


REVIEW ARTICLE

Models of Sentencing Children as Criminals (A Comparison of Several Countries)

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Abstract

The sentencing of children in the context of children as perpetrators of crimes has its own complexities and challenges. On the one hand, law enforcement must be carried out in preventing and tackling crime, on the other hand the perpetrators of crimes are children who are legally regulated in judicial mechanisms and special systems. The model for punishing children in Indonesia has basically been regulated through the Juvenile Criminal Justice System and the Child Criminal Law. However, this model of punishment by several studies and related studies is said to be not perfect and adequate. This study aims to analyze and compare models of punishment for children as perpetrators of crimes in three countries: Indonesia, Thailand, and the Philippines. The method used in this research is a normative legal study. This method is used to analyze and compare several model practices of child punishment in three countries. This study uses a comparative law study approach and a statute approach. The location of this research is not carried out through field research but through library research and document studies. Supporting data in this study were also obtained from various data on the internet and printed sources.

Keywords: *Child Criminalization, Children as Criminals, Comparative Law, Juvenile Delinquency*

1. INTRODUCTION

Punishment is an act against a person or group of crimes aimed not at having committed evil but so that the perpetrator no longer commits a crime and that others do not commit similar crimes. Conviction is part of the law because it relates to the principle of legality. It is mentioned in article 1 of the Criminal Code which reads, "*Nullum delictum nulla poena sine previa lege poenali*" (Waluyo, 2000) which means that no act cannot be punished, except on the basis of existing statutory powers. Then, the systematics of punishment for children basically must be treated differently from adult punishment, in order to protect the rights of children.

Based on a report by the Indonesian Child Protection Commission, there were 123 cases of children facing the law as perpetrators in 2020. Then, based on data on child complaint cases in 2020, there were 239 cases facing the law. The data shows that there are high problems regarding children facing the law as perpetrators of crimes. Children as perpetrators of crimes, must still get protection so as not to be deprived of their rights and future. In Indonesia, the punishment of children is only carried out in children aged 12-17 years. Meanwhile, for children of criminals under the age of 12, they are not convicted, but guidance is carried out organized by government agencies (Susanti, 2019).

Based on the principle contained in international law related to children, it can be known that efforts to resolve cases against children are carried out through a diversion system. This is certainly related to the concept of child protection which includes all activities to be able to guarantee and protect the rights of children so that they can grow, develop, and participate optimally according to the dignity and dignity of humanity as well as protection from violence and discrimination (Ningtias et.al., 2020).

Because the substance of child protection is very important, this is also true in the juvenile criminal justice

system. There is a specificity of the juvenile justice system, this is contained in the United Nations Minimum Standards Regulations for the Administration of Juvenile Justice also known as the "Beijing Rules". Wherein it states that "*Juvenile justice should be understood as an integral part of the national development process of each country, within the framework of comprehensive social justice for all children, thus, at the same time, contributing to the protection of young people and the peaceful maintenance of peace in the order of society*".

It is not only Indonesia that applies discrimination or diversion to criminal justice carried out by children. There are some countries that also implement diversion in the criminal justice of children. For example, the Philippines and Thailand. These two countries have the same legal system as Indonesia, namely *Civil Law* and also apply diversion in the form of restitution to juvenile justice, the same as that in Indonesia. However, despite implementing a restitution system in juvenile criminal justice, there are also differences in the form of restitution and its application from that in Indonesia.

The juvenile criminal justice system prioritizes diversion with a restorative justice approach. Based on the agreed agreement, compensation is an obligation imposed on the person who has violated the law, in this case the child who has committed a criminal act. The form of restitution in Indonesia itself is still in the form of payments in the form of money. This is written in Article 8 Paragraph (1) of Government Regulation Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling (Aryana, 2020) of Children Under 12 Years Old, namely "In the event that the Diversion agreement as referred to in Article 6 paragraph (3) and Article 7 paragraph 4) requires the payment of restitution or return in its original state, then the Diversion agreement is carried out within the period agreed in the Diversion, but it should not be more than 3 (three) months."

With several other options besides payment of losses in the form of money, such as doing social work, it has not been done by Indonesia. So, there is only restitution in the form of payment of losses with money in the legislation in Indonesia. Whereas the payment of money losses tends to cause perpetrators who come from poor families to have less opportunity to settle cases because they are hindered from being able to pay the stipulated restitution. Of course, this condition causes obstacles to justice to children who commit crimes who come from poor families (Sinatrio, 2019).

In contrast to the restitution applied in the Philippines and Thailand. The Philippines provides for diversion in Republic Law No. 9344 i.e., "(i) Diversion refers to an alternative process appropriate for a child in determining the responsibility and treatment of a child in conflict with the law based on his social, cultural, economic, psychological or educational background without the use of formal courts".

The local Philippine council governing Child Protection and *Sangguniang Kabataan* provides for a law that states that families are also jointly responsible for resolving criminal justice cases. The diversion process taking place in the Philippines should include adequate socio-cultural and psychological services for children. The diversion program must be carried out and agreed upon by the parties. Diversion programs can be carried out with property restitution, repair of damage caused by the perpetrator, apologies both in writing and orally, upbringing, coaching and supervision of orders, counseling for children in conflict with the law and their families, participation in training, seminars and lectures on anger management skills, problem-solving and/or conflict resolution skills, value building, and other skills that will assist the child in face situations that may lead to repeated violations. Other programs that can be done are participation in available community-based programs, including community service, or participation in education, as well as vocational and life

skills programs. Diversion can be solved by deprivation of proceeds or the means of crime and payment of the costs of the case.

The perpetrator's parent/guardian is responsible for providing restitution to the victim. Parents/guardians in the Philippines who do not have a job and cannot afford to pay compensation to the victim, can pay in installments. In practice, there are also parents who are willing to work for the victim, that is, wash the victim's clothes for several days. Traditionally, children are treated as the responsibility of their parents or guardians. Adults make decisions in the best interests of children and the state upholds their right to do so. The best interests of the child also demand that the child has the right to be heard. This does not mean that the child has the right to make all decisions but that the child should be given the right to participate in discussions where relevant.

In Thailand itself, there is also a settlement of children's cases through diversion. There are many elements of restorative justice remaining in the traditional way of communal justice in some rural areas. Restorative justice itself was first introduced in Thailand on January 6, 2002. The idea of restorative justice is referred to as *Saman Chan* which in Indonesian means social harmony.

Diversion agreements can take the form of restitution. With the form of restitution and benefits for the victim as Boonsit wrote, "Restitution can mean more than just paying money to the victim, and that includes an apology from the perpetrator to the victim and attaching a plan of action to cause the offense" (Erdianti & Al-Fatih, 2019). The perpetrator will listen to the feelings of the victim and the impact that the victim feels from the actions of the perpetrator. It can be therapeutic for the victim to express his feelings and make an invisible impact on the abuser. All of this leads the perpetrator to provide compensation/recovery to the victim. This helps the abuser to prepare

himself back to life in society (Sri Utari et al., 2019; Ratu, 2019).

The form of restitution in the juvenile justice legal system in Indonesia is still limited to payments in the form of money. On the other hand, restitution in the Philippines and Thailand is extended to social services. This form of restitution can be adopted in the concept of restitution in Indonesia. However, the reformulation of restitution by the service should be regulated on a limited basis and supervised by law enforcement to avoid slavery (Purnomo et al., 2018).

Therefore, based on this background, the author is interested in conducting research with the focus on "Models of Punishment of Children as Perpetrators of Crime (A Comparison of Several Countries)". This research has a high level of urgency and *adequate novelty* because it uses *comparative law* to find a suitable model for Indonesia.

2. METHOD

The approach in this legal research uses a *conceptual approach*, where in this study it looks at various theories and cases related to the punishment of children as perpetrators of crimes in Indonesia, Thailand, Philippines. Normative legal research does not necessarily connote juridical norm research. In general, juridical norms research is understood to be only legal research that limits the norms that exist in laws and regulations. Normative legal research is broader. Normative law is a scientific research procedure for discovering truth based on scientific logic from its normative side. Based on the explanation above, this research was conducted using normative legal research methods by looking at the application and conformity of norms in a statutory regulation and using a conceptual approach.

3. RESULT AND DISCUSSION

A. Models of Conviction of Children as Perpetrators of Crime in Several Countries (Studies in Indonesia, the Philippines, and Thailand)

Settlement of cases through diversion is the culture of Indonesian society, where problem solving is carried out based on deliberation for consensus. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System legitimizes diversion in cases of children in Indonesia. Article 1 paragraph 7 states that diversion is the transfer of the settlement of a child's case from a criminal justice process to a process outside of criminal justice (Fikri, 2020). A restorative justice approach helps offenders to avoid other crimes later in life. The restorative juvenile justice model departs from the assumption that a response or reaction to a delinquent child's behavior will not be effective without the cooperation and involvement of the victim, the perpetrator, and the community. The principle underlying the restorative justice model is that justice is well served, if each party receives fair and balanced attention, is actively involved in the judicial process, and benefits adequately from their interactions with the juvenile justice system. The implementation of diversion with *a restorative justice* approach can be disseminated with various programs. For example, it may include the payment of damages from the perpetrator to the victim. The basic principles of restorative use in various international documents and meetings, the need for legal protection for children can cover various aspects that:

- 1) Protection of children's rights and freedoms
- 2) child protection in judicial proceedings;
- 3) childwelfare protection (in the family, education, and social environment);
- 4) protection of the child in case of detention and deprivation of liberty;
- 5) protection of children from all forms of exploitation (slavery, child trafficking, prostitution, pornography,

drug trafficking/abuse, exploitation of children in committing crimes, etc.);

- 6) street child protection;
- 7) protection of children from the effects of armed war/conflict; and
- 8) protection of children from acts of violence. Diversion is one way of resolving children's cases.

The ini process shifts the criminal justice process to the non-criminal judicial process. This emerged and developed in reaction to dissatisfaction with the previous juvenile criminal justice system that focused on the state and perpetrators, without involving all parties to the conflict and society. This is different from *restorative justice*, which involves victims and community actors in problem solving. The settlement of cases through deliberation aims to achieve harmony in society. It is not intended to muddy the atmosphere and maintain a peaceful atmosphere. The concept of diversion aims to achieve peace between the perpetrator and the victim by giving restitution or by apologizing. There should be no more conflicts after the transfer and the perpetrator will not repeat evil deeds and feel remorse. Diversion programs can be alerts, skill development, guidance, or counseling (Hambali, 2019). The idea of the idea of diversion aims to avoid incarceration, the label of criminality, and to improve the life skills of the perpetrator, the responsibility of the perpetrator, the prevention of the recurrence of criminal acts, informal intervention is needed for both the victim and the perpetrator. Diversion programs can prevent children from being involved in judicial system processes. Further steps in the program could keep the child away from the negative impacts and implications of the judicial process. Out-of-court settlements as an alternative to the criminal justice system are necessary for the following reasons:

- 1) It is expected to reduce the buildup of cases.
- 2) The dispute resolution process is faster, cheaper, and simpler.

- 3) Granting the widest possible access to the parties to the dispute for justice
- 4) strengthening and maximizing the function of the judiciary in dispute resolution, not limited to criminal conviction proceedings.

Diversion provisions in the juvenile justice system are not only developing in Indonesia but also in other countries, including in neighboring countries such as the Philippines and Thailand the Philippines provides for diversion in Republic Law No. 9344 otherwise known as the Law establishing a Comprehensive Juvenile Justice and Welfare System, creating a Juvenile Justice and Welfare Council Under the Department of Justice, Using Funds Therefore and For Other Purposes. (Darmawati, 2021) Diversion refers to an alternative process appropriate for the child in determining the responsibility and treatment of a child in conflict with the law based on his social, cultural, economic, psychological or educational background without the use of formal courts. Dewan Local for Child Protection and Sangguniang Kabataan designed and implemented a diversion program. It is provided for in Sections 15 and 17 of the Law of the Republic No. 9344. The parent or guardian of the child in conflict with the law is "*jointly responsible for the responsibility of the child.*" Parents are liable for damages unless they prove, in accordance with the decision of the judge in court, that they are conducting reasonable supervision of the child at the time the child commits the offense and make reasonable and diligent efforts to prevent or prevent the child from committing the offense (Hidayat, 2019).

The settlement of child cases through diversion is also known in the Thai legal system. Many elements of restorative justice remain in the traditional way of communal justice in some rural areas. With a strong background in Thai culture and growing problems due to the weakness of conventional criminal justice, it is not surprising to see the interest in *restorative justice* in Thailand

increasing. Formally, the first national seminar on restorative justice was held on January 6, 2002. The seminar formally introduced restorative justice to Thailand's criminal justice community. The idea of restorative justice is called *Samarn-Chan* in Thai, which means social harmony, or *Yutithum Samarn Chan*, which means justice, for social harmony. The media and society, as well as academia, accept the term well. Diversion agreements can take the form of restitution. Boonsit formulations of various forms of restitution and benefits for diversion are carried out to reduce the number of cases in court. The Family Court level may impose restitution on the offender. For example, there is an obligation to repair damage or perform certain services for the benefit of the victim or the community (Ariani et al., 2019).

Thus, Indonesia has actually implemented a special punishment system for children who commit crimes, namely in Undnag-Law Number 11 of 2012 concerning the Juvenile Criminal Justice System or hereinafter referred to as SPPA. However, the shooting has not gone as planned because there are many weaknesses including

- 1) Many law enforcement agencies do not know and understand restorative justice and divestment. So, there are many perceptions of its implementation.
- 2) Diversion is understood as restitution (the cost of returning stolen, damaged goods, medical expenses, customary costs) so that an agreement is not reached because the nominal figure is not in accordance with the wishes of the victim / family or child / family
- 3) The behavior or level of desire of law enforcement officers who tend not to achieve the purpose of diversion where they side with one of the parties (victim/perpetrator) and are unable to act as mediators or facilitators.

In short, the Philippines and Thailand's sentencing model is the same as Indonesia's, which uses *diverse restorative justice*, but when compared to Indonesia in its

laws and regulations, it does not regulate other forms of restitution. This condition causes children who come from poor families to have less opportunity to solve their cases outside the court. This condition is different from the form of restitution in the Philippines and Thailand. Both countries have expanded the meaning of restitution by providing other options. It can be in the form of services carried out by the perpetrator and / or the family of the perpetrator to the victim and / or the victim's family, as well as repairing the damage caused by the perpetrator. This form of restitution is an alternative to reformulation in the *ius constituendum* dimension. However, law enforcement must determine and supervise the form of restitution services to avoid slavery.

B. Mechanisms for Convicting Children as Perpetrators of Crime in Three Countries (Indonesia, Philippines, and Thailand)

Crime as an act prohibited by ethical norms and legal norms, because of its nature that harms the state to others and the state, therefore it is necessary to form an action-reaction, through counseling and imposing sanctions / punishments as a surefire move (*Ultimum Remedium*) to overcome and suppress crime. In fact, crimes are not only committed by adults, but often there are crimes committed by children. Sadly, in this case the child is limited to being a victim of a crime, but the child becomes a perpetrator of a criminal act (Gultom, 2006) . Such a social phenomenon is very sad because it shows the inability of the state to help children with its various efforts. However, crime is still a crime, so it is necessary to make repressive and preventive efforts to prevent and overcome it. Therefore, this chapter will discuss the mechanism of child punishment (a comparative comparison of countries between Indonesia, the Philippines, and Thailand), whether there is special treatment for children and still protects and guarantees their rights. Furthermore, it will be discussed in the following discussion.

1) Mechanisms for Convicting Children as Perpetrators of Crimes in Indonesia

The child punishment system in Indonesia is regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which regulates the punishment of children and is contained in several chapters in the law, such as diversion, juvenile criminal justice procedures, criminal and actions, to child development, as well as several other scopes. Based on research data conducted by the Directorate General of Corrections, children facing the law are mostly affected by the abuse of narcotics, psychotropics, and other addictive substances. In addition, the level of welfare of the child and the family can also affect the crimes committed by the child. Regarding the mechanism for convicting children as perpetrators of crimes in Indonesia, of course, there are some differences with the mechanism for sentencing adults, because they must participate in implementing the values of the Convention on the Rights of the Child as ratified by the government of the Republic of Indonesia with Presidential Decree Number 36 of 1990 concerning ratification of *the Convention on the Rights of the Child*.

Child punishment regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System is only applied to children over the age of 12 years, until before reaching the age of 18 years and not yet married. Meanwhile, children facing the law who are not yet 12 years old cannot be held criminally liable, where the provision is a revised provision for *judicial review* of the Constitutional Court which states that the child's liability if he is 8 years old. And the change in the age of accountability of children from 8 years old to 12 years old was welcomed by the wider community (Kemenkuham, 2022). Criminal provisions for children who are not even 12 years old, if suspected and/or proven to have committed a criminal act, then community supervisors, investigators, and child development agencies must make a decision that the child concerned is returned to the parent or guardian for guidance at the LPKS (Social

Welfare Implementation Institute) as contained in Article 21 of the SPPA Law jo. Article 67 PP 65/2015 concerning the Implementation of Diversion and Handling of Children Not Yet 12 Years Old. Regarding the mechanism regulated in the Criminal Procedure Code (KUHAP), unless otherwise specified in the SPPA Law, with the following systematics:

a. Investigation

The investigation is carried out by the investigator and must prioritize diversion efforts a maximum of 7 days after the investigation begins. Diversion is the process of transferring the settlement of a case, where the perpetrator is a minor, from criminal justice to dispute resolution efforts outside of criminal justice. The priority of diversion is expected to be able to provide opportunities for children to return to their environment without feeling ashamed because they have to undergo criminal court proceedings with the position of the perpetrator. The stigmatization of society towards children who face the law often suppresses the child's mentality, so that it has a negative impact on the child's psychic which can hinder the child's growth and development, so in this case diversion efforts are prioritized. Diversion as an implementation of (Wahyuni et al., 2021) *the Restorative Justice* approach, both for the child and for the victim. *Restorative Justice* is the resolution of a criminal act by involving the perpetrator (in this case: the child as the perpetrator), the victim, the family of the perpetrator/victim, and other parties concerned by jointly deliberating to settle the case fairly and emphasizing the nature of recovery in the initial situation, and not retribution.

In addition to the parties to the dispute involved in the diversion process, the community participates in diversion efforts in the context of child protection, to the process of social reintegration of children. Therefore, the diversion process also pays attention to the side of community harmony as stated in Article 8 paragraph (3) of the SPPA

Law, where the diversion process must pay attention to several points, including:

- (1) The interests of the victim
- (2) Avoidance of negative stigma of society
- (3) Avoidance of retaliation
- (4) Child welfare and responsibility
- (5) The harmony of society, and
- (6) Propriety, decency, and public order.

If the diversion fails, the investigator must continue the investigation and transfer the case to the Public Prosecutor (JPU) by attaching the diversion minutes and community research reports.

b. Arrest and Detention

Arrests of children facing the law need to be made for the purposes of investigation, with certain provisions, where arrests are only made a maximum of 24 hours and the child must be placed in a special place for children. If there is no special place for children in an area, then the child can be placed in LPKS (Lembaga Organizing Social Welfare), and accompanied by humane treatment, considering the age that is still sensitive and vulnerable. Detention is only made against children facing the law who are 14 years old and whose crimes are punishable by imprisonment of 7 years or more.

The detention of children in the face of the law must remain guided by the principles of protection and survival and growth and development of the child, so it is important to ensure the physical and spiritual needs of the child during detention. Regarding the period of detention, it can be arbitrary according to the needs of such detention, as long as it does not deprive the child of rights.

c. Prosecution

The prosecution of a child who is in conflict with the law is carried out by the Public Prosecutor on the order of permanent legal force of the Attorney General's Decree or

any other official authorized by the Attorney General to do so. Diversion efforts must be prioritized as a way of resolving cases, if the diversion that has been attempted fails, then the public prosecutor can delegate the settlement of the case to the competent court, by embedding a report on the results of community research.

d. Judge's Examination

The examination is carried out by a Judge appointed by the Chief Justice to handle children's cases with a maximum deadline of 3 days after receiving the case file from the public prosecutor. In addition to the Public Prosecutor, even if it has reached the examination stage, the Judge is also obliged to seek diversion a maximum of 7 days after being appointed by the chief justice of the district court as a judge which is carried out a maximum of 30 days. If the diversion attempt is unsuccessful, the case will proceed to trial.

e. Trial

The hearing time in a child case facing the law is conducted more quickly and takes precedence over the time of an adult hearing, and the room is conducted in a separate place from the general hearing because the juvenile trial is public in nature, except for the time of reading the verdict.

f. Verdict

The reading of the verdict after various attempts at the trial is carried out to determine the decision which is read before the court and is open to the public, and the identity of the victim and witnesses must be kept secret by the mass media with the use of initials without images (image censorship). The child is allowed not to attend this stage. Regarding legal remedies allowed in juvenile courts, namely appeals, appeals, and judicial review (PK), if they meet the applicable requirements in accordance with the laws and regulations.

Regarding the crimes that can be imposed on children as perpetrators of crimes can only be imposed as contained in Law Number 12 of 2011 concerning SPPA Article 71 paragraphs (1) and (2) which contains the main and additional criminal matters, which consist of:

- (1) Basic Criminals, including
 - a. Criminal warnings
 - b. Criminal is accompanied by coaching, service, and supervision.
 - c. Job training
 - d. Development of community institutions, and
 - e. Prison
- (2) Additional criminals, including
 - a. Deprivation/confiscation of the profits derived from the commission of the crime, and
 - b. Fulfillment of customary obligations.

Punishment for children in conflict with the law must prioritize the benefits of sanctions that will be imposed on children. Of course, the punishment in question is inversely proportional to the ordinary criminal, which is aimed at protecting society from a criminal act. The provision of special treatment in the stages of child empowerment facing the law is aimed at (Mahmud, 2019) protecting children so that in the future children can get equal opportunities in welcoming their future, through physical and spiritual protection of children. Through child development, it is hoped that children as the next generation of the nation can be wiser, more responsible, and later can be useful, both for themselves, family, and the nation. Protection of children, even if children who commit crimes, is still carried out by the state as a form of commitment to state ideals contained in the Preamble to the 1945 NRI Constitution (Surbakti & Zuliandi, 2019). The judicial process of Children's cases from the time of arrest, detention, to the verdict of the child must be carried out by a special official who understands the child's problem.

2) Mechanisms for Convicting Children as Perpetrators of Crimes in the Philippines

Child protection law in the Philippines has had its ups and downs, especially regarding the system of convicting children as perpetrators of crimes into their own urgency that deserves consideration. In neighboring countries, such as the Philippines, child protection is regulated in Law No.9344 of 2006 on the Establishment of a System of Justice and Child Welfare. The law also contains a chapter on the mechanism for sentencing children facing the law, where the age of criminal responsibility for children is 15 years old until before the age of 18. This means that those (children facing the law) who are 15 to before 18 years old, can be detained in youth centers and undergo rehabilitation programs, while those who are not yet 15 years old can be exempted from criminal responsibility but must undergo intervention. Pursuant to Section 4 of the revised Philippine Law on Children in Contravention of the Law, an intervention is a series of individual care activities or programs designed to address the problem that causes a child to commit an offense, including counseling, skills training, education, and other activities aimed at improving and improving the psychological, emotional and psycho-social well-being of the child. Nonetheless, the House of Representatives is proclaiming a reduction in the age of criminal liability of children to 9 years through the House of Representatives Bills 864, 1376, 3127 and 6512 in lieu of Law No.9344 of 2006. The purpose of such a change is considered by the Dpr as an effort to expand rehabilitation for children in conflict with the law and strengthen the social reintegration of children. The high opposition to reducing the age of criminal liability of children to 9 years, because many community organizations think that the policy will not contribute much to suppressing crimes committed by children in the Philippines. The opinion is expressed because the majority of the driving factors for a child to commit a crime are the economic problems of poor families

and that is only the effort that can be made to survive (Manila Bulletin, 2021; Gutierrez, 2019).

In the Philippines, in addition to diversion, the settlement of cases where the child is the perpetrator of the crime is also carried out restitution efforts by the perpetrator's family (parents) to the victim. In the event that the perpetrator's parents do not work or do not have the money to pay restitution, then symbolic restitution applies as compensation, such as the perpetrator's parents paying in installments through work, namely washing the victim's clothes or doing the victim's housework within a few days as agreed. So that compensation in the Philippines is not limited to money, as is the case in Indonesia, but rather a physical and spiritual loss to the victim, such as providing social services as a form of traditional culture and local wisdom in being apologetic. Therefore, it is worth emulating regarding the meaning of restitution in the constitution of the Republic of Indonesia (Aryana, 2020).

3) Mechanisms for Convicting Children as Perpetrators of Crime in Thailand

Efforts to resolve children's cases in Thailand are also prioritized using diversion efforts and restitution payments as an implementation of restorative justice. The idea of restorative justice is called *Samarn-Chan* in Thai, which means social harmony, or *Yutithum Samarn Chan*, which means justice. The main legal basis for resolving child criminal cases is based on the Thai Criminal Code. Regarding the substance of criminal liability for children under the age of 15 years contained in Article 73 of the Thai Penal Code (No. 26) BE 2560 (2017) provides that "a child not older than 10 years will not be punished for committing what is prescribed by law as an offence". That is, if a child who is not even 10 years old commits crimes such as theft, drugs, rape, and murder, then he is still guilty of it, but cannot be subject to criminal sanctions. Meanwhile, for children over 10 years old who face the law, it is regulated

in Article 74 of the Thai Criminal Code, the mechanism of punishment for children over 10 years old until before the age of 15 is explained, containing:(Hengtrakul, 2012)

- a. The court may reprimand the child and then release him; and if deemed necessary, the court may also summon the parent or guardian of the child or the person living with the child to be given a reprimand as well;
- b. If the Court is of the opinion that the parent or guardian is capable of childcare, the Court may order to hand over the child to the parent or guardian by establishing a provision that the parent or guardian shall guarantee that the child does not cause any harm during the time prescribed by the Court, but not more than three years, and stipulate a sum of money, as it deems appropriate, payable by a parent or guardian to the Court, but not more than one thousand Baht for each time the child causes damage;
- c. If the child resides with someone other than his or her parent or guardian, and the Court finds it unfit to summon his or her parent or guardian to enforce the aforesaid provisions, the Court may summon the person living with the child for questioning. whether or not he will accept the same terms as prescribed for the aforementioned parent or guardian. If the person with whom the child resides agrees to accept the injunction, the Court orders to hand over the child to that person by enacting the aforesaid provisions;
- d. In the event that the Court hands over the child to his parents, guardians or to the person living with the child under paragraphs (2) and (3) above, the Court may establish the conditions for regulating the conduct of the child in the same manner as specified in Section 56. In such a case, the Court shall appoint a probationary period of literature review officers or other officers to monitor the conduct of the child; (1) The court may reprimand the child and then release him; and if deemed

necessary, the court may also summon the parent or guardian of the child or the person living with the child to be given a reprimand as well;

- e. If the child does not have a parent or guardian, or has them but the Court is of the opinion that they cannot care for the child, or if the child lives with someone other than the parent or guardian, and thus the person does not want to accept the provisions referred to in paragraph (3), the Court may order to hand over the child to a person or organization, which the Court finds appropriate, to nurture, train and give instructions for a period prescribed by the Court when approved by such person or organization. In such a case, the person or organization shall have the same power as the guardian's power to administer, train and provide teaching and determine the place of residence and arrange the work to be done by the child, as possible. Reasonable; or to send the child to a school or training and teaching place or a place erected for the training and giving of instruction to the children for a period of time prescribed by the Court but not longer than the time when the child shall complete eighteen years of age.

Children who commit crimes are tried under the Juvenile Justice System in Thailand. The police are responsible for prosecuting children who are in conflict with the law in Thailand or called investigation officers. Regarding the mechanism for sentencing children, it starts through the initial stages, including:(*Ministry of Justice Thailand*, 2015; Sanitphot dkk., 2021).

- a. The investigating officer is the initial agency for the prosecution of children by making reports of violations accompanied by the collection of physical evidence or from witnesses. The responsibility of the police as the initial stage in the prosecution of children plays an important role in the investigation and coordination with relevant agencies in managing the prosecution file and evidence of the case(Srisilarak & Chantuek, 2017) .

- b. The child as the perpetrator of the crime is then called upon for examination, either by the public prosecutor or psychologist/social worker as a multidisciplinary professional or the parent/or person needed by the child, and a lawyer.
- c. The prosecution file is then submitted to the Public Prosecutor. All such procedures must be completed within 24 hours before bringing the child to court.
- d. In prosecuting a child, officers are obliged to pay attention to the age category because children under 10 years old cannot be prosecuted by law, as well as the severity of the pattern of violations.
- e. Investigating officers are only allowed to ask questions of the child in the presence of a multidisciplinary professional before sending the prosecution file to the Public Prosecutor.
- f. The submission of the file to the JPU is then determined by the judge, whether the case and evidence will be processed through the court or not.

The Public Prosecutor, in handling cases of children as perpetrators of crimes, must pay close attention to the provisions as specified in the Thai Criminal Code, the Child Protection Regulations in Thai Criminal Cases: BE 2543 (2000), Child Protection Investigations and Investigations: BE 2552 (2009), and Child and Family Courts and Events: BE 2559 (2016). Similarly, it requires judges with experience in prosecuting children under the age of 15 who are authorized to provide enforcement against juvenile criminals. The ruling was also previously accompanied by a summons for both parents/guardians to consult, advise, provide bail, or enter into agreements relating to specific ordinances and periods, for a child to serve a sentence and perform community service or public works. This is intended to improve children's behavior and prevent repetition of evil deeds.

The revision of the Thai Criminal Code has been passed on May 7, 2022 through Amendment Act No.29 B.E.

2565 (2022), which in the amendment changes the age of criminal liability to 7 – 14 years. For a child who is 7 years old but not even 12 years old who commits a criminal act, is not convicted but given a public service penalty. Meanwhile, for children in conflict with the law with an age range above 12 years and before 14 years, criminal charges can be imposed and special measures are applied to ensure their rights are adequately protected (International Law Office, 2022).

C. Legal Studies on the Model of Punishment in the Philippines and Thailand and Its Comparison with Indonesia

Based on the explanations above, it can be seen that the method of convicting children as perpetrators of crimes in Indonesia, the Philippines, and Thailand is different from the application of punishment in general. This can be seen from the model of child punishment carried out, the mechanism for sentencing children, and the laws and regulations governing the punishment of children. Because it is appropriate that the method of punishment of children is distinguished given the large role of children in the development and future of a country and should be understood and applied in various fields including in the case of punishment of children.

The legal study of the criminal model in the Philippines, Thailand and its comparison with Indonesia can be seen first through the "United Nations Convention on the Rights of the Child" or commonly abbreviated as UNCRC which in Indonesian is also known as the International Convention on the Rights of the Child which guarantees the rights of children in various fields such as civil, economic, health, political, and cultural in 1989 by the United Nations. The convention, which specifically regulates the rights of the child internationally, considers that the fulfillment of children's rights also includes the fulfillment of human rights that must be upheld by every country in the world. Article 3 of the convention also states that "(Lestari, 2017)All

actions and decisions concerning a child shall be made on the basis of the best interests of the child"(UNICEF, 2020). So, this also applies in the field of law, especially the punishment of children who must focus on the interests of the good child, including the child as the perpetrator of the crime. This Convention was ratified and also applied by Indonesia, the Philippines, and Thailand so that the application of the law to children which also includes child crimes is also based on this convention.

Not only is the International Convention on the Rights of the Child used as one of the sources of application of the method of conviction of children but there is also the UN Minimum Standards Regulation for the Administration of Juvenile Justice called the Beijing Rules which states that "*Juvenile justice should be understood as an integral part of each country's national development process, within the framework of comprehensive social justice for all children, thus at the same time contributing to the protection of young people and the peaceful maintenance of peace in the order of society*"(Darmi, 2016) . So in terms of child punishment in Indonesia, the Philippines, and Thailand, we also understand juvenile justice as well as juvenile justice in the Beijing Rules which understands that every child must be protected and given support for the future of the nation.

The application of juvenile justice in Indonesia is based on the laws and regulations that are used as the basis for making every decision made. In Indonesia, the regulation of the juvenile justice system is regulated in Law Number 11 of 2012 concerning the Juvenile Justice System. In the Philippines itself the juvenile criminal justice system is regulated in the *Juvenile Justice and Welfare Act Of 2006*. Then for Thailand itself, which regulates the juvenile justice system, it is contained in *The Juvenile and Family Court Act of 2010*. (That, 2021) These three countries adhere to the same legal system, namely *Civil Law*. Where with the application of *Civil Law*, a law will gain binding force because it is realized through regulations in the form of laws and are

systematically arranged in certain codifications or arrangements or compilations. So that both Indonesia, the Philippines, and Thailand do base arrangements in the form of established laws and regulations, including in the judicial arrangements for children. In addition, (Christian dkk., 2021) *Civil Law* is also closely related to all judicial decisions based on the prevailing laws and regulations so that it does not rely on decisions from judges and the laws of each country are very closely held by each country (Aulia & Al-Fatih, 2017).

In addition to the similarities in the legal system between the state, Indonesia, the Philippines, and Thailand also apply the same diversion in the juvenile justice system, namely diversion in the form of restitution. The diversion intended here is interpreted as a transfer of proceedings to a long and rigid system of resolving juvenile criminal cases. Diversion is carried out as a form of fulfilling the rights of the child in the form of protecting him and guaranteeing his *safety*. However, although these three countries have legal systems with the same application of the juvenile criminal justice system, namely diversion, in terms of their application there are differences as explained in the mechanism for conviction of children. (Triatmaja, 2020) (Rodliyah, 2019)

The difference in diversion between Indonesia and the Philippines itself is like a different age limit. As it is well known that these countries apply the results of the Convention on International Rights then there is an agreement that the age of the child is 18 years old (Rosalin & Octara, 2018). However, in Law No. 11 of 2012 concerning SPPA, it is known that the limit for conflicting children is from the age of 12 years to 18 years. Meanwhile, in the *Juvenile Justice and Welfare Act of 2006 (Republic Act No. 9344)* Filiphina states that the limit for children in conflict or litigation is 14 to 18 years. So, it can be concluded that the Philippines guarantees more children's right to protection by giving fewer restrictions than Indonesia.

In addition, there are also differences in terms of what criminal acts can be pursued in the diversion of juvenile criminal justice between Indonesia, the Philippines, and Thailand. As written in Law No. 11 of 2012 concerning SPPA, diversion can be carried out if the criminal act is threatened with imprisonment under 7 years and does not include criminal offenses. Meanwhile, in the law in the Philippines and Thailand, the implementation of diversion is carried out in every criminal act on children (Utari & Setiabudhi, 2018) .

Diversion is one of the differentiators of punishment that is carried out and applied in cases of conviction of children. But it's not just diversion that's in the spotlight when it comes to its implementation and settings. The other thing is related to restitution. Restitution is a form of compensation that will be given to the victim or their family by the perpetrator or a third party, where the form can be in the form of returning property, payment of compensation, or reimbursement for certain actions. Regarding this restitution itself, it is fully regulated in Perma 1 of 2022 which was promulgated in the State Gazette on March 1, 2022.(Marasabessy, 2015)(Registrar of the Supreme Court of the Republic of Indonesia, 2022)

The application of restitution in juvenile criminal justice in Indonesia is regulated in Government Regulation No. 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Under 12 years old Article 8 Paragraph (1) which states "*In the event of a diversion agreement as referred to in Article 6 paragraph (3) and Article 7 paragraph (4) requires payment of restitution or return in its original state, then the diversion agreement is carried out within the period agreed in the diversion, but it cannot exceed 3 months.*" This regulation requires the provision of restitution only in the form of payment of losses with money. In contrast to the restitution applied in the Philippines and Thailand. The Philippines provides for diversion in Republic Law No. 9344 i.e. "*(i) Diversion refers to*

an alternative process appropriate for a child in determining the responsibility and treatment of a child in conflict with the law based on his social, cultural, economic, psychological or educational background without the use of formal courts". (Aryana, 2020) In Thailand itself, there is also a settlement of children's cases through diversion. There are many elements of restorative justice remaining in the traditional way of communal justice in some rural areas. Restorative justice itself was first introduced in Thailand on January 6, 2002. The idea of restorative justice is referred to as (Prasetyo et al., 2019)*Saman Chan* which in Indonesian means social harmony.

The form of restitution in the juvenile justice legal system in Indonesia is still limited to payments in the form of money. On the other hand, restitution in the Philippines and Thailand is extended to social services. This form of restitution can be adopted in the concept of restitution in Indonesia. However, the reformulation of restitution by the service must be regulated on a limited basis and supervised by law enforcement to avoid slavery. So that's the legal study of the child punishment model in the Philippines and Thailand with the comparison in Indonesia.

4. CONCLUSION

Indonesia has established methods of punishment for children as perpetrators of crimes in Law Number 11 of 2012 against the Juvenile Criminal Justice System. The model of child punishment in Indonesia is said by several studies and related studies to be rudimentary and adequate so that there is a need for comparison with other countries including Thailand and Philippines. Both countries are considered to have provided appropriate protection for children in accordance with the general principles contained in the KHA. All three countries adhere to the Civil Law system which focuses on the laws and regulations in force in each country that have been systematically compiled and codified. The three countries have similarly ratified the International

Convention on the Rights of the Child and the Beijing Rules on the punishment of the Child. But there is a difference, Indonesia uses diversion only applies to criminal acts committed with imprisonment under 7 (seven) years and not a repeat of criminal acts, while the Philippines and Thailand have no prison limit. Indonesia's restitution is limited to paying compensation with money, while Thailand and the Philippines are expanding into social services. Furthermore, there is also the lowest age limit for children which in Indonesia is set between 12-18 years old while the Philippines and Thailand are 14-18 years old

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