legal system can change the judge's view so that not all crimes are the result of malicious intent. Children who get in trouble with the law are often involved in crimes because they come from low economic backgrounds, so they steal to make ends meet. Children who come from broken homes will be less affectionate individuals, so they often vent their emotions with actions that can harm them. Low education in children also leads to their lack of legal understanding making them vulnerable to negative

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<sup>9</sup> Diah Ratna Sari Hariyanto & Gde Made Swardhana, Optimizing the Implementation of Diversion in the Restorative Justice System in Denpasar City, *Journal of Indonesian Legislation*. Vol. 18 (3), September 2021: 395

<sup>10</sup> *Ibid.*



influences. Children's unstable mental state makes them want to try new things without parental supervision or strong self-control.<sup>11</sup>

According to Sajipto Rahardjo, the application of progressive law is beyond law enforcement according to the text of the law, to seek a deeper meaning of the law.<sup>12</sup> Implementing social justice in concrete ways is the main responsibility of a judge. Judges must break away from traditional and conventional ways of thinking that hinder the development of more appropriate thinking. This coincides with the progressive legal principle that requires the law to be always open, dynamic, and flexible. The concept of progressive law is interesting because it doubts the sustainability of modern law which is considered stable in people's lives. The application of action sanctions in juvenile justice law shows that the law does not only have one system path, but has two system paths. The two-track system provides another option for judges in determining appropriate sanctions. One important thing in the application of criminal law against children is when it comes to imposing punishment, which must always prioritize the protection of children's rights by making punishment a last resort. Criticism of prison sentences as a criminal act is being widely raised by experts who consider that prison sentences as a method of restricting freedom are less than perfect.<sup>13</sup>

In fact, in Indonesia, the implementation of the ultimum remedium principle still needs a lot of review. The diversion process, which often fails because it is considered ineffective for recidivist children, is one of the inhibiting factors of this principle. The Special Children's Development Institution (LPKA) which is very limited and experiences *over capacity* because the number of crimes is not balanced with the development of the number of LPKAs, the application of this principle should be included in the form of laws and regulations that apply in Indonesia because of the existence of positive laws.<sup>14</sup> The stigma from the community and law enforcement officials themselves against recidivist children also causes this restorative approach to be sidelined and the lack of coordination between institutions also slows down the process of resolving cases. This restorative approach or in the juvenile criminal justice system is carried out with diversion that should be tried as much as possible at the investigation stage but must end up at the court stage.

In relation to the imposition of a criminal offence or an action against a child, Article 70 states that the judge may consider the lightness of the act, the personal circumstances of the child, and the circumstances when the incident occurred as a basis for consideration not to take action or impose punishment for the sake of justice and humanity".<sup>15</sup> According to the author, it is basically not wrong if the court imposes criminal punishment on the child of the perpetrator of a criminal act through a judge's decision. In any case, the judge must consider whether giving a criminal sentence to a child can provide educational value or benefit to them. The judge needs to uphold the latter principle as the primary option and determine the punishment that is more appropriate for the child involved in the crime. The concept of child protection considers children who are involved in crimes to be victims due to the lack of supervision from parents, society, and the government. If supervision is inadequate, children can engage in illegal activities such as stealing, gambling, using drugs, committing violence, and even killing. Punishment is considered more effective for children who have committed crimes. This is due to the focus of sanctioning measures not only to avoid children being imprisoned, but also to improve children's behavior through optimal guidance, rehabilitation, and education.<sup>16</sup>

<sup>11</sup> Berliana Devi Siregar, Criminal Liability for Minors as Perpetrators of the Crime of Persuading Children to Have Intercourse (Study of Decision No. 1/Pid.Sus.Anak/2020/Pn. Medan), *Jurnal Rectum*, Vol. 4 (1), January 2022: 135.

<sup>12</sup> Rahardjo, S. 2009. *Law Enforcement A Sociological Review*, Yogyakarta: Genta Publishing

<sup>13</sup> Harista, *Op.Cit* 4

<sup>14</sup> Novita Sari, The Application of the Principle of Ultimum Remedium in Law Enforcement for Narcotics Abuse *Journal de Jure*, Vol. 17 (3), September 2017: 351-363

<sup>15</sup> Arif Agung Prasetya, The Application of the Principle of Ultimum Remedium in Children in Conflict with the Law Who Are Intermediaries in the Buying and Selling of Narcotics, *Juristic Journal*, Vol. 2 (3), December 2021 :346.

<sup>16</sup> Harista, *Op.Cit* 8

## **Conclusion and Suggestion**

### **1. Conclusion**

- a. Applying progressive laws in the concept of justice in restorative justice is the best step to help children who are involved in legal problems. In dealing with children who return to criminal acts, it is important to continue to comply with diversion and restorative justice procedures in accordance with the law to protect children's rights for their future.
- b. The final emphasis is on using criminal punishment as a last resort. In the situation of a child who relapses, ultimum remedium is used to avoid excessive punishment and prioritize rehabilitation and recovery. Although children who return to delinquency show a tendency to repeat mistakes, this strategy still prioritizes the protection of their rights, emphasizing the process of reintegration into society rather than simply imposing punishment.

### **2. Suggestion**

- a. There needs to be a more targeted and sustainable rehabilitation program for recidivist children, involving families, schools, and communities to prevent them from committing crimes again.
- b. Judicial officers, police, and social workers need to receive more intensive training on *restorative justice-based* approaches, so that the principle of ultimum remedium can be applied consistently.
- c. The government needs to conduct periodic monitoring and evaluation of the effectiveness of the application of the principle of ultimum remedium, especially in the case of recidivist children, to ensure that this policy runs in accordance with the objectives of protecting children's rights.

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