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## THE URGENCE OF REGULATION OF THE CONCEPT OF RESTORATIVE JUSTICE AGAINST CHILDREN OF SEXUAL VIOLENCE REGULATION OF THE KAPOLRI NUMBER 10 OF 2009 OF THE REPUBLIC OF INDONESIA

### Abstract

*Today's child crime has grown rapidly and is heavily influenced by technological developments. Various kinds of child crimes are problematic with the law so that the rapid development of information technology currently has a positive impact on the community by easily obtaining the information needed and has a negative impact because there is a lot of misleading information circulating and websites, pornographic sites. So that children who are just about to grow up or teenagers will feel curious and will most likely take actions beyond reason. So legal action is needed to protect children from the influence of the formal legal process given to the perpetrators of these crimes so that the criminal justice system is given to punish the perpetrators of sexual violence, it is necessary to do a better alternative justice for children. However, it must be balanced for the victims as well, so that the alternative referred to as "diversion" or what is referred to as restorative justice does not feel shielded.*

**Keywords :** *Alternative Justice, Children's Crimes, Diversion*

### Abstrak

Kejahatan anak dewasa ini telah berkembang pesat dan sangat dipengaruhi oleh perkembangan teknologi. Berbagai macam tindak pidana anak bermasalah dengan hukum sehingga pesatnya perkembangan teknologi informasi saat ini memberikan dampak positif bagi masyarakat dengan mudahnya memperoleh informasi yang dibutuhkan dan berdampak negatif karena banyak beredar informasi yang menyesatkan di website, pornografi situs. Sehingga anak yang baru beranjak dewasa atau remaja akan merasa penasaran dan kemungkinan besar akan melakukan tindakan diluar nalar. Maka diperlukan upaya hukum untuk melindungi anak dari pengaruh proses hukum formal yang diberikan kepada para pelaku kejahatan tersebut sehingga sistem peradilan pidana diberikan untuk menghukum para pelaku kekerasan seksual, maka

perlu dilakukan peradilan alternatif yang lebih baik bagi anak. . Namun, harus seimbang bagi korban juga, agar alternatif yang disebut “diversi” atau yang disebut keadilan restoratif tidak terasa terlindung.

**Kata Kunci :** Alternatif Justice, Diversi, Kejahatan Anak

## Introduction

According to the history of the development of criminal law, the word "diversion" was first put forward as vocabulary in a report on the implementation of juvenile justice submitted by the President of the Australian Crime Commission in the United States in 1960. before 1960 was marked by the establishment of children's courts (children's courts) before the 19th century, namely the diversion of the formal criminal justice system and the formalization of police cautioning. The practice has been running in the Australian state of Victoria in 1959 followed by the state of Queensland in 1963 (Chandra, 2021). In Article 32 of Law no. 11 of 2012, children in conflict with the law are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a crime. Crimes committed by children are very varied, ranging from sexual violence, drug abuse to theft and murder. Children's crimes are strongly influenced by technological developments. The rapid development of information technology today has a positive impact on society easily getting the information needed and has a negative impact because there is a lot of misleading information circulating and websites, porn sites. Factors from advances in technology and information as well as the influx of western cultural influences that entered Indonesia freely caused the moral decline of the younger generation and the values of Pancasila were no longer used as a guide for the younger generation as they are today (Mangku & Yuliartini, 2021). The technology like computers, internet, emails, external storage devices have made it easy for the child pornography makers to do criminal activities and hide effectively from the law enforcement agencies. Child pornography has harmful effects on children because it exploits children for sexual and commercial purposes. It has serious short and long term consequences not only to the children's body, but also their mind (Prameswari, 2020).

Many perpetrators of sexual violence are carried out by minors due to the influence of easily accessible pornographic sites. According to the Head of the Aceh LPKS Administration, Hersi Malahayati Sandra, in Indonesia there were 12,943 child complaints against the law, as well as the release of survey results in 23 provinces in Indonesia. Indonesia, which was carried out by KPAI on August 21, 2020, that for the past nine years, stated that when returning to their families, the perpetrators returned to committing crimes, influenced by the environment, friends, or there was a trigger to take the same action (Hersi Malahayati, 2020). To reduce the number of cases of sexual violence perpetrated by children, parental guidance and attention is needed in accordance with the Convention on the Rights of the Child as ratified by the Government of the Republic of Indonesia with Presidential Decree No. 36/1990. on the Ratification of the Convention on the Rights of the Child. According to John T. Whitehead and Steven P. Lab, Most recently, critics have become concerned about juvenile crime and the adequacy of the juvenile justice system to handle the serious offender, even to increased use of waiver, legislative exclusion, and prosecuto-rial

waiver and of other more punitive measures such as blended sentencing characterize many juvenile court systems (Haab et al., 2020).

Restorative Justice is very urgently applied to the judiciary at this time because many children who are perpetrators of sexual violence are thrown into prison with sentences of under seven years. The inclusion of children who are perpetrators of sexual violence in prison has an impact on prolonged psychological trauma to the child because they are stigmatized by the community as recidivism. In Article 5 (1) of the SPPA Law, it is emphasized that the juvenile criminal justice system must prioritize a restorative justice approach (Nani Susilowati et al., 2022). This needs to be a concern of all law enforcers, because in order not to throw children who are perpetrators of sexual violence into a child's cell, so that the mental and moral of the child is not further damaged due to the pattern of association with other adult criminals in the cell. Punishment with retaliation must be changed to punishment that is more humane in nature, for example by using a restorative justice approach which emphasizes recovery and improvement as before the crime occurred (Diah Ratna, 2021).

This study aims to examine the importance of a concept of restorative justice in the form of diversion in the Regulation of the National Police Chief Number 10 of 2009 concerning the application of legal action against the child who is sexually abused by being placed in a special fostered house with special treatment. To fulfill the principle of child justice, it is hoped that the child will no longer be stigmatized as a prisoner or recidivist. There are several countries that have implemented the concept of restorative justice in the form of diversion although with different legal forms, namely France with continental law, New Zealand with Anglo- Saxon law and Saudi Arabia with Islamic law. his old age with improved mentality and morals. France, in 2011 Around 26,847 inmates served community-based sentences and there were only 7,605 inmates placed in Correctional Institutions, New Zealand with community work to "pay back" to the community for crimes committed Supervision is carried out, if an inmate is convicted of committing a crime and is awaiting punishment. A Probation Officer will assess the needs of the person who committed the violation and the sentence and what program is most suitable to be implemented. Home Detention is the placement of prisoners in prison detention. so that prisoners can maintain contact with their families, work or find work and attend training or rehabilitation programs. Usually the punishment period ranges from 14 (fourteen) days to 12 (twelve) months. Then Saudi Arabia with its Islamic law implements restorative justice by compensating the victim as a substitute for prison time. Shulh (Peace) Shulh according to language means Qothulmunaazaah or who decides the dispute. If it is associated with qishash, then the agreement in question is a peace agreement between the heirs/guardians of the victim and the killer in freeing qishas in return. In principle, this peace opens flexibility for the killer in fulfilling his obligation to pay diyat: the amount (smaller or larger than what is prescribed), the repayment period, and the method of payment (Chintya Cahya, 2020).

The Indonesian government in the application of restorative justice refers to the Supreme Court Regulation Decree of the Director General of the Supreme Court of the General Judiciary Agency Number: 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in General Courts, Restorative Justice) is an

alternative for resolving criminal cases which in the mechanisms and procedures of criminal justice focus on punishment which is converted into a dialogue and mediation process involving the perpetrator, the perpetrator, the family of the perpetrator/victim and other related parties. and balanced for the victims and perpetrators by prioritizing the restoration of returning to its original state and restoring the pattern of good relations in society Similarly, in the Circular, it is explained that in all actions involving children carried out by government and private social welfare institutions, judicial institutions, government institutions or legislative bodies, the best interests of children must be the main consideration. There are two things that become the basis of thought in the implementation of the criminal justice process for children, namely:

- a. The child in conflict is 12 years old but not yet 18 (eighteen) years old who is suspected of committing a crime;
- b. Restorative justice is the settlement of criminal cases by involving the perpetrators and victims, the families of the perpetrators/victims and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation (McKeever, 2020).

According to Marie-Stéphane Vittrant, prison director of integration and probation at the department of integration policies, probation and prevention of recidivism of the DISP in Paris said there is also restorative mediation, which consists of bringing together a victim and his perpetrator, under the supervision of a mediator. This device requires a long preparation beforehand with the two protagonists so that this meeting can bear fruit. The mechanisms put in place within the framework of restorative justice the first There are of all the meetings between perpetrators and victims which can take place in a closed environment (Victims Detainees Meetings / RDV) or in an open environment (Victims Condemned Meetings / RCV). It is a meeting between a group of victims and a group of perpetrators concerned by the same type of facts. This device requires a long preparation beforehand with the two protagonists so that this meeting can bear fruitSupport and Responsibility (CSR) are another device that aims to surround an isolated person (initially the perpetrators of a sexual offense), to prevent recidivism and promote reintegration (Marie Stéphane, 2021). In principle, justice restoration is to bring together the makers of crime and victims that lead to the recovery of the victims as well as to obtain the rehabilitation of crime makers. Restorative justice is not only based on the relationship of victims, but also includes citizens including the makers of the crime itself (Haris & Risky, 2019). That with the concept of diversion, the child gains greater benefits than being put into a cell.

Specifically for legal protection of children in Indonesia, the government passed Law Number 35 of 2014 which is an amendment to Law Number 23 of 2002 concerning Child Protection. These changes are to emphasize the importance of increasing criminal sanctions and fines for perpetrators of crimes against children so that there is a deterrent effect, as well as to encourage concrete steps to restore physically, psychologically and socially child victims and/or children as perpetrators of crimes so that they can do it again (Nani Susilowati et al., 2022). This is in line with the criminal justice process carried out by minors so that a trial is carried out in the form of the application of restorative justice in the form of diversion. (UN) on Children and Juvenile in Detention of Human Rights Standards in

Vienna, Austria, October 30 – November 4, 1994. In the explanation of The Beijing Rules in Rules 11 on diversion, it is explained that:

- a. Diversion is a program that eliminates the formal judicial process for a defendant and replaces it with a policy based on a pattern of community social services.
- b. The purpose of implementing this diversion is to eliminate negative effects such as those arising from the application of formal and administrative procedures in the conventional criminal justice system so that in many cases, this alternative form of policy is considered the most appropriate step and will provide optimal results, especially in cases of children. commit a crime that is classified as light and not serious, but the family, school and community environment also provide support and can act appropriately (not to exaggerate the problem).
- c. Diversion can be applied by the police, prosecutors and other relevant and authorized institutions such as courts, institutional tribunals and councils (representations of community groups). The application of diversion is not always narrowly limited to only mild cases.
- d. The implementation of diversion must obtain the approval of young law violators (parents/guardians) of the suggested diversion measures. Child offenders should not feel pressured or pressured into agreeing to diversion programs

The results of the meeting called on all countries, starting in 2000, to implement The Beijing Rules, The Riyadh Guidelines and The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty. Children's crimes are influenced by many factors, and According to Whitehead and Lab, punishment has many counterproductive “side effects” in suppressing antisocial behavior, with restorative justice, incorporates appropriate treatment, with alternative approaches to reduce crime (Bonta & Andrews, 2016). So to protect children from the influence of the formal process of the criminal justice system, it is necessary to do a better alternative justice for children. Based on this thought, the concept of diversion was born, which in Indonesian terms is called diversion. Diversion for child offenders is to provide a better alternative to the formal procedure in court. The word diversion comes from the English word diversion which means avoidance or diversion (Heriwiyanto et al., 2021).

State of the Art of this research are several previous studies related to the title of this research, among others, the first conducted by Diah Ratna Sari Hariyanto, I Dewa Gede Dana Sugama entitled The Effectiveness of Imprisonment Amid the Idea of Criminalization With a Restorative Justice Approach The results of the study indicate that the emergence of recidivist in Bali and there is still a negative stigma from Balinese society after convicts leave prison shows that the goals of correctionalization have not been achieved and prison sanctions are not effective in Bali. Thus, it is necessary to carry out a court that prioritizes humanity with a pattern of restorative justice. The second research was conducted by Fitria entitled Restorative Justice Practices At the Correctional Institutions (LP) in France, New Zealand and Saudi Arabia by making comparisons to the three countries that were the object of this research. The application of restorative justice law in the three countries, although with different legal patterns, Nurini Aprilianda, entitled Protection of Children Victims of Sexual Violence through a Restorative Justice Approach with the conclusion that the regulation of child protection as perpetrators and victims of sexual violence in Article 71D of

Law 35/2014 concerning changes to Law 23/2002 have not fully reflected the handling with a restorative justice approach. From the results of these studies, there are differences in the results on the effectiveness of the application of restorative justice which is adjusted to the applicable law in the country. obtain common ground and novelty. The main problems in this research are:

1. Children who are perpetrators of crimes of sexual violence in court are likened to serious criminals.
2. Child perpetrators of sexual violence are included and detained in prison.
3. Judicial judges who handle children who are perpetrators of sexual violence are reluctant to apply restorative justice

## **Methods Research**

The method used is a normative legal research method with a literature study approach with a study focus on departing from the ambiguity of the implementation of laws and regulations with a statute approach, conceptual approach, and analytical approach to answer existing problems. The normative legal research method with a literature study approach is a research conducted by examining the literature on documents related to the title of this research. Techniques for tracing legal materials, legislation, books and international articles using document study techniques, with study analysis using qualitative analysis.

## **Results and Discussion**

### **1. Overview of the Status of the Law and the Act on Restorative Justice**

Article 1 number 2 of Law Number 23 of 2002 stipulates 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 protection, and receive protection from violence. and discrimination. The handling of criminal cases for children is different from adults, because they are specifically regulated in the Supreme Court Guidelines by the Decree of the Director General of General Courts Number: 1691/DJU/SK/PS.00/12/20 concerning Restorative Justice. This is also stated in the Criminal Procedure Code (KUHAP), Law Number 2 of 2002 concerning the Police, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, and Law Number 35 of 2014 concerning Child Protection. Regarding the process of handling children's cases, there are some people who do not understand, so that it raises the assessment that children cannot be punished. Attorney General or other officials appointed by the Attorney General. After the crime of a child is reported, the investigator in conducting the investigation of a child case is obliged to ask for considerations or suggestions from the community supervisor and the Community Research Institute must submit the results of the research no later than 3 (three) days after the investigator's request. request a social report from a social worker or social welfare worker after a crime has been reported; Furthermore, against children who are proposed as children in legal conflict (ABH) at the level of investigation, prosecution and examination of children's cases in court, diversion must be sought.

2. Overview of the Status of Laws and Laws Regarding Child Perpetrators of Sexual Violence According to Child sexual abuse is a form of child abuse in which an adult or older teenager uses a child for sexual stimulation. Forms of child sexual abuse include soliciting or pressuring a child to engage in sexual activity (regardless of the outcome), providing indecent exposure of the genitals to a child, displaying pornography to a child, having sexual relations with children, physical contact with a child's genitals (except in certain non-sexual contexts such as a medical examination), viewing a child's genitals without physical contact (except in a non- sexual context such as a medical examination), or using a child to produce child pornography (Martin, 1993). The effects of sexual violence on children include depression (Roosa, 1999), post-traumatic stress disorder (Widom, 1993) anxiety (Levitan, 2003) a tendency to become victimized further in adulthood (Messman, 2000) and physical injury to the child among other problems (Dinwiddie, 2000). Sexual violence by family members is a form of incest, and can result in more serious and long-term psychological trauma, especially in cases of parental incest (Dinwiddie, 2000).

In North America, about 15% to 25% of women and 5% to 15% of men are sexually abused (Finkelhor, 1999) as children (Julia, 2007). Most sexual harassers are people their victims know; about 30% are family members of the child, most often a brother, father, uncle, or cousin; about 60% are other acquaintances such as 'friends' of family, caregivers, or neighbours, strangers are offenders around 10% in cases of child sexual abuse. Most child sexual abuse is perpetrated by men; studies show that girls commit 14% to 40% of reported offenses against boys and 6% of reported offenses against girls (Gorey, 1997). Most offenders who sexually abuse children before puberty (Ames, 1999) are pedophiles (Hall, 1997), although some perpetrators do not meet clinical diagnostic standards for pedophilia (Blaney, 2009).

Under the law, "child sexual abuse" is a general term describing criminal and civil acts in which adults engage in sexual activity with minors or the exploitation of minors for the purpose of sexual gratification (Chart Sexual Exploitation of Children, 2001). The American Psychiatric Association states that "children cannot consent to sexual activity with adults", and condemns such acts by adults: "An adult engaging in sexual activity with a child is committing a criminal and immoral act that can never be considered normal or socially acceptable behavior" (American Psychological Association, 2009). Sexual violence against children became a public issue in the 1970s and 1980s. Prior to this point in time sexual violence had remained somewhat of a secret and in society's opinion this was a very bad thing. Studies on child abuse did not exist until the 1920s and the first national estimate of the number of cases of child sexual abuse was published in 1948. By 1968, 44 of the 50 states of the United States had enacted laws requiring physicians to report suspicious cases of child abuse. Legal action began to become more common in the 1970s with the passage of the Prevention and Treatment of Child Violence Act in 1974 in conjunction with the establishment of the National Center for Child Abuse and Abandonment. Since the enactment of the Law on the Prevention and Treatment of Child Violence reported cases of violence against children have increased dramatically. Finally, the National Coalition for Violence was founded in 1979 to create greater pressure in Congress to legislate more sexual violence.

The second wave of feminism brought greater awareness of child sexual abuse and violence against women, and with success to society, political issues. Judith Lewis Herman, Harvard professor of psychiatry, wrote the first ever book on father-daughter incest when she discovered during a medical residency that a large number of the women she had seen were victims of father-daughter incest. Herman notes that her approach to clinical experience grew out of her involvement in the civil rights movement. His second book, *Trauma and Recovery*, is considered a classic and the background created by the term complex posttraumatic stress disorder and includes child sexual abuse as a cause (Herman, 1997). In 1986, the United States Congress passed the Child Sexual Assault Victims' Rights Act, which gives children the right to pursue civil lawsuits in sexual assault cases. A number of laws passed in the 1980s and 1990s began to make greater demands and detection of perpetrators of sexual violence against children. During the 1970s a major transition began in the legislature regarding sexual violence against children. Megan's law, which was passed in 2004, provides the public with access to knowledge about sexual offenders nationwide (*Understanding Sexual Attraction for Children*, P.15). Child sexual abuse can result in both short-term and long-term harm, including psychopathology later in life (Dinwiddie, 2000). The psychological, emotional, physical and social impacts include depression (Roosa, 1999), post-traumatic stress disorder (Arehart, 2005), anxiety (Levitan, 2003), eating disorders, poor self-esteem, personal identity disorders and anxiety; common psychological disorders such as somatization, neurosis, chronic pain, changes in sexual behavior (Faller, 1993), school/study problems; and behavioral problems including drug abuse (*Theory and review of the empirical literature*, 1995), self-harm (Arnow, 2004), animal cruelty (Fergusson, 1996), adult crime and suicide (Julia, 2007).

The specific character pattern of the symptoms has not been identified. and there are several hypotheses on this causality association (Neale & Kendler, 1995). The long-term negative effects on the development of victims who experience repeated treatment in adulthood are also associated with child sexual abuse. The results of the study stated that there was a cause and effect relationship between childhood sexual violence and cases of adult psychopathology, including suicide, anti-social behavior. Studies have established a causal relationship between childhood sexual violence and certain areas of adult psychopathology, including suicidal tendencies, anti-social behavior, posttraumatic psychiatric disorders, anxiety, and alcoholism (Brown, 2000). Adults who have a history of childhood sexual abuse are more likely to be customers of emergency services and medical services than those who have no dark past history (Arnow, 2004). A study comparing women who experienced childhood sexual violence compared to those who did not, resulted in the fact that they required higher health care costs than those who did not (Bonomi, 2008).

Children who are sexually abused suffer more psychological symptoms than other normal children; one study has found these symptoms in 51 to 79% of children who have experienced sexual violence (Morais et al., 2018). The risk of harm is greater if the perpetrator is a relative or close relative, also if the violence extends to sexual intercourse or forced rape, or if it involves physical violence. The level of danger is also influenced by various factors such as the entry of genitals, the amount and duration of violence, and the use of violence. The social stigma of child sexual abuse may compound the psychological



harm to children (Browne & Finkelhor, 1986), and the adverse effects will have little impact on children who have experienced sexual violence but have a supportive or supportive family environment after violence (Ba & Bhopal, 2017).

a. Legal Certainty Theory

The theory that becomes the grand theory in this research is the theory of legal certainty. Gustav Radbruch there are two kinds of understanding of certainty, namely, legal certainty because of the law and legal certainty in or from the law. Laws that succeed in guaranteeing a lot of legal certainty in society are useful laws. Legal certainty because of the law gives two other legal tasks, namely ensuring legal justice and the law must remain useful. Meanwhile, legal certainty in law is achieved if the law is as much as possible (Solly, 1994).

b. Legal System Theory

The supporting theory in this study is the theory of the legal system (legal system) as a knife of analysis as the grand theory in this research, as explained below. "The Legal System A Social Science Perspective", states that the legal system consists of a legal structure, legal substance (laws) and legal culture or legal culture (Friedman, 1975). The legal system must contain Substantive Law, Legal Structure, and Legal Culture. The enforcement of the law depends on the legal culture in society, meanwhile the legal culture of the community depends on the legal culture of its members which is influenced by educational background, environment, culture, position or position and interests (Himonga et al., 2013). The legal structure (legal structure) is a framework of thought that provides definitions and forms for the operation of the existing system with predetermined limits, so the legal structure can be said to be an institution that carries out law enforcement with all the processes in it (Bayern, 2016). Legal substance is the rules, norms and patterns of human behavior in the legal system. Legal substance means products produced by people within the legal system, either in the form of decisions that have been issued or new rules to be drawn up. The legal substance is not only in written law (law in the book), but also includes the law that lives in society or the living law Legal culture is a human attitude towards law and the legal system. This community attitude includes beliefs, values, ideas and expectations of the community towards the law and the legal system. Legal culture is also a social force that determines how the law is implemented, avoided or even how the law is abused. Legal culture has a big role in the legal system. Without a legal culture, the legal system will lose its power, like a dead fish stranded in its basket, not a live fish swimming in the ocean. The three elements of the legal system are related to each other, and have a role that cannot be separated one by one. These three elements form a single unit that moves the existing legal system to run smoothly. As an example, the legal structure is a machine that produces something, the legal substance is the person who decides to run the machine and limits the use of the machine. If one of the three elements of this legal system does not function, it will cause the other sub-systems to be disrupted (Tri Susilowati, 2020).

c. Justice Theory.

The next theory that becomes the Middle Theory in this research is the theory of justice. Justice is the fulfillment of individual desires in a certain level. The greatest justice is the fulfillment of the wishes of as many people as possible (Palguna & Gede, 2021). Stated that initially there were 2 (two) principles of justice as follows (John, 2017):

- a. The principle that requires equality in basic rights and obligations;
- b. The principle that recognizes that social and economic differences are still fair as long as these differences benefit everyone.

In choosing the principle of justice to be used, Rawls put forward the theory of "original position", where the "original position" is a reasonable initial situation where it can be ensured that all the basic agreements reached in the community are fair. The word justice comes from fair. In English, it is called "justice", in Dutch it is called "rechtvaardig". Fair is defined as being objectively acceptable. Justice is defined as a fair nature (deed, treatment). There are three fair meanings, namely (Spilker et al., 1997):

- 1) Not one-sided or partial;
- 2) Side with the truth;
- 3) Rightly or not arbitrarily

The author in this case means that the basic agreements referred to above are initial agreements regarding the principles of justice that are applied in the implementation of Diversion in the No Crime of Children who are on target. So by taking into account the meaning of "Diversion", it can be assumed that the parties in conducting the Diversion are parties who have strong partners with the Investigator, while each party has the same right in choosing the principles of justice, providing suggestions regarding the principles of justice.

-principles of justice, put forward reasons regarding their agreement on the principles of justice and others (without forgetting the actual position of the victim).

As stated above, Rawls believes in the existence of 2 (two) principles of justice in the "original position", but further developed into the following by someone else and second principle is social and economic differences will be managed in such a way that.

- a. These differences are expected with reasonable reasons to benefit everyone;
- b. These differences can be monitored from positions and positions -positions that are open to the public. The first principle of justice above requires the same freedoms for every citizen, such as: political freedom (right to vote and right to public office), freedom of opinion, freedom of thought, freedom of property rights, and freedom of confiscation, every color of the state in a just community has the same human rights.

However, the author sees that although in this first principle of justice every citizen has the same freedom and human rights, the implementation/realization of the freedom and human rights of each person requires harmonization with the implementation/realization of the freedom and human rights. other people. If the harmonization is achieved, then that's when justice can be said to be realized. While the second principle of justice above applies :

- a. To the distribution of income and wealth;
- b. To forms of organization that make differences in authority and responsibility or a series of orders.

When the distribution of wealth and income is not the same, then this must be for the benefit of everyone and, at the same time, all parties who have the authority to get Diversion must be right on target, not on the Crime of Sexual Violence. In this case the author tries to mean that each party who applies the second principle of justice can have direct access to positions and positions that have authority or can give orders so that the distribution of

wealth and income is different from one another, so that with this access every one can ascertain whether the difference is intended for everyone's benefit or not.

The flow of Natural Law (Natural Law), the essence of the teachings of natural law views that natural law must be maintained by humans to achieve goals. In connection with the need for awareness of the human position to adjust to the interests or normative order found in nature, the benchmark for the flow of natural law to the essence of law is still oriented towards the interests of nature, namely goodness. This essence is the rule of the universe created by God in His immortality, so that the basic norms in the flow of natural law are eternal, eternal and universal (Erwin, 2013). On the other hand, the positivist school pioneered by John Austin, holds that the law must be seen in the provisions of the law, because only then can the legal provisions be verified. As for what is outside the law, it cannot be included as law because it is outside the law. Law must be separated from morals, although positivism circles recognize that the focus on legal norms is closely related to moral, theological, sociological and political disciplines that influence the development of the legal system. Morals can only be accepted in the legal system if they are recognized and ratified by the ruling authority by enacting it as law. Therefore, a law may be unfair, but it is still a law because it was issued by the authorities (Achmad, 2002). In essence, the character of law is justice, as did Cicero and medieval thinkers. But it is also impossible to identify law with justice, as Hobbes and the positivists want us to do. Justice can be considered as an idea, or an absolute reality as did Plato and Hegel who assume that knowledge and understanding of it can only be obtained partially and through very difficult philosophical efforts. However, justice as a legal goal is a condition that must be realized by law, with various dynamic efforts from time to time (Shinta, 2014).

Argues that due to the absence of religious, philosophical or moral teachings/doctrines that are recognized by all citizens, the concept/basic of justice that is recognized in a democratic society must be a concept called "the concept of political justice". Rawls assumes that the views of citizens regarding the concept of justice in a community consist of 2 parts, namely (Edgar, 2006):

1. One part can be seen as a generally known concept/basic of political justice;
2. Another part which is a complete teaching/doctrine regarding justice.

In connection with the assumptions above, Rawls asserts that each citizen will determine for himself how to link the generally known concepts of basics of political justice with their respective perspectives on the complete teachings or doctrine of justice. However, the author understands that on the other hand Rawls also asserts that a community can be well organized only with the concept or basic of political justice when without being bound by complete teachings or doctrine of justice), provided that :

- 1) First, citizens- citizens who recognize the existence of these complete teachings/doctrine, have an overlapping consensus to continue to support the concept/basic of justice that influences their basic political decisions in the community;
- 2) The complete teachings/doctrine cannot explore the principles of justice in the community.

From international legal instruments as well as the state foundation, namely Pancasila and the 1945 Constitution, the protection of ABH is translated into UUSPPA as previously mentioned. UUSPPA uses restorative justice theory to replace retributive justice theory. This

is manifested in the availability of diversion efforts that provide an opportunity so that the ordinary criminal procedure system does not need to be applied. So that ABH can avoid the negative impact of punishment and for them can find alternative case settlements that pay more attention to the benefits for the future of ABH, for victims and for society in general. Pancasila in the 4th and 5th precepts implies that the characteristics of the Indonesian nation are based on deliberation and social justice. Diversion, which is a method that uses deliberation and the goal of restorative justice, is on the same path as social justice. Retributive justice in the Juvenile Court Law is individual because it emphasizes retaliation alone. The principle of restorative justice, which is basically an effort to divert from the criminal justice process to a deliberation settlement, cannot be applied to all types or levels of crime. However, in certain criminal acts, the application of this principle can be said to be much more effective than the conventional criminal justice process. The principle of restorative justice in Indonesia has begun to be applied to the juvenile justice system. Through restorative justice, a crime is considered a disease that needs to be cured, not just an act of breaking the law. The theory of retributive justice is able to accommodate the understanding that a crime is only a violation of the law. Meanwhile, if it is considered a disease that must be cured, then the treatment must be holistic, comprehensive, involving all elements touched by the crime. In this case, restorative justice is an approach that can be used.

In line with that, is the theory of justice from John Rawls and also the justice embraced by Pancasila. Rawls sees the main importance of justice as guaranteeing the stability of human life, and a balance between personal life and collective life (<https://ditreskrimsuspoldakalsel.blogspot.co.id/2013/07/keadilanrestoratif-dalam-penegakan.html>). John Rawl's thinking of justice is a social justice thought that can be applied in the law enforcement process. In the process of law enforcement for a crime, of course, it must be seen whether the root of the problem of the crime itself is influenced by an unfair social structure. In such cases, of course, law enforcement actions can only be said to be fair if they consider social conditions and structures ([http : // www.bphn.go.id/ data/ documents/ laporan\\_ akhir\\_ pengkajian\\_ restorative\\_ justice\\_ anak pdf](http://www.bphn.go.id/data/documents/laporan_akhir_pengkajian_restorative_justice_anak.pdf) diakses 29 November 2016). Pancasila as the basis for the idea of the Indonesian Nation states in the 5th principle, Social Justice for All Indonesian People. The statement shows that the principle of justice used in the structure and structure of Indonesian society is justice in the context of society, not individualistic justice. infected by a criminal event. The embodiment of restorative justice is through diversion efforts as contained in the UUSPPA.

### **Criminal Theory**

The theory of punishment can be classified into four groups of theories, namely:

1. The theory of retaliation or the theory of rewards (Vergfalden) or the Absolute theory (Vergeldingstheorieen). This theory justifies punishment because someone has committed a crime, so it is absolutely necessary to take revenge in the form of a criminal offense by not questioning the consequences of punishment for the convict;
2. Relative theory (Nisbi) or objective theory (Doeltheorieen) Purpose theory justifies punishment (rechtsvaardigen), on the purpose of punishment, namely to prevent crime

(ne peccetur). The existence of a criminal threat is intended to frighten the potential criminal in question or for general prevention;

3. Combined Theory (Verenigings-theorieën) This theory bases punishment on a combination of the theory of retaliation with the theory of purpose, because the two theories stand alone, each of which has weaknesses;
4. Negative Theory (Negativisme) This theory was pioneered by Hazelwinkel-Suringa saying that evil should not be fought, and enemies should not be hated because only God has the right to punish his creatures. George B Volt said theory is part of an explanation that appears when someone is faced with a phenomenon that is not understood. This means that theory is not only something important but more than that because it is very much needed in order to find academic answers. The theory of the purpose of punishment in the literature is mentioned differently but substantially the same. In general, there are 3 (three) theories that are often used in studying the objectives of sentencing, namely: a. Retributive theory (absolute) b. Retributive Theory (Theory of Goals) c. Integrative theory (combined).

### **Authority Theory**

The implementation of diversion by law enforcement officers is based on the authority of law enforcement officers, the discretionary authority regulated in Article 16 paragraph (1) letter l which reads: "In order to carry out the tasks as referred to in Articles 13 and 14 in the field of criminal proceedings, the Republic of Indonesia is authorized to: take other actions according to responsible law."

The authority in question is the application of diversion and discretion in restorative justice to children who are in conflict with the law at the level of investigation carried out by following and meeting various restrictions determined by formal standards in the form of legal regulations relating to the problem of children who are dealing with the law. In relation to the functions and/or duties of the authority in question, namely the application of diversion and discretion in restorative justice for children who are in conflict with the law at the investigation level, the implementation of Police duties as stated in the provisions of Article 2 of Law Number 2 of 2002 concerning the State Police of the Republic of Indonesia, namely the function Police are one of the functions of the State government in the field of maintaining security and public order, law enforcement, protection, shelter, and service to the community. Law enforcement is the process of making efforts to enforce or actually function legal norms as guidelines for behavior in social or state life (Siregar & Sinaga, 2021). In this regard, law enforcement is a process of linking real values, rules, and patterns of behavior with the provisions of existing legal rules, which aims to achieve peace and justice with the main task of law enforcement being to realize justice and how to achieve justice. the law is properly applied.

### **Utility Theory**

The term utilitarianism comes from the Latin word *utilis* which means useful, useful. This school argues that the goodness or badness of an action depends on its usefulness or benefits. Utility theory is a view that states that actions and policies need to be evaluated based on the benefits and costs imposed on society. Bentham defines utility as any pleasure,

happiness, benefit, benefit or any means to prevent pain, evil, and unhappiness. Some of his important thoughts are (Soedjono, 1984) its Quantitative hedonism (the notion held by people who seek pleasure solely quantitatively that there is only a kind of pleasure, where pleasure only differs quantitatively, namely according to its amount, duration and intensity so that pleasure is physical and based on sensations. *Summun bonum* which is materialistic means that pleasures are physical and do not recognize spiritual pleasures and regard them as false pleasures.

Hedonistic calculus (hedonistic calculus) that pleasure can be measured or assessed with the aim of facilitating the right choice between competing pleasures. A person can choose pleasure by using hedonistic calculus as the basis for his decision. Jeremy Bentham found that the most objective basis is to look at whether a certain policy or action brings benefits or results that are useful or, conversely, harm to the people involved (Sonny, 1998). He strongly believes that laws should be made utilitarianistically, seeing their use with standards based on profit, pleasure and human satisfaction. In law there is no question of good or bad, or of the highest or highest law in terms of value. Bentham is of the view that the purpose of law is that the law can guarantee happiness for individuals. Bentham proposed a classification of crimes based on the severity of the offense and the latter was measured on the basis of the distress or suffering caused to victims and society. An offense that harms other people, according to Bentham, should not be considered a criminal act. Displacement, according to Bentham, can only be accepted if it provides hope for the prevention of greater crime). When related to what Bentham stated in the policy, the good and bad of the law must be measured from the good and bad consequences produced by the application of the law. A new legal provision can be considered good, if the consequences resulting from its application are goodness, maximum happiness, and reduced suffering. And vice versa is considered bad if its application produces unfair consequences, losses, and only increases suffering. So it is not wrong that there are no experts who state that this benefit theory is the economic basis for legal thought. The main principle of this theory is regarding the purpose and evaluation of law. The purpose of law is the maximum welfare for the majority of the people or for all people, and legal evaluation is carried out based on the consequences resulting from the process of applying the law. Based on that orientation, the contents of the law are provisions regarding the regulation of the creation of state welfare (Greer et al., 2013).

The basic principles of Jeremy Bentham's teachings are as follows :

1. The purpose of the law is that the law can provide a guarantee of happiness to new individuals in the crowd. Bentham's utility principle reads "the greatest happiness of the greatest number";
2. The principle must be applied quantitatively, because the quality of pleasure is always the same;
3. To realize the happiness of individuals and society, the legislation must achieve four goals To provide subsistence, to provide abundance, to provide security, to attain equity.

Utilitarianism has the view that the purpose of law is provide benefits to as many people as possible. Benefit here is defined as happiness, so that the assessment of whether a law is good or bad or not depends on whether the law gives happiness to humans or not. Thus, it means that every preparation of legal products or laws and regulations, should

always pay attention to the purpose of the law, namely to provide as much happiness as possible for the community. So that a law that gives a lot of happiness to the greatest part of society will be judged as a good law. Therefore, it is hoped that legislators must form laws that are fair to all citizens individually. Furthermore, Bentham argues that the existence of the state and law is merely a tool to achieve the essential benefit, namely the happiness of the majority of the people (Bonto et al., n.d.).

After the enactment of the SPPA Law, which is motivated by being present to prioritize the rights of children, both children as perpetrators of criminal acts, children as victims and children as witnesses of a crime, it is hoped that it can become a policy or regulation that is always useful, not only providing benefits for child perpetrators. criminal acts, but also provides benefits to society by giving birth to justice and happiness for the people as wide as possible. The restorative justice approach is something that must be done in the implementation of diversion, which in its implementation prioritizes one of the objectives of the legislation, namely providing legal protection, in this case the child as the perpetrator of a crime. Diversion itself is considered as an appropriate action to bring benefits (utility) to many people, especially for children as perpetrators of criminal acts. However, do not forget the position of the victim who has been stigmatized for the rest of his life.

## Conclusion

The role of the police in implementing restorative justice is very important, where the police play the role of :

1. Initiator, namely as a party that initiates the application of restorative justice to resolve a criminal case and proposes it to parties its victims, perpetrators, investigators;
2. Mediator, namely as a third party who leads and mediates neutral handling of difficulties based on the choice or agreement of the parties;
3. Facilitator, namely the party who assists the process of implementing penal mediation by preparing and proposing material agreements, preparing the place, time and parties needed to be present in the mediation process.

The legal consequences of the agreement resulting from the principle of restorative justice are :

1. The emergence of the perpetrator's obligation to be responsible for recovering the victim's losses;
2. Termination of the process of handling criminal cases, in the event that the case has reached the stage of investigation, the mediation agreement results in the termination of the investigation. This action is actually not in accordance with the norms of criminal law and criminal procedure, but the use of a peace agreement as the basis for terminating an investigation has become a kind of unwritten law based on the discretionary authority of the police;
3. The sub-system in the integrated criminal justice system that is most effective in applying the principles of restorative justice is the Police, because the police is the initial sub-

system that handles a case so that it plays an important and active role in implementing this principle.

### Suggestion

The active role of the police in the investigation phase by applying the principles of diversion can help achieve benefits and justice for the settlement of criminal cases. Even so, this action needs to be supervised by the community so that mediation that is guided by the principles of diversion is actually implemented for reasons of benefit to the parties and recovery of losses for the victim as a manifestation of diversion, not to be used as a tool for perpetrators to 'abstain' from criminal responsibility.

Supervision must also be carried out by the leadership regarding the actions of stopping cases carried out by investigators so that police discretion is carried out truly for justice and the benefit of the community, do not let it become a loophole for 'bribes so that perpetrators are free from prosecution', do not lead to termination of investigations which is illegal which can be pretrial right.

Waiver of cases that can only be carried out by the Attorney General, preferably by revising existing regulations, can also be applied by ordinary prosecutors so that ordinary prosecutors can have the authority to apply the principles of restorative justice without going through a long judicial bureaucratic system. The draft KUHAP which contains peace rules as the reason for stopping cases needs to be promulgated immediately

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