

# **JUVENILE JUSTICE SYSTEM THROUGH DIVERSION AND RESTORATIVE JUSTICE POLICY**

**Dr. Dra. Hj. Dyah Listyarini, SH. M, Hum.**

## **Abstract**

*Indonesia as a state of law has ratified several international human rights instruments, especially the Convention on the Rights of the Child, in which the state should ensure the protection, respect, fulfillment, promotion, and enforcement of children's rights. In fact, many children have been treated unjustly in the fulfillment of their rights when conflicting with the law. Methods of legal protection of the rights of children conflicting with the law are based on the provision that "every child has the right to survive, grow and develop as well as the right to protection from violence and discrimination". Other ways to protect children's rights may also include the policy that children conflicting with the law should be treated humanely in accordance with their dignity and rights; special personnel should be provided for their companion and counseling; sanctions should be appropriated for the best interests of the children; and special facilities and infrastructure for children should be equally provided. This means that appropriate sanctions should hence be supported through the process of resolving cases using the principle of "diverse and restorative justice. The concept of diverse and restorative justice can be applied to the crime of under 7<sup>th</sup>-year punishments and non-repeated crime. Methods for handling children who have conflicts with the law have hitherto emphasized on normative juridical processes such as investigation, prosecution, and examination of the case by the judge (in court). The processes, however, have not guidelines or technical manuals for law enforcement officers to implement the non-litigation settlement for children cases.*

**Keywords:** *Diversion, Restorative Justice, Delinquency Child, Convention on the Rights of the Child,*

## **1. Introduction**

Government policy in child protection has been established through several laws. 64 articles regulates about child protection. Firstly, treatment towards children must be done as humanly in accordance to children's dignity and rights. Secondly, special personnel must be provided to accompany children since early

stage. Thirdly, special facilities must be provided. Fourthly, the application of sanctions must be appropriate to the best interests of the child. Fifthly, continuous monitoring and recording on the development of children in conflict with the law. Act No. 3 of 1997 on Juvenile Court regulates how crimes committed by children handled, among them: judge, public prosecutors, investigators and legal advisors and other officials in the trial must not wear a robe or uniforms; Children trial held in private; The judge hearing the child is a special judge, the child case decided by a single judge; Availability of correctional supervising in children trial; Investigation on naughty children was done by a special investigator; Investigators shall investigate in family atmosphere and shall be kept confidential, and every child were entitled to legal aid since they were arrested or detained.

International juvenile criminal trials were based on Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) which listed principles:

1. Non-discrimination against children of criminal acts perpetrators in the criminal justice process.
2. Determination of the child age limit in criminal liability against children
3. Imprisonment used only as the last effort.
4. Diversion was done with the approval of the child or parent/guardian.
5. Protection of child perpetrator's privacy
6. Regulation of juvenile justice process must not contradict against this principle<sup>1</sup>

Legal protection of children involves institutions and an adequate legal instrument. The enactment of Act No. 3 of 1997 on Juvenile Justice is a solid legal pitfall in order to provide child protection. This legislation has determined the difference in treatment in procedural law, starting at the beginning of investigation until the case investigation at children's court. Differentiation of children's penalty is determined by the Penal Code, which specified half of the maximum penalty of

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<sup>1</sup>United Nation Standard Minimum Rules for the Administration of Juvenile Justice(The Beijing Rules Adopted by General Assembly Resolution 40/33 dated 29 November 1985.

½ of the adults as the maximum penalty, while the imposition of death penalty and life sentence shall not be applied to children.<sup>2</sup>

Although it was written in the preamble of Act No. 3 of 1997 on Juvenile Court that the purpose of protection in child court was to warrant the child's growth, the provisions stipulated in Act No. 3 of 1997 on Juvenile Court felt more incriminating. There are provisions which are inconsistent between Act No. 3 of 1997 on Juvenile Court to the Criminal Code, one of which was issues of conditional discharge. According to Article 29 of Act No. 3 of 1997 on Juvenile Justice, conditional discharge can only be applied for imprisonment and the maximum length of the trial period both for committing crimes or violations. Meanwhile, according to the Criminal Code, conditional discharge can be imposed not only to imprisonment but also to detention, heavy criminal fines, and an additional penalty. Even for probation was defined differently between crimes and violations under the Criminal Code. Similarly, in Act No. 39 of 1999 on Human Rights, child protection issues received considerable attention, as stated in Article 52 paragraph (2) which asserts that children rights are human rights and, for its interests, the children rights was recognized and protected by law even in the womb.<sup>3</sup>

The enactment of Act No. 11 of 2012 on Child Criminal Justice System does not mean it has completed the issue of children in conflict with the law. Among these issues were prosecutors in child cases still put criminal charges and no action. As a result, special judge keeps sentencing penalty. Sentencing by the judge was not wrong, but the judge should reconsider the benefits of its sentencing. One of the policies of Act No. 11 of 2012 on Child Criminal Justice System is the concept of diversion and restorative justice. Diversion is a policy that is carried out to prevent offenders from the formal criminal justice system. Diversion is done to

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<sup>2</sup>Wagiati Soetodjo, *Hukum Pidana Anak*, Bandung: Refika Aditama, 2010, page.3.

<sup>3</sup>Syamsir Rozali Abdullah, *Perkembangan HAM dan Keberadaan Peradilan HAM di Indonesia*, Bogor: Ghalia Indonesia, 2004), page. 19.

provide protection and rehabilitation to the perpetrators in an effort to prevent children becoming adult criminals.

Issues of child protection have taken into consideration by the government. Act No. 39 of 1999 on Human Rights was considered insufficient to elevate children rights, thus formed Act No. 23 of 2002 on Child Protection. Act No. 23 of 2002 on Child Protection, Article 1 paragraph 2 states that every child has the right to live, grow, develop and participate fairly in accordance with human dignity, as well as protection from violence and discrimination. Legal protection of children is also mandated in Act No. 11 of 2012 on the Criminal Justice System Children, considering section part b: "To maintain the dignity and status, children are entitled to special protection, especially legal protection in the judicial system". Legislation Provisions gives decisive action in the form of sanctions given to the perpetrators of violence against children. In fact, many found the children who are less fortunate, due to the lack of protection when dealing with the law.

Juvenile crime prevention policy. According to Friedman<sup>4</sup>, law's work in a system was determined by three elements, namely the legal structures, legal substance and legal culture. The third element of the legal system related to one another and has a role that cannot be separated from each other. All three are in unity that moves the existing legal system in order to run smoothly.<sup>5</sup>

According to G. Pieter Hoefnagels, crime prevention efforts can be pursued in various ways, 1) the application of criminal law, 2) prevention without penalty, and 3) influence people views about crime and punishment through the media. Crime prevention efforts can be reached with the "penal" (criminal law) path and the "non-penal" (other than the criminal law) path. According to G.Pieter Hoefnagels, crime prevention efforts without a criminal can be done through the media (point 2 and 3), including non-penal efforts.

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<sup>4</sup>Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, New york: Rusel sage Foundantion, 1975, page. 14.

<sup>5</sup> Ibid.

G. Pieter Hoefnagels' opinion indirectly shows that the penal path is not the only crime prevention efforts. The non-penal path can also be used as a means of crime prevention efforts. The concept of diversion and restorative justice are two concepts of criminal acts solving which give child protection. Both of these concepts involve the consent of the victim, offender, and community.<sup>6</sup>

## **2. Reseach Method**

### **Protection Forms of Children Conflicting with Law**

Child, from the psychiatric aspects, was illustrated by the age limitation associated with the range of one's mental development. Elizabeth B Hurlock classifies one's age associated with its mental development into four stages: (a) children, a person aged under 12 years old; (B) a preteen, a person aged between 12-15 years old, (c) adolescence, a person aged between 15-18 years old, and (d) adult, a person over the age of 18 years old.<sup>7</sup> Meanwhile, Singgih Gunarso classifies are associated with one's mental development into five stages, (a) children, a person aged under 12 years old, (b) early adolescence, a person aged between 12-15 years old, (c) late adolescents, a person aged between 15-18 years old, (d) young adults, a person aged between 18-21 years old, and (e) adults, a person aged 21 years old and over.<sup>8</sup>

### **CHILD AGE LIMITATION ACCORDING TO POSITIVE LAW, COMMON LAW AND ISLAMIC LAW**

No	Legal Standing	Age Limitation
01	Act No. 3 of 1997 On Juvenile Justice	A child is a person aged 8 years old, has not reached 18 years old and has never been married. (Article 1 paragraph (1))

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<sup>6</sup>Allison Morris and C. Brielle Maxwell, *Restorative justice for Juveniles: Conferencing Mediation and Circles*, Oxford University Hart Publisging, 2001, page. 3.

<sup>7</sup>Elizabeth Hurlock, *Development Psychology, A Life Span Approach*, translated by Istiwidayanti & Sudjarwo, Psikologi Perkembangan, Jakarta: Penerbit Erlangga, 2000, page. 14

<sup>8</sup>Singgih Gunarso "Perubahan Sosial dalam Masyarakat", makalah yang disampaikan dalam Seminar Nasional "Keluarga dan Budaya Remain Perkotaan", Jakarta PAU FIS, UI, 1989, page. 9.

02	Act No. 23 of 2002 On Child Protection	A child is a person who is not yet 18 years old, including those who are still in the womb. (Article 1 paragraph (1))
03	Act No. 39 of 1999 on Human Rights of Juvenile Justice	Child is every human being aged under 18 years old and have never been married, including those who are still in the womb if it is for their interests (Article 1 paragraph (5))
04	Act No. 4 of 1979 on Children Welfare	Child is a person who is not yet aged 21 years old and have never been married (Article 1 paragraph (3))
05	Indonesian Civil Code	Child is a person who is not yet aged 21 years old, except said person has been married
06	Common Law	Measurement to define someone as an adult is not of his age, but from how he can work; competent to do that is required in social life; and the ability to take care of his own wealth
07	Act No. 1 of 1974 on Marriage	Child who is not yet 18 years old or has never been married was under the authority of his parents as long as they are not lifted of their authority (Article 47 paragraph (1)) Parents cannot alienate or duplicate reality of their child who has not yet 18 years old or have never been married, unless interests of the child requires (Article 48)
08	Islamic Law	Minors were started since 7 years old until reached maturity ( <i>balig</i> ) and <i>fuqoha</i> limits them up to 15 years old, which is the period of poor thinking ( <i>tamyiz</i> who are not yet <i>balig</i> ), if a child has reached the age mentioned, then he is considered as mature although he is not yet mature by the real meaning <sup>9</sup>
09	Act No. 11 of 2012 on Juvenile Justice System	A child who can be held accountable for criminal law is aged between 8 years old until 12-18 years old. Meanwhile, the

<sup>9</sup> Hadith Imam Muslim narrated from Ibn 'Umar that means: "It was narrated from Ibn' Umar: The Prophet examined me during the battle of Uhud, I was 14 years old, so he does not allow me to join the war, then during the war of Khandaq I was examined by The Prophet, I'm 15 years old, then he allows me to join the war" (HR. Muslim)

		minimum age requirement for a child to be detained is 14018 years old.
10	Constitution Court Decision No. I/PUU-VIII/2010 of February 24 <sup>th</sup> , 2011 on Examination toward Article 1 Act No. 3 of 1997 on Juvenile Justice.	Child under 12 years old is not subject to criminal proceedings, a child between 12-18 years old can be held accountable for criminal law and child over 12 years old can be charged.

Age limit based on the decision of the Constitutional Court is that the lower limit of the age of children who can be held criminal responsibility is 12 years old. Prior to this decision, according to Act No. 3 of 1997 on Juvenile Justice, children aged 8 to 18 years old should be held accountable for criminal law. Constitutional Court ruling that "Declaring age limit of 8 years in Article 1 paragraph 1, Article 4 paragraph (1), and Article 5, paragraph (1) Law on Juvenile Justice and the following explanation is contradictory to the 1945 Constitution and not legally binding on parole. It is unconstitutional unless interpreted 12 years ".

Children who are categorized as criminals are children who are dealing with specific legal cases. Although still classified as children category, the law must ensure the protection of children who are in the legal process. This is a consequence of the provisions of Article 28B of the Constitution of the Republic of Indonesia which explained that "every child have the right to live, grow and develop and is entitled to protection from violence and discrimination".

According to Article 64 of Act No. 23 of 2002 on Child Protection, the form of protection of children in conflict with the law and child victims of crime, among others: "The treatment of children must be done humanely in accordance with the dignity and rights of the child; The provision of a special escort officer for children in early stages; Provision of special facilities and infrastructure; The imposition of appropriate sanctions for the best interests of the child; Monitoring and recording constantly on the development of children in conflict with the law; Provision of guarantees to maintain relationships with parents and families; Protection of identity through the mass media and to avoid labeling.

Child protection was given to children in conflict with the law because children are the potential future of human destiny, it was he who would participate in the nation's history and also reflects the attitude of the nation in the future. Children are a part of the young generation, the successor to the ideals of the national struggle and Human Resources (HR) for national development. One way to protect children in conflict with the law is by performing diversion or restorative justice.<sup>10</sup>

#### **a. Child Protection Forms in Diversion Concept**

Non-penal criminal prevention efforts is a crime prevention without the use of criminal law by influencing public view toward crimes and punishment through media. The concept of diversion and restorative justice is an alternate form of criminal case solving which aimed for informal solution by involving all parties involved in the criminal justice system. Solution through diversion and restorative justice concept is a growing solution in several countries in solving the crime.

Diversion is a policy which is carried out to avoid the perpetrator from the formal justice system. Diversion is done to provide protection and rehabilitation of the offender as an attempt to prevent children becoming adult criminals. The main principle of diversion is persuasive action or approach and providing the opportunity for offenders to change for the better. Diversion in an effort to urge people to obey and enforce the law while considering the sense of justice. Diversion is not intended to ignore the law and justice, but the diversion is considered as a new way to uphold justice in society.

#### **b. Child Protection in Restorative Justice Model**

Restorative justice as stated in Article 1 paragraph 6 of Act No. 11 of 2012 on the Juvenile Criminal Justice System was the resolution of criminal case by involving the perpetrator, the victim, the perpetrator's or the victim's family and

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<sup>10</sup>Paulus Hadisuprpto, "Pemberian Malu Reintegratif sebagai Sarana Nonpenal Penanggulangan Perilaku Delinkuensi Anak (Studi kasus di Semarang dan Surakarta)" Dissertation, Semarang: Doctorate in Law Diponegoro University. 2003. page.214-215.



other relevant parties to work together to find a fair settlement with emphasis on restoring back to its original state, and not in retaliation. Restorative Justice is a concept that basically completed the juvenile criminal acts outside the criminal justice system. Restorative justice process aimed at finding a way out of the traditional model of justice based on the conviction of those who commit criminal acts for a deterrent effect. A person who violates the criminal law will deal with the country through law enforcement agencies, so restorative justice becomes juvenile justice solution which is able to provide protection to the children themselves.<sup>11</sup>

Restorative justice approach is assumed to be the latest shifting of the various models and mechanisms that work in the criminal justice system in handling criminal cases at this time. The United Nations through the basic principles which have been outlined in it considered that a restorative justice approach is an approach that can be used in a rational criminal justice system. This goes along with the views G. P. Hoefnagels stating that political criminals should be rational (a rational total of the responses to crime).<sup>12</sup> Restorative justice approach is a paradigm that can be used as a frame of the criminal case handling strategies aimed at answering the dissatisfaction over the workings of the criminal justice system that exists today.

Restorative justice is a concept which responds development thought of the criminal justice system by focusing on the needs of victims and community involvement that is felt left out by mechanisms that works in the criminal justice system that existed at this time. On the other hand, restorative justice is also a new framework of thinking that can be used in response to a crime for the law enforcers and professionals.

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<sup>11</sup>Joko Sumadi dan Imam Purwadi, *Penanganan Anak yang Berhadapan dengan Hukum (ABH) Melalui Pendekatan Pranata Lokal Berbasis Masyarakat*, West Nusa Tenggara: LPA NTB Associated with UNICEF, 2010, page. 6.

<sup>12</sup>G. Peter Hoefnagels, *The Other Side of Criminology*, Deventer: Kluwer b.v., 1973, page.78.

involvement that is felt left out by mechanisms that works in the criminal justice system that existed at this time. On the other hand, restorative justice is also a new framework of thinking that can be used in response to a crime for the enforcement and legal professionals.

A precaution to prevent delinquency and the demands of child protection in the criminal justice system, especially in the perspective of restorative justice, which is as follows:

1. Child criminal system should prioritize in corrective recovery treatment with restorative justice approach, particularly alternative forms of punishment to prevent children from entering the criminal justice system of deprivation of liberty which is done as a last resort. Shifting the efforts of punishment made toward treatment, mediation efforts and other forms of community service or social work, criminal parole or victim-oriented conditional release to meet and express his regret to the victims and also to show his responsibility by involving the community in the recovery state and restoring the balance of the community. This effort has been supported by a legal framework with the legalization of Act No. 11 of 2012 on the Juvenile Justice System, for example, Article 5 states that the Juvenile Justice System shall prioritize restorative justice approach.
2. In the perspective of juvenile justice, the role of strategic Correctional Center, when in pro-justicia, offense or crime is being investigated by police investigators, community supervisors from the correctional centers perform community research and provide alternative recommendations which are more factual and accurate about the condition of the child. For the best interest of the child, police and correctional centers could jointly undertake a diversion for children of children's rights are protected. The implication expected is the creation of a fair treatment for the child, whether formal or material. The problem is the officer's different and egoistic perspective, with facilities and infrastructure is not yet on the optimal level. Roles and functions of Correctional Centres start from pre adjudication, adjudication and post adjudication.

Therefore, correctional centers must strengthen its position in both the juridical and administrative aspects in the future so that the correctional centers do not only focus on completing the community research, but also strengthen the tasks of supervision, mentoring and monitoring.

3. In the pre-adjudication stage, the children in conflict with the law deal with situations such as:
  - a. The minimal movement of diversion for children in the early stages of the criminal justice process, namely during the investigation and detention by the police.
  - b. Correctional centers have not carried out its role and function actively, given legally correctional centers are passive, and structural and institutionally correctional centers do not correspond to the needs of the objective conditions of society.
  - c. Susceptibility to a violation of the rights of children during court proceedings and detention, including violence by other tenants as well as those carried out by officers of the Detention Center.
4. In the adjudication stage, the children in conflict with the law deal with situations such as:
  - a. Many children with minor cases and short punishment time were processed to the court
  - b. Lack of non-imprisonment verdict for children in trials.
  - c. Lack of community supervisors role in justice system
  - d. Community research has yet to be decisive part in the consideration and decision of the judge, although juridically if a judge does not consider community research, the verdict is null and void
5. In the post-adjudication stage, some situations which often met by children with mild cases and the sentences short, many are processed up to the level of the court, and some were sentenced to imprisonment and mingled with adults in

adult prisons. This situation of potential or even in real terms has an impact on the poor condition of the child in the process of education, mentoring, coaching, detention and imprisonment. For example, the declining quality of health, education stagnation due to disconnection of the school up to psychological discomfort could potentially become a serious offender as a result of interaction during the supervision and guidance in correctional centers, as well as in custody or prison.<sup>13</sup>

### **3. Results and Discussion**

#### **a. Juvenile Justice System in Indonesia**

Age limit of children dealing with the law according to Act No. 11 of 2012 on Juvenile Justice System, as mentioned in Article 1 Number 2 and 3. The definition of children dealing with the law are children in conflict with the law, children who become a victim of a crime, or children who become witness of a crime. Children are defined as those past 12 years old, but not yet 18 years old who are suspected of committing criminal acts. According to Article 1 Number 4 Act on Juvenile Justice System, children who become the victim of a crime, further mentioned as a child victim, is someone aged under 18 years old who experience physical, psychological, and/or economic suffering caused by criminal acts.

As in Western countries, the practice of the juvenile justice system gained a lot of criticism, because the system has the flexibility authority of discretion by the judge, the child and their parents are no longer fully heard and recognized their rights. Many institutions that should be the place of coaching becomes nothing more than a warehouse, camping the children also showed their prosperity increases, education is more advanced, secularization and individualization lead to demands and emancipation movement, including

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<sup>13</sup>Patrialis Akbar, “Kebijakan Kementerian Hukum dan HAM RI dalam penanganan anak bermasalah dengan hukum dengan pendekatan Restorative Justice”. Bogor. April 5<sup>th</sup>-6<sup>th</sup> 2010, page. 4-9.

younger age groups (children and adolescents). It showed a tendency of the need for legal certainty to children and juvenile justice process emphasis is normative or often referred to as crime control model of juvenile justice rather than welfare models<sup>14</sup>

The types of diversion generally consist of three types, namely; warnings, informal, and formal. The warning is given by police for minor offenses. Informal is given for minor offenses where it is not appropriate if they only get a warning. As for the formal diversion, the victim and the offender meet face to face, an event known as Restorative Justice.

The idea of diversion is consideration about giving authority to the law enforcement agencies to take policy actions to address or solve the problem of child violations by not taking a formal way, for example by stopping or continuing / release them from the criminal justice process or returned / delivered to the public and forms and other social service activities. Implementation of diversion can be done in all levels of examination from the investigation, prosecution, trial court to the level of implementation of the verdict. The application is intended to reduce the negative impact of children's involvement in the judicial process.

Diversion programs confer a benefit on the community in the initial and quick handling of the deviant behavior. This initial treatment also saves the costs incurred by the local police. The child offender will be given instructions by the police. Juvenile criminal conditional patrons, justice department officials, and the school contacted the police. Then the teens voluntarily follow the consultation and or education that is appropriate and social activities. If the teens are successful in this program, the prosecutor does not prosecute the case and will not be noted in the case file on the act

Benefits of diversion program are:

- a. Helps children learn from their mistake by early intervention

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<sup>14</sup>**Tbid**, page 18.

- b. Recovers the trauma caused by the criminal act for the family, the victim, and the community
- c. Cooperating with the parents and tutors while given daily life advice.
- d. Awaken children ability to make responsible decisions
- e. Gathering of restitution fund for the victims
- f. Gives the children responsibility for their actions and lessons about chances to observe effects of the case
- g. Gives chance for the offenders to keep clean of criminal record
- h. Lowers the burden on the court and prison
- i. Prevents juvenile crime

Several situational factors which are considered in performing diversion are:

- a) Trait and condition of the crime
- b) Previous violations
- c) The degree of involvement in the case
- d) Attitude towards the crime
- e) Parents and/or family reactions toward the crime
- f) Impact of the crime for the victim
- g) Judge's view about the handling offered

However, despite containing many advantages and benefits to the child, a diversion which is actually a non-litigation settlement is also not out of obstacles. Studies that have been done in Banyumas, Purbalingga, Banjarnegara, Kebumen, and Cilacap showed that not all victims or their families would receive a settlement with the diversion. The reason given is the desire to make the perpetrators give up if put in jail. Another reason is when the crimes committed by the perpetrator is a crime punishable by severe penalties, law enforcement less supportive of a settlement with the diversion. In addition, there is no implementation directions and

technical guidelines for law enforcement officials to implement this non-litigation settlement.<sup>15</sup>

The cornerstone of the philosophy and practice of restorative is an enlightened thought that occurred around the 1970s and 1980s. Restorative justice can be regarded as being a perversion of the paradigm of public problem solving and community participation are known in communitarian society, which is characterized, among others, administration of emphasis on collective responsibility and mutual responsibility between citizens to build a society based on social justice. Restorative justice is closely related to the theoretical perspective of meaningful sanctions and the role of the community in response to the crime of child behavior and enforcement of societal norms concerning children.

Conceptual thinking and academics that emerged in response to the factual condition of juvenile justice practices in society. From the above explanation, it is also the tendency for observers of juvenile justice, considering the factual conditions existing juvenile justice practices, suggested the need for the implementation of juvenile justice reform. One proposal that is the foundation of theoretical conceptual thinking of juvenile justice which is called the family model of juvenile justice or "paradigm of restorative juvenile justice".<sup>16</sup> Juvenile justice models factually and empirically held in several countries would be important to explore, given that often the development of conceptual and theoretical thinking it was far from factual conditions in the administration of justice.

Settlement of children in conflict with the law has a lot of the approach taken, as the term restorative justice, namely the systematic response for acts of irregularities which emphasized the recovery of losses suffered by the victim or the

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<sup>15</sup>Dwi Hapsari Retnaningrum and Manunggal K. Wardaya, "*Perlindungan Terhadap Anak Yang Melakukan Tindak Pidana (Kajian Tentang Penyelesaian Secara Non-Litigasi Dalam Perkara Tindak Pidana Anak di Kabupaten Banyumas, Purbalingga, Banjarnegara, Kebumen, dan Cilacap)*", Research Report, FH UNSOED, 2011, page. 127-129.

<sup>16</sup>John Braithwaite, Reintegrative Shaming, Republicanism and Policy in Hugh D. Barlow, Crime in .... Police, Putting Theory to Work Boulder: Westview Press, 1990. page. 194-198; John Braitwaite & Philip Petit, Comment: Republican Criminology and Victim Advocacy, from Law and Society Review, Volume 28, Number 4, The Law and Society Association, 1994, page. 767-771.

community as a result of a criminal act. Restorative justice further emphasizes on recovery and not to punish as to the target of handling current problems.<sup>17</sup> The expectation for the restorative justice concept are:

1. Lowering the number of arrested, detained, and imprisoned child
2. Eliminate stigma and return children to normal people so they can be of use in the future
3. Child offenders can realize their mistake, so they will not repeat it in the future
4. Decreasing the burden of officers, prosecutors, courts, and prisons
5. Does not cause resentment because the offenders have been forgiven by the victim and victim can get restitution funds faster.
6. Involves parent and community in handling juvenile violations
7. Reintegration of children into society
8. Involves customary and social institutions as the mediator in the discussion, can be chosen from trusted public figure and if it happens in school, headmaster or teacher.<sup>18</sup>

Principles of restorative justice are based on the following principles: First, the admission of guilt of the child. Recovery or rehabilitation must begin with the recognition or guilt of the child, expressed as a form of acceptance of behavior that does not conform to the norm or law. Secondly, there is acceptance of the victims and the people who have felt disadvantaged as a result of acts committed by the child. This acceptance is very important so that the child does not feel guilty for a

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<sup>17</sup>Restorative Justice is a concept that basically completed the settlement of the criminal acts committed by children in ways beyond the completion of the criminal justice system (criminal justice system). Restorative justice process aimed at finding a way out of the traditional model of justice centered on jatunyan penalties against those who commit criminal acts for a deterrent effect. A person who violates the criminal law will deal with the state through the law enforcement officials. For more details about restorative justice as a solution to juvenile justice, then below are described in detail on the concept; Joko Sumadi dan Imam Purwadi, *Penanganan Anak yang Berhadapan dengan Hukum (ABH) Melalui Pendekatan Pranata Lokal Berbasis Masyarakat*, NTB: LPA NTB Associated with UNICEF, 2010, page. 6.

<sup>18</sup>Ibid., page. 12-16.



long time, so it can quickly adapt himself back to correct his bad behavior. Third, there must be aware of people who fall victim to accept and acknowledge the apology that carried by the child. The consequences of this can be embodied in various forms. For example, a child can be released without any trade-offs that must be made, or the victim requires them to restore his losses or provide a form of punishment in an effort to make amends of what the child has done. For example, assigning children for recovery by doing activities that are approved as a way to educate in order to obey rules. Surely the task or job that is charged is not burdensome and violate the rights of children. Fourth, they are willing to cooperate toward law enforcement. Restorative Justice does not have trials in terms and prefers discussion. But, victim's acceptance of the apology from the child is already a law enforcement effort by prioritizing fairness in recovery. Connected with the implementation of the criminal justice system functions above in dealing with children, then the fulfillment and protection of children's rights become the main goal of the system. That function should be based on the principle of the best interests of the child.<sup>19</sup>

Restorative justice (restorative justice) is a relatively new thing in Indonesia. However, restorative justice has a different view to addressing the issue of children in conflict with the law. Restorative juvenile justice start from the assumption that the response or reaction to a child offender will not be effective without the cooperation and involvement of the victim, perpetrators, and community. The principle which it is based is that justice is best served if all parties receive fair and balanced attention, actively involved in the judicial process and to benefit adequately from their interaction with the juvenile justice system.<sup>20</sup>

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<sup>19</sup>Purnianti dan Ni Made Martini, *Children and Young People in Conflict with the Law, Correction in America : An Introduction*, 5th Edition, page. 72.

<sup>20</sup>Paulus Hadisuprpto, *Delinkuensi Anak, Pemahaman dan Penanggulangannya*. Malang: Bayumedia Publishing, 2008, page. 225.

## **b. Implementation of Diversion and Restorative Justice**

Act No. 11 The year 2012 on Juvenile Justice System set out a clear and decisive role to be, even mandatory in some roles, run by law enforcement agencies. The role moves from the investigation stage to the stage of supervision after serving their sentences. Nevertheless, the spirit contained in Act No. 11 The year 2012 on Juvenile Justice System is to promote equitable relief effort (Restorative Justice) and prevent children from judicial proceedings (diversion). Therefore, Article 7 (1) states that in the level of investigation, prosecution, and the case investigation of children in the district court shall be sought diversion. But not all of the offenses can be resolved with diversion. Diversion is implemented in the case of criminal offenses committed for imprisonment under seven (7) years and is not a repetition of criminal acts. Meanwhile, if the case of children should be included in the judicial process, the legislation has the obligation to provide assistance to children in every level of examination. Article 23 paragraph (1) states: "In every level of examination of the child shall be given legal assistance and mentored by a civic or another companion in accordance with the provisions of legislation".

The concept of Restorative Justice is basically done through discretion and diversion, namely the transfer of criminal proceedings to the outside of the formal process to be resolved by deliberation. Settlement through consultation is not really new for Indonesia, even the customary law in Indonesia does not distinguish between the completion of criminal and civil cases, all cases can be settled by deliberation with the aim to get the balance or recovery state. The main requirement of the settlement through consultation is the recognition of perpetrators as well as the consent of the perpetrators, the perpetrator's family, as well as the victim to resolve the matter through consultation and recovery. The judicial process should run as the last option with regard to the basic principles and conventions of the rights of children which have been adopted into law on child protection.

When children are forced to be detained, the detention must be in juvenile detention, and if forced to go to jail it should be placed in juvenile prisons. Both in detention and in prisons, children should stay in school and get their human rights in accordance with the Beijing Rules so that they can meet a bright future because neglecting the children's rights is a disregard for the future of the nation. The model of restorative justice is also based on the workings of the criminal justice system, which greatly respect the rights of the legal rights of any suspect such as, the right to suspected and treated as an innocent person if the court has not sentenced guilty, the right to self-defense and the right to a punishment that is proportional to the offense which has been done. In the case of a child offender, they are entitled to the assistance of a lawyer during their trial. The interests of victims should also not be ignored, but should still pay attention to children's rights as a suspect.

Cases of children in conflict with the law brought in the judicial process only in serious cases, and even then the principle of the best interests of children must take precedence, and punishment process is a last resort while not ignoring the rights of children. Beyond that cases of children can be solved through a non-formal mechanism based on firm standards. Non-formal forms of treatment can be done by diversion or restorative justice that can be solved by obliging children in conflict with the law to participate in education or training in a particular institution, or if punishment should be done, the rights of children should not be overlooked. So, in the end, no formal handling can be done well if matched by efforts to create a conducive justice system.

#### **4. Conclusion**

1. A form of legal protection of the rights of children in conflict with the law was based on the provision that "every child has the right to live, grow and develop and is entitled to protection from violence and discrimination". The form of legal protection are as follows:

- a. Special protection for children in conflict with the law includes humane treatment in accordance with the dignity and the rights of children, and the availability of specialized child escort when a child is against the law.
  - b. Development of diversion and restorative justice, which is an action or treatment to shift the formal settlement process to be informal so that not every child perpetrators of criminal cases directly enter the criminal justice system. The application of this concept is an alternative solution for the case of a child without a criminal conviction as an attempt creating humane justice.
2. Diversion and restorative justice in juvenile justice can be implemented if the act committed is considered a crime punishable by imprisonment under 7 years in prison, and is not a repetition of criminal acts. If the acts committed categorized as a criminal offense punishable with imprisonment for 7 years and or a repetition of a crime, then the child stay in the judicial process, and children must be accompanied by a psychologist in every level of examination.

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Khandaq I was examined by The Prophet, I'm 15 years old, then he allows me to join the war" (HR. Muslim)

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