

The Regulation of Diversion in Indonesia's Juvenile Criminal Justice System Oriented Toward the Best Interests of the Child and Fairness

Walim¹, M. Iman Santoso², Waty Suwarty Haryono³, Rocky Marbun⁴

¹ Krisnadwipayana University Jakarta, Indonesia

² Krisnadwipayana University Jakarta, Indonesia

³ Krisnadwipayana University Jakarta, Indonesia

⁴ Pancasila University Jakarta, Indonesia

ABSTRACT

Background: Children in conflict with the law need special protection, and diversion is intended to shift juvenile cases from criminal justice to non-judicial measures. In Indonesia, the implementation of diversion under Law No. 11 of 2012 is not fully optimized, with law enforcement and courts often prioritizing imprisonment. This approach overlooks the child's best interests, as current regulations limit diversion to specific offenses.

Purpose: This study explores issues in the practical implementation of diversion within Indonesia's juvenile justice system, the limitations of current regulations in prioritizing the child's best interests, and how these regulations can be improved.

Method: The research employs a normative legal method combined with an empirical juridical approach.

Results: The findings reveal that although Law No. 11 of 2012 promotes diversion and restorative justice, there are weaknesses in legal substance, system, and culture. Reforms are needed to address these issues, considering sociological, philosophical, and psychological perspectives. The study suggests that diversion should be applicable to all juvenile offenses, ensuring it prioritizes the best interests of the child while incorporating justice for victims, including compensation and relationship restoration, in line with Article 1320 of the Indonesian Civil Code.

Conclusion: Indonesia's Juvenile Criminal Justice System under Law No. 11 of 2012 aims for non-punitive measures but faces challenges due to structural and practical limitations. To improve the system, Article 7, paragraph (2), letter (a) should be amended to allow diversion for all juvenile offenses, aligning with the Convention on the Rights of the Child and restorative justice principles. If diversion fails, judicial proceedings should continue under existing laws.

KEYWORDS

Best Interests of the Child, Diversion Regulation, Juvenile Criminal Justice

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Correspondence:

Walim
walimandpartners@gmail.com

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INTRODUCTION

Children hold a significant role in the Indonesian Constitution, as emphasized in Article 28B of the Constitution of the Republic of Indonesia of 1945 (Djamil, 2013). This article asserts that the state guarantees every child's right to life, growth, development, and protection from violence and discrimination (Huraerah, 2018).

The interests of children should be viewed as essential to both humanitarian concerns and the nation's existence. To this end, the government has implemented child protection policies through Law No. 35 of 2014 (Fitri, 2019), which amends Law No. 23 of 2002 on Child Protection, and has ratified the Convention on the Rights of the Child through Presidential Decree No. 36 of 1990. The government also enacted Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (Hasibuan et al., 2015), which replaces Law No. 3 of 1997 on Juvenile Courts, to protect Children in Conflict with the Law (CICL) and prioritize restorative justice (Wahyudi, 2010).

The Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989 (Convention on the Rights of the Child, 1989), and ratified by Indonesia through Presidential Decree No. 36 of 1996, establishes that all actions and decisions concerning children must be made in the best interests of the child. Article 3 of this convention emphasizes that the government and law enforcement agencies must base every decision affecting children on the principle of the best interests of the child, ensuring their rights are protected and fulfilled (Ariani, 2014). The convention is an international agreement aimed at safeguarding children's rights and ensuring their survival and development. Law No. 11 of 2012 concerning the Juvenile Criminal Justice System underscores the importance of protecting and rehabilitating children who conflict with the law (Fatoni, 2015). This law prioritizes restorative justice and diversion, redirecting children's cases from the criminal justice system to alternative systems that better consider the best interests of the child. The philosophy of this law is to ensure that every decision made regarding children always takes into account their continuity and growth, by the Declaration of the Rights of the Child. In its implementation, imprisonment or detention is considered a last resort (*ultimum remedium*) (Syachdin, 2016), with a focus on education, rehabilitation, and the restoration of the child's mental condition so they may grow into independent and responsible individuals.

The significance of resolving juvenile criminal cases through diversion, as stipulated in Article 6 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, aims to achieve reconciliation between the victim and the child (Fikri, 2018), resolve cases outside the judicial process, avoid deprivation of liberty, encourage community participation, and instill a sense of responsibility in the child. Diversion is mandatory at the stages of investigation, prosecution, and trial if the criminal threat is below seven years and not a repeat offense. However, this provision poses problems as it restricts the right to diversion only to offenses with penalties under seven years, which is contrary to the principles of justice, non-discrimination, and the best interests of the child. Consequently, children with penalties above seven years do not receive the right to diversion. The restriction of diversion to offenses with a maximum penalty of seven years, as outlined in Article 7 of Law No. 11 of 2012 (Setyowati, 2020), results in many juvenile cases not qualifying for diversion. This limitation undermines the idea of diversion within the juvenile justice system, which should focus on the best interests of the child and protect their future, rendering it ineffective. This provision is considered discriminatory compared to policies in other countries such as the Philippines, Ireland, Thailand, and South Africa, which do not impose limitations on the severity of the offense for diversion, thus providing adequate protection in line with the principles of the Convention on the Rights of the Child (Harefa, 2016).

RESEARCH METHODOLOGY

The research utilizes a normative legal method with an empirical juridical approach, combining legal document studies and field research. The empirical juridical approach is applied to analyze the implementation of diversion by the Police, Prosecutor's Office, and Courts. The

research is descriptive-analytical in nature, aiming to describe and analyze legal issues, the legal system, and regulations related to diversion based on legal events occurring in society.

The research approach is consistent with the employed method, which is a normative-empirical approach incorporating legislative and case-based methods. The normative-empirical approach involves analyzing existing legal norms and practices concerning diversion. The legislative approach focuses on statutes and regulations pertinent to diversion, while the case-based approach involves studying specific cases to understand the practical application and challenges of these legal norms in real-world scenarios. This combined method provides a comprehensive analysis of both theoretical and practical aspects of the legal framework governing diversion.

RESULT AND DISCUSSION

Diversion in the Juvenile Criminal Justice System

Diversion in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice refers to redirecting juveniles in conflict with the law from the formal criminal justice system to informal pathways, such as governmental social institutions and non-governmental organizations, through negotiation or mediation (Zainuddin & Hambali, 2023). The concept of diversion was introduced in the United States in the 1960s and was implemented in Australian states such as Victoria in 1959 (Badaru, 2023). According to Article 1(7) of Law No. 11 of 2012, diversion is defined as the redirection of juvenile cases from the criminal justice system to an alternative system outside the formal judicial process, aiming to reduce arrest, detention, and punishment of juveniles, eliminate stigma, and reintegrate the child into society as a normal individual. Diversion aims to avoid the stigmatization of juveniles in conflict with the law and allows them to return to normal life through a deliberative process. The most important principle in applying this concept is to provide offenders with an opportunity for change through affirmative, non-violent actions (Hadisoeperto, 1997). In Indonesia's juvenile criminal justice system, diversion is implemented at every step to keep the child away from the formal justice system and resolve issues in a family-like manner, in line with the fourth principle of Pancasila. Diversion represents a new approach to justice that does not disregard the law but ensures that justice is served more humanely and wisely.

In various Indonesian regulations, the definition of a child varies depending on the context. For example, Law No. 11 of 2012 concerning the Juvenile Criminal Justice System defines a juvenile offender as someone aged 12 to 18 years. Meanwhile, Law No. 1 of 1974 on Marriage sets the age limit for a child as 18 years or unmarried. These differing definitions highlight that the determination of the age limit for a child depends on the interests and objectives of the legal provisions created, without a uniform age limit across different laws.

The practice of diversion aims to prevent negative impacts on the life and development of a child due to their involvement in the criminal justice system, based on the discretion of law enforcement and aiming to provide opportunities for rehabilitation without punishment (Marlina, 2009). This concept was first mentioned in the Beijing Rules, which grants police, prosecutors, and judges the authority to handle juvenile offenses outside formal court proceedings with the consent of the child or their guardian. Diversion, as outlined in Article 6 of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (SPPA), aims to achieve reconciliation, prevent the deprivation of the child's freedom, encourage community participation, hold the child accountable, and protect the child's human rights from the stigma of being a "delinquent child," (Suharto & Widyaningrum, 2024). Diversion also prevents juveniles from entering prison, avoids criminal

labeling, and promotes restorative justice by encouraging responsibility, providing the child an opportunity to make amends, and facilitating reconciliation with the affected community.

According to Article 7(2) of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, diversion can only be applied if the offense carries a maximum prison sentence of seven years and is not a repeat criminal act. However, Article 3 of the Regulation of the Supreme Court of the Republic of Indonesia (PERMA) No. 4 of 2014 states that juvenile judges are required to seek diversion if the child is charged with offenses punishable by less than seven years and is also charged with offenses carrying a sentence of seven years or more, in the form of subsidiary, alternative, cumulative, or combined charges. Additionally, judges must consider factors such as whether it is the child's first offense, the child's school status, the nature of the crime, and the capacity of the parents/guardians to educate and supervise the child.

Protection of children in Indonesia is regulated through the Convention on the Rights of the Child, ratified by Presidential Decree No. 36 of 1990, as well as Law No. 4 of 1979, Law No. 23 of 2002, and Law No. 11 of 2012 concerning the Juvenile Criminal Justice System. The fundamental principles of child protection include non-discrimination, the best interests of the child, survival and development, and respect for the role of the child. Law No. 11 of 2012 emphasizes a juvenile justice system that encompasses the entire process from investigation to post-criminal guidance, with the primary aim of protecting the child's welfare. This system includes subsystems for investigation, prosecution, judicial examination, and sanction enforcement while upholding principles of protection, justice, and non-discrimination. A comparison with Law No. 3 of 1997 reveals a shift towards a more comprehensive protection framework based on restorative justice principles, with an integrated approach to adjudication focused on rehabilitation and avoiding retribution.

Modern and globalized criminal justice enforcement focuses on ensuring safety, security, and legal protection by involving the community and relevant stakeholders. The success of law enforcement relies on a justice system that is fair and responsive to societal values. According to Joseph Goldstein and Mardjo Reksodiputro, law enforcement must respect legal values, adhere to full compliance concepts, and address practical limitations and infrastructure challenges. In Indonesia, issues of juvenile delinquency, such as drug use and violence, highlight practical enforcement challenges that require in-depth attention and systemic solutions.

The Indonesian government is committed to protecting children's rights through various laws, including Law No. 23 of 2002 and its amendments, as well as Law No. 11 of 2012 concerning the Juvenile Criminal Justice System. The primary focus is on restorative justice and diversion, which prioritizes resolving juvenile cases outside the criminal justice system through deliberative processes involving offenders, victims, and the community to reach agreements without detention. This approach aims to avoid negative stigma and provide children with opportunities to correct their mistakes by involving community counselors and social workers. The system emphasizes the protection of children's rights and favors non-punitive solutions that prioritize recovery and the well-being of the child.

Implementation of Diversion in the Juvenile Criminal Justice System in Indonesia

In Indonesia, the law enforcement agencies consist of the Indonesian National Police, the Indonesian Attorney General's Office, and the Supreme Court of the Republic of Indonesia. Each institution plays a crucial role in the judicial process, including the implementation of diversion for juvenile cases. The police are responsible for conducting investigations, overseeing law enforcement processes, and maintaining public order. Following the police investigation, the prosecutor decides whether to advance the case to court or resolve it through diversion. Judges at

the Supreme Court are tasked with conducting juvenile court proceedings, including implementing diversion following Law No. 11 of 2012. Diversion must be carried out within 30 days after the court's order, with judges making every effort within 7 days. If diversion fails, the case proceeds to trial. Judges handle juvenile cases in closed sessions to protect the child's privacy, involving parents, advocates, and community counselors. Additionally, the court refers to Law No. 11 of 2012 and Government Regulation No. 65 of 2015 in implementing diversion and managing cases involving children under the age of 12. Verdicts are announced in open court, but the identities of the child, victims, and witnesses are kept confidential. The entire process aims to safeguard the rights of children and ensure justice within the juvenile criminal justice system.

Analysis of the application of the best interests of the child principle in court rulings from five District Courts in Indonesia reveals several challenges in implementing this principle. In cases such as No. 62/Pid.Sus.Anak/2017/PN.Tng and No. 03/Pid.Sus.Anak/2018/PN.Tng, judges have tended to emphasize prison sentences without considering social rehabilitation or the potential for the child's development. This suggests that in some cases, considerations regarding the child's best interests, such as educational opportunities and rehabilitation, have not been fully addressed. The imposition of prison sentences in these rulings frequently conflicts with the principles of protection and rehabilitation outlined in the Juvenile Criminal Justice System Law. Other rulings, such as No. 42/Pid.Sus-Anak/2019/PN.Tng and No. 25/Pid.Sus-Anak/2020/PN.Tng, shows that decisions to detain children often overlook recommendations for social rehabilitation and their impact on the child's future. Judges tend to prioritize imprisonment as a deterrent without considering potential negative effects on the child's education and social development. This indicates the need for improvements in considering the child's best interests and the application of more effective restorative justice approaches. Challenges in applying the best interests of the child principle include a lack of understanding of the Juvenile Criminal Justice System Law, as well as insufficient facilities and human resources within the police, prosecution, and judiciary. The implications of applying this principle include protecting and rehabilitating children, reducing the burden on correctional facilities, and avoiding negative stigma. However, obstacles such as inadequate dissemination of the law, limited infrastructure, and insufficient child protection units remain significant challenges.

Not only in Indonesia but also in various countries, different approaches to diversion are implemented. In Ireland, diversion is governed by the Children Act 2001, specifically in Part 4 (18). This law stipulates that diversion can occur if the child admits their wrongdoing and is willing to take responsibility. The goal of this mechanism is to educate the child about responsibility and honesty and to provide them with an opportunity to correct their behavior without undergoing formal judicial processes. In South Africa, the Child Justice Act 75 of 2008 regulates diversion in Section 52 (1). This law includes several criteria for applying diversion, such as the child's acknowledgment of responsibility, parental or guardian consent, and an assessment by the prosecutor to determine the suitability of diversion. Parental consent is a crucial factor as it ensures that all parties involved agree to the diversion process. In Japan, juvenile law governs diversion with a focus on the protection and development of adolescents. According to Article 3 of the Juvenile Law, Family Courts handle offenses committed by individuals aged 14-19, as well as offenses by children under 14 if they involve criminal acts. The primary aim of this law is to provide appropriate protection and handling for children and adolescents involved in criminal activities, with an emphasis on rehabilitation and character development.

Diversion Regulations Oriented Towards the Best Interests of Children

Indonesia as a nation governed by law, as stipulated in Article 1, Paragraph 3 of the 1945 Constitution, enforced the law based on applicable regulations to ensure justice for all citizens. This approach is underpinned by the values of Pancasila and is applied across various legal domains, including child protection. The Indonesian government has integrated child protection into its legal system through Law Number 23 of 2002 and Law Number 11 of 2012, which regulate the juvenile criminal justice system and diversion in line with the principles of the Convention on the Rights of the Child (CRC), ratified through Presidential Decree Number 36 of 1990.

The history of juvenile criminal law in Indonesia reflects an evolution from limited handling to the establishment of specific regulations under Law Number 11 of 2012. Before this law, the approach to children in conflict with the law was guided by Law Number 3 of 1997 and various older regulations, such as the Criminal Code (KUHP) and Supreme Court Circular Number 3 of 1959. Law Number 11 of 2012 replaced the older approach with a justice system focused on restorative justice and diversion, addressing the shortcomings in child rights protection found in previous laws. This law introduced a new approach to prioritizing child welfare and avoiding unnecessary criminal sanctions. While this represents progress in the juvenile justice system, challenges remain, including consistent implementation and the need for specialized facilities for children. The new regulations aim to ensure that the judicial process considers the best interests of the child and avoids the negative impacts of a harsh criminal justice system.

The implementation of diversion in Indonesia's juvenile criminal justice system, from 2020 to 2022, reveals variability in the execution across different law enforcement agencies. Data indicates that the Indonesian National Police, the Indonesian Prosecutor's Office, and the Supreme Court have varying levels of success in implementing diversion. The police recorded a percentage of cases successfully resolved through diversion at 9.70% in 2020, decreasing to 7.23% in 2021, and slightly increasing to 7.75% in 2022. The prosecutor's office showed similar results, with a diversion percentage of 12.34% in 2020, significantly dropping to 3.98% in 2022. Meanwhile, the Supreme Court exhibited significant fluctuations, with a diversion percentage of 2.7% in 2021, 1.2% in 2022, and a sharp increase to 12.6% in 2023.

Several factors contribute to the low implementation of diversion in Indonesia, including legal provisions that restrict diversion to crimes with a maximum penalty of under seven years, as well as resistance from the community and victims. Law Number 11 of 2012 stipulates that diversion should be conducted through deliberation involving the child, parents, victims, and relevant parties, utilizing a restorative justice approach. However, this process often encounters obstacles such as the victim's family's refusal to participate, difficulties in compensation, and a lack of understanding and engagement from those involved. Positive implications of diversion include psychological protection and rehabilitation for the child offender, and reducing the burden on courts and correctional institutions. Nonetheless, challenges persist, including the inability of the offender's family to participate in restitution, negative societal attitudes, and insufficient awareness of the state's responsibilities in child protection. These barriers highlight the need for further efforts to enhance the implementation and effectiveness of diversion within the juvenile justice system.

Children, as the future generation of the nation, must be protected from criminal sanctions that may cause undue suffering. Criminal law should be considered a last resort, not the primary solution. However, an analysis of five decisions from district courts in Indonesia, specifically in Medan, Central Jakarta, Semarang, Surabaya, and Makassar, reveals that judges often fail to optimally apply the principle of the best interests of the child. In these cases, all judgments imposed prison sentences on the children, even though the offenses committed were minor, with sentences of

less than five years. Data from the Tangerang District Court between 2017 and 2022 show a similar pattern, where all verdicts resulted in prison sentences for child offenders. These judicial decisions often focus solely on juridical and legal aspects without adequately considering non-juridical factors and the best interests of the child. The principle of the best interests of the child, as outlined in Article 28B Paragraph (2) of the 1945 Constitution and Article 2(d) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, mandates that the children's health and development should be prioritized in every legal decision.

The weaknesses of the diversion regulations in Indonesia's juvenile criminal justice system lie in the limitations set by Article 7 Paragraph (2) of Law Number 11 of 2012, which only allows for diversion in cases of offenses carrying a maximum penalty of less than seven years. This restriction creates injustice, as certain minor offenses that carry a penalty of more than seven years, such as carrying a sharp weapon, are ineligible for diversion. Moreover, in a civil law system that adheres to the principle of legality, written law serves as the primary guide, and this provision restricts the effective application of diversion. Consequently, only a few juvenile criminal cases can be resolved through diversion in practice. Another weakness of the diversion rules from the legal system aspect lies in the legal structure, which is constrained by the law and the lack of independence among law enforcement agencies such as the Police, Prosecutor's Office, and Judges. According to Lawrence M. Friedman, the effectiveness of law enforcement depends on the legal structure and the quality of law enforcement officers. In practice, the subjective mindset of law enforcement officers can lead to suboptimal implementation of diversion, particularly when the threat of punishment exceeds the seven-year limit. As a result, juvenile offenses often cannot be resolved through diversion, even though restorative justice principles might be applied to adult crimes. Without competent and independent law enforcement, achieving justice is difficult.

Based on data from the South Tangerang Police Resort, South Tangerang District Prosecutor's Office, and South Tangerang District Court, the implementation of diversion is often hindered by normative limitations that stipulate that diversion can only be applied to offenses with a maximum penalty of under seven years, even though some offenses committed by children are relatively minor. Court decisions that prioritize imprisonment indicate that the principle of the best interests of the child, which should be the primary consideration in juvenile legal processes, has not been optimally applied. Sanctions involving the deprivation of liberty should be considered a last resort, in line with the principle of *ultimum remedium*, as outlined in various regulations. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System mandates that diversion serves as a process to shift the resolution of juvenile cases from criminal justice to alternative processes outside the judicial system, to avoid stigmatization and provide children with the opportunity to reintegrate into society appropriately. The implementation of diversion aligns with the principle of restorative justice, which aims to protect children and offer opportunities for rehabilitation before imposing criminal penalties. However, in practice, the application of this principle continues to face various challenges that affect the effectiveness of diversion within the juvenile justice system.

In addressing issues related to children, the principle of the best interests of the child must be the foremost priority, as mandated by Article 28B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia and Article 2(d) of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. This principle emphasizes that the welfare, growth, and development of the child must be considered in every decision. The courts, as part of the legal system, must prioritize the best interests of the child, favoring alternative measures before resorting to criminal penalties as the last solution. The application of the best interests of the child principle is also related to the principle of *parens patriae*, whereby the state and judicial system have the

responsibility to provide protection and guidance to children, rather than merely imposing punishment. Juvenile delinquency should be viewed as an indicator of social problems that require appropriate intervention, rather than being met with punishment alone. Therefore, the juvenile criminal justice system must incorporate approaches that protect and nurture children, in line with the principles of restorative justice and the protection of children's rights.

The conditions for implementing diversion as stipulated in Article 7 of Law Number 11 of 2012, which only allows for diversion in cases of offenses carrying a penalty of less than seven years, need to be revised to ensure greater justice for victims. Even though offenders are punished, justice for victims remains crucial, especially in addressing the impact and trauma they have suffered. Restorative justice emphasizes compensation and rehabilitation for victims, as well as the relationship between the victim and the offender, rather than focusing solely on punishment. The approach aligns with the principles of justice that emphasize the protection of human dignity and social justice, as articulated by thinkers such as Immanuel Kant and John Rawls. The restorative justice approach focuses on healing and reconciliation, providing offenders with the opportunity to acknowledge their wrongdoing and apologize, and involving victims in the resolution process. It ensures that victims feel respected and understood and receive appropriate compensation without coercion. The legal system must ensure adequate protection for victims and provide fair procedures, by international principles and legal protections in Indonesia. Therefore, the implementation of diversion should consider not only the offense and wrongdoing committed by the child but also the fundamental meaning and purpose of diversion, which is to resolve issues collectively, restore the situation to its original state, and enable the child to recognize their mistake and take responsibility for their actions.

The implementation of diversion for juveniles varies across different countries, reflecting their respective legal systems. In Ireland, diversion is regulated under the Children Act 2001, which emphasizes the child's admission of guilt and taking responsibility as prerequisites. In South Africa, the Child Justice Act 75 of 2008 stipulates that diversion requires the child's admission of guilt, parental consent, and assessment by the prosecutor. Japan's Juvenile Law focuses on the protection of the child through peaceful and private hearings, involving various parties in the family court process. In China, the Victim Offender Reconciliation (VOR) managed by the People's Mediation Commission prioritizes mediation and legally binding agreements following the approval of the authorities. In Australia, particularly in South Australia, diversion has been implemented since 1972 under the Young Offenders Act, of 1993, employing a system of police caution and family conferencing to address minor offenses. This process includes informal warnings from the police, which are not recorded in the police records if the child admits guilt. These diverse approaches illustrate the efforts of these countries to balance justice for victims with the protection and rehabilitation of juveniles who come into conflict with the law.

CONCLUSION

The Diversion Regulation in Indonesia's Juvenile Criminal Justice System is governed by Law Number 11 of 2012, which replaced Law Number 3 of 1997. Although this law emphasizes a non-punitive approach, the implementation of diversion remains limited due to issues within the legal structure, legal substance, and legal culture. Law enforcement officers often fail to fully consider the principle of the best interests of the child, and imprisonment continues to be the primary option rather than the last resort. The dissemination of the law has also been suboptimal, leading to a lack of understanding and application of children's rights within the legal process. To improve the system, it is necessary to reformulate Article 7, paragraph (2), letter (a) of Law Number

11 of 2012 by removing the restriction on imprisonment under seven years and replacing it with the application of diversion for all juvenile offenses. This reform should consider the principles of the Convention on the Rights of the Child, restorative justice, and various legal, social, and psychological perspectives. If a diversion agreement is not reached, the judicial process can still proceed by the provisions of the law.

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