



The Settlement Concept of the Children in Conflict with Law (A Review of Diversion Approach)

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ABSTRACT:- “Every child shall entitled to live, grow, and develop and be protected from violence and discrimination”. That is what the 1945 Constitution of the Republic of Indonesia has been mandated. Legal protection to the children is an effort that is intended to prevent children from being subjected to false (child abused), either directly or indirectly in order to ensure the survival, growth, and development of children appropriately, physically, mentally and socially. In accordance with the basic philosophy of the treatment of children in conflict with the law to do ‘the best interest of the child’, the Law No. 11 of 2012 regarding Criminal Justice System for Juvenile Delinquency have been asserted the concept of restorative justice as a process of diversion. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Since the enactment of the Law No. 11 of 2012 until today, the application of diversion concept through restorative justice approach as a form to resolve the children cases is still very taboo. The other way, mostly of children cases in conflict with the law in the process ends at imprisonment. The objective of this research is to understand the essence of the settlement concept of the children in conflict with law related to the best interest of the child principle. It follows in order to construct a restorative justice principle which has legitimacy and applicable within the criminal judiciary system regarding the children in conflict with law in criminal case settlement.

Keywords:- Child, Diversion, Restorative Justice

I. INTRODUCTION

Children are the future generation and have an important role in the bedrock of healthy and prosperous communities and nations. For that reason, child needs exceptional attention, not only by the State, but also from the world community a whole. Once the importance of children's issues, then all countries in the world think to look for alternative forms of the settlement for the children in conflict with the law.

The term ‘children in conflict with the law’ according to UNICEF,¹ refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence. Most children in conflict with the law have committed petty crimes or such minor offences as vagrancy, truancy, begging or alcohol use. Some of these are known as ‘status offences’ and are not considered criminal when committed by adults. In addition, some children who engage in criminal behaviour have been used or coerced by adults. Too often, prejudice related to race, ethnicity or social and economic status may bring a child into conflict with the law even when no crime has been committed, or result in harsh treatment by law enforcement officials. According to Waluyo, being derived from the foreign law (relic of the colonial era), the Criminal Code has been obsolete, injustice, outmoded and unrealistic irrelevant for the present reality.²

There is some mention of children in conflict with the law in the International Convention on Civil and Political Rights (ICCPR)³, but the key international standard for children’s rights in youth justice is the United

¹ The United Nations Children’s Fund (UNICEF). *Children in Conflict with the Law*. Child Protection Information Sheet. May, 2006.

² Waluyo, B. (2015). Relevansi Doktrin Restorative Justice dalam Sistem Pemidanaan di Indonesia. *Hasanuddin Law Review*, 1(2), 210-226. Retrieved from: <http://pasca.unhas.ac.id/ojs/index.php/halrev/article/view/80>

³ Article 14(1) of the International Convention on Civil and Political Rights have mentioned that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his

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Nations Convention on the Rights of the Child (CRC). The CRC represents the first human rights treaty specifically concerned with the rights of children. The CRC stands out from other human rights standards as having reached 'virtual universality'.⁴

In the context of national law, Indonesia itself is one of 191 countries that have ratified the convention on children's rights in 1990 through Presidential Decree No. 36 of 1990 regarding the Convention on the Rights of the Child. Thus by ratifying this convention, then Indonesia has an obligation to fulfill the rights of all children without exception, one of the rights of children who need attention and protection of the rights of children, especially to the children in conflict with the law in the juvenile justice system.

Historically, the regulations related to legal protection of children in Indonesia itself can be traced from what has been mandated by the preamble of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), which among other things states that:

"...and then to form a Government of the State of Indonesia that protects all Indonesian people and the entire land of Indonesia and to develop the welfare of the people, the life of the nation, and participate in the world orderliness based on freedom, eternal peace and social justice, National Freedom of Indonesia is prepared in a Constitution of the State of Indonesia, formed in a structure of the State of the Republic of Indonesia with people sovereignty based on the One Supreme God, Just and civilized humanity, Indonesian unity and Democracy lead by wisdom in Deliberation/ Representation, and by realizing a Social justice to all Indonesian people."

It seems clear that these formulations give attention to children as part of the destination country. Furthermore, as the constitutional right, the implementation of state goals relating to child protection in the field of law can be seen also in Article 28B(2) of the 1945 Constitution which have been formulated that "*every child shall entitled to live, grow, and develop and be protected from violence and discrimination*".

The constitutional mandate is then formulated into various legislations which have also adopted international regulations such as: Law No. 4 of 1979 regarding Child Welfare; Law No. 23 of 2002 as amended by the Law No. 35 of 2014 regarding the Protection of the Children; and Law No. 11 of 2012 regarding Criminal Justice System for Juvenile Delinquency. Various provisions have been enacted in Indonesia is a testament to how big the attention of the Indonesian state against children, without exception towards children in conflict with the law.

Legal protection to the children is an effort that is intended to prevent children from being subjected to false (child abused), either directly or indirectly in order to ensure the survival, growth, and development of children appropriately, physically, mentally and socially. In accordance with the basic philosophy of the treatment of children in conflict with the law to do 'the best interest of the child', the Law No. 11 of 2012 regarding Criminal Justice System for Juvenile Delinquency has asserted the concept of restorative justice as a process of diversion, that all parties involved in a specific criminal acts jointly address the problem as well as creating an obligation to make things better by involving victims, children, and the community in seeking solutions to repair, reconciliation and reassurance which is not based on retaliation.

As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Since the enactment of the Law No. 11 of 2012 until today, the application of diversion concept through restorative justice approach as a form to resolve the children cases is still very taboo. The other way, mostly of children cases in conflict with the law in the process ends at imprisonment.

According to the Chairman of the National Commission for Child Protection of Indonesia or more commonly known in Indonesia as KPAI, Merdeka Sirait⁵ says that during the year 2014, reports of crimes committed children entered the institution there are about 1,851 complaints. That number increased in 2013 compared to only 730 cases. Nearly 52 percent of that figure is a case of theft followed by violence, rape, drugs, gambling, and persecution. In addition, 89.8 per cent of cases ends at imprisonment.

rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

⁴ Rios-Kohn (1998) as cited in Nessa Lynch. "Restorative Justice through a Children's Rights Lens". *International Journal of Children's Rights* 18 (2010): 161-183.

⁵ Source: Tempo.co "*Sepanjang 2014 Kejahatan Terhadap Anak Meningkat*", Avalibale online from: <http://gaya.tempo.co/read/news/2014/12/31/174632007/sepanjang-2014-kejahatan-terhadap-anak-meningkat> (Accessed May 16, 2015).

Beside the application of restorative justice principles on the handling of children in conflict with the law have been accommodated, but have to recognize that it's not comprehensively. In fact, many children in conflict with the law who commit minor crimes but still processed in a legal procedure without prioritizing versioned, so it ends at the judge's decision in the form of prison sanctions. On the other hand, there has been an increase in crime which carried a child from day to day, both modes and types of criminal acts.

II. THE OBJECTIVE OF RESEARCH

The objective of this research is to understand the essence of the settlement concept of the children in conflict with law related to the best interest of the child principle. It follows in order to construct a restorative justice principle which has legitimacy and applicable within the criminal judiciary system regarding the children in conflict with law in criminal case settlement.

III. METHOD OF THE RESEARCH

The type of research used in this paper is normative legal research with descriptive method. Reviewing of the settlement concept of the children in conflict with law related to the best interest of the child principle in the Indonesian criminal justice system. The data being used include secondary data consisting of primary law materials in the form of laws and regulations, tertiary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as tertiary law materials in the form of language dictionaries.

This research was conducted at the ranks of Regional Police of Southeast Sulawesi; the State Attorney of Kendari; the District Court of Kendari; and Penitentiary Klas II A of Kendari, Southeast Sulawesi, Indonesia. The analysis method applied in this paper starts with the abstraction of primary law materials, secondary law materials and tertiary law materials, leading to an understanding of the essence of the settlement concept of the children in conflict with law related to the best interest of the child principle as well as criminal law theories.

IV. RESULTS AND DISCUSSION

The settlement concept of the children in conflict with law as adopted in Law No. 11 of 2012 regarding the Criminal Justice System of the Child as a form of ratification of the Convention on the Rights of the Child has asserted the concept of restorative justice as a process of diversion,⁶ that all parties involved in a specific criminal acts jointly address the problem as well as creating an obligation to make things better by involving victims, children, and the community in seeking solutions to repair, reconciliation and reassurance which is not based on retaliation. Hence, this concept applying criminal liability and protection of children in a balanced manner. Consequently, restorative justice approach into alternatives to imprisonment that would be bad for children interest.

The application of the concept of restorative justice for child as offenders does not mean eliminating the punishment for children, but more than that the child acts cured by providing support for victims and requires offenders to take responsibility with the help of families and communities in a whole. Particularly related offenses threat under 7 years can be done by way of diversion or settled outside the legal process and require the restorative justice approach that involves actors (children against the law), the victim's family, parents actors and other parties associated with the motivation to prioritize problem solving together without forward retaliation.

In accordance with the basic philosophy for the establishment of the Law No. 11 of 2012 because the child can not understand what it does as well as promoting the best interests of the child and the corresponding with convention on the rights of the child (1990) which was ratified by Indonesia as a member of the United Nations through Presidential Decree No. 36 of 1990 states that the criminal approach is a last resort (*ultimum remedium*). Legal protection towards children in conflict with the law on this convention can be seen in Article 37(b) which asserted that, "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

As a result, with the enactment of the Law No. 11 of 2012 regarding the Criminal Justice System for the Child, there is rigor in the implementation of diversions, that diversion shall be pursued ranging from Pre-adjudication, Adjudication, and Post-adjudication.⁷

⁶ As Article 1 paragraph 7 of the Law No. 11 of 2012, which defines the transfer of settling disputes Diversion as the Son of the criminal justice process to the outside of the criminal justice process.

⁷ Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Source: "Glossary for Administrative Hearings". Washington State

Pre-adjudication

In the criminal justice system, this stage as an initial stage which is under the authority of the police in their function as law enforcement agencies to conduct an investigation of all criminal acts committed by both adults and children. The duty of police in conducting investigations against children in conflict with the law, both arrest and detention as stipulated in Article 43 of Law No. 3 of 1997 regarding the Indonesian Criminal Procedure Code.

In conducting the arrest, the presumption of innocence principle must be respected and based on sufficient evidence. The Indonesian Criminal Procedure Code, do not provide specific notion of sufficient evidence, so in practice is difficult to assess the evidence sufficient or not. Thus, it does not reflect the legal protection of the child, because it needs to be strictly regulated.

Accordingly, in terms of the investigation, Article 96 of Law 11 of 2012 asserted, "Investigator, Prosecutor, and the Judge intentionally discharge duty Diversion threatened with two years in prison two years and or a fine of 200 million rupiah." In the case of criminal offenses committed by children between 12-18 years old, the investigator shall ask for consideration or written advice from the supervising social workers (Article 27). Furthermore, the research community must be delivered by Bapas to investigators in the longest 3x24 hours after investigators received a request (Article 28).

Recently, the following report of children in conflict with law which has been received by the Police Resort of Kendari city from 2011 until July 2014 (Table 1).

Table 1 Report of Children in Conflict with Law by the Police Resort of Kendari City, Southeast Sulawesi 2011-2014

No	Year	Total Cases	Percentage (%)
1	2011	41 cases	23,16 %
2	2012	46 cases	25,98 %
3	2013	47 cases	26,55 %
4	2014*	43 cases	24,29 %
Total		177 cases	100%

* Until July 2014 Source: Data Polresta Kendari, edited (July 2014)

As a result by looking at the number of children in conflict with the law mentioned above, from 2011 until July 2014, Police Resort of Kendari City received as many as 177 cases (100%), with details: during 2011 as many as 41 cases or (23.16%), 2012 as many as 46 cases or (25.98%), in 2013 as many as 47 cases or (26.55%), and up to July 2014 as many as 43 cases or (24.29%). Thus, the number of children in conflict with the law from 2011 through 2014 as many as 177 cases. Conversely, it is experiencing a significant increase both in quantity and quality from year to year.

In addition, based on the type of criminal offenses committed by children in conflict with the law from 2011 to 2014 indicated that the most prominent crime is theft, persecution, beatings, traffic accidents, gambling, extortion, etc.

Table 2 The settlement methods of criminal offenses committed by children in conflict with the law in Kendari City, Southeast Sulawesi 2011-2014

No	Year	Total Cases	Restorative Justice Approach	Retributive Justice Approach
1	2011	41 cases	6 cases	35 cases
2	2012	46 cases	9 cases	37 cases
3	2013	47 cases	6 cases	41 cases
4	2014	43 cases	8 cases	35 cases
Total		177 cases	29 cases	148 cases

* Until July 2014 Source: Data Polresta Kendari, edited (July 2014)

Based on the criminal statistics above (Table 2) indicated that, from 177 cases of criminal offenses committed by children in conflict with the law in Kendari City during 2011-2014, there were only 29 cases were dealt with using the restorative justice principle. In contrast with the application of retributive justice approach which reached 148 cases handled by the Police Criminal Investigation Unit Kendari.

As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. Based on the description of the facts above, one thing for sure that many people choose the punishment as the main line resolve criminal cases (the purpose of which provide a deterrent effect), it turns out after returning to society, the child actually educated into criminals another kind, even in many cases, people who have undergone punishment nonetheless repeat offenses (criminal act) or recidive in the future.

It also has become its own consideration of the effectiveness of sentencing in the criminal justice system, so it is necessary to find other ways that are able to guarantee the completion of the criminal case effectively and deal with the principles of justice. How to completion of the criminal case in question is the restorative justice approach.

According to the authors, the application of the concept of diversion at the level of adjudication, should be mandatory conducted by the parties items, namely the perpetrators and their families and victims and their families were completed by local community leaders such as religious leaders, traditional leaders, or other public figures Whose wisdom persona and well respected by the parties.

The police in the Indonesian criminal justice system basically just as a facilitator. When the case came to the police and the child had found the perpetrator and the victim in the investigation process, after the investigators to facilitate the process of diversion through the submission process to the diversion of public figures have been determined. Whatever the outcome of the peace process, will only be acted upon by the police. If the peace efforts reached, then the police will discontinue its case. Conversely, if the peace efforts is not reached, then the police have to prove and forward it to the local prosecutor. The model is called the 'Prapenal' models in the pre-adjudication.

Adjudication

The second stage of the criminal justice system is the adjudication. At this stage, the prosecution as one of the law enforcement agencies provides demands in front of the court which headed by the judge to make a decision. Then, the first step of this court session is filing a case to court, including cases of children in conflict with the law by the attorney as a representation of the attorney institution.

The prosecutor as one subsystem of criminal justice is the integral unity, mutual influence and co-exists with other subsystems to achieve the objectives of the law. However, in case handling children in conflict with the rule of law by the Attorney both in the Criminal Procedure Code, the Law on Public Prosecution and the Law on juvenile justice has opened an opportunity for the Prosecutor to conduct diversion approach against children in conflict with the law.

The term of 'Diversion' as contained in *the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)* described diversion as Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority. As a result, Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions (point 6.1).

Ideally, similarly to the role of Police, prior to make a prosecution, the Prosecutor should make efforts to progressively diversion to the parties, either the victim and their families or the offender and his family. At practical level, the role of the prosecutor in making diversion is working to bring the two sides, the Offender and the victim as well as their family to find a win-win solutions. If the peace efforts reached, then the prosecutor must halt prosecution. That model is similar to 'Plea bargaining system' in the United States.

In the countries of the Anglo-Saxon system commonly known a Plea Bargaining. Practice Plea Bargaining is done by making a statement of guilt or Guilty Plea known as the reward in the form of a reduced sentence for a defendant who pleads guilty⁸. According to Kerper⁹, *Plea Bargaining* is a process in which the public prosecutor and the defendant in a criminal case in negotiations that benefit both parties. Typically, it includes a guilty plea of the accused to obtain waivers demands or to gain some other advantage which allows for leniency.

⁸ Andrew Ashworth, *Sentencing and Criminal Justice*. Third edition. United States: Buttersworth, pg. 24.

⁹ Hazel B. Kerper, *Introduction to the criminal justice System. Second ed*, United States: West publishing company, pg. 185.

Historically, the application of the Plea Bargaining System models began to emerge in the mid-19th century as a form of special treatment to the defendant because he had done well against the victim.¹⁰ Besides the criminal justice system conditions at that time were not effective because the number of incoming cases resulting in the length of the timing of a case.¹¹ Thus, the prosecutor attempts to do versioned this model needs to be formulated to provide protection to children in conflict with the law.

Post-adjudication

The last stage of the criminal justice system is a post-adjudication or the stage of implementing court decisions which conducted by correctional institutions (prisons). The objective of this stage is intended to promote the criminal offenders back to the community. In the Indonesian criminal justice system, this stage is very significant for rehumanize human deeds diverge as stated explicitly in Article 5 of Law No. 12 of 1995 concerning the Corrections, that the coaching system correctional based on the principles of security, equality of treatment and care, education, guidance, respect for human dignity, loss of independence is the only one suffering, and ensuring the right to keep in touch with family and certain people. Correctional (imprisonment) in his capacity as one of the sub-systems within the criminal justice system in an integrated way (*integrated criminal justice system*) carry out tasks in the field of custody services, coaching inmates, children's state and correctional counseling clients. Implementation of this duties is carried out in an integrated manner together with other law enforcement agencies (Police, Attorney, and Judge) in order for them after undergoing imprisonment, no longer acted against the law (repeated offender), and can be returned to citizens and can play an active role in development.

V. CONCLUSION

The application of the concept of diversion in the settlement of cases of children in conflict with the law in the Indonesian criminal justice system, ie at the pre-adjudication carried out by police in Kendari has been conducted in accordance with the mandate of the law, especially the Law No. 11 of 2012 regarding the Criminal Justice System for the Child. Consequently, adjudication stage in the form of prosecution by the prosecutor and trial in court by the judge in Kendari only one case of children in conflict with the law are resolved in diversion approach. In addition, on the stage of post-adjudication, the law of criminal justice system for the child does not regulate the application of restorative justice at the level of correctional institutions (imprisonment).

Suggested to the law enforcement agencies in the Indonesian criminal justice system to implement the mandate of the Law No. 11 of 2012 in a comprehensive manner and in line with the best interest for the child as a basic principle in handling the children in conflict with the law. Specifically to the police officer, in order to use discretionary as their authority or use prapenal to make efforts diversion, while the prosecution to be able to use deponering form or adopted *Plea Bargaining System* as an alternative form in the handling of children in conflict with the law.

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