

## RESTORATIVE JUSTICE IN ACT NO. 11 OF 2012 ON THE JUVENILE CRIMINAL JUSTICE SYSTEM IN INDONESIA

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### ABSTRACT

*Children require special treatment and protection, because the physical conditions and mental abilities are not stable, so their ability to behave and their responsibility are not the same as adults. Against Children in conflict with the law required is different treatment it does not like dealing with the adults who against the law*

*This research review to two issues: first how is the formulation policy of juvenile justice system today, the second is how to restorative justice in Act No. 11 of 2012 on Juvenile Criminal Justice System. The approach used is a socio - legal studies, as well as historical and comparative approachment. Types of data are used secondary data and primary data. Secondary data were obtained by literature and documentary studies. Primary data were obtained by interview. In this research data analysis applied of quantitative and qualitative.*

*The research results shows, that the formulation of policies in the international law instruments for children in conflict with the law has been set up, in several international legal instruments include the UN Standard Minimum Rules on the Administration of Juvenile Justice (" Beijing Rules ") and The UN Guidelines for the Prevention of Crime ( " Riyadh Guidelines " ). The UN resolution is the minimum standards for the protection of children from all forms of deprivation of liberty based on human rights and prevent the child from the side effects of all forms of detention in order to achieve the integration of children into society. In the national law instruments, the Act No.11 of 2012 on the Juvenile Criminal Justice System explained about the juvenile criminal justice system, as well as restorative justice.*

Keywords: Restorative Justice, Juvenile Criminal Justice System.

### A. INTRODUCTION

The rights of children today, especially regarding the protection of children in the juvenile criminal justice system has not been quite able to provide better conditions in the sense of getting rid of the bad condition of the child. In regard to the protection of some things and need attention, namely, shelter, protected parties feel secure in the protection. Interests and fundamental rights guaranteed and not harmed, even cultivated developed, so as to achieve growth mentally, physically, and socially maximum. The judicial process cause adverse psychological effects for children. They will be under pressure and stigmatization during the process of justice, then based on that all activities undertaken in the framework of the juvenile justice whether it is by the police, prosecutors, judges or other officials, must be based on a principle is for the welfare of the child and the child's interests.<sup>1</sup>

In the administration of justice, due to a variety of factors have not been able to provide protection to juvenile as offender optimally. It is still due to the limitations of the use of criminal law in combating crime in general and children in particular delinquency, which only combat the symptoms and do not touch the surface roots or often called " kurieren am symptoms " on the one hand, and on the other hand is still scarce thought explores conceptual concrete criminal policy of non – penal.<sup>2</sup>

Based on these conditions, restorative justice is needed as a form of handling for offenders against the law in an effort to achieve restorative justice. Restorative Justice is a theory that emphasizes the loss and restore broken relationships caused or incurred by a criminal act. Recover losses and this relationship will be achieved by the cooperative processes that include all stakeholders (interested).<sup>3</sup>

This research review two issues: first formulation of how the juvenile criminal justice system today, second how restorative justice in Act No. 11 of 2012 on the Juvenile Criminal Justice System in Indonesia.

<sup>1</sup> Sudarto, Law and Criminal Law, Bandung : Alumni, 1977, p. 140

<sup>2</sup> Barda Nawawi Arief, The Boundaries of the Criminal Law Capabilities In Crime Prevention ", paper presented at the National Seminar on Non-penal approach in Combating Crime" in Semarang, dated 2 September 1996.

<sup>3</sup> Muladi, Capita Selecta Criminal Law, Semarang: Publisher Agency Diponegoro University, 1995, p. 125

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## B. RESTORATIVE JUSTICE

The distinguishing feature of restorative models with other models lies in the way he looked at the behavior of the juvenile delinquency. According to the model of restorative, delinquency behavior is behavior that is detrimental to the child victim and the community. Restorative justice response to delinquency directed at society. Restorative justice is not punitive, nor mild nature. Its main objective is the improvement of the wounds caused his actions, and conciliation and reconciliation among victims, offenders, and communities. Restorative Justice also intends to restore the well-being of society through means confronts the child's behavior on the responsibility for his behavior. Victims are given the opportunity to participate in the process. According to Braithwaite express ways as it gave birth to feelings of shame and personal and family responsibility for the actions of any of them to be adequately repaired.<sup>4</sup>

According to Frank E. Hagan, restorative justice has evolved from a concept that is so little known to be a term that is used widely but in a different way. There is no doubt about its appeal, though using a variety of terms that cause confusion. Umbrella term "Restorative Justice" has been applied to the initiative identified as restorative by some people but not for others. An example is the legal notice for sex offenders, victim impact statements, and the murder victim has the "right" to attend the execution.

The real goal of restorative justice is to restore harmony between victims and perpetrators. For some, this means a loss of physical and psychological harm. For actors, it means taking responsibility, dealing with shame, and regain their dignity. This idea has grown rapidly, with major new conceptual developments, namely the incorporation of the role of the community.<sup>5</sup> Most restorative justice advocates agree that the process involves five basic principles:

- a. Crime is not just from the criminal law violations and irregularities against government power.
- b. Crime cause disruption in the three-dimensional relationship between the victim, the community, and the offender.
- c. Because the crime to harm the victim and the community, the main goal should repair the damage and heal the victims and society.
- d. Victims, communities, and offenders must all participate in determining the response to crime; government should hand over authority over the process.
- e. Disposition of cases should be based primarily on the needs of the victim is not solely on the needs of the offenders or error, danger, or history.<sup>6</sup>

Helen Cowie and Dawn Jennifer, identifying key aspects of restorative justice as follows;

- a. Improvement, not about victory or accept defeat, accusations, or revenge, but about justice.
- b. Rapprochement, not the criminals are sentenced to assume responsibility for error and fix a number of ways, but through a process of open and direct communication between victims and criminals, which could potentially change the way relate to each other.
- c. Reintegration, the broadest level, providing an arena where children and parents can obtain a fair process. It means that they learn about the consequences of violence and criminality, and to understand the impact of their behavior on others.<sup>7</sup>

Jeff Christian explained more simply on differences Retributive Justice and Restorative Justice is. In Retributive Justice against state actors / queen / government, while Restorative Justice Offender against the victim, or the resistance between individuals. In retributive models in question is how to punish the wrong people so that there is a war between lawyers. But on the model in question is restorative how to solve the problem so that what is needed is dialogue and cooperation.<sup>8</sup> Restorative Justice is in an effort to prevent the same thing over crimes in the future. According Muladi in restorative justice dignity of victims are taken into account. The offenders must be held accountable and be integrated back into the community. The offenders and the victim is a resident balanced and interdependent because it must be reconciled.<sup>9</sup>

John Braithwaite argued, that Restorative Justice aimed at restoring harmony or balance when the law has been enforced.<sup>10</sup> Restoring harmony / balance is an sich is not enough, therefore "restore balance" can only realize the idea of justice diteima as if "balance" morally between offenders and victims that existed previously are appropriate balance.

<sup>4</sup> John Braithwaite, *Restorative Justice : Assessing an Immodest Theory and a Pessimistic Theory Draft to be summited to Crime and Justice : Review of Research*, University of Chicago, Press, p. 5

<sup>5</sup> *Ibid*

<sup>6</sup> Frank E. Hagan, *Criminology Today*, Amerika Latin , Wadsworth Group, Thomson Learning, 2002, p. 184

<sup>7</sup> Hadi Supeno, *Kriminalisasi Anak*, Jakarta: Gramedia, 2010, p.203.

<sup>8</sup> *Ibid*, p. 204.

<sup>9</sup> Muladi, *Opcit*, p. 27 – 29.

<sup>10</sup> John Braithwaite, *Restorative Justice : Assessing an Immodest Theory and a Pessimistic Theory Draft to be summited to Crime and Justice : Review of Research*, University of Chicago, Press, p. 5

In restorative justice, the role of the community is very important, since understanding to the implementation of the judicial system. Even restorative justice will fail if the community does not participate in the implementation of the process.

### C. JUVENILE CRIMINAL JUSTICE SYSTEM TODAY

The results of the analysis of the study shows, that the various policies in the formulation of international legal instruments have been set up on the legal protection of children covering areas / aspects, among others in the criminal justice system of children mentioned the need to prioritize the handling of non-formal process as to avoid the stigma for children, Children who was in custody before the court will be housed separately from adults and shall be detained in separate institutions from institutions that hold adults, receive care, protection and all necessary individual assistance, social, educational, skills, psychological, and physical treatment they need according to age, gender, and personality.

The protection of juvenile against the law has been set up in several international legal instruments include the UN Standard Minimum Rules on the Administration of Justice for Juvenile ("Beijing Rules") by the United Nations Assembly Resolution No. 43/33 November 29, 1985 and the UN Guidelines order Crime Prevention Centre ("Riyadh Gidelines") authorized and declared in the UN General Assembly Resolution No. 45/112 December 14, 1990, with the assertion that the UN resolution is the minimum standards for the protection of juvenile from all forms of deprivation of liberty, which is based on human rights and prevent the child from the side effects of all forms of detention in order to achieve the integration of children into society. In addition, the Convention on the Rights of the Child (Convention on the Rights of the Child) are acting as international law began on 2 September 1990, which saw the need to perform the steps of systematic and comprehensive to provide protection to children who are in conflict with the law.

In Indonesia, The Act No. 11 of 2012 on The Juvenile Criminal Justice System regulate the entire process of settling disputes concerning Juvenile against the law began the investigation phase to the stage after a sentence of supervision. The articles related to the process are as follows:

#### Article 1

##### Number 1:

Juvenile Criminal Justice System is the whole process of settling disputes juvenile against the law, from the stage of the investigation up to the stage after a sentence of supervision.

##### Number 2:

Juvenile against the law are juvenile in conflict with the law, juvenile who are victims of crime, and juvenile who are witnesses of crime.

##### Number 3:

Juvenile in conflict with the law, here in after referred to Children is a child who was aged 12 (twelve) years, but not the age of 18 (eighteen) years who suspected committed the crime.

#### Article 2:

Juvenile Criminal Justice System is implemented based on the principle:

- a. protection;
- b. justice;
- c. Non-discrimination;
- d. Best interests of the child;
- e. Respect for the views of the child;
- f. Survival and development of the child;
- g. Coaching and mentoring a child;
- h. proportional;
- i. Deprivation of liberty and punishment as a last resort; and
- j. Avoidance of retaliation.<sup>11</sup>

#### Article 13:

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<sup>11</sup> What is meant by "protection" includes activities that are directly and indirectly from acts which endanger the Child physically and / or psikhis.

What is meant by "justice" is that every child should be settling disputes reflect a sense of justice for Children.

The definition of "non-discrimination" is not any different treatment based on ethnicity, religion, race, class, gender, ethnicity, culture and language, the legal status of the Child, Child birth order, as well as physical and / or mental.

What is meant by "best interests of the Child" is any decision must always consider the survival and development of the Child.

What is meant by "respect for the opinion of the Child" is the Son of respect for the right to participate and express their opinions in decision-making, especially when it comes to matters affecting the life of the Child.

What is meant by "the survival and development of the Child" is the most fundamental rights of Children protected by the State, the government, communities, families, and the elderly

The Juvenile criminal justice process followed in the case of:

- a. Diversion process did not produce an agreement; or
- b. Diversion agreement was not implemented.

Child's age limit liability:

Article 69

- (1) Children can only be punished or subjected to action under the provisions of this Act.
- (2) A child who has not aged 14 (fourteen) years can only be subjected to the action

In international instruments and national instruments, has arranged that the legal mechanisms and law enforcement officers and citizens is a network that is responsible for the implementation of the juvenile criminal justice system and prefer the informal approach as preventing juvenile against the law.

#### **D. RESTORATIVE JUSTICE IN ACT NO. 11 OF 2012 ON THE JUVENILE CRIMINAL JUSTICE SYSTEM IN INDONESIA**

In Indonesia substantially in restorative justice is the lack of legal certainty, fairness and benefits to the two sides for the reduction of juvenile delinquency to achieve well-being of society. In an effort that has considered various aspects of policy, namely social policy, criminal policy and law enforcement policies, which is influenced from various aspects, namely sociopolitical, sosiophilosophy, and the underlying sociocultural norms and provide the content and substance of criminal law in the future.

Structurally the restorative justice process for juvenile delinquency offenders expected to undergo trials involving people in a mediation meetings to get an agreement between the victim, the offender, the victim's family, a family of actors, as well as parties that are directly related to the case. In relation to public participation in the fight against juvenile delinquency, however, the organization structure of the village in this case provide facilities for mediation all interested parties in the deliberation to reach an agreement between the victim and his family, the offender and his family, the community by involving religious leaders, community leaders and teacher.

Legal culture is conducting an education in the community so that the law was made and accepted as a manifestation of a nation's self-image. The presence and enlightening discourse legal culture, because people come to know, that there is only one way arbitrate the same in this world. In the legal culture of the legal work and is embedded in a socio-cultural matrix. Community or society forces will lead, define and determine how far and how legal it would obviously run, work and force in society. Attitudes and behavior of a nation will be in touch with the values espoused by the man who runs a particular legal system. The values for Indonesia is Pancasila. In its implementation needed the quality of certain human resources in order to walk in the empirical landscape.

Associated with restorative justice in Indonesia has been regulated in The Act Number 11 of 2012 on the Juvenile Criminal Justice System, some of the articles of them namely :

##### 1 Juvenile Criminal Justice System:

Article 5

- (1) Juvenile Criminal Justice System shall prioritize the Restorative Justice approach.
- (2) Child Criminal Justice System as referred to in paragraph (1) shall include:
  - a. Children criminal investigation and prosecution carried out in
  - b. accordance with the provisions of the legislation, unless otherwise
  - c. provided in this Act;
  - d. Children trials conducted by the courts in the general court; and
  - e. Coaching, mentoring, supervision and / or assistance during the implementation process and after a criminal or a sentence or action.
- (3) In the Juvenile Criminal Justice System referred to in paragraph (2) letters a and b must be pursued Diversion.

Article 6:

Diversion aims:

- a. Achieving peace between the victim and the Child;
- b. Children resolve the case outside the court process;
- c. Avoiding Child of deprivation of liberty;
- d. Encouraging people to participate; and
- e. Instill a sense of responsibility to the Child.

Article 7

- (1) At the level of investigation, prosecution, and court proceedings Children in the country must be

pursued Diversion

- (2) Diversion as referred to in paragraph (1) shall be implemented in the case of criminal offenses committed:
  - a. punishable by imprisonment under the 7 (seven) years; and
  - b. is not a repetition of criminal acts.

Article 8

- (1) Process Diversion done through consultations involving Children and parents / guardians, the victim and / or parent / guardian, Supervising Social and Professional Social Worker based approach Restorative Justice.
- (2) If necessary, consultations referred to in paragraph (1) may involve the Power of Social Welfare, and / or community.
- (3) Diversion process shall take into account:
  - a. The interests of victims;
  - b. Child welfare and responsibilities;
  - c. Avoidance of negative stigma;
  - d. Avoidance of retaliation;
  - e. Harmonious society; and
  - f. Propriety, morality, and public order.

Article 9 (2):

Diversion agreement must be approved by the victim and / or family Children Victims and Children with their families as well as the willingness, except for:

- a. The Criminal offense ;
- b. Misdemeanor;
- c. Criminal offense without victim; or
- d. Value casualty losses not more than the value of the local provincial minimum wage.

Article 10:

- (1) Diversion Agreement to resolve crimes such violation, misdemeanor, criminal acts without the victim, or the victim loss value is not more than the value of the local provincial minimum wage referred to in Article 9 paragraph (2) can be carried out by the investigator and the actors / or family, community Advisor, and can involve community leaders.
- (2) Diversion Agreement referred to in paragraph (1) conducted by investigators at the recommendation may take the form of Community Advisors:
  - a. Indemnification in case there is a victim;
  - b. Medical and psychosocial rehabilitation;
  - c. Handing back to parents / Guardians;
  - d. Participation in education or training in educational institutions or LPKS later than 3 (three) months; or
  - e. Community service no later than 3 (three) months.

Article 11:

Diversion can be formed on the agreement, among others:

- a. Peace with or without compensation;
- b. Handing back to parents / Guardians;
- c. Participation in education or training in educational institutions or LPKS later than 3 (three) months; or
- d. Community service.

Article 12

- (1) The results of the agreement referred to in Article 11 stipulated in the agreement form Diversion.
- (2) Results of Diversion agreement referred to in paragraph (1) shall be submitted by the direct supervisor of the responsible officials at every level of investigation to the district court within the legal jurisdiction within a period of 3 (three) days after the agreement was reached to acquire determination.
- (3) The determination referred to in paragraph (2) shall be conducted within a period of 3 (three) days from the receipt Diversion agreement.
- (4) The determination referred to in paragraph (3) shall be submitted to the Community Advisors, investigators, public prosecutor, or judge within a period of 3 (three) days after enactment.
- (5) Upon receipt of the determination referred to in paragraph (4), Investigators publish the

determination of the termination of investigation or public prosecutor issuing the determination of termination of prosecution.

Article 29

- (1) Investigator must seek diversion in time for a maximum of 7 (seven) days after investigation began.
- (2) Diversion process as referred to in paragraph (1) shall be implemented not later than 30 (thirty) days after the start of Diversion.
- (3) In the case of the Diversion reached an agreement Diversion Investigators deliver news event along Diversion agreement to the chairman of the district court to make the determination.
- (4) In terms of Diversion fail, the Investigator shall continue the investigation and to transfer the case to the public prosecutor to attach the minutes Diversion and social research reports.

Article 42

- (1) The Public Prosecutor shall endeavor Diversion period of 7 (seven) days after receiving the case file from the investigators.
- (2) Diversion as referred to in paragraph (1) shall be implemented not later than 30 (thirty) days.
- (3) In the case of the Diversion managed to reach an agreement, the Public Prosecutor delivered the news event along Diversion Diversion agreement to the Chairman of the Court to make the determination.
- (4) In terms of Diversion fail, the Public Prosecutor shall submit the minutes of Diversion and delegate to the court to attach social research reports.

Article 65

Community Supervisor on duty:

social research reports for the benefit of Diversion, mentoring, coaching, and supervision of the Child during the Diversion and implementation of agreements, including a report to the court if Diversion is not implemented;

3 A Type of sanction:

Article 70:

Severity of the act, the personal circumstances of the Child, or the circumstances at the time of the act or that ensues can be used as the basis for consideration of the judge does not impose criminal or wearing taking action in terms of justice and humanity.

4 Criminal Type:

Article 71

- (1) Criminal of staple for child consists of:
  - a. warning criminal;
  - b. criminal with the following requirements:
    - 1) coaching outside the institution;
    - 2) community service; or
    - 3) supervision.
  - c. job training;
  - d. coaching in organizations; and
  - e. Prison.
- (2) Additional Criminal consists of:
  - a. appropriation of profits derived from the crime; or
  - b. fulfillment of customary obligations.
- (3) If within the material being threatened criminal cumulative of imprisonment and fines, criminal penalties rewarded with job training.
- (4) The penalties imposed on Children prohibited violate the dignity of the Son.
- (5) Further provisions on the form and procedures for the implementation of the crime referred to in paragraph (1), paragraph (2), and subsection (3) is regulated by the Government

5 Measure Type:

Article 72

A warning criminal misdemeanors that do not result in restrictions on the freedom of the child.

Article 82

- (1) Measures shall be liable to the Children includes:
  - a. returns to parents / Guardians;
  - b. submission to someone;
  - c. treatment in a mental hospital;
  - d. LPKS care;
  - e. obligation to follow the formal education and / or training organized by the government or private entities
  - f. revocation of a driver's license; and / or
  - g. repair of a criminal offense.
- (2) The act referred to in paragraph (1) d, e, and f subject to a maximum of 1 (one) year.
- (3) Measures referred to in paragraph (1) may be filed by the Public Prosecutor in the claim, unless the criminal offense punishable with imprisonment for a minimum of 7 (seven) years.
- (4) Further provisions on the actions referred to in paragraph (1) is regulated by the Government.

Article 83

- (1) The submission of the Son to be done for the sake of the Son of man is concerned.
- (2) Measures against Child care is intended to help parents / Guardians in educating and
- (3) Provide mentoring to the child concerned.

9 Article 76:

Criminal Community Services:

- (1) Criminal community service is intended to educate Children with increasing concern for positive social activities.
- (2) If the child does not meet all or part of criminal liability in the running of public services without a valid reason, official's builder may propose to the supervisory judge to instruct the Children repeat the whole or part of the criminal community service imposed against him.
- (3) Criminal community services for Children imposed minimum seven (7) hours and a maximum of 120 (one hundred and twenty) hours.

Controlled substance under this law, including the placement of the child can be placed on trial at the Special Child Development Institute (LPKA). The substance of the most fundamental in this law is expressly settings on restorative justice and diversion intended to avoid and keep the Son of the judicial process so as to avoid stigmatise against Children in conflict with the law and is expected to Children can return to the normal social environment, because it is indispensable participation of all parties in order to achieve this goal. The process aims at the creation of restorative justice, both for the offender and for the victim's children.

## E. CONCLUSION

It can be concluded, that the international instruments governing the juvenile criminal justice system as well as efforts to protect the best interests of the child. In Indonesia in Law Number 11 Year 2012 on the Juvenile Criminal Justice System has set an obligation to give priority to children with the criminal justice system through diversion restorative justice approach, provided that the criminal act committed is punishable by imprisonment under 7 years old and not a repetition criminal offense which is a requirement. It is an effort that must be undertaken as well as the transfer of non formal process in the handling of juvenile against the law, which aims to provide better conditions in the sense of minimizing the bad condition for the child, and more attention to the special needs of the juvenile against of law, and in an effort to achieve restorative justice.

Indonesia as a state based on Pancasila need to develop restorative justice with community participation that further optimize the function and role of village institutions as part of a sub-system in the structure of juvenile criminal justice.

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