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## RESEARCH ARTICLE

# Legal Protection of Children in Conflict with the Law through Restorative Justice Principle (A Review of the Prosecutor's Role)

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## Abstract

Children have special characteristics which can not be equated with adult offenders. That is why the purpose of punishment against children should be tailored to the needs of the child. Recent developments in criminal law that became an international trend or tendency is to find an alternative forms of criminal cases toward the children. As the successor generation, children have a strategic role that ensures the existence of the nation in the future. It is become the main concern of Indonesian Criminal justice system who has adopted the Convention on the Rights of the Child through Presidential Decree Number 36 Year 1990 regarding Ratification of Convention on the Rights of the Child. The negative stigma toward children was began since those has firstly against law enforcement officers therefore an alternative model of handling such children is required. Based on the perspective of the child's interests, then developing of restorative justice and diversion principles as an alternative methods should be considered in handling children cases.

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## INTRODUCTION

Children are a gift of the God Almighty and considered as the most valuable treasure compared to other possessions. At the same time, each child also has the right to live, grow and develop as well as be protected from violence and any discrimination.

A child related his personality has the logical reasoning which not good enough to distinguish between good and bad things. Therefore, a criminal offense by children in generally is a process of imitating or affected persuasion from adults. Then formal criminal justice system, which in turn puts the child in prisoners' status would bring considerable consequences in terms of child development. As cited by Zulchaina's report, the imprisonment even makes the child more professional in doing a crime.

One of the issues of child protection in Indonesia is the high number of children in conflict with the law. In US Courts, as an effort to establish a Special Courts for children, juvenile delinquency becomes the main topic to be discussed. There are two things that the major topic of discussion, namely from the aspect of legal violations and the nature of the child's actions, whether it deviates from the norm and breaking the law or not.

The term children in conflict with the law' 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.

Practically, children in conflict with the law is an act of violation of norms, both legal norms and social norms committed by children younger ages.<sup>1</sup> Children occupy a special place in the law. Legal systems presume that children do not have the mental capacity to care for themselves or make their own choices. Instead, many of the choices a child has are often made by the child's parent.

Special Courts for children (juvenile courts) was held in order to solve the problem of criminal acts committed by those who belong to the children, all who are living in a judicial hearing is mandatory for children in the courts in the judicial environment. The law on the juvenile court will provide a legal basis for the protection of national laws through a judicial order.

In addition to the Law No. 3 Year 1997 concerning the Juvenile Court which is updated by the Law No. 11 Year 2012 concerning the Criminal Justice System for Juvenile Delinquency, which is intended as a legal device which is more steady and sufficient in carrying out construction and providing legal protection of children as well as law enforcement is problematic with the rights of the child and the child law to embody the principle of the best interests of the child (the best interest of the child). Existing provisions in the law concerning the juvenile court has been partly refers to the signs of this kind. Children as immature individuals need to get legal protection/judicial (legal protection) in order to secure his interests as a member of the community.

The protection of children's rights is also regulated in a special international conventions. Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in Article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children.

Based on international instruments human rights above, looks very clear that the State was very attentive and protect the rights of children. The rights of the child shall be upheld by everyone. As it turns out in practice, however, it has certain weaknesses, particularly in view of the children interest. First, punishment model in Indonesia until now sometimes still treats children who are involved in criminal action as an offender who are punished as an offender of a criminal action that is conducted by adults. Second, another issue regarding legal arrangement of children in conflict with the law are related their negative assessment by the peoples (stigmatic).

One of the concepts considered to be appropriately applied in dealing with various legal issues as described above is the approach of restorative justice principle. The restorative justice approach in criminal (penal) case concerning legal protection of children in conflict with the law is considered as a new method, although most of the patterns being applied have been rooted in the values of local wisdom.

The restorative justice principle is an approach which is more focused on creating conditions of harmonization and balanced justice for the victim and the perpetrator of crime. The criminalization oriented mechanism of criminal procedure and justice is shifted to the process of dialogue and mediation with an orientation towards the restoration of justice for victims and reaching an agreement for a more just and balanced criminal case settlement for the victim and the offender concerned.

The restorative justice concept is understood by some parties as a form of non-litigation or settlement outside the framework of the criminal judiciary system. Although in essence the concept of restorative justice is a criminal law concept and it is different from the concept of alternative dispute resolution in the settlement of civil cases. Similarly to the concept of diversion in the provisions of Law No. 11 Year 2011, this is a concept which in fact focuses on children as perpetrators of crime. As well as the implementation of restorative justice concept which has adopted Joint Decree of the Chairman of the Indonesian Supreme Court, Attorney General, Chief of National Police, the Minister of Justice and Human Rights, the Minister of Social Affairs and the Minister of Women Empowerment and Child Protection No. 166/KMA/SKB/XII/2009, No. 148A/A/JA/12/2009, No.B/45/XII/2009, No. M.HH-08 HM.03.02 of 2009, No.10/PRS-2/KPTS/2009, No. 02/Men.PP and PA/XII/2009 regarding the Handling of Children in Conflict with the Law.

### Identification of the Issue

The issue to be discussed in this paper is "How does the legal protection of children in conflict with the law through restorative justice principle find its legitimacy within the criminal law enforcement concept and its relations of the prosecutor's role?"

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<sup>1</sup> Mark Theoharis. 2011. *Child Abuse: Laws & Criminal Penalties*. Berkeley: Nolo Publisher. pg. 19

## Method of Research

The type of research used in this paper is normative research also known as doctrinal research<sup>2</sup> by reviewing the handling of children in conflict with the law. The data being used include secondary data consisting of primary law materials in the form of laws and regulations,<sup>3</sup> secondary law materials in the form of reference books, opinion of experts, and the outcomes of previous research, as well as journal articles related the Indonesian criminal law reform issues.

## Analysis and Discussion

### Children as Perpetrators of Crime

Legal protection of children in a community, is a measure of civilization. Child protection activities essentially is a legal actions that resulted legal consequences.<sup>4</sup> Therefore, as a State, it's an obligation to make it happen. Legal guarantees is needed for the protection of children. Legal certainty needs to be cultivated for the sake of sustainable child protection and prevent abuses that have a negative impact on the children interests.<sup>5</sup>

According to National Commission for Child Protection of Indonesia or more commonly known in Indonesia as KPAI, related to children which in conflict with the law throughout the mid of 2010 there were 1,471 children.<sup>6</sup> Furthermore, data from the Indonesian Commission on Child Protection (re: KPAI), shunt each year about 150 complaints regarding children which in conflict with the law.<sup>7</sup>

Based on data from the Directorate General of Corrections of the Ministry of Justice and Human Rights, the number of child prisoners increased from 5,630 children in March 2008 to 6308 children in early 2010.<sup>8</sup> These conditions are not only extremely poor, but also very worrying because it illustrates that the actual handling of children in conflict with the law have not actually reflect the perspective of child protection. Various improvement efforts have been made, but the situation has not much changed. Children in conflict with the law are always resolved by imprisonment.

Whatever the reason, imprisonment and detention will always contrary to the principle of the protection toward the children. Because of prison life, can turn off the development of the child, full of violence and become media internalization of higher crime, psychological trauma, as well as the labeling of children throughout his life. In addition, according to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as "the Beijing Rules") point 19.1 stated that, "The placement of a juvenile in an Institution shall always be a disposition of last resort and for the minimum necessary period".<sup>9</sup>

According to the results of analysis and monitoring of the Indonesian Commission on Child Protection, there are at least 3 (three) as the main cause of the number of children in Indonesia against the law, namely: First, there is the doctrine and the views are deeply entrenched in our society, that all children one should be punished. Punishment is justice means processed as an adult. Second, the culture of law enforcement in Indonesia who prefer formal justice process in children, rather than the other way is actually also possible through the process of restorative justice (fairness in relation recovery methods) and diversion (diversion penalties). Third, there are state regulations that indeed criminalize child, the juvenile justice provisions as reflected in the Law No. 11 Year 2012 concerning the Criminal Justice System for Juvenile Delinquency.

Regulation on the rights of children in relation to the responsibilities of the offenses can be seen in the United Nations Resolution No. 45/113 regarding United Nation Rules for the Protection of Juveniles Deprived of their Liberty, which stated that: Rule 1.1. Imprisonment should be used as a last resort; and Rule 1.2. Deprivation of the liberty of a juvenile should be disposition of last resort and the minimum necessary period and should be limited to exceptional cases.

### Restorative Justice Principle and Legal Protection for the Children as Perpetrators of Crime

Restorative justice values give the same attention to the victim and the perpetrator. Authority to determine the sense of justice is in the hands of the parties, not only by the state. Either on retributive or restitutive justice approach.<sup>10</sup>

<sup>2</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2005, pg. 35.

<sup>3</sup> Morris L. Cohen dan Kent C. Olson, *Legal Reserach in A Nutshell*, West Publishing Company, St. Paul Minnesota, pg. 1-3.

<sup>4</sup> Abdul G. Nusantara, *Hukum dan hak-hak Anak*, disunting oleh Mulyana W. Kusumah, Jakarta : Rajawali, 1986, pg. 23.

<sup>5</sup> Arief Gosita, *Masalah Korban Kejahatan*, Jakarta : Akademika Pressindo, 1993, pg. 222.

<sup>6</sup> Komisi Perlindungan Anak Indonesia, *Menuju Sistem Peradilan Anak di Indonesia*, Bahan Rapat Dengar Pendapat (RDP) KPAI, September 22, 2010.

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

<sup>8</sup> Source: "Jumlah Anak di LP Meningkat" Kompas, April 6, 2010

<sup>9</sup> Available online at: <http://www.un.org/documents/ga/res/40/a40r033.htm> Accessed March 10, 2014.

<sup>10</sup> Harkristuti Harkrisnowo, *Pendekatan Restorative Justice dalam Sosialisasi RUU Sistem Peradilan Pidana Anak*, 2010.

Law enforcement through the criminal justice system at the moment still dominated by the positivist way which assumes that the settlement of criminal cases only relied by the law. It is quite contrary to the view that the law is only a last remedy (*ultimum remedium*).

Various countries have developed the concept of Restorative justice as a concept applying a new method for the settlement of criminal matters. The implementation of the restorative concept in such Countries has been designed as a new method more commonly applied for the settlement of criminal cases involving children in conflict with the law, as well as misdemeanours, focusing on the reconciliation of victims, offenders, and the community concerned.

The implementation of the restorative justice principle as an approach in settling criminal cases has raised concern among many parties, particularly related to legitimacy, accountability, as well as supervision related aspects in the application of such method.<sup>11</sup> Understanding and the implementation of the restorative justice principle which tends to position the criminal case settlement mechanism by taking it out of the criminal judiciary system framework, is in fact a source of concern to the author, not only due to the program's poor public accountability mechanism, but also related to the concern expressed by OC Kaligis about the "miscarriage of justice" mentioned in his Professorial Inauguration speech on November 8, 2008.<sup>12</sup>

The legitimacy of the criminal judiciary system according to OC Kaligis<sup>13</sup>, lies between two pillars, namely: effectiveness and fairness of the criminal judiciary system. Effectiveness is assessed based on the ability and precision or accuracy in detecting, conducting investigation, probe, inquiry, prosecution, examination in the hearings, up to the point of imposing the appropriate punishment on the defendant who has been proved guilty of committing a criminal act, up to the level of enforcement of the criminal punishment.

Introduction of restorative justice in Indonesian criminal system is still partial and incomprehensive, which are scattered in various regulations. As it turns out in practice, however restorative justice with welfare modern approach regarded as a more humane punishment for the child interest. The principle of restorative justice is an exploration results and the comparison between welfare to justice approach that was initiated by John Braithwaite, known as reintegrative shaming because this model shifts the value of philosophical handling of children criminal cases.<sup>14</sup>

### **Diversion on the Criminal Justice System for Juvenile Delinquency**

According to the historical development of criminal law, the term of "Diversion" was first put forward as a vocabulary in juvenile justice implementation report which submitted by President's Crime Commissions of Australian in the United States in 1990.<sup>15</sup> Children who have violated the law or committed a crime greatly influenced by several other factors beyond the child.

The protection of children from the influence of the formal process of the criminal justice system, then the resulting human thought or lawyers and humanitarian has agrees to make formal rules issued to a child (remove) who have violated the law or commit criminal acts of the criminal justice process by providing alternative which is considered better for the child. Based on these thoughts, it gives birth to the concept of Diversion where in the Indonesian terms is called 'Diversi' or redirection.<sup>16</sup>

To avoid the negative impact of the criminal justice process against children, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) has provided guidelines as an attempt to avoid the negative effects of criminal proceedings against children. These actions are called diversion as set out in Rule 11.1, 11.2 and 17.4 of the Beijing Rules.<sup>17</sup>

There is an assumption in the criminal justice system with restorative paradigm that in achieving the goal sanctions, then included the victim's entitled to be actively involved in the judicial process. Indicators of the achievement can be seen whether the victim has been restored, the satisfaction of victims, the amount of compensation, awareness offender for his actions, the number of agreements made improvements, the overall service quality of work and the process.

<sup>11</sup> Declan Roche, 2003, *Accountability of Restorative Justice*, Clarendon Studies of Criminology, Oxford University Press, New York, pg: 19.

<sup>12</sup> Otto Cornelis Kaligis, 2008, *Miscarriage of Justice dalam Sistem Peradilan Pidana: Perlunya Pendekatan Keadilan Restoratif*, (Miscarriage of Justice in the Criminal Judiciary System: The Need for Restorative Justice Approach), Professorial Inaugural Lecture, Universitas Negeri Manado, North Sulawesi, pg. 7-8.

<sup>13</sup> *Ibid*, pg. 13-14.

<sup>14</sup> *Ibid*

<sup>15</sup> Marlina, "Penerapan Konsep Diversi Terhadap Anak Pelaku Tindak Pidana dalam Sistem Peradilan Pidana Anak", Jurnal Equality, 2008, pg. 1.

<sup>16</sup> Abdi Reza Fachlewi Junus, *Peran Jaksa Dalam Menerapkan Konsep Diversi Terhadap Anak Yang Berkonflik Dengan Hukum*, Indonesia University, 2012, pg. 61

<sup>17</sup> Setya Wahyudi, *Implementasi Ide Diversi Dalam Pembaruan Sistem Peradilan Pidana Anak Di Indonesia*, pg. 35

The purpose of the implementation of the diversion program is to prevent crime more children in the future. Prevention of crime carried the child in the form of community supervision, restitution, compensation, fine, counseling or activities involving the family (family intervention).<sup>18</sup>

The formulation of legal norms into law is important for the public and law enforcement to know how law. Besides law enforcement will determine the authority to act as it is matched in the formulation of legislation. Then, community provide guidance to actors and act as mentors and provide input to the court about the background of a crime. For the purposes of offender rehabilitation, social institutions necessary changes in attitude and behavior of adults. Rehabilitation of offenders is done by having the character of learning by doing, counseling and therapy to encourage the active involvement of the parties.

### **Prosecutor's Role in Handling of the Children in Conflict with the Law**

Since the enactment of the Law No. 11 Year 2012 regarding the Criminal Justice System for Juvenile Delinquency, the Prosecutor as law enforcement agencies are clear position in its role in handling children in conflict with the law. In accordance with the duties contained in Law No. 16 Year 2004 regarding the Indonesian Attorney, the Attorney in the criminal justice system is one of the integrated subsystems, which play a role Prosecutor to conduct the prosecution.

Bagir Manan<sup>19</sup> mentioned that restorative justice requires a number of substances that contain several principles, among others: joint participation between the perpetrator and the victim, and society; put the perpetrator and the victim as 'stakeholders' in the search for a fair settlement for all parties (win-win solution), and the agreement between them to choose the path of informal and personal.

The concept and this principle has long been practiced by a number of indigenous peoples in Indonesia. Therefore, the effort to make this approach as an alternative model in handling the issue of children in conflict with the law is prospective, meaning that living modified from practices that are conventionally existing and evolving in a number of places in Indonesia.

In line with the understanding introduced by Howard Zehr,<sup>20</sup> the restorative justice approach in settling a criminal case must be based on justice and legitimacy as its reinforcement aspect, therefore, it must remain within the criminal punishment framework referred to as "restorative punishment". Such view of Zehr implies the notion that, basically, the restorative justice principle must be applied within the criminal judiciary system, and settlement cannot be reached if it is conducted outside the criminal judiciary system.

To determine the differences between retributive and restorative justice approach in settling disputes of children in conflict with the law, can be seen in the Table 1 below:

**Table 1.** The differences between retributive and restorative justice approach in settling disputes of children in conflict with the law

No.	Restorative Justice Approach	Retributive Justice Approach
1	Crime formulated as a violation of a person against another person, and is recognized as conflict	Crime is defined as a violation of the country, the nature of the conflict of evil is obscured and repressed
2	The main concern on solving the problem of accountability and liability in future	The main concern is directed to the determination of the errors of the past
3	Normative properties built on the basis of dialogue and negotiation	The relations of the parties is resistance, through a process of regular and normative
4	Restitution as a means of improvement of the parties, reconciliation and restoration as the primary goal	The implementation of suffering to provide a deterrent effect and prevention
5	Justice formulated as relations rights, assessed on the basis of results	Justice formulated with intent and with process
6	Target attention to the improvement of social loss	Social disadvantages replaced by another one

<sup>18</sup> *Op.Cit.*, pg. 141.

<sup>19</sup> Manan, Bagir (2008). "*Restorative Justice (Suatu Perkenalan)*" dalam Refleksi Dinamika Hukum Rangkaian Pemikiran dalam Dekade Terakhir, Perum Percetakan Negara-RI, Jakarta.

<sup>20</sup> Howard Zehr, 1990, *changing Lenses, A New Focus For Crime and Justice*, Herald Press, Scottdale PA, p. 209 as cited by Eva Achjani Sulfa, June 2009, Doctoral Dissertation *Opcit*, pg 128.



7	Society as a facilitator in restorative process	Society is on the side line and displayed in the abstract by country
8	The role of the victim and the offender are recognized, both in the problem as well as the completion of the rights and needs of victims. Criminals are encouraged to take responsibility	Action is directed from the state in criminal, the victim must be passive
9	Offender accountability is formulated as an understanding of the impact of actions and to help decide on the best	Accountability of the perpetrators of criminal acts defined in the framework of criminal
10	Criminal acts be understood in the context of a comprehensive, moral, social and economical	Criminal acts defined in legal terminology and purely theoretical without a moral dimension, social and economic
11	Stigmatization can be removed through restorative actions	Stigma of crime can not be eliminated

Source: *Secondary data, edited (2013)*

Based on the analysis of the table above, it shows that the legal development in recent years has undergone a law reform perspective in handling children who commit mischief and unlawful acts. In response to recent child cases, many States Parties as well as Indonesian criminal justice system have taken or are taking legislative measures to address the problems of children in conflict with the law.

Indonesian legal experts and policy makers began to think of a more appropriate solution alternatives in the treatment of children by giving more attention to involving them directly (reintegration and rehabilitation) in solving problems, different ways of handling adult.

Restorative justice is a response to offending which focuses on repairing the harm caused by the offence and effecting reconciliation between the victim and the offender. According to Articles 37 and 40 of the Convention on the Rights of the Child, children in conflict with the law have the right to treatment that promotes their sense of dignity and worth, takes into account their age and aims at their reintegration into society. Also, placing children in conflict with the law in a closed facility should be a measure of last resort, to be avoided whenever possible. The convention prohibits the imposition of the death penalty and sentences of life imprisonment for offences committed by persons under the age of 18.

The awareness to make the criminal justice as a final step to deal with Children in Conflict with the Law (or commonly known in Indonesia as ABH) is reflected in the convention agreed by the countries in the world. There is some mention of children in conflict with the law in the International Convention on Civil and Political Rights (ICCPR) (Article 14(4)), but the key international standard for children's rights in youth justice is the United Nations Convention on the Rights of the Child (CRC). The CRC represents the first human rights treaty specifically concerned with the rights of children. Include international instruments, among others: the Beijing Rules on 29 November, 1985, The Tokyo Rules dated December 14, 1990, Riyadh Guidelines dated December 14, 1990, and Havana Rules dated December 14, 1990.

Indonesian government's commitment to child protection has existed since the founding of this country. It can be seen in our basic constitution, where in the Preamble of the 1945 Constitution stated that the goal of this country was founded, among others, to promote the general welfare and educating the nation. Implicitly, the general welfare and the nation's intellectual life is dominated connotation because of the intellectual life of the nation's children in particular be done through the process of education, where learning spaces typically contains children of all ages. As mentioned in Article 34 (1) that, "the indigent and abandoned children shall be raised by the state".

## Conclusion

Child protection is an effort to create the conditions in which children can exercise their rights as a child. Based on the concept of parents *patriae*, the state provides care and protection to children as befits the parents to their children, then the handling of children in conflict with the law should be handling in the best interest for the child.

The concept of diversion in the provisions of Law No. 11 Year 2011, this is a concept which in fact focuses on children as perpetrators of crime. As well as the implementation of restorative justice concept which has adopted Joint Decree of the Chairman of the Indonesian Supreme Court, Attorney General, Chief of National Police, the Minister of Justice and Human Rights, the Minister of Social Affairs and the Minister of Women Empowerment and Child Protection No. 166/KMA/SKB/XII/2009, No. 148A/A/JA/12/2009, No.B/45/XII/2009, No. M.HH-08

HM.03.02 of 2009, No.10/PRS-2/KPTS/2009, No. 02/Men.PP and PA/XII/2009 regarding the Handling of Children in Conflict with the Law.

The purpose of the implementation of the diversion program is to prevent crime more children in the future. Prevention of crime carried the child in the form of community supervision, restitution, compensation, fine, counseling or activities involving the family (family intervention). All programs are expected to be useful diversion to prevent further child crime. Starting from the objectives of the diversion program above, the concept of diversion can be used as a tool in criminal policies.

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