

## Diversion and Restorative Justice in The Criminal Justice System of Children in Indonesia

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### Abstract

Diversity and Justice Justice is the norm in the Criminal Justice System in Indonesia, as regulated in Law Number 2012 on the System Juvenile Justice. The latest Law Number 11 Year 2012 was not available to be separated by UN Resolution Number 44.25 about Convention of the Rights which was ratified by the Indonesian Government dated January 26, January 1990 in the Presidential Decree No. 36 Year 1990. Convention on the Rights of the Children of the Republic of Indonesia was the basis of the consideration of the establishment of Law Number 11 of 2012 about Juvenile Criminal Justice System which replaced Law Number 3 1997 concerning Juvenile Court. At this time, there are a number of developed countries that have implemented diversion, among others is Australia. Australia has Act on Juvenile Crimes (The Young Offenders Act 1977). In which the Law gives the authority of lawyers (police) to do diversion child offender. This thing can be known from the purpose of the Juvenile Criminal Act Law. In Australia, the policymaking has the authority to do diversion in handling crime done by child. Authority is done with consideration: a) avoiding labeling or stigma which was caused by the effects of the system judicial justice. b) There are doubts about whether to progress from treatment to children. In Indonesia, regulated in Law Number 11 of 2012 about the Juvenile Criminal Justice System, which began after 2 years promulgated on July 30, 2012. In Law Number 11 of 2012, diversion was regulated in Article 17, Article 6 / Article 15. Regarding the restorative justice in developed countries, restorative justice not only in academic fields and practical practice and criminology North America, Australia, and some Europeans, restorative justice has been applied to all know the conventional criminal justice process, namely the investigation, prosecution, stage adjudication, and the stages of the trial. The justice-restructuring process looks for a facility dialogue between various parties affected by crime, including victims, perpetrators supporters and community are all over. Death involves the process that all parties who acted in crime were at the same time together to try to complete the scrutiny of how the negotiation after the crime has taken place Indonesia trial justice regulated in Article 1 Article 6, Article 5 (1) and Article 8 Section (1) Law Number 11 Year 2012.

**Keywords:** *diversion, restorative justice, juvenile criminal justice system*

## **A. Introduction**

### **1. Background**

Government attention to increase human rights protection generally show improvement since 1998. It is marked by several political actions by Indonesia government such as amend the UUD 1945 by appending basic principles of human rights to be a part of constitution, also by ratifying several international conventions, for instance Anti Abuse Convention, UN General Assembly Resolution No. 39/46, dated 10 December 1984 which had been ratify by RI Government with UU No, 5 Year 1998. In the Convention it is determined that those regulated by the anti-abuse convention are direct or indirect actions carried out by government officials or employees, while abuse carried out by citizens is not regulated in the convention (Wiyono, 2016, p. 35).

Neglection of human rights becomes very clear when talking about children and their rights. When realizing the massiveness of violence against children, the number of children who are victims of human trafficking, the large number of children who cannot attend basic education because of poverty and the number of children who do not have birth certificates. All of these facts are only part of the big problem regarding the fulfilment of children rights (Foundation for Monitoring Children Rights and UNICEF, 2005, p.2). Those children rights are part of human rights which have legal guarantees and protection, even children rights should be treated in a special/unique way or *sui generis* with adults, because child since has been in the womb until being born, grow up and develop are still not independent (dependent) in many of their needs. The special treatments are in the form of legal protection in obtaining civil rights, political rights, economic rights, social rights and cultural rights in accordance with what is expected in the legal provisions that have been set. Thus, the child as the future generation will become a strong foundation and pillar for themselves, family, community, nation and country (Abintoro, 2016, p. 4).

The international instrument that regulates children rights is the UN Convention on The Rights of the Child, adapted by the UN General Assembly on 20 November 1989. Approved and opened for signature, ratification and accession by the General Assembly 44/25, 20 November 1989. Apply on September 2, 1990, based on Article 49.

In the Convention on Children Rights Preamble, among other stated as follows:

Realizing that for the sake of full and harmonious development of his personality, the child must be raised in a family environment, in a happy, loving and understanding atmosphere.

Given that, as stated in the Declaration of the Rights of the Child, due to physical and mental immaturity, children need special custody and care, including appropriate legal protection, before and after birth.

Acknowledging that in all countries in the world there are children living in difficult circumstances, and these children needs special attention (Nasution, 2006, p. 24).

In order to provide legal protection for children, especially children who are victims of criminal acts, Indonesia has issued UU No. 35 of 2014 concerning Amendments of UU No. 23 of 2002 concerning Child Protection.

Whereas the legal protection of children as perpetrators of crimes must also pay attention to the Convention on the Rights of the Child specifically Article 37 and Article 40 as follows:

#### Article 37

The participating countries will guarantee that:

- a. No one will become a subject of abuse or other mistreatment or cruel punishment, inhumanly or destructive. Likewise, the death penalty or life imprisonment without the possibility of being released will not be applied to the violations committed by the person under 18 years old.
- b. No one will be deprived of their liberty illegally or arbitrarily. The arrest, detention, or punishment of a child must be in accordance with the law and will be applied as a last resort and for the shortest period of time.
- c. Every child deprived of his liberty will be treated humanely and respected their human dignity by paying attention to the needs of his age. In particular, every child deprived of liberty will be separated from an adult unless it is deemed to not do this is in the best interest of the child concerned and he has the right to make contact with his family through correspondence or visits, safe in certain circumstances.
- d. Every child deprived of his liberty has the right to immediately obtain legal assistance and other appropriate assistance, and also has the right to challenge the legitimacy of the deprivation of liberty before a court or other authorities in charge, and independent, and impartial, and entitled to an immediate decision regarding those issues (Setia, 2000, p. 22).

#### Article 40

- a. The participating countries recognize the right of every child who is suspected, accused, or approved as having violated the criminal law to be treated in a appropriate manner to the enhancement of children's dignity and value, which strengthens children's respect for human rights and fundamental freedoms from others by paying attention to the child's age and

the desire to increase reintegration of children and increase the constructive role of children in society.

- b. For this purpose and taking into account relevant international provisions and instruments, participating countries, in particular guarantee that:
  - 1) No child will be suspected as or accused of or acknowledged as having violated criminal law because of acts or inadvertence that are not prohibited by national or international law at the time the act was committed.
  - 2) Every child suspected or accused of or had been accused of violating the criminal law has at least the following guarantees:
    - a) Considered innocent until proven guilty according to law.
    - b) Immediately and directly be informed of the allegations against him, and if appropriate, through the child's parents or legal guardian, and to obtain legal assistance and other assistance in preparing and submitting his defence (Setia, 2000, p. 22).
    - c) Examine the issue without delay by the authority in charge, independent and impartial, or by judicial body in an examination which is unfair in accordance to the law, any legal assistance or other appropriate assistance or unless it is considered not in the best interests of the child, especially with regard to age or situation of children, parents and legal guardians.
    - d) Not compelled to give testimony or to confess guilt, to investigate or have investigated the adverse witnesses and to obtain the participation of the adverse witnesses' examination and to obtain the participation of witnesses' examination for the sake of the child based on the equal rights provisions.
    - e) If deemed to have violated the criminal law, the decision and any action imposed as a result thereof can be reviewed by a higher authority who is in charge, independent and impartial, or by the judicial body in accordance to the law.
    - f) Obtaining the free assistance of an interpreter if the child cannot understand or cannot speak the language used.
    - g) Fully respect the private lives of children in all levels of the judicial process.
- c. The Parties will seek to improve legislation, judicial processes of power and institutions specifically applicable to children, suspected or accused of, or approved to have violated the criminal law and in particular.
  - 1) Determination of minimum age at which the age below it will be deemed as having no ability to violate criminal law (Setia, 2000, p. 25)

- 2) If feasible and desirable, measures to deal with such children without having to take legal action, provided human rights and legal cares are fully respected.
- d. Various arrangements, such as care, guidance and supervision regulations, giving advice, probation, adopted children care, education programs, and honesty training and other alternatives for foster care institutions will be held to ensure that children will be dealt with in a way that is appropriate for their lives in balance with their circumstances and violations committed (Setia, 2000, p. 25).

Except for the above-mentioned Convention on the Rights of the Child, there are still many international instruments that must be considered to protect children who are dealing with the law, including.

- a. United Nations Minimum Standards Rules for the Administrative of Juvenile Justice "Beijing Rules". UN General Assembly Resolution No. 40/33, November 29, 1985.
- b. Code of Conduct for Law Enforcement Officials, UN General Assembly Resolution dated December 17, 1979. Adopted by General Assembly Resolution 34/169.
- c. And so on.

The existence of the aforementioned international instruments encouraged the Indonesian government to form a law. No. 11 of 2012 concerning the Criminal Justice System of children replaces the Law. No. 3 of 1997 concerning Juvenile Courts.

Law. No. 11 of 2012 concerning the Child Criminal Justice System was ratified by President R.I. dated July 30, 2012 in Jakarta, promulgated on July 30, 2012, published in the State Gazette R.I. Year 2012 No. 153 TLN. No. 5332. It is stated to be valid for 2 (two) years from the date of promulgation (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, TLN. Number 5332 Article 108, 2012).

New things stipulated in the Act. No. 11 of 2012 is about diversion and restorative justice. Diversity is regulated in Chapter I of General Provisions, Article 1 of Legion 7 and Chapter II of Diversion Article 6 to 15. While restorative justice is regulated in Chapter I, General Provisions Article 1 point 6 and Article 5.

## **2. Problems**

- a. What is the basis of consideration of the establishment of the Act. No. 11 of 2012 concerning Child Criminal Justice System?
- b. How is the regulation of diversion and restorative justice according to the Act. No. 11 of 2012?

## B. Discussion

### 1. The Criminal Justice System and the Juvenile Justice System

#### a. Criminal Justice System.

Objects or centres of criminology attention have recently undergone a shift. The central issue of focus is no longer on the reasons why someone commits a crime while others do not, but why someone acts defined as a crime, while others do not. In this regard, Austin Turk pointed out that criminology is no longer the centre of attention on the criminal character of behaviour, but in the process of criminalizing behaviour. According to Clayton A. Hartjen, there is a shift of attention from the offender or perpetrator of the crime to the criminal justice system and the relationship between perceptions of crime, the administration of criminal law and society in general (Hartjen, 1974, p. 9).

The criminal justice system is a judicial network that uses criminal law as its main means, both substantial criminal law, formal criminal law, and criminal law. The criminal justice system has a dual functional dimension, on the one hand it functions as a means of the community to hold and control crime at a certain level (Crime Containment System), on the other hand, it also functions for secondary prevention, namely trying to reduce crime among them who have committed a crime and those who intend to commit a crime through the process of detection, punishment, and criminal execution (Muladi, 1995, p. 22).

The Criminal Justice System is essentially a criminal law enforcement process. Therefore, it is closely related to the legislation itself, both substantive criminal law and formal criminal law, because the criminal legislation is basically an *in abstracto* criminal law enforcement which will be realized in *in concreto* law enforcement (Muladi & Nawawi, 1995, p. 173).

The criminal justice system (the sentencing of system) is a law that relates to criminal sanctions and punishment (the statutory rules relating to penal sanctions and punishment) (Hulsman, 1978, p. 320).

The criminal justice system is also referred to as the *Criminal Justice Process*, which starts from the process of arrest, detention, prosecution, and investigation in court session, and ends with criminal execution in the Penitentiary (Yesmil & Adang, 2003, p. 33).

The criminal justice system was first introduced by criminal law experts and experts in: *Criminal Justice System* in the United States in line with dissatisfaction with the working mechanism of law enforcement agencies and law enforcement institutions. This dissatisfaction was proven from the increase in crimes in the United States in the 1960s. At that time the approach used in law enforcement was law and order (*law and order approach*) and law enforcement in the context of approach known with the term: *law enforcement*.

The term shows that the legal aspects of crime treatment are prioritized with the police as the main support. The success of crime treatment at that time was very dependent on the effectiveness and efficiency of the work of the police organization.

Frank Remington was the first person in the United States who introduced administration engineering of criminal justice through system approach and the notion about this system was found in the pilot project report in 1958. This notion was then put into administration mechanism of criminal justice and named “*criminal justice system*”. This term was later introduced and disseminated by “*The President’s Crime Commission*”. In the period of the late 1960s and early 1970s, *Criminal Justice* as discipline of study has appeared replacing the term “*law enforcement*” or “*Police Studies*”.

The development of this system in the United States and in several European countries becomes a dominant model with emphasis on “*The Administration of Justice*” and giving the equal concern to all components in law enforcement (Yesmil & Adang, 2003, p. 33).

#### b. Juvenile Criminal Justice System

The juvenile criminal justice system is different from adult criminal justice system in various aspects. Juvenile criminal justice covers all activities of investigation and termination of cases concerning the interests of children. Emphasizing or focusing on children's interests must be the center of attention in child criminal justice (Maldin, 2009, p. 6).

One characteristic that is inherent in the juvenile criminal justice system is that law enforcers can end the judicial process at any time, since certain circumstances are known by the authorities to stop it (Abintoro, 2009, p. 11). This is in line with the spirit of “The Beijing Rules”. *The Beijing Rules 17.4 The competent authority shall have the power to discontinue the proceedings at any time.*

The legal authorities will have the power to end the judicial process at any time. The power to end the judicial process at any time is a characteristic that is inherent in the handling of child-age legal violations as a differentiator for adults. At any time, certain circumstances can be known by legal authorities who will make the complete cessation of intervention appear as the best disposition to the case. Analogous to the criminal justice system that uses criminal law as the main means, then the juvenile criminal justice system main means is child criminal law (Abintoro, 2016, p. 11).

The juvenile criminal justice system is all elements of the juvenile criminal justice system that are related to the handling of juvenile delinquency cases. First, the police as a formal institution when a bad boy first comes into contact

with the justice system, which will also determine whether the child will be released or further processed. Second, prosecutors and parolees will also determine whether the child will be released or processed into a juvenile court. Third the juvenile court as a stage when the child is positioned among choices from being released to being included in the conviction institution. The last is conviction institution (Robert C. Trajanewicz & Marry Morash).

Juvenile criminal justice system according to UU No. 11 of 2012, Article 1 point 1 is the whole process of resolving cases of children dealing with the law from the investigation stage to the stage of coaching after undergoing a punishment (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, TLN. Number 5332 Article 108, 2012).

In his dissertation, Setyo Wahyudi stated that what is meant by juvenile criminal justice system is law enforcement system of juvenile criminal justice which consists of a sub-system of judge child examination, and a sub-system for the implementation of juvenile criminal sanctions based on child material criminal law and child formal criminal law, as well as the law of implementing criminal sanctions for children (Wahyudi, 2011, p. 16).

## **2. Juvenile Courts in Advanced Countries**

### **a. Juvenile Courts in European Countries**

Since ancient times in England there has been a prerogative right of the king to act as a *parens patriae* that is to protect people who need help including children who need it, with the creation of a child judge, then the principle of *parens patriae* is also applied. The child judge then changes the duty from *pater familias*, the child judge who determines what is good for the child concerned (National Legal Development Body Workshop on Juvenile Court, 1975, p. 81).

Wagiati Sutedjo stated that at the end of the nineteenth century European and North American countries began to be hit by concerns about the increasing number of crimes committed by children and youth. In dealing with the phenomenon at that time, handling cases involving children and young people who were treated equally with adults in the various countries mentioned above, efforts were made towards child protection (Wagiati, 2006, p. 25).

*Juvenile* Courts in England have started since 1908, prosecuting children who violate the law, bad and neglected children or who are outside of their parents' surveillance. Members from the Magistrates Court who are also selected for 3 (three) years, then can still be re-elected until the age of 65 (sixty five) years. At the time of the trial at least one chairman and one or more who are members and one must be a woman. The trial must be in the building or at least in the rooms and days other than the rooms and the trial day of the Magistrates court. Juvenile court session may only be attended limited by:



- 1) Court officials, police, or detectives.
- 2) The defendant, one or more of the persons concerned, for example a witness.
- 3) Probation officials and children's affairs.
- 4) Representative of designated newspapers.
- 5) Other people allowed by the court.

Representatives of newspapers cannot mention the name, address, or school of a child or other things that can introduce a child's identity. Children who are accused of violating the law other than murder must be tried in a simple manner, and if in addition to murder and have been 17 (seventeen) years old then can choose to be tried in the Juvenile court or in court with a Jury, or the Juvenile court itself that sends to the jury. It is required that the juvenile court must explain to the children or the youth about the subject of the accusation with simple words according to their age and understanding. The court assists the child in asking the witness and his parents or those who care for him, helping the child in defending themselves. Before making a court decision, the court must receive a report on the state of his household, during school, mental health, body health and behaviour (BPHN, 2007, p. 101).

In the Netherlands also tried to make children not enter the jail which resulted in more evil than before. In the Netherlands there are 2 stages in the history of its development. The first stage began with the formation of the *Dutch Weetboek van Strafrecht* in 1881, in which the act, the articles reflecting as if children were not even 10 years old could not be prosecuted under criminal law if they were proven of committed a crime, but were ordered into *rijksopvoedingshasgestiecht* (Kingdom Education Institution) by civil judges. If the offender is 10 (ten) years old to 16 (sixteen years), then the criminal judge must investigate whether the perpetrator can make *ordeldesondersheids* (can make an assessment of his actions) and be aware of the prohibited nature of his actions or not. If the answer can be, then the perpetrator can be sentenced to as an adult, but minus 1/3 (one third) of the sentence, whereas if the answer is no, then the perpetrator cannot be punished. Whereas in the second stage in 1901, there is already had a Child Law (*Kinderwetten*) and began effective in 1905. The child judge (*Kinderrechter*) was not a juvenile court (*Kinderrechtbank*-, *Kindergerecht* or *Juvenile court*) held with UU on the 5th of July 1921 which began effective on November 1st, 1922. Such matters brought changes, among others, in investigating child cases no longer based on *ordeldesondersheids*, but prioritizing the issues of education that needed to be given to perpetrators, accompanied by the formation of a number of crimes and more appropriate actions for underage perpetrators of crime (Wagiati, 2006, p. 3).

In handling criminal cases that the perpetrators is the child, the judge must be aware that what is important to him is not whether the child can be punished or not, but what kind of action that must be taken to educate the child. Thus, the Netherlands has had experience in juvenile justice for almost a century. Juvenile justice grows naturally and is in line with culture, because the law governing the judiciary is part of the legal system, while the legal system itself is closely related to the culture of the nation. Culture evokes the law about children, and intermittently some time later child justice arises (Wagiati, 2006, p. 3).

In the United States, the state of *Illinois* in the city of Mines in 1889 was the first juvenile tribunal called the *Juvenile Court of Cook Country* which was based on the principle of *parens patriae* which meant the authorities had to act when children needed help, while children and youth who committed crimes should not be punished but must be protected and given assistance. The juvenile court was based on a law called “*An sette regulate the treatment and control of dependent, neglected and delinquent children*”, then followed by other countries (Prakoso, 1988, p. 166).

Thus, in the history of court intervention in the lives of children is always intended to overcome conditions that are less favorable and even tend to be harmful to children, exploitation of children and child crimes and many other things (Abintoro, 2017, p. 11).

#### b. Juvenile Court in Indonesia

Romli Atmasasmita stated that the history of justice in Indonesia had begun since Dutch colonialism, initially in 1917. At that time several kings in the regions and youths as the nation's leaders had succeeded in establishing an institution called *Pro Juventute*. This institution received recognition from the Dutch government to provide guidance to parents who have difficulty providing advice and guidance to children who are involved in crime. Although the *Pro Juventute* institution has received recognition from the Dutch government, Indonesia has not yet had a juvenile justice agency and legislation that specifically regulates cases for children (Romli, 1985, p. 11).

Children who are brought before court are treated the same as adults. This situation can be understood, considering that our procedural law based on HIR / RIB comes from an era when the world still believes that children are treated fairly as adults in small size (BPHN, 2007, p. 19).

That is when the formation of children trial in Jakarta in the sense of prosecuting criminal case. Therefore *jurisdiction* of children trial is children mischief based on KUHP, more clearly, a child based on KUHP, more clearly, a child who commits a crime based on KUHP is the one submitted to the child's trial (Abintoro, 2016, p. 37).

The Supreme Court issued a circular No. 3 Year 1959 in order to support principles of special treatment toward children. Based on that circular, the judge conducting the investigation of the child is done in closed hearing. In 1980 when Criminal Procedure law is being revised, special treatment toward children bind the judges.

This special treatment is regulated in Article 33 Clause (3) KUHAP which state that trial is not open to public if the defendant is children. In December 1983 issued Judicial Ministerial regulation No. M.06.UM.01.06 Year 1983 concerning the Court Order and the Court Layout of Juvenile Trial. It is necessary to do early inspection by the judge who examining the subject matter of the alleged criminal act as well as regarding the environment, influence, also the state of the children that underlying the crime acts. Minister of Justice issued Regulation No. M.03-UM.01.06 Year 1991 pertaining to Change of Article 12 clause (2) Regulation of Minister of Justice of RI concerning Court Order and Court Layout amended that the word 'could' become 'mandatory', thus read as follows: To find out the background of child's life, the judge must assign the author of child social research report to Community Counselor (Bispa) in the jurisdiction of the district court which trial the child. With the change of word 'could' to 'mandatory' prove to community that government have tried to give to community a protection toward children, however sometime the judge commit the breach by not complying with existing rule.

Thus, it is understandable that the idea of juvenile court in Indonesia has been existing since 1970 as it is meant in Explanation of Article 10 UU No. 14 Year 1970 concerning Judicial Authorities. Furthermore continue by Minister of Justice Regulation and Supreme Court Circular to realize the UU of Juvenile Court in Indonesia, on 10 November 1995 Government with Presidential decree No. R. 12/PU/XII/1995 submitted a juvenile justice bill to DPR to obtain discussion and approval. Hereafter Article No. 3 Year 1997, which amended again with UU No. 11 Year 2012 concerning Juvenile Justice System legalized in 30 July 2012 published in Indonesian sheet No. 153 thus UU No. 3 Year 1997 concerning Juvenile Court is not applicable.

### **3. International Instruments on Legal Protection for Children and Juvenile Justice Standard**

#### **a. International Instruments on Legal Protection for Children**

In order to provide legal protection for children, Indonesian Government has formulated UU No. 23 of 2002 concerning Child Protection, amended by UU No. 35 of 2014 concerning Amendments to the UU No. 23 of 2002 concerning Child Protection. The establishment of the law could not be

separated from the existence of the International Instrument which regulates Legal Protection of Children. Various International Instruments are as follows:

- 1) A number of declarations, resolutions, conventions, or still as international guidelines have guaranteed/protected children rights, which began with the *Geneva Declaration on the Rights of the Child 1924*. The Declaration was recognized in the *Universal Declaration of Human Rights 1948*. (World Declaration of Human Rights) (Abintoro, 2016, p. 27).
- 2) International Provisions concerning the Rights of the Child begin with a UN resolution 1386 (XIV) *Declaration of the Rights of the Child 1959* dated November 20, 1939 which affirms *The Geneva Declaration on the Rights of the Child 1924*.
- 3) UN General Assembly Resolution No. 39/46 *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* dated December 10, 1984, which was ratified by the Government of the Republic of Indonesia with UU No. 5 of 1998.
- 4) UN General Assembly Resolution XXIV No. 663 C on July 31, 1957 and to LXII No. 2078 dated May 13, 1977 concerning *the Standard Minimum Rules for the Treatment of Prisoners Adapted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva at 1955, and approved by the Economic Social Coordination*).
- 5) UN General Assembly Resolution Rp. 40/33 *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* dated November 29, 1985.
- 6) UN Assembly Resolution No. 40/35 *The Prevention of Juvenile Delinquency* dated November 29, 1985.
- 7) UN General Assembly Resolution No. 41/85: *The Declaration of Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to foster placement and adoption Nationally and internationally* dated December 3, 1986.
- 8) UN General Assembly Resolution 43/121: *The Use of Children in the Illiet Traffic Barocie Drugs* on 8 December 1988.
- 9) XXIV UN General Assembly Resolution No. 663 C on July 31, 1957 and to LXII No. 2078 May 13, 1977 concerning *the Minimum Standard Rules for the Treatment of Prisoners. Adapted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at Geneva in 1955, and approved by the Economic Social Council* (Abintoro, 2016, p. 28).

- 10) *Convention on the right of the child. Adapted and Opened for Signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.*

Children's rights in the Convention on the Rights of the Child (1989) in general, can be classified into 3 categories. First, the rights that are the right of every child regardless of age, but in this convention are stated and reaffirmed. For example: a guarantee of protection against torture, rights to the name and identity of citizenship, or the right to social security. Second, the catalog of human rights in general, but in the convention is given emphasis, guarantees of rights need to be strengthened and applied specifically, such as rights and requirements for children (youth) who want to work, or children's rights in the context of deprivation of liberty (detention / imprisonment). Furthermore, third, special rights relating to children, such as adoption, the right to basic education and communication (relating) to their parents.

In addition, the Convention on the Rights of the Child also includes guarantees aimed at providing protection and mediation to children to avoid extortion and abuse of power. In particular, towards children with disabilities, children in status without status and in refugee camps, including children from indigenous or minority groups. The Convention also encourages fulfillment of child participation rights, such as: expressing opinions and participate in social and political life in their community. We have already adopted two optional protocols to the Convention, which deals with the child trade, prostitution, and pornography (General Assembly resolution A/Res/54/263 of 25 May 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002). As well as protocols concerning the involvement of children of armed conflict (UN. Doc. GA resolution 2200 (XXI), 16 Desember 1966 entry into force 3 Januari 1976, in accordance with article 17, the International Covenant on Economic, Social, and Cultural Rights, art 40. General Assembly resolution A/RES/54/263 of May 2000. Optiora, 2002).

ILO also adopted at least two conventions aimed at the protection of children's rights. Before the Convention on the Rights of the Child was adopted, in 1973, ILO had adopted the Convention on Minimum Age (UN. Doc. General Conference of the International Labors Organisation at its fifty-eighth session Minimum Age Convention, 1973. (No. 138), 1976).

Then in 1999, ILO established Convention No. 182 concerning the Worst Forms of Child Labor (UN. Doc. Adopted on 17 June 1999 by the General Conference of the International Labors Organisation of its eighty-seventh session. Worst Forms of Child labors Convention 1999 (No. 182), 2000).

b. International Instruments on Juvenile Justice Standards

International instruments relating to the standards of child criminal justice include the following:

- 1) United Nations Standard Minimum Rules for the Administrative of Juvenile Justice "Beijing Rules". General Assembly Resolution No. 40/33, 29 November 1985. Under the UN regulation, it is determined, among other things, that the juvenile justice system will prioritize people's welfare. Therefore, every state law enforcement apparatus is given the authority to deal with children who violate the law without using formal justice.
- 2) Code of Conduct for Law Enforcement Officials, UN General Assembly Resolution, December 17, 1979. Law enforcers must carry out the obligations placed on their shoulders by the judge by serving the community and protecting all people against unlawful acts (Kunarto, 1996, p. 87).
- 3) Minimum Standard Rules for the Treatment of Prisoners, UN General Assembly Resolution No. 663 C XXIV, July 31, 1957. Regulations contained in this resolution should be applied without distinction as to race, color, sex, language, religion, political opinion, origin, nationality and social, property, birth or other status (Kunarto, 1996, p. 73).
- 4) Rules for the Protection of Juveniles Deprived of Their Liberty, UN General Assembly Resolution No. 45/113, November 14, 1990.

Against adolescents who are temporarily detained or awaiting trial, the principle of presumption of innocence applies. Detention before the court as far as possible is avoided and limited only to certain cases. Always try hard to determine ways of rehabilitation other than detention. If preventive detention is unavoidable, the juvenile justice and the investigator must work extra hard to make the shortest possible detention. They must be detained separately from teenagers who have been accused (Kunarto, 1996, pp. 128-129).

UN General Assembly Resolution No. 45/113, dated 14 November 1990 that there are some basic perspectives, among others:

- 1) The juvenile justice system must support the rights, safety and physical and mental health of the child being tried. Imprisonment should be a last resort.
- 2) Children may only be deprived of their liberty according to the principles and procedures set forth in this regulation and in the UN Minimum Standard rules for the implementation of juvenile justice (Beijing Regulation). Deprivation of children's freedom must be a last resort and in a minimum period of time and must be limited to excluded

cases. Duration of sanctions (imprisonment etc.) must be determined by the judicial authority without closing the possibility of early release (Nasution, 2006, p. 460).

#### **4. Diversion in various countries and in Indonesia**

##### **a. Diversion in various countries**

To avoid the effects or negative impacts of criminal proceedings against children, United Nations Standard Minimum Rules for the Administrator of Juvenile (The Beijing Rules) has provided guidelines in an effort to avoid those negative effects, by giving powers to law enforcement officials take policy action in dealing or misrepresenting the problem of child offenders by not taking formal paths, including stopping or not continuing or releasing from the judicial process or returning or submitting to the community and other forms of social service activities. This action is called diversion as summarized in Rule 11.1, 11.2, 17 A SMRIJ (The Beijing Rules). With this act of diversion, it is hoped that it will reduce the negative impact due to the involvement of children in the court process (Wahyudi, 2011, p. 46).

The idea of diversion was published in the SMRIJ (The Beijing Rules) as an international standard in the administration of juvenile justice, at a meeting of UN experts on Children and Juvenile in Detention of Human Rights Standards in Vienna, Austria on 30 October to 4 November 1994. this has appealed to all countries that began in 2000 to implement The Beijing Rules, The Riyadh Guidelines and the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (Wahyudi, 2011, p. 46).

The diversion discourse surfaced in various discussions in an effort to find a model for handling criminal cases committed by children. The development of practice in the field of law enforcement officers is to try to accommodate the shortcomings that exist in formal criminal law through the diversionary institution (BPHN, 2007, p. 67).

The concept of diversion in the Black Law Dictionary is translated as a Diversion Program, namely: A Program that refers to certain criminal defendants before the trial to community programs on job training education, and the like, which if completed may be lead to the dismissal of the charges (Garner, 2000, p. 387). (the program addressed to a defendant before the trial process in the form of a community program such as job training, education and the like, which is considered successful if the program allows him to not pursue further criminal proceedings).

In the Black Law Dictionary, diversion is a shape-shifting process which is a program that is only done at the stage of pre-adjudication of the criminal justice system. This form of transfer of cases or diversion is usually related to

the discretionary authority of law enforcement officers. With those definition in *Black Law Dictionary* the meaning of diversion is as if belong only to the police through their discretionary authority.

In conjunction with the power discretionary criminal proceedings discretionary word often associated with the police authority while a similar authority associated with prosecutors known as call the case rights or divert the case commonly known as *opportunitas*. However, it was not the case with David E. Aronson who stated that discretion designates power to freedom to judge and decide what need to be done in particular situation (Aaronson, Dienes, & Musheno, 1984, p. 5). Furthermore, David E. Aronson describes that the meaning of discretion includes the act of interpreting the law, the use of authority and the choice of action from law enforcement.

Ronald F. Wright stated that the discretion of the prosecutor is the authority to choose and determine the prosecution of a case and determine the type, weight or duration of the sanctions to be prosecuted (Wright & Engen, 2006, pp. 1942-1943).

At this time several states have implemented diversion, among others, are as follows:

1) Australia

In Australia there is The Young Offenders Act 1997, in which the law authorizes law enforcement officers (police) to carry out diversion against child offenders. This can be known from the objectives of the UU of Juvenile Crime (Bergen, 2003).

The purpose of the UU of Juvenile Crimes, as stated in section 3, *Young Offenders Act 1997* (NSW), as follows:

- a) To establish a scheme for dealing with children that provides an alternative to court processes for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warning (Wahyudi, 2011, p. 145);
- b) To establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences (Wahyudi, 2011, p. 145);
- c) To establish and use youth justice conferences to deal with alleged offenders in a way that:
  - (1) Enable a community based negotiated response to offences involving all affected parties, and
  - (2) Emphasises restitution by the offender and acceptance of responsibility by the offender for his or her behaviour, and
  - (3) Meets the needs of victim and offenders (Wahyudi, 2011, p. 145).



In Australia, the police have the authority to carry out diversions in dealing with crimes committed by children. This diversion authority is carried out with the following considerations:

- a) Avoid labeling or stigma caused by the effects of the juvenile justice system
- b) There are doubts about the progress of treatment of children's behavior (Werner, 1987, p. 185).

With these two things in mind, the police have a habit or tradition as a special right, namely discretion in the form of giving formal warnings rather than investigating child perpetrators (Werner, 1987, p. 185).

## 2) The Netherlands

In the Dutch juvenile justice system there are rules relating to this discretion and diversion in the form of:

### a) Police Transactions

Article 74 c clause (1) Sr. states: criminal acts in certain cases can be resolved wisely based on the laws and regulations by investigating officials. This regulatory policy means that the police can formulate certain conditions for the defendant, through these conditions criminal prosecution can be prevented. The authority of the police is the delegation of authority possessed by the public prosecutor. This authority is intended for perpetrators of crimes aged 12 years and under 18 years, (Article 74 c clause (2) and (3) Sr.)

### b) Ruled out of Cases by the police

Police in the practice of developing policies of verbal processing for handling child crimes, in a number of cases the preparation of verbal processes is deflected or supplemented by a short verbal process or summary, all of which are more related to the nature of the crime committed, the perpetrator's age, recidivism, or not. For first time perpetrator and for certain types of criminal acts, handling is carried out outside the judicial way, in this case the child is directed directly to the programs of providing child assistance or handled through talks between the police and children, parents, or the treatment is sufficient. It's just given a strong reprimand or payment of compensation to the victim. The whole step of handling by the police is without being followed by the sending of the verbal process to the public prosecutor. At the beginning of the non-judicial settlement of the police, a variety of collaborative projects among agencies emerged which were directed at efforts to provide child assistance. This is stipulated in Article 77 e clause (1) and clause (2) Sr. based on Article 77 c clause (1) Sr. Investigating officials appointed by the public prosecutor are authorized

to draft the participation of the accused child in a project to prevent the submission of verbal processes to the public prosecutor. This policy direction is focused on the non-judicial policy of resolving child crimes that are compatible with criminal acts that can be handled through police transactions, which is usually carried out with the Bureau of Het Alternatief (HALT) (Hadisuprpto, 1997, p. 233).

If an investigator who proposes a child to participate in the HALT project considers that the child in question really follows the Halt project, then he must make a written report from the investigating officer to the public prosecutor that a child who has committed the crime has seriously considered participating in the HALT project, then the criminal prosecution rights against the child also fall. (Article 77 e clause (5) Sr.)

c) Transactions by the public prosecutor

The provisions of Article 74 Sr., in accordance with Article 77 b which is applied to children who commit crimes aged 12-8 years, state that the public prosecutor has the authority to settle with his own policies criminal offenses that are legally threatened with imprisonment 6 years and violation cases.

The public prosecutor is directing his attention more on his actions on the interests of the defendants of the child than the interests of the implementation of the child's trial by formulating one or more requirements to prevent criminal prosecution. Fulfilled by the requirements contained in the transaction with the child, the right to do criminal proceedings is dropped.

The terms of the transaction consist of:

- (1) payment of a sum of money to the country;
- (2) release of material rights;
- (3) transfer of material rights;
- (4) the seizure of profits obtained against the law;
- (5) compensation;
- (6) appointment of family guardian;
- (7) community service, working to repair damage arising from criminal acts in one of the appointments of damage caused by child crime or participating in a training project (Hadisuprpto, 1997, p. 234).

In addition, the public prosecutor still has other authority in the form of "*seponeren*". The accused child is invited in a courtroom to receive a report of a strong reprimand, get directions and warnings (on other occasions the public prosecutor will act harder).

d) Alternative sanctions (Hadisuprpto, 1997, p. 232)

Alternative sanctions in juvenile justice are very important because all of this comes from the main principles of the administration of juvenile criminal justice, namely the best interests of the child must be the main consideration. There are 3 types of alternative sanctions, namely: (a). society service; (b). work that is oriented towards recovering losses due to criminal acts and (c). participation in training projects.

### 3) Japan

Juvenile criminal justice system in Japan adheres to the principle of priority (*Hogo Yuusen Shugi*). The principle of submitting all cases (*Zenken Soochi - Shugi*) and adhering to the Diversity Principle (Ota, 1995).

Protection Priority Principles, namely the examination of children (people under the age of 20) who commit crimes are separated from the event towards adults, and the inspection procedure is not intended to punish children, but aims to protect and educate children. What is needed for a child who is a criminal is protection from the state, not a punishment. The Principle of Handover of All Cases, meaning that the child who is a criminal who is 14 years and older after being examined in the police and prosecutor's office, will be submitted to the family court (*Katesaibansho, family court*) without being prosecuted in regular court.

A child judge in a family court is the one who can decide which treatment is most suitable for the child. So, all child cases must be submitted to the Family Court.

The juvenile criminal justice system in Japan adheres to the Diversion Principle, it is known that most of the bad children are avoided from punishment in institutions. If it turns out that it is given an action, but the priority is on coaching outside the institution, namely social supervision. For example: in 1992, children processed in family courts totaled 147,682. Of these, 106,078 people (71.8%) cases of children resolved without trial. Children completed without any action after the trial (without action) amounted to 24,572 people (16.6%). Thus children who were completed without action amounted to more than 88% (71.8% plus 16.6%).

The policy to prevent or not file a suspect to court is a preventive policy in law enforcement. This preventive policy gives authority to law enforcement officers to conduct a selection of suspects who will be brought to court, even though the person clearly has committed a crime. Preventive policies exist in the Japanese criminal justice system. In Japan not all cases by the police are handed over or forwarded to the prosecutor's office to be prosecuted on the grounds of:

- a) Crimes against property;
- b) The suspect shows real regret;
- c) Compensation has been made by the suspect;
- d) The victim has forgiven the suspect (Ota, 1995).

In Japanese criminal procedural law, the Prosecutor has the authority to delay prosecution even though the evidence is sufficient. The authority to delay the prosecution (*Suspension of Prosecution*) is based on the provisions in Article 248 of the Japanese Criminal Procedure Code, where prosecution does not need to be done after considering the factors:

- a) Characteristics, age and circumstances of the perpetrator
- b) The severity or seriousness of the criminal act and the circumstances at the time the crime was committed
- c) Circumstances caused by the occurrence of the crime

b. Diversion in Indonesia

In Indonesia the idea of diversion has become one of the recommendations in the National Juvenile Justice Seminar held by the Faculty of Law, Padjadjaran University, Bandung, on October 5th, 1996. In the formulation of the results of the seminar, there were matters agreed upon in the recommendations, among others, Diversity. The idea of diversion agreed upon in the seminar's recommendations, to give authority to judges, namely the possibility of a judge to stop or transfer / not continue to examine cases and examine children during the hearing process before the trial (Atmasasmita, 1997, p. 201).

The idea of diversion has appeared in the Draft Law on the Criminal Code and in the Draft Renewal of the Juvenile Court Law. In the Draft Law on the Criminal Code there are provisions on Diversion provisions, as stipulated in Article 114 of the Draft Law on Criminal Code Book I Part Four concerning "Crimes and Actions for Children". Article 114 of the Draft Law on Criminal Code Bill regulates the following:

- 1) By paying attention to the provisions concerning the objectives and guidelines for punishment as referred to in Article 54 and Article 55, in the interest of the child's future, the examination before the court can be postponed or stopped after hearing the considerations of investigators, public prosecutors and community officials.
- 2) The postponement or termination of the examination as referred to in paragraph (1) is accompanied by the following conditions:
  - a) The child will not commit a criminal act; and or
  - b) Children must in a certain time replace all or part of the losses caused by their action (Criminal Code Book I 2008, t.thn.).

Whereas in the Draft for the Renewal of the Juvenile Court Law, there is an idea of diversion as a material for renewal, which is listed in Article 1 and Article 40 of the Draft Amendment to the Law. The Juvenile Court, there is an idea of diversion included in the formulation policy for the renewal of the Juvenile Court Law (Depkumham, 2009).

Formally the diversion idea has not been included in the UU No. 3 of 1997 concerning the Juvenile Court and only stated in the UU No. 11 of 2012 concerning the Juvenile Justice System. In the UU No. 11 of 2012 the diversion is regulated in Article 1 number 7, Article 6 to Article 15.

In order to implement the UU No. 11 of 2012, the Government has issued:

- 1) Government Regulation No. 65 of 2015 pertaining to Diversion Implementation Guidelines and Child Handling who are not yet 12 years old. Issued in State Gazette of R.I. of 2015 No. 194, TLN. R.I. No. 5732.
- 2) R.I. Supreme Court Regulation No. 4 of 2014 pertaining to Diversion Implementation Guidelines in Juvenile Justice System.
- 3) Attorney General's Regulation No. Per 006/A/J.A/04/2015 pertaining to Diversion Implementation Guidelines at the level of prosecution, issued in Official Gazette of R.I. No. 621 of 2015.

The meaning of diversion according to UU No. 11 of 2012 regulate in Article 1 number 7 is as follows: Diversion is the transfer of child cases settlement from criminal trial process to process outside the criminal trial (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, Article 1 Number 7, 2012).

In the academic script of RUU of Juvenile Justice System it is stated that diversion is the transfer of child cases settlement which suspected to committing a particular crime from formal criminal proceedings to peaceful settlement between the suspect or defendant or perpetrator of a crime with the victim facilitated by family and/or the community, child social counselor, police, prosecutor, or judge (Djamil, 2013, p. 137).

According to *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* what is meant by diversion is administrating authority to law enforcement officers to take policy actions in handling and settling child violation problem by not taking the formal way such as dismissing or continuing or releasing from criminal trial process or returning or handing over to community in the form of other social services. Diversion application could be done in every level of investigation, intended to reduce the negative effect of child involvement in those trial processes (Wahyudi, 2011, p. 56).

In a general explanation of UU No. 11 of 2012 it is mentioned that the most basic substance in this UU is the strict regulation regarding the restorative justice and diversion. It is meant to avoid and keep the child away from the trial process, so as to prevent the stigmatization of a child dealing with the law and it is expected that the child could return to social environment naturally (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153 Chapter General Explanation).

According to Article 6 UU No. 11 of 2012 mentions the aims of diversion are:

- 1) Reach settlement between the victim and the child;
- 2) Settling the child cases outside the trial process;
- 3) Prevent the child from deprivation of independence;
- 4) Encourage the community to participate; and
- 5) Instill the sense of responsibility to the child (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, Article 6).

As a component or sub-system of juvenile justice system, every state apparatus, namely Polri, R.I. judiciary, and law court in carrying out the diversionary tasks should have the same objective as mentioned in that Article 6 UU No. 11 of 2012. If one of the law enforcement apparatus in carrying out the diversionary tasks have different objective from the other law enforcement apparatus, therefore the juvenile justice system did not work out as required by the UU No. 11 of 2012 (Wiyono, 2016, p. 48).

Article 7 UU 11 of 2012 determined:

- 1) In the level of investigation, prosecution, and examination of child case in district court it is mandatory to attempt diversion.
- 2) Diversion as mentioned in clause (1) implemented in the case of a crime committed:
  - a) Threatened with 7-year prison sentence; and
  - b) Not repetition of a crime (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, TLN. Number 5332 Article 7).

In this case what is meant by the phrase: child case in Article 7 clause (1) UU No. 11 of 2012 is criminal act suspect to be committed by child.

As for what is meant by criminal case is a case regarding prohibited actions and threatened with punishment for anyone who violate the prohibition. In explanation of Article 7 clause (2) UU No. 11 of 2012 stated:

- 1) Provision of imprisonment under 7 (seven) years refers to criminal law;
- 2) Repetition of criminal case in this provision is a criminal case committed by child, either a similar or not similar criminal case, include as criminal

case which resolve by diversion (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, Explanation of Article 7 clause (2)).

Therefore, child case which is not mandatory to attempt for diversion is the child case with criminal act as follows:

- a) Threatened with imprisonment above 7 (seven) years;
- b) A repetition of criminal case.

The meaning of not mandatory to attempt diversion is not imperative or facultative. That is to say, the child case which criminal act is threatened with imprisonment above 7 (seven) years or a repetition of criminal case could attempt for diversion.

Regarding the process of diversion regulate in Article 8 UU No. 11 of 2012, as follows:

- 1) The process of diversion is done by discussion involving the child and parents/legal guardian, victim and/or parents/legal guardian, Community Counselor, and Professional Social Worker according to restorative justice approach.
- 2) In case it is needed, discussion as mentioned in clause (1) could involve Social Welfare Personnel, and/or the community.
- 3) The diversion process must pay attention to:
  - a) The victim's interests
  - b) The child's welfare and responsibility;
  - c) Avoidance of negative stigma;
  - d) Avoidance of retaliation;
  - e) The community harmony; and
  - f) Appropriateness, decency, and public order (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, TLN. Number 5332 Article 71).

In explanation of UU Article 8 No. 11 of 2012 state that:

Clause (1): The victim's parents and legal guardian involve in diversion process in case the victim is a child.

Clause (2): What is meant by the society among others religious figure, teacher, or public figure (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, TLN. Explanation of Article 8 (1), (2)).

The matters that should be consider by law enforcement apparatus in doing diversion regulate in Article 9 UU No. 11 of 2012 as follows:

- 1) Investigator, Public Prosecutor, and Judge in doing diversion should consider:

- a) Criminal act category;
  - b) The child's age;
  - c) Results of community research from Bapas;
  - d) Support of the family and community environment.
- 2) Diversion agreement should obtain the consent from the victim and/or the child victim's family and willingness from the child and the family, except for:
- a) A criminal act in the form of infringement;
  - b) Minor criminal act;
  - c) Criminal act without victim; or
  - d) The victim's loss value is not exceeding the value of the local provincial minimum wage (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, TLN. Number 5332 Article 9).

In explanation of Article 9 UU No. 11 of 2012 state:

Clause (1), letter a: This provision is an indication that the lower the criminal threat, the higher is the Diversion priority. Diversion is not meant to be done against serious offenders, for instance murder, rape, narcotics dealer, terrorism, which threatened with sentence above 7 (seven) years. Letter b: the child's age in this provision is meant to decide the priority of giving diversion, the younger the child's age, the higher is the diversion priority.

Clause (2). The provision regarding the consent from the child victim's family in this case the victim is minors. Letter a is quite clear. Letter b: what is meant by minor criminal act is criminal act which threatened with imprisonment, imprisonment for a maximum of 3 (three) months (UU Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Number 153, Explanation of Article 9 (1), (2)).

Furthermore Article 10, 11, 12 UU No. 11 of 2012 regulate about Diversion Agreement.

In order to complete the discussion regarding this diversion matters it is needed to give example cases of the application of diversion as follows:

The application of diversion for child offender in Cibinong District Court began in 2015 as stated in 2015 Cibinong District Court Annual Report as follows:



**Table 1 Child Criminal Cases that Applied for Diversion in 2015**

No	Number and Date of Letter	Child's Name	Article	Date of Agreement	Date and Number of District Court Decision & Date of Diversion Implementation
1	14/sus. Anak 29 May 2015	Muh. Hafids Albiansyah	80 (2)	4-6-2015	8-6-2015 : 6/Pid.Sus.Anak/2015 8-6-2015
2	16/sus. Anak 4 June 2015	Lorentius Alviando Bayu	310 (3)	17-6-2015	18-6-2015 : Pid.Sus.Anak/2015 18-8-2015
3	23/sus. Anak 29 May 2015	Wahyu Dwi Sucipto	303 (1)	3-9-2015	3-9-2015 : 10/Pid.Sus.Anak/2015 3-9-2015
4	29/Sus. Anak 4 September 2015	Randa Andani	351 (1)	29-9-2015	29-9-2015 : 11/Pid.Sus.Anak/2015 29-9-2015

Data source: Annual Report of Cibinong District Court in 2015

From table 1 it could be known that the total of criminal cases committed by child in 2015 which applied for diversion and reach settlement at Cibinong District Court in 2015 are really small number, only four cases.

Compare to child criminal case (the perpetrator is child) that had been sentenced by Cibinong District Court in 2015 as follows: sentence to crime 13 Cases, with action 8 Cases, with crime and action 11 Cases. Total 32 Cases. Therefore the application of diversion for child offenders at Cibinong District Court in 2015 only 12,5% (Annual Report of Cibinong District Court in 2015, page 41)

## 5. Restorative Justice in various countries and di Indonesia

### a. Restorative Justice in various countries

Implemented nicely in various developed countries, restorative justice (restorative justice) not only in academic fields and practical lawcriminal justice and criminology. In North America, Australia and parts of Europe, Judicial justice has been applied to the justice process conventional, which is an investigation, and prosecution, stage adjudicator and the training phase.

The progress is triggered by explaining the interest in the last fourth of the last century, which then go to all corners of the world. Even the UN continues to help countries. Even UN develops restorative practices through national criminal justice. Considering for the next one or two decades, organizing criminal justice (to administer criminal justice) in various countries including Indonesia. Thankfully, academics and legal practitioners in Indonesia showing

positive behaviour If not, left far away from development and nearly 100 countries.

Many definitions of experimental justice have been made by people. In the United Kingdom, Tony F. Marshall formulated the definition of his position received international attention. Fair justice is a process where the parties concerned, solve the way together achieve a national agreement on criminal acts, including the implication is then day.

The term restorative justice (restorative justice) created by a psychology Albert Eglash in 1977, in his writing liability for loss or cover (reparation). Restorative justice pays attention to rebuild the development of relationships after there is a crime, between the criminal and community. Restorative Justice said by Sarre (2003) as a sign (hallmark) of the modern plantation court (Rick, 2003, pp. 100-101.)

A judicial justice that is peacefully resolved, not solely on applying the decision regarding the truth in the criminal justice system is hostile in the adversarial system. The justice-restructuring process is looking for a facility in dialogue between various affected crimes of victims, perpetrators, supporters, and society is a whole thing. Death involves the process that all the parties who acted in evil were found together - the same trying to resolve collectively how handle the counterpart after it has been done with evil and its implication in the future.

To better understand the general description of restorative justice, hereinafter described fairness in context history. According to Australian John Johnson Barithe, along with the history of humanity, restorative justice is the restoration of the model of dominant crime justice. Its binding, restorative justice is an offer for the return of the judicial system that is relatively had not lost its role, as a result of continuing to be used in the group influential interests.

Speaking of losses that must be paid by the subject of crime, restorative justice have known it since 40 years ago. In *Code of Ur-Nammu*, The Book of Law is the first year 2000 SM in the Islamic World, was found obliged to pay a fee it is also a crime for violence sanctions for human rights which was also found in the past Code of Hammurabi, which was written in 1700 BC in Babylon. Next, the laws of Romans obliged the payment of the value to be paid the object. The word included the incised year 449 BC on the twelve "plate" ivory which is known as "A dozen inscriptions" (Twelve Tables)

In A.D Era, the compensation of crime with or without violence, ordered by the Clovis Army with Laws in Germany year 496. While law is Brehon (Brehon Laws) written the first time in Old Ireland era, explain the loss is the way pay for losses in terms of crime (around 600-900). More loss is needed earlier than

600 in the Ebertbert of Kent Law, in the UK, after the attack on Normandy, retributive justice with the nature of retaliation shifts restorative justice. Crime is against kings, not individuals against individuals. According to the Law of King Henry 1 for example a crime that is qualified as a customer against "peace" (King's peace) less than with violations in the present time.

In its subsequent development, growth and distribution of restorative justice gets support of UN. In Congress Five year 5th year (Geneva, 1975), UN begins to influence attention to replace the crime of crime, as an alternative to judicial and retributive justice. The following decade, this world council goes a step further and concretely protects and enforces the rights of victims through several international instruments and provisions for implementation. The peak happened in the 11th UN Fifth Annual Year Congress (Bangkok, 2005), where explicitly fair justice for the first time mentioned in the wrong one: "Improving Criminal Justice Reform, Including Restorative Justice."

#### b. Restorative Justice in Indonesia

In Indonesia, justice and reformation are formally regulated in the Law No. 11 of 2012 about the Criminal Justice System Article 1 paragraph 6, Article 5 (1), and Article 8 paragraph (1).

According to Article 6 of Law No. 11 of 2012 about Juvenile Criminal Justice System, it was mentioned:

Restorative justice is the settlement of criminal cases involving perpetrators, victims, family members of perpetrators/victims, and other parties related to look for a fair solution of the problem by emphasizing on the recovery to the original state instead of retaliation.

Article 5 (1) Law No. 11 of 2012 about Juvenile Justice System states:

Juvenile Criminal Justice System must prioritize the Restorative Justice approach.

In the explanation the article was stated quite clearly.

Article 8 paragraph (1) of Law No.11 of 2012 about about Juvenile Justice System states:

The Diversion process is carried out through deliberation by involving the child and his parents/guardians, victims and/or their parents/guardians, Community Counselors, and Professional Social Workers based on the Restorative Justice approach.

In the Academic text of the Juvenile Criminal Justice System Program, it is stated that the juvenile criminal justice system with Restorative Justice aims to:

- 1) Seek peace between victims and children;
- 2) Prioritize solutions outside the process;
- 3) Keep children away from the negative influence of the judicial process;

- 4) Instill children's sense of responsibility;
- 5) Embody children's welfare;
- 6) Avoid children from deprivation of liberty;
- 7) Encourage people to participate;
- 8) Improve children's life skills.

In the general explanation of Law No.11 of 2012, it is stated that Restorative Justice is a diversion process in which all parties involved in a particular crime jointly solve the problem and create an obligation to make things better by involving the victims, the children and the community in finding solutions to improve, reconcile and reassure the emotions that is not based on retaliation.

### **C. Conclusion**

1. Diversion and Restorative Justice is a new thing in Juvenile Criminal Justice System in Indonesia, speech as regulated in Law Number 11 of 2012 about Juvenile Criminal Justice System.

The making of the Law Number 11 of 2012 can't be separated from the existence of the United Nation's 44.25<sup>th</sup> Resolution about Convention on the Rights of the Child, adapted by the General Assembly of the United Nations on 20 November 1989 (Convention on the Rights of Children) which has been ratified by Indonesian Government on January 20<sup>th</sup> 1997.

The United Nation's Convention on the Right of Children encourages Indonesian Government to form the Law Number 11 of 2012 about Juvenile Criminal Justice System replacing the Law Number 3 of 1997 about Juvenile Criminal Justice System.

One of the attached characteristics of the Child Criminal Justice System is that law enforcers can end the judicial process at any time, since certain circumstances are known by the authorities to stop it.

2. The definition of diversion according to Law Number 11 of 2012 is the transition of resolutions of child cases from criminal justice processes to processes outside of criminal justice. To avoid the negative effects or impacts of the criminal justice processes on children, United Nations Standard Minimum Rules for Administrator of Juvenile (The Beijing Rules) has provided a guidance in attempt to avoid the negative effects, namely by giving authority to the law enforcement officers to take policies in handling or resolving the problem of child offenders by not taking a formal path, such as stopping or not continuing or discharging from the judicial process or returning or submitting to the community and other forms of social service activities. This action is called diversion, as stated in the Rule 11.1, 11.2, and 17 A SMRIJ (The Beijing Rules).

With the act of Diversion, it is expected to reduce the negative impact of the involvement of children in the judicial process.

At this time several countries have implemented diversions, including:

Australia. In Australia there is Juvenile Criminal Act (The Young Offenders Act, 1977) wherein the law authorizes law enforcement officers (police) to carry out diversion against child perpetrators. This can be known from the objectives of the Juvenile Criminal Act. In Australia, the police have the authority to carry out diversion in handling crimes committed by children. This diversion authority is carried out with the consideration of: a) avoiding labeling or stigma caused by the effects of the juvenile justice system. B) there are doubts about the progress of the treatment of child perpetrators.

In Indonesia, diversion is formally regulated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which is effective after 2 years since the promulgation on July 30, 2012. In Law No. 11 of 2012 the diversion is regulated in Article 1 number 7, Article 6 to Article 15. Regarding the purpose of diversion regulated in Article 6 of the Law Number 11 of 2012, diversion is aimed at a) achieving peace between victims and children, b) solving child cases outside the judicial process, c) avoiding children from deprivation of liberty, d) encouraging people to participate, e) instilling a sense of responsibility to children. Article 7 of Law Number 11 of 2012 determines: (1) At the level of investigation, prosecution and examination of juvenile cases in state court, diversion must be attempted (2) diversion as referred to in paragraph (1) is carried out in the case of a crime committed:

- a. Threatened with imprisonment under 7 (seven) years
  - b. Not a repetition of the crime
3. Regarding Restorative Justice, it can be concluded that: Nowadays in various developing countries, restorative justice is not just a discourse of academics and practitioners of criminal and criminology law. In North America, Australia and parts of Europe, restorative justice has been applied at all stages of the conventional criminal justice processes, namely the investigation and prosecution stages, the adjudication stage and the imprisonment execution stage. The restorative justice process seeks a facility of dialogue between various parties affected by the crimes of victims, perpetrators, supporters, and the community as a whole. This involves a process that all parties at risk in certain crimes collectively try to resolve collectively how to deal with problems after crime and its implications in the future. In the case of victims' losses that must be paid by perpetrators, restorative justice has recognized it for 40 centuries. In the Code of *UrNammu*, the oldest Law Book written around 2000 BC in Sumeria for example, found the obligation to pay compensation to victims of violent

crime. In Indonesia, restorative justice is just formally regulated in Law Number 11 of 2012 about Juvenile Criminal Justice System, Article 1 number 6, Article 5 paragraph (1), and Article 8 paragraph (1). Law Number 11 of 2012 about Juvenile Criminal Justice System is stated: Restorative Justice is the settlement of a criminal case involving the perpetrator, victim, family of the perpetrator / victim, and other related parties to jointly seek a fair solution by emphasizing the recovery to the original state instead of retaliation. So, in Indonesia restorative justice is a part of diversion.

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