

## Policy Concerning Crime Done by Children

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### Abstract

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Criminal acts / juvenile delinquency often occur because of the bad influence of the community and the problems that exist in the lives of children, therefore child delinquency must be addressed in a rational manner, namely with a criminal law enforcement policy approach that prioritizes the best interests of the child. Indonesia has ratified the Convention on the Right of Children and the Beijing Rules of Convention, so that Indonesia has an obligation to fulfill the rights of children to all children, especially providing legal protection for children facing the law. Problems faced are: How is the formulation policy against criminal acts carried out? How is the Policy of Diversion Against Crimes committed by Children? Regulations concerning the settlement of criminal acts / juvenile delinquency as an effort to deal with child crimes have been regulated in the Criminal Code and Law No. 3 of 1997 concerning Juvenile Courts. After the enactment of Law Number 11 of 2012 concerning the Child Criminal Justice System, specifically for Children cases a mechanism is known to transfer settlement cases from criminal justice processes to processes outside criminal justice, which is called Diversion. According to Article 7 paragraph (1) stated in all levels of examination both at the level of investigation, prosecution, and examination of cases in the District Court must be sought for Diversion. Diversion is the main feature of the Child Criminal Justice System Law because in the old Juvenile Justice Act and other criminal laws do not recognize this. Given the importance of this mechanism, the Child Criminal Justice System Law in Article 96 threatens imprisonment or fines for Investigators, Public Prosecutors and Judges who deliberately do not carry out Diversion obligations, even though the Constitutional Court has subsequently canceled this provision, but does not reduce the intention and the desire of the makers of the Child Criminal Justice System Law if Diversion is an important mechanism and must be pursued at every level of case investigation.

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Keywords: Criminal Law Policy, Diversion, Child Crime.

### A. Introduction

Attention to the need for special protection for children originated from the Geneva Declaration on the Rights of the Child in 1924 which was recognized in the Universal Declaration of Human Rights in 1958. Then on November 20, 1958 the UN General Assembly passed the Declaration of The Rights of The Child (Declaration of Rights, children's rights). Indonesia is one of the countries that has ratified the Convention on the Right of Children in 1990 through Presidential Decree Number 36 of 1990. By ratifying this convention, Indonesia has an obligation to fulfill children for all children without exception, one of children's rights that need attention and protection are the rights of children in conflict with the law. Indonesia itself as a form of protection for children, has a special law concerning children, namely Law Number 3 of 1997 concerning the Juvenile Court then Law Number 23 of 2002 concerning Child Protection.<sup>2</sup>

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<sup>2</sup> Nur Rochaeti, "Restorative Justice Model for Delinkuent Children", Magazine Legal Problems, Number 4, December 2008, page. 243.

Understanding children in general is associated with the level of age and mental condition of a person. Meanwhile, the understanding of children in the context of criminal law is associated with criminal liability in the sense of how far a child within a certain age limit is considered capable of being accountable for his (criminal) actions.

Talking about children, it can not be separated from talking about children's behavior. The behavior or behavior of each child is different, some are obedient and in accordance with their role as children, but there are also children whose behavior or behavior can endanger the interests of others, so always considered disturbing order in society. This difference in behavior of children is strongly influenced by the social conditions of each child. The social conditions can cover several aspects of life, for example from family, environment, even the economy can also affect children's behavior.

Children whose behavior or behavior endangers the interests of the community and are classified as unlawful acts can be referred to as a child delinquency. The mention of delinquency on child behavior seems appropriate, because deviant children's behavior is actually more appropriate to be called child delinquency rather than child crime. These considerations are made because the mention of crimes against the behavior of children who violate the law will have a negative impact on the development of children, besides the mention of juvenile delinquency aims to maintain the good name of children, even if they have committed an illegal act.

Juvenile delinquency is an act or act that violates the norm, both legal norms and social norms carried out by young children.<sup>3</sup> As a result, people's lives become anxious, feelings of insecurity even pose a threat to their own children. This can not be separated from the many problems that are being experienced by children today, which results in the emergence of delinquency carried out by children under age.

This situation should get special attention from the government, both from the handling of juvenile delinquency as an effort to enforce criminal law against children and also as a government effort in preventing the occurrence of child delinquency. In an effort to deal with delinquency committed by children, the government as People's welfare organizers are obliged to provide protection for Naughty Children who are having problems with the law. This is related to the condition of a child who is still considered as weak and vulnerable, so that legal protection is needed even though the bad boy is proven to have committed an illegal act .

Based on the results of the study showing that children who are in conflict with the law, many get poor treatment even in some cases it has been treated worse when compared to adults who are in the same situation.<sup>4</sup> Most of the children in conflict with the law claim to have experienced acts of violence while in the police station, a common form of violence, namely physical violence in the form of slaps and kicks, but there are also cases of violence which are also in the form of sexual abuse such as violence directed at the genitals or suspected child who was stripped naked.<sup>5</sup> In addition, violence also occurs in the form of punishment, namely in the form of forcing children to clean the police station (sweeping and mopping) and cleaning cars.

Bad treatment also sometimes still occurs when children are in detention and Correctional Institutions, the treatment is in the form of bullying or other forms of exploitation.<sup>6</sup> This fact shows that detention centers and prisons also have a negative influence on children, not only as a result of their association with other fellow detainees, both children and adults, but also in their experiences of physical and sexual violence while in detention. The facts described above compel us not to expect positive benefits from the use of the existing juvenile justice system, except only the negative benefits of suffering and long-term effects for these children.<sup>7</sup> Therefore, it is only natural that we must fix this problem, by making changes in implementing systems and processes that are suitable for the needs of our children and society.

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<sup>3</sup>. Wagiaty Soetodjo, *Child Criminal Law*, Refika Aditama, Bandung, 2006, page. 11.

<sup>4</sup>. Ruben Achmad, *Efforts to Settle Children Conflicting with Law in Palembang City*, 10 January 2005, [http://www.fh.unsri.ac.id/old\\_version/RubenAchmad.doc](http://www.fh.unsri.ac.id/old_version/RubenAchmad.doc) , accessed on March 17, 2019 at 21:30 WIB.

<sup>5</sup>. *Ibid.*

<sup>6</sup>. *Ibid.*

<sup>7</sup>. *Ibid.*

In addition, from now on law enforcement officials must develop a restorative approach in handling children who have problems with the law, as much as possible avoid children from entering the criminal justice system but still make the case as learning for children that their actions are wrong and at the same time place the community as actors in solving problems. The efforts of law enforcement officials to use reason mediation in resolving criminal disputes outside the court at this time, against criminal cases carried out by children under the age of age are a good start in resolving child crimes. Although, in general, out-of-court dispute resolution only exists in civil disputes, in practice criminal cases are often resolved outside the court through various discretionary law enforcement agencies or through mechanisms of deliberation / peace or forgiveness institutions that exist within the community even though there is no foundation formal law.<sup>8</sup>

Cases of delinquency of children or adolescents that are increasingly happening nowadays should not be solved juridically, because the imposition of criminal sanctions is not solely as a deterrent effect, but the most important thing is the provision of guidance and protection in order to return to being members of the community well. So that it is necessary to have an appropriate effort on how to prevent or overcome crimes committed by children, of course this effort needs to get support from the government as the holder of state power in an effort to prosper the people.

Basically criminal imprisonment is also an effort to enforce criminal law, not only the implementation of criminal legislation, but also as an effort in the framework of efforts to overcome all forms of crime / crime, especially against juvenile delinquency. Then should the enforcement of criminal law in the juvenile justice system, not only as an attempt to implement criminal sanctions, but also to pay attention to the interests of children in conflict with the law by providing legal protection to these brats. Actually, until now there has been no specific Criminal Law concerning children that regulates both crime and judicial processes, so that the juvenile justice process as described above is in fact felt that it has not been able to resolve child cases in Indonesia, and until now has not received the right place like people's expectations.

Based on the background of the problems mentioned above, the main issues to be discussed by the author can be formulated, namely:

1. How is the formulation policy regarding criminal acts committed by children?
2. How is the diversion policy against criminal acts committed by children?

## **B. Research Objectives**

The formulation of the purpose of writing is a view of direction and the elaboration of strategies on the problems that arise in writing, as well as the writing that is being done does not deviate from the original purpose. Then the objectives of this paper are formulated:

1. To find out the formulation policy of criminal acts committed by children.
2. To find out the diversion policy against criminal acts committed by children.

## **C. Discussion**

The existence of a criminal law policy against criminal acts committed by children is very necessary, because the presence of criminal law policies can determine what can be done or done against criminal acts committed by children.

1. Policy on Formulation of Crimes committed by Children
  - a. International Convention on the Rights of Bad Children :

- 1). UN's Convention on The Rights of the Child Number 44 of 1955 (Convention on the Rights of the Child)

Attention to the need for special protection for children originated from the Geneva Declaration on the Rights of the Child in 1924 which was recognized in the Universal Declaration of Human Rights in 1958. Starting from that, then on November 20, 1958 the UN General Assembly passed the Declaration of The Rights of The Child (Declaration of Children's Rights).

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<sup>8</sup>.Barda Nawawi Arief, Mediation of Penal Settlement Outside the Court, Masters Library, Semarang, 2008, page 3

In 1979, when the International Child Year was launched, the Polish Government proposed a document that laid international standards for the recognition of children's rights and juridically binding. This was the beginning of the formulation of the Convention on the Rights of the Child. In 1989, the draft Convention on the Rights of the Child was resolved and in the same year the final text was unanimously adopted by the UN General Assembly on 20 November. Indonesia ratified Convention on the Rights of the child on 25 September 1990 through Presidential Decree No. 36 of 1990 and entered into force from 5 October 1990.

The Convention on the Rights of the Child is an international agreement concerning the affirmation of children's rights, child protection by the State, the participation of various parties in respecting children's rights. This convention contains provisions on child protection, with the aim of children to be able to grow naturally in undergoing their childhood, have the right to enjoy their rights and freedoms both in their own interests and in the interests of society. The entire provision consists of 54 articles grouped into three parts, the first part consists of 41 articles, the second part consists of 4 articles, and the third part consists of 9 articles.

#### 2). United Nations Guidelins for the Pervation of Juvenile Delinquency (The Riyadh Guidelines)

The Riyadh Guidelines are listed in UN Resolution 45/112 dated December 14, 1990, this Resolution concerning the guidelines of the United Nations (UN) relating to business in the context of preventing juvenile delinquency. The Riyadh Guidelines consist of six parts, which explicitly explain business forms in efforts to overcome child delinquency, these parts are in the form of Part I concerning Basic Principles, Part II concerning Scope of Guidelines, Part III concerning General Prevention, Part IV concerning Processes Socialization, Part V concerning Social Policy, Part VI concerning Legislation and Implementation of Juvenile Justice. In order to be clearer, the following is a description of the provisions (sections) in the Riyadh Resolution Guidelines relating to efforts to overcome juvenile delinquency.

#### 3). United Nations Standard Rules for the Administration of Juvenile Justice (The Beijing Rules)

The Beijing Rules, which were the result of a meeting on May 14-18, 1984 in Beijing, China, namely in the VIIth UN Congress on Prevention and Development of Criminal Actors (the Seventh UN Congress on Prevention of Crime and Treatment of Offender), and were approved on September 6, 1985 and made UN Resolution on November 29, 1995 in UN Resolution 40/33, a convention that specifically regulates policies in an effort to prevent child delinquency and fostering children as perpetrators of crimes / delinquency, in which also regulates the rights that are entitled to be given to children who are faced with the law.

The Beijing Rules as a whole consist of six parts, namely Part I General Principles, Part II Investigation and Prosecution, Part III Adjudication and Disposition, Part IV Outside Institution Development, Part V Coaching in Institutions, Part VI Research Planning, and Evaluation.

#### 4). United Nations Minimum Standards Rules for Non-cus Todial Measures (The Tokyo Rules)

The UN Resolution, also called the Tokyo Rules on December 14, 1990 was approved by the UN General Assembly with Resolution 45/110. The resolution of the Tokyo Rules consists of seven parts, namely Part I on General Principles, Part II on the Pre-Judicial Stages, Part III on the Judicial and Criminal Stages, Part IV on Post-Criminal Stages, Part V on Implementation of Non-Custodial Actions, Part VI About Volunteers and Other Community Resources, Part VII about Research, Planning, Policy Formulation, and Evaluation.

#### 5). The United Nations Rules for Protection of Juvenile Deprived of Their Liberty

This international instrument is contained in UN Resolution 45/113, and came into force on December 14, 1990, in this Resolution contains several provisions that emphasize minimum standards for the protection of children from all forms of deprivation of independence based on human rights and as a goal avoid children from adverse effects and stigmatization caused by the process of detention or imprisonment of children.

This convention consists of five parts, namely: Part I concerning Basic Perspectives, Part II concerning Coverage and Application of Regulations, Part III concerning Children Arrested or Who Are Waiting for Justice, Part VI concerning Managing Correctional Facilities for Children, and Part V about Officers.

#### b. Legislation concerning Children in National Law in Indonesia

##### 1). The Criminal Code

The current Criminal Code is a legacy of Dutch colonial rule. The Criminal Code has been made since the 1981 Criminal Code by the Netherlands, even though the arrangement is aimed more at adults, but in some provisions of the article or its rules it also regulates articles relating to children, such as Article 45 to Article 47 of the Criminal Code. The formulation of Article 45, Article 46, and Article 47 of the Criminal Code concerning children aims to provide legal protection to children, especially the protection of children who are having problems with the law in the judicial process. In addition to providing legal protection to juvenile delinquents who are having problems with the law, the formulation of these articles is also useful as a means of law enforcement officials in efforts to combat child crime.

## 2). Law Number 4 of 1979 concerning Child Welfare

The child is the next generation of aspirations of the nation's struggle as well as human resources in the future which is the nation's capital for sustainable development, therefore the important position of the child is needed guidance and development in a directed, integrated and holistic manner which is essentially becoming the responsibility of all parties.

In order for this purpose to be achieved, efforts are needed to develop, maintain and improve the welfare of children. Efforts to maintain, foster and improve child welfare must be based on the philosophy of the Pancasila with the aim of ensuring the survival and personality of the nation, because children both spiritually, physically and socially do not yet have the capacity to stand alone, it is an obligation for previous generations to guarantee, maintain, and secure the interests of the child. The maintenance of guarantees and safeguarding the interests of children should be carried out by those who care for them under the supervision and guidance of the State, because the caregivers and the State as the supervisors are also responsible for child care, to protect children from disturbances that come from outside or from the child itself.

Based on the background and as an effort to realize the above goals or efforts, the Law was drafted which regulates the welfare of children, as a legal basis governing matters for realizing child welfare, namely Law number 4 of 1979 concerning Child Welfare published in the Republic of Indonesia State Gazette number 32 of 1979, this law came into force since the issuance of Government Regulation of the Republic of Indonesia number 2 of 1988 concerning Child Welfare Efforts. Overall this law consists of 5 chapters, and is composed of 16 articles. The regulated chapters cover Chapter I General Provisions, Chapter II concerning the Rights of the Child, Chapter III Regarding Parental Responsibility for Child Welfare, Chapter IV Concerning Child Welfare Efforts, and Chapter V concerning Transitional and Closing Provisions.

## 3). Law number 3 of 1997 concerning the Juvenile Court

Criminal law policy in an effort to overcome child crime which is a criminal policy, should need to consider the position of the child with all the characteristics and characteristics that are unique. Even though the child has been able to determine his own steps based on thoughts, feelings, and will, the surrounding conditions can influence his behavior. Therefore, in dealing with Bad Boy problems, parents and surrounding communities should be more responsible for fostering, educating, and developing the behavior of these bad boys.

Given the characteristics and characteristics that are unique to the child and for the protection of the interests of the child, then the Naughty Child case, must be tried at the Court of the Child who is in the General Court environment. So that the Juvenile Court's judicial process from the time of arrest, detention, trial, and guidance, must be carried out by law enforcement officers who truly understand the child's problem.

The various considerations mentioned above as well as in order to realize a case handling of children involved in criminal acts better than the previous one, it is necessary to regulate provisions concerning the administration of courts specifically for children in the General Judicial environment. the right direction in fostering and protecting children, and can be a means of criminal law policy in efforts to combat child crime.

Child crime is a manifestation of a child's misbehavior, which according to the law is not in accordance with the child's mischief in general, so that family, community and government are obliged to overcome the crime of this bad boy. The existence of Law number 3 of 1997 concerning Juvenile Courts, which has determined itself regarding boundaries which are special competencies in efforts to overcome child crime, then through a policy formulation in the provisions of the Juvenile Court law it is expected to be able to assist in efforts to deal with criminal acts child.

Since the enactment of Law number 3 of 1997 concerning Juvenile Courts, the provisions in Article 45, Article 46 and Article 47 of the Criminal Code are declared invalid. The arrangement for the non-entry into force of the articles of the Criminal Code is contained in Article 67 concerning "Closing Provisions" (Chapter VIII) of Law number 3 of 1997 concerning Child Courts which states in general, "all provisions that contradict this Law are declared invalid". Provisions referred to in Article 67 of Act number 3 of 1997 concerning Juvenile Courts namely Article 45, Article 46, and Article 47 of the Criminal Code.

Law number 3 of 1997 only states Articles 45, 46 and 47 of the Criminal Code which are declared invalid. It means that juridically the other articles in the Criminal Code still apply, including provisions on criminal Article 10 to Article 43 of the Criminal Code, including conditional criminal and conditional release, provisions concerning trials, inclusion, *perbarengan* (*concursum*), and reasons for erasers criminal, the reason for removing the authority to prosecute and execute a crime.<sup>9</sup> Even the special rules in Books II and III of the Criminal Code also apply to children, including the provisions regarding recidive. Actually this is strange in terms of the still validity of the rules in Books I, II and Book III of the Criminal Code, despite the enactment of Law Number 3 of 1997 concerning Juvenile Courts, because in Chapter III the Law on Juvenile Justice has also regulated itself "Criminal and Action".

Affirmation of Article 67 of the Juvenile Court Law is quite reasonable, because the material regulated in the three Articles of the Criminal Code has indeed been regulated in Chapter III (Criminal and Action) of the Juvenile Court Law. Thus, Article 67 is a logical consequence of the provisions in Chapter III, however, the provisions of Article 67 are felt to be lacking, because only three articles of the Criminal Code are declared invalid. Chapter III of the Children's Court Act is actually not only related to the three articles (45, 46, 47 of the Criminal Code), but also related to other articles "concerning criminal" in Chapter II Book I of the Criminal Code (Article 10 to Article 43). So that the articles in Chapter II of Book I of the Criminal Code which are directly related to those stipulated in Chapter III of the Juvenile Court Law can be viewed / assumed to be invalid automatically, thus the assumption also applies to Article 45 to Article 47 Criminal Code.<sup>10</sup> That is, without Article 67 of the Juvenile Court Law, the three Articles of the Criminal Code should automatically be deemed invalid, for more details this would be discussed on the next page, regarding the discussion of imposition of criminal sanctions and actions according to the Law. Juvenile Court.

Law number 3 of 1997 concerning the Juvenile Court was made basically aimed at creating special protection for the interests of children who have problems with the law, apparently in its implementation it was not fully realized, and the Children's Court Law felt that there was little protection for children both physically and mentally, because the Juvenile Court Law is more likely to lead to the giving of stigma to children. So that the provisions in the Juvenile Court Law can work in accordance with the objectives of the promulgation of the Juvenile Court Law, it is necessary for law enforcement officials who know clearly and have experience in legal protection efforts for children.

#### 4). Law Number 23 of 2002 concerning Child Protection

The issue of legal protection and its rights for children is one side of the approach to protect Indonesian children. Developing children's rights in the criminal justice process is also needed to realize legal protection for children, which begins with attention to mental aspects, physically, socially, and economically, because children as the future generation of the ideals of the nation's struggle have a strategic role as guarantor of the continuity of the nation's future, in it contains the dignity as a whole person that must be protected to be able to grow optimally, physical and mental health towards child welfare, this is the main consideration made and the enactment of Law Number 23 of 2002 concerning the Protection of this Child.

#### 5). Law Number 11 of 2012 concerning the Child Criminal Justice System.

The thing that most distinguishes this law from the previous law is Law Number 3 of 1997 concerning the age of a child, namely a child who can be submitted to a criminal trial with a minimum age of 12 (twelve) years. In this law, it is also related to the diversion that must be carried out by the Police, Prosecutors and Judges to divert the settlement of cases from criminal justice processes to non-judicial processes (deliberations for peace).

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<sup>9</sup>Barda Nawawi Arief, *Some Aspects of Criminal Law Enforcement and Development Policy*, Citra Aditya Bakti, Bandung, 2005, page. 185.

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

Law enforcement officers, prosecutors and judges who do not seek diversion can be jailed for two years and fined two hundred million and those who violate the detention period can be jailed for two years. Law number 11 of 2012 concerning the Child Criminal Justice System prioritizes restorative justice, namely the settlement of criminal cases by involving perpetrators, victims and their families by prioritizing the recovery of victims' losses, not "revenge" against the perpetrators.

Law Number 11 of 2012 concerning the Child Criminal Justice System also changes regarding detention. In this law the child of a criminal offender must not be detained if there is a guarantee from the parent / guardian that the child will not flee, the child is not 14 (fourteen) years old and the threat of punishment is below 7 (seven) years.

## 2. Policy on Diversion Against Crimes committed by Children

Application policy is the power to implement criminal law, this application policy is carried out by law enforcement officers (criminal) who have applicative authority, which includes the Police Officers, Attorney General's Office, and Court Apparatus. In the sub-chapter on application policy in efforts to deal with criminal acts carried out by underage children, it is described how the rules in legislation governing the application of criminal law sanctions against juvenile delinquents, the process of applying criminal law sanctions starts from the process of arrest and detention, Investigation, Prosecution, Trial up to the last process in the application of criminal law sanctions, namely the imposition of sanctions on naughty children. The application policy regarding the application of criminal legal sanctions against juvenile delinquents is only found in Chapter V of the Juvenile Justice Program, Law Number 3 of 1997 concerning Juvenile Courts.

The principle of justice places the law to be fair to everyone involved in the law itself. Likewise, the diversion must be the rights of every child in conflict with the law. Every child has the right to have the opportunity to be diversified, whatever the action taken. After the enactment of Law Number 11 of 2012 concerning the Child Criminal Justice System, specifically for the case of Children, there is a mechanism to transfer the settlement of cases from criminal justice processes to processes outside criminal justice, which is called Diversion. According to Article 7 paragraph (1) stated in all levels of examination both at the level of investigation, prosecution and examination of cases in the District Court must be sought for Diversion.

However, not all compulsory matters are carried out in Diversion, the Child Criminal Justice System Law regulates diversion only in the event that the child commits a crime that is threatened with imprisonment under 7 (seven) years and is not a repetition of a crime committed by the child, either similar and non-similar crimes, including criminal offenses that are settled through Diversion.<sup>11</sup>

Diversion is the main feature of the Child Criminal Justice System Law because in the old Juvenile Justice Law and other criminal law rules do not recognize this. Given the importance of this mechanism, the Child Criminal Justice System Law in Article 96 threatens imprisonment or fines for Investigators, Public Prosecutors and Judges who deliberately do not carry out Diversion obligations, even though the Constitutional Court has subsequently canceled this provision,<sup>12</sup> but does not reduce the intention and the desire of the makers of the Child Criminal Justice System Law if Diversion is an important mechanism and must be pursued at every level of case investigation.

## D. Conclusions

Normatively the implementation of Diversion will produce 2 (two) things, namely the success of reaching an agreement and not succeeding in reaching an agreement. The main requirement for Diversion to reach an agreement is first, the victim and / or family of the child victim agrees and secondly, the child (the perpetrator) and his family are willing to do Diversion. The qualification of "Child is willing to do Diversion" means that the child acknowledges his actions, because one of the objectives of Diversion is to instill a sense of responsibility to the child, especially if settlement of cases through Diversion is calculated as proven to have committed a crime and vice versa if the child does not admit Diversion can successfully reach an agreement.

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<sup>11</sup> See the explanation of Article 7 Paragraph 2 of Act Number 11 of 2012 concerning the Child Criminal Justice System.

<sup>12</sup> According to the Constitutional Court Decision Number 110 / PUU-x / 2012: Article 96, Article 100 and Article 101 of Law Number 11 of 2012 contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force

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