

## **A Case Study on Restorative Justice Approach of Juvenile Criminal Justice System In South Sulawesi**

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**Abstract:** This study aims at identifying, analyzing and revealing the nature of diversion in the restorative justice of juvenile criminal justice system and its implementation in South Sulawesi and factors influencing its implementation. This research employs a normative-empirical research. Following the study of normative law or legal research, this study employs a descriptive research. The results show that in providing the justice and legal protection to the children, the nature of restorative justice is in conflict with the law without prejudice to the criminal responsibility of children. The diversion is not a peace effort between children committing crimes and becoming the victim or his/her family but instead a form of punishment towards the children by means of non-formal punishment. The diversion is in the form of punishment which provides education to the children committing crimes (TPA). It is found that the diversion implementation in the restorative justice by the police, the district attorney and the court in South Sulawesi has not been yet effective.

**Keywords:** *Restorative Justice, Criminal Justice System, Children*

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### **I. INTRODUCTION**

Development in the current *das sein* research shows that crimes committed by children are increasingly common. According to Priyadi, the Director of Community Guidance and Child Care of Directorate General of Corrections, Ministry of Law and Human Rights<sup>1</sup>, there were only 20 Juvenile Correctional Institutions in Indonesia, whereas data from the Directorate General of Corrections (DG PAS) stated that up until June 2017, the number of child inmates registered at the UPT (technical implementation unit) managed by the Directorate General of Corrections (DG PAS) was 910. This number was increasing compared to that of 2016 i.e. 907, and it did not include the number of child inmates overseen by the Police (the number was not available and/or could not be accessed). As of June 2017, the number of child inmates was 2,559, this number increased from December 2016 i.e. 2,320 distributed in 33 regions in Indonesia.

Ironically, not all regions had LPAS (Temporary Child Placement Institution) and LPKA (Juvenile Correctional Institution). As a comparison, before it was changed to LPAS, only 17 provinces in Indonesia had juvenile correctional institutions. Accordingly it is ascertained that children who are inmates or fostered residents in the regions that did not have juvenile correctional institutions (LPKA and LPAS) were placed in correctional institutions and adult prisons.

Up till recently, the National data at the National Police Criminal Investigation Unit showed that, at the end 2015, the number of Children in Conflict with the Law (ABH), the number of child inmates was 2,017. At the end 2016, this number had increased to 2,123, whereas in June 2017 the number of child inmates was 3,983.

The General Criminal Investigation (*Reskrim*) of South Sulawesi Regional Police recorded that the number of children in conflict with the law (ABH) at Tabes Police Station (*Restabes*) Makassar in 2015 was 126 cases, in 2016 was 106 cases, in 2017 was 142 cases. In Tanah Toraja District Police Office, the number was 3 cases in 2015, in 2016 was 5 cases, and in 2017 was 9 cases. In Bone District Police Office, there were 5 cases in 2015, 10 cases in 2016, and 14 cases in 2017. In Takalar District Police Office, there were 20 cases in 2015, 19 case in 2016, 14 cases in 2017.

In their day-to-day practice, the police investigators who specifically handling cases of criminal offences by minors, resolved their cases outside the court. The settlement was applied because the law cannot accommodate all cases in the community. The settlement processes were carried out by the parties involved in which all parties agreed to resolve their cases without having to go through a long and complicated processes.

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<sup>1</sup>Fajri Achmad Nf. Bandung Ekspres Komitmen, jabarekspres.com. Headline. Accessed on August 5, 2015

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Settlement of such criminal cases outside the court usually involved the police as the investigator and law enforcement acting as the mediator from each party (Penal Mediator), in which the Penal Mediator (Police) strives for a deliberation between the perpetrator and the victim's family to reach an agreement to resolve family matters (amicably).

Penal mediation by the Police is an implementation of the rules /norms implied in the Republic of Indonesia Law Number 2 of 2002 concerning the Indonesian National Police (particularly Article 16 and Article 18). The penal mediation by the Police implied a public response towards the Police performance in handling juvenile criminal cases, because the penal mediation institution was, in fact, a constructive effort by the Police in resolving juvenile criminal cases through an Alternative Dispute Resolution (ADR)<sup>2</sup>.

Imposition of criminal fines also leads to injustice. The fines imposed on perpetrators collected by the State Treasury and the fate of the victims was neglected<sup>3</sup>. The victims, who should have received recovery treatment, did not receive their rights. One of correct approaches to addressing the various legal conflicts described above is the Restorative Justice Approach. Restorative Justice Approach in the settlement of criminal cases is considered as a new method, although the patterns used in the approach are typically rooted in the values of local wisdom of primitive society.

The concept of Restorative Justice Approach focuses more on the condition of creating justice and a balance for both the perpetrator and the victim. The procedural and criminal justice mechanisms that focus on prosecution are converted into a process of dialogue and mediation to create an agreement on the settlement of criminal cases that are more just and balanced for the perpetrator and the victim.

The Restorative Justice carries the meaning of justice that restores, however, what is actually restored? The process of conventional criminal justice recognizes a restitution or compensation for victims. But restoration has a broader meaning. Restoration involves restoring the relations between the victim and the perpetrator. The recovery of this relationship can be based on a mutual agreement between the victim and the perpetrator. The victim can convey the loss he/she has suffered and the perpetrator is given the opportunity to redeem such loss through a mechanism of compensation, peace, social work, and other agreements. Why is this important?

The approach of Restorative Justice can be applied in enforcing juvenile criminal law. Juvenile criminal case is part of criminal law with different character and resolution than the common criminal law<sup>4</sup>. If a juvenile criminal case is to be handled using the ordinary Criminal Procedure Court, such approach and handling may not reach the final goal of justice seekers i.e. to resolve problems, and instead, it will likely lead to create injustice<sup>5</sup>.

The approach to restorative justice is considered appropriate to settlement in juvenile criminal cases. If imprisonment shall be applied, the convicted will be placed in a Penal Institution with the goal to ameliorate the convicted, nonetheless living in Penitentiary in Indonesia has not succeeded in nurturing its inmates to become better persons, due to the overcapacity in most penitentiaries in Indonesia. Data from the Directorate General of Corrections shows that, out of 33 Provincial Offices, 28 offices experienced over capacity of inmates and detainees<sup>6</sup>. All the more so, overcapacity in several institutions reached almost 500%<sup>7</sup>.

This non-conducive condition in many Penitentiary Institutions mentioned above may have led an inmate who previously did not have a wicked talent to actually become wicked after life in the Penitentiary. An example of such case is the fights among inmates at Tanjung Gusta Class I Correctional Institution, Medan, North Sumatra, 2013.

To overcome such condition, we need a paradigm shift. Imprisonment was originally used as a means of punishment in the settlement of juvenile criminal case that causes death. It needs to be studied by utilizing countermeasures through a restorative justice approach.

Regulations regarding an approach to restorative justice in juvenile criminal cases are strictly regulated in the law, in particular the Law on the Juvenile Criminal Justice System.

The restorative approach in resolving juvenile crime cases can be applied in every stage of a criminal justice system, namely at the police, prosecutor office and in court<sup>8</sup>. However, it would be even better if the settlement is carried out during the preliminary investigation and the investigation shall be based on police

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<sup>2</sup> Roeslan Saleh. *Segi Lain Hukum Pidana*, Jakarta: Ghalia Indonesia, 1984, pg.14

<sup>3</sup> Artijo Alkostar. Restorative Justice. *Varia Peradilan* Year XXII No.262 July 2008

<sup>4</sup>As legislation in certain fields that have criminal sanctions, or criminal acts regulated in special legislation, outside the Criminal Code. Azis Syamsuddin. 2013. *Tindak Pidana Khusus*. Sinar Grafika, Jakarta. Pg.8.

<sup>5</sup> Ridwan Mansyur. 2006. *Persidangan Perkara Berperspektif Gender*. Yayasan Obor Indonesia. Jakarta. Pg. 361

<sup>6</sup><http://www.bantuanhukum.or.id/web/blog/kemenkumham-beri-solusi-tidak-menyentuh-akar-masalah-di-lapas/Accessed> February 14, 2016.

<sup>7</sup><http://satelitnews.co/lima-penjara-yang-over-capacity/>. Accessed October 30, 2014

<sup>8</sup> Mahfud MD. Restoratif Dalam Penegakan Hukum, Paper, Ditreskrimsus Provincial Police, South Kalimantan. July 27, 2013

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discretionary authority. Such approach to restorative justice at the police stage will create a more efficient, effective and efficient result in dealing with juvenile criminal case.

On the contrary, the restorative approach in resolving juvenile crime cases by law enforcement officials sustains a lot of obstacles. These obstacles occur due to the capacity of law enforcement officials, the victims, the perpetrators, the community and availability of facilities and infrastructures.

Based on the above phenomenon, it is thus assumed that the current criminal law does not fulfill the sense of public justice; there is an assumption that there are laws that grow and develop along with the society, that the society wants a concept reconstruction of justice within

## II. RESEARCH METHOD

This is a normative-empirical research, therefore in the study of normative law (legal research) this study employs the descriptive research, namely a legal study to analyze normative provisions and provide an overview by way of examining the law as what is written in the legislation (law in books) or as a rule/norm used as a guideline for the behavior of every individual in the community including law enforcement officials in resolving juvenile criminal cases by applying the principle of restorative justice in the juvenile justice system in South Sulawesi.

## III. DISCUSSION

The role of law in society, especially in dealing with changes in society needs to be studied in order to promote a social change. The influence of this legal role can be direct and indirect, significant or insignificant. The law has an indirect influence in encouraging the emergence of social change in the formation of certain social institution that directly influences the community<sup>9</sup>.

The criminal law enforcement within the framework of the criminal justice system in Indonesia which is currently still based on Law Number 8 of 1981 concerning Criminal Procedure Law (KUHAP) is indeed perceived as yet to represent the various interests<sup>10</sup>. The criminal law reform (both formal and material) that is inclined towards the victims of crimes committed by children (TPA), needs to be given a strong foundation so that the interests of both the victims and the people who experience suffering and losses receive a legal protection. The victims need to receive immediate attention; therefore, the law enforcement and justice-oriented policies that consider victims' perspectives and restorative justice need to be studied, for example, by means of Law Number 35 of 2014 concerning Law of Child Protection.

The protection of children's rights was stipulated in the 1979 on Declaration of the Rights of the Child which was later adopted by the United Nations into the 1989 Convention on the Rights of the Child in Geneva and has been ratified, approved or signed in 192 countries. The issue in the convention resulted in a careful commitment to give a priority to children's rights, survival, protection and development<sup>11</sup>.

The central and regional government and other state institutions are obligated and responsible to provide a Special Protection to the children who are victims of criminal acts. In other words, children who are the victims of a criminal act have the rights as regulated in Law No. 35 of 2014, namely the right to obtain a special protection. This special protection shall be given to: children who are victims of criminal acts of kidnapping, trafficking; children who are victims of physical and /or psychological abused; children who are victims of sexual crimes; children who are victims of terrorist networks; children who are victims of abuse and neglect; and children who are victims of stigmatization from labeling related to the condition of their parents.<sup>12</sup>

The Restorative Justice emerged because the then criminal process had not provided justice to the victims. Restorative Justice places a crime as a symptom that is part of social action and not just a violation of criminal law or a crime perceived as a destruction of social relations. The view differs to criminal law which views crime as a State problem<sup>13</sup>.

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<sup>9</sup> Sekhroni, Criminal liability and diversion towards crimes committed by children/juveniles within juvenile court system in Indonesia, *Jurnal Unifikasi*, Vol. 03 No. 01, January 2016, pg.41

<sup>10</sup>Muhammad Taufiq, Penyelesaian Perkara Pidana Yang Berkeadilan Substansial, *Yustisia Jurnal Ilmu Hukum*, Vol.2 No.1, 2013, pg.26.

<sup>11</sup>Syamsul Haling, Paisal Halim, Syamsiah Badruddin & Hardianto Djanggih, Perlindungan Hak Asasi Anak Jalanan Dalam Bidang Pendidikan Menurut Hukum Nasional Dan Konvensi Internasional, *Jurnal Hukum &Pembangunan*, Vol. 48, No. 2, 2018, pg.362

<sup>12</sup>Nurini Aprilianda, Perlindungan Anak Korban Kekerasan Seksual Melalui Pendekatan Keadilan Restoratif, *Jurnal Arena Hukum*, Vol. 10, No. 2, 2017, pg.323.

<sup>13</sup>Reyner Timothy Danielt, Penerapan Restorative Justice Terhadap Tindak Pidana Anak Pencurian Oleh Anak Di Bawah Umur, *Lex Et Societatis*, Vol. 2, No. 6, 2014, pg.16.

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Restorative Justice is an approach model emerged in the 1960s in an attempt to resolve criminal cases, in contrast to the approach used in a conventional criminal justice system. The approach focuses on a direct participation of perpetrators, victims and the community in the process of resolving criminal cases<sup>14</sup>.

Restorative Justice does not prioritize the deterrent effect for the perpetrators, instead it prioritizes the awareness of the perpetrators, on their responsibility for actions they committed. It places a higher value in the direct involvement of the parties. The victims are able to restore elements of control, while the perpetrators are encouraged to assume a responsibility to take the step to correct the fault caused by the crime or in building their social value systems<sup>15</sup>.

The principal of restorative justice is an appreciation of human dignity. Man is both personal and social being who does mistake and error. The problem is that the person who has the authority or the right to give punishment to other person who is considered to have committed a crime or violated the rule of law, is not necessarily a better person than the person who will receive the punishment, and the law used as the basis of justice may not have a just integrity. In a divine philosophy, God is the most just, pure of any error, the most powerful and eternal. Therefore God is the only one who has the most right to give punishment. In addition, man must have the nature to forgive, to improve and to protect each other. For the victims who suffer harms, it will be more beneficial if their losses are replaced, treated or recovered to the original. And the perpetrators shall be given the opportunity to understand and rectify their mistakes, and to reintegrate good relations between the victims and the perpetrators, especially if the parties involved have close relations as husband and wife.

The society still considers that family issues including domestic abuse issues are not appropriate to be included in the realm of criminal law. TPA issues should be resolved by deliberation and kinship because what is involved is between family members. Completion of the TPA through the criminal law process is deemed not to have provided a good solution because it will eventually end with punishment (in prison) which will damage the future of the child perpetrator<sup>16</sup>.

The above event is one of the stories that will occur from the settlement of the TPA case which does not prioritize deliberation and kinship. The loss suffered by the victim will increase; hence TPA case should not be resolved instantaneously by the criminal law process, even against the TPA which results in serious injury and even death if the result is not the perpetrator's goal.<sup>17</sup>

In determining whether a person shall be charged for criminal liability, one must consider the relationship between the mind (thought), feeling (feeling), and action (action) as an important element in determining errors and making legal decisions on these mistakes. This assumption actually confirms 2 (two) important criteria for demanding legal liability, namely *mens rea* (guilty of mind) and *actus reus* (guilty act). The first criterion, *mens rea*, states that the subject is called a criminal offense and therefore deserves to carry legal responsibility if the person knows and understands what the person is doing. In other words, subjects have the mental capacities that deserve the legal responsibility. Knowledge and understanding is not enough to determine a person committing a crime, it must be proven that the subject committed or obviously committed a crime that was accused on the subject (*actus reus*). The second criterion, *actus reus*, is critical because it is the clearest evidence that the suspect not only understands, but also has the ability to carry out the alleged action. If the TPA is carried out because of the role of the victim, it is done once and is not repeated violence, then according to the researchers; a perpetrator does not need to undergo a criminal law process.

Social justice is a strong reason to apply a restorative justice approach towards a settlement of TPA cases. A TPA case will not only affect the relationship between the perpetrator and the victim, but also affect the relationship between the perpetrator and the child victim, the extended family of both parties and the community, thus a comprehensive recovery effort is needed not only for the victims. A restorative justice approach for resolving TPA cases will lead the victims and perpetrators to reconcile, so that they can continue the family life. Children will receive the love and care from both their parents. Relationships with extended families and surrounding communities will also be maintained and harmonious, because family experiencing acts of violence will also affect the condition of the extended family of both parties and the community.

Based on the philosophical, juridical and sociological considerations mentioned above, the concept of resolving a TPA case through a restorative justice approach can be carried out by seeking a penal mediation and diversion. Penal mediation is selected in order to transfer the TPA case from the criminal justice process (diversion) outside the criminal justice process.

The penal mediation offered can be done through two models. In the first model, the parties choose to solve their problems assisted by their families and then report the results to the investigator and revoke their

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<sup>14</sup> Rr. Susana Andi Meyrina. Restorative Justice Dalam Peradilan Anak Berdasarkan Undang-Undang No.11 Tahun 2012, Jurnal Penelitian Hukum De Jure, Vol. 17, No. 1, 2017, pg.93

<sup>15</sup>Rd. Dewi Asri Yustia, Penerapan Restorative Justice Terhadap Orang Tua Pelaku Perdagangan Anak Dalam Perspektif Sistem Peradilan Pidana Indonesia, *Jurnal Ilmu Hukum Litigasi*, Vol. 14, No. 1, 2013, pg.1857.

<sup>16</sup>Diolah dari wawancara dengan Tokoh Masyarakat

<sup>17</sup>Wawancara dengan orangtua korban (HS) tanggal 15 Mei 2018.

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report. The mediation conducted by the investigator is limited to bringing the victim and the perpetrator together, providing information regarding the conditions faced if the TPA shall go into court process and advising both parties to take peace effort. When an agreement for peace is reached, the perpetrator will make a statement that he/she shall not repeat the crime against the victim. This model was adopted with the conferencing model applied in Wagga-Wagga in the State of New South Wales. Settlement of such cases was initially under the coordination of the police. The police acted as a single doorman and then determined and conducted a selection of cases that can be resolved through a conferencing model. In the State of South Australia, this is known as the "family conference" model.

Second, investigators play the role as the party that guides and helps to find solutions to the problems. This second mediation model is similar to the mediation model in HALT program. Effort to reconcile both parties is known as a term mediation. This mediation model must still be under the supervision of the police with no fear that the police will be biased, because in cases of TPA, the parties involved usually consist of people who have a very close relationship.

In the settlement of TPA case, penal mediation must be done under the supervision of the police. According to Douglas H. Yarn, this is what distinguishes between penal mediation and the Dispute Resolution Alternative (ADR) in civil law. Penal mediation must remain in the stage of criminal justice so that supervision by the police officers in Indonesia is still indispensable.

One disadvantage in the application of diversion on legal cases involving children as perpetrators is the difficulty of bringing together the perpetrators and the victims. In TPA cases, investigators did not find it difficult to bring the parties together. Investigators will send an investigation summons and the parties shall always be present at the time of the call. Another disadvantage in diversion is that the institution is exploited by the victim or his/her family to demand the perpetrators a very large compensation, hence, it may seem like an "extortion" from the victim to the perpetrator. The disadvantage is not experienced by perpetrators in the case of TPA. Most TPA victims only asked for a statement not to repeat the crime, then to forgive the perpetrator voluntarily. This is the case when the parties involved are husband and wife with very close relationship<sup>18</sup>.

The diversion in the SPPA Law shall be applied at every stage of the juvenile criminal justice, but in a TPA case, it is ideally applied at the investigation stage with the police. The application of diversion on TPA case by the police will be more effective than when the parties have to face each other in court to prove the other party's mistakes.

The integrity and harmony of a happy, safe and peaceful life is the dream of every member in a family. The creation of such integrity and harmony in a family is depended highly on every member in the family. Efforts to create a whole and harmonious family are achieved not only by not committing violence, but also choosing a good settlement endeavor in every issue within a family.

Restorative justice presents as an alternative to settlement of criminal acts, including criminal acts committed by children. Principally, restorative justice is in accordance with the local wisdom, customary law and religious teachings. Restorative justice provides an alternative solution to cases of criminal acts committed by children by giving the parties involved the opportunity to participate and overcome the consequences.

Restorative justice must also be supported by law enforcement officers, especially the police. Police officers may think and act progressively by not applying textual regulations but also need to break through the rules because a just law is a law for people and not the other way around.

#### IV. CONCLUSION

Restorative Justice in the Juvenile Criminal Justice System is the transfer of settlement of juvenile cases from the criminal justice process to a process outside fair criminal justice with an emphasis on restoring the original state, and not the retaliation. Implementation of diversion in the Juvenile Criminal Justice System in South Sulawesi has not been or less effective, because there were still a lot of children who had conflict with the law was handled through a penal procedure than through settlement of retributive justice, restitution justice and restorative justice.

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<sup>18</sup>Prepared from the results of investigator's interview on PPA unit and unit Chief

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