

## Reconstruction of restorative justice system approach to children who have problem with the laws based on justice values

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### Abstract

The purpose of this study is to find out the reconstruction of the Restorative Justice System approach to children who have a law problem with justice-based law. This descriptive analytical research is expected to build a new theory in the field of law, both in the development of criminal law in general and formal criminal law, especially concerning the concept of Justice Restorative Justice System to children in conflict with the law in the implementation of the criminal justice system of children in Indonesia. The results of this study shows that the reconstruction that needs to be done is to change the provisions of Article 7 of Law no. 11 of 2012 on the juvenile justice system, namely the clause contained in the provisions of Article 7 paragraph 1 of Law no. 11 of 2012 on the juvenile justice system that clause "must strived" is changed to clause "must be done using peace settlement.

**Keywords:** reconstruction, restorative justice, children, law problem, justice values

### Introduction

Law is an order for human action. "Order" is a system of rules. The law sometimes are what is not defines as a rule. Law is a set of rules that contain a kind of unity that we understand through a system <sup>[1]</sup>. Therefore, the existence (existence) of the law is universal. The law can not be separated from society, but it has a reciprocal relationship <sup>[2]</sup>. The purpose of the law is the creation of a peace based on the harmony between order and peace. The purpose of this law will certainly be achieved if supported by the legal task, namely the harmony between legal certainty with the comparability of law, so that will produce a justice <sup>[3]</sup>. that has a particular order. The particular order here refers to a structure composed of parts. Both systems as a plan, method, or procedure for doing something. In the understanding of the legal system it will be seen, that both can be recognized again in usage, for example when we talk about the interpretation and discovery of the law. This allocation, embedded with an understanding of the truth, is what is commonly referred to as justice. Aristotes that draws the famous line of distinction between distributive justice and communitative justice, between the principle in which wealth and honor are allocated among citizens and with respect to individuals and lawsuits <sup>[4]</sup> The other basic function of the legal system is the social control which is

basically the enforcement of rules concerning correct behavior <sup>[5]</sup>.

According to Talcott Parsons, the development of the legal system under special circumstances is capable of creating a new set of institutional relationships that will accelerate development in the wider society. In this developmental model the law of evolution of the legal order in an organized society is like a political one in the form of a state. The types of legal order are the order of Repressive Law, Autonomous Law Order and Responsive Legal Order. The Repressive Law Order that precedes two other orders, arises or is required to resolve fundamental issues in establishing the political order in which is a prerequisite for the legal system and the political system to achieve higher goals. The Autonomous Law Order presupposes and builds upon the results achieved by the Repressive Code of Law. The Responsive Legal Order rests on the "constitutional cornerstones" of the "Rule of Law" stage produced by the Autonomous Legal Order <sup>[6]</sup>. The Repressive Law Order type shows the following characteristics <sup>[7]</sup>:

1. The legal institution is directly accessible to political power; Law is identified with the State and subordinated to the purpose of the State (raison d'etat);
2. The lasting authority is the most important affairs in the administration of law. In the established "official perspective," the benefit of the doubt goes into the system, and administrative convenience becomes the focus of attention;

<sup>1</sup> Hans Kelsen, *Teori Umum tentang Hukum dan Negara*, Nusamedia-Nuansa, 2006, Bandung, P. 3

<sup>2</sup> Riduan Syahrani, "Rangkuman Intisari Ilmu Hukum" dalam buku *Ilmu Hukum dan Filasafat Hukum studi Pemikiran Ahli Hukum Sepanjang Zaman*, DR. Teguh Prasetyo, SH.,M.Si, Pustaka Pelajar, Yogyakarta, 2007, P. 38.

<sup>3</sup> Edmon Makarim, "Kompilasi hukum Telematika" dalam buku *Ilmu Hukum dan Filasafat Hukum studi Pemikiran Ahli Hukum Sepanjang Zaman*, DR. Teguh Prasetyo, SH.,M.Si, Pustaka Pelajar, Yogyakarta, 2007, P. 39.

<sup>4</sup> Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial*, Nusa Media, Bandung, 2009, p. 19

<sup>5</sup> Ibid, p. 20

<sup>6</sup> Nonet – Selznick, "Law and society In Transition" seperti dikutip oleh Teguh Prasetyo, dalam buku *Ilmu Hukum dan Filasafat Hukum Studi Pemikiran Ahli Hukum Sepanjang Zaman*, Pustaka Pelajar, Yogyakarta, 2007, P. 52

<sup>7</sup> Ibid P. 53

3. Specialized control institutions, such as the police, become independent centers of power; They are isolated from a soft-functioning social context, capable of rejecting political authority;
4. A "dual law" regime "institutionalizes justice by class by consolidating and legitimizing patterns of social subordination.
5. The criminal law reflects the dominant values; Legal moralism that will prevail..

Typical characteristics of autonomous law can be summarized as follows <sup>[8]</sup>.

1. The law is separate from politics. Typically, this legal system expresses the independence of judicial power, and makes a clear line between the legislative and judicial functions;
2. Legal order supports the "model of rules". Focus on regulation helps apply measures for accountability of officials; At the same time, it limits the credibility of legal institutions and the risk of interference of legal institutions within the political sphere;
3. "Procedure is the heart of the law". Fairness, rather than substantive justice, is the main objective and main competence of the rule of law;
4. "obedience to the law" is understood as a perfect adherence to the rules of positive law. Criticism of applicable law must be channeled through politics.

In this type of Responsive Legal Order, <sup>[9]</sup>. law is seen as a facilitator of responses or means of response to social needs and aspirations. This view implements two things. First, the law should be functional, pragmatic, purposive and rational, The two set standards for criticism of what works. This means that the objective serves as a norm of criticism and thus controls the administrative discretion as well as the risk of "Institutional Surrender". In this type, the expressive aspect of the law is more prominent than in the other two types, and substantive justice is also important in addition to procedural justice. As In the final responsive law in question is the goal of social order <sup>[10]</sup>. Procedural Justice <sup>[11]</sup>. can be a substitute for substantive justice, the result being that a morality of ways will transcend the whole of legality and justice. Substantive Justice is derivative in nature, which is a supplementary result expected from a perfect method, but formal justice is consistent with serving patterns of privilege and power. Awareness of justice seems to be assaulted when a system that prides itself on a full and biased trial is incapable of replying to the demands of an important claim about substantive injustice. Autonomous justice will be perceived as lies and arbitrariness if it will lead to a pretation of hopes for justice thats has set alight, in time, the tension between procedural justice and substantive justice will move the forces that push the rule of law beyond far beyond Boundaries of autonomous law. The laws and regulations that have been made by the Indonesian government to protect children's rights includes: Law No.4 of 1979 on Child Welfare, Law

Number 39 Year 1999 on Human Rights, Law Number 23 Year 2002 On Child Protection, Law Number 11 Year 2012 on the Criminal Justice System of Children where the substance of the Act regulates the rights of children in the form of, the right to life, the right to name, the right to education, the right to basic health, the right to worship according to their religion, The right to expression, thinking, playing, creating, resting, socializing and social security. Especially for children in conflict with the law following the ratification of the Convention on the Rights of the Child by the Government of Indonesia by issuing Presidential Decree Number 36 of 1990, it legally creates obligations to Indonesia (participating countries) to implement the rights of the child by absorbing them into law National, Act No.23 of 2002 on Child Protection which has been amended by Law No. 35 of 2014 on Amendment of Law No.23 Year 2002 on Child Protection and Law Number 11 Year 2012 on Child Criminal Justice System as Successor of Law No. 3 of 1997 on Juvenile Justice.

With regard to the term criminal justice system that can not be separated from the term of system as described by Davies et.al as "the word system conveys an impression of a complec to end" means that the word system indicates an impression of another complex object and Running from beginning to end, therefore in realizing the purpose of the system there are four related agencies namely police, prosecutors, courts and prisons. These four components must work together in an integrated (Integrated Criminal Justice Administration). Implemented in an integrated way means that these four sub-systems work together even if each of them is independent. Police as investigators conduct investigations including investigation, arrest, detention, searches, confiscation and examination of letters. Prosecutor as the prosecutor prosecuted based on the results of the investigation submitted by the investigator. The judge on the basis of the indictment of the public prosecutor conducts a hearing in a court hearing.

Facing and handling the juvenile justice process involved in the crime, the first thing that should not be forgotten is to look at his position as a child with all his special characteristics and personality, thus the orientation is based on the concept of child protection in the process of handling so that this Will stand on the concept of child welfare and the child's interests. Handling of children in their legal process requires approaches, services, treatment, care and special protection for children in an effort to provide legal protection against children in conflict with the law.

The Indonesian Child Protection Commission (KPAI) in 2014 <sup>[12]</sup>. records from police data shows that in a year there are 7,000 detained children. They are included in legal proceedings such as examination and investigation. Confirming the detention of children because of legal issues is not a solution. So far, at the police level, the handling of children facing the law still emphasizes the positive legal procedures of the Criminal Procedure Code without considering the effect on the child, consequently the child facing the law sometimes gets violence and

<sup>8</sup>Ibid, p. 54

<sup>9</sup>Ibid

<sup>10</sup>Koesriani Siswosoebroto, SH, Buku Teks Sosisologi Hukum, Editor: Prof. Dr. A.A.G Peters (Universitas Utrecht)- (Universitas Indonesia), " Hukum dan Perkembangan sosial", Pustaka Sinar Harapan, Jakarta, 1990, p. 163.

<sup>11</sup> Ibid, p. 174

<sup>12</sup> Republika Online 16 Juli 2014.

mistreatment while captured and in the process of preparing the Examination Report (BAP), and also when the children is in the police custody. The police treatment that captures and interrogates (investigating the child cases) for the making of BAP can deeply embedded in the minds of children. This memory will be more remembered as a painful bad experience without any positive side for the child <sup>[13]</sup>. Law Number 11 Year 2012 on the Child Criminal Justice System incorporates restorative Justice as a concept of thinking that responds to the development of the judicial system by focusing on the needs of the involvement of the community and the victims perceived as marginalized by the mechanisms employed in the existing criminal justice system <sup>[14]</sup>. Restorative justice is a process aimed at granting rights to victims of crime. In order to achieve the objective, a meeting was held between the victim and the perpetrator <sup>[15]</sup>. The handling undertaken taking into account the wider influence on victims, perpetrators and communities is carried out through a diversion mechanism. The purpose of this article is to establish an ethical pathway based on the principles and rules and violations <sup>[16]</sup>. Based on the above description it is necessary to learn more about How to reconstruct the Restorative Justice System approach to children in law conflict with justice-based law.

### Method of Research

The method of this research is by the way of data collection which is done by documentation study, questionnaire, and interview. Documentation study is done by tracing through reseach library, to primary and secondary data sources. The instruments used in this study are questionnaires, interview guidelines and observation notes. The use of questionnaires as a means of collecting data is based on the consideration that there are several questions the respondent must answer carefully and with due consideration based on the reference and the goodness of the references sourced from the literature (Law or other sources of law) as well as on the basis of consideration of Conscience and honesty. The questionnaires used in this study are mixed (semi-closed), a combination of closed questionnaires and open questionnaires. Qualitative research methods and Grounded theory study approach, which is based on primary data comparative Law and secondary data from the relevant literature <sup>[17]</sup>. The determination of the mixed

model questionnaire is based on the consideration that in this research the data and information need as wide and as deep as possible in accordance with the research focus.

### Research Result and Discussion

The concept of Restorative Justice is a new paradigm in criminal law enforcement, although in fact the concept has long been developed and practiced in the settlement of criminal cases in some countries that embrace common law system. Because the concept is relatively new, it is not surprising if the application of the concept already in practice on criminal law enforcement in Indonesia, especially by the Police encountered many obstacles. Submission of damages by the heirs will be more likely to be accepted if a victim has been initiated before the death of the victim. Replace the losses to be earned by the heirs or in other words compensation to be granted is material. The submission of immaterial damages was rejected by the French Supreme Court. In addition, heirs can only make compensation if there is a timeframe between the crime and the death of the victim, but if the victim is killed instantly, the heirs cannot claim harm on the victim's behalf <sup>[18]</sup>.

Restorative Justice or restorative justice is one of the efforts to resolve cases of children in conflict with the law by involving families, community leaders, perpetrators, victims and other relevant parties, with the emphasis back to the original state without any element of retaliation. So Restorative Justice is defined as justice of healing, or the restoration of justice for the victims, so there is no element of revenge and punishment of the perpetrators.

The provisions of Article 7 paragraph 1 of Law no. 11 Year 2012 on the Criminal Justice System of the Child, at the stage of examination at the level of legal proceedings both at the police, Attorney and Juvenile Court Facing the Law must be made Diversion efforts, especially for criminal acts as stipulated in article 7 paragraph 2 of Law no. 11 Year 2012 on Child Criminal Justice System.

Although the diversion has been done by the police in the process of settlement of children facing the Law, there is still no uniformity in its implementation, because the interpretation of the provisions of Article 7 paragraph 1 by the researchers is considered as a not explicitly done diversion, because the provisions of Article 7 paragraph 1 only emphasize the clause " Must be strived "so that the point of gravity in the clause is the effort to do Diversi which seemed only the stages of the formalities, but the obligation to be solved by Diversi does not exist, so that more explicit and assertive in solving the problem Children who are dealing with the Law and as one A form of protection for children based on Justice Restorative Justice, then the clause of Article 7 paragraph (1) should be changed to "a settlement must be made".

In addition, the limitation of criminal acts as stipulated in Article 7 paragraph (2) of Law no. 11 Year 2012 on Child Criminal Justice System is also a limitation of children facing the law to do Diversi, because the arrangement of

<sup>13</sup> Charles N. Swanson, Jr. Neil C. Chamelin, Leonard Terito, 1984, Criminal Investigation, Random House, New York, p. 4, dalam Purnianti, Mamik Sri Supatmi dan Ni Made Martini Tinduk, p. 77

<sup>14</sup> Marlina, Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice, Bandung: Refika Aditama, 2007, p. 95.

<sup>15</sup>Ibid

<sup>16</sup> Setyo Trisnadi, The Legal Protection of Indonesian Physicians: The Medical Dispute Settlement Based on Principles, Standards, Normsand Rules of Physicianprofession in Doctor-Patient Relationship, International Journal of Humanities Social Sciences and Education (IJHSSE) Volume 3, Issue 1 , PP 146-155 ISSN 2349-0373 (Print) & ISSN 2349-0381 (Online) January 2016

<sup>17</sup> Wahyu Widodo, Sapto Budoyo and Maryanto, Understanding The Concept Of Nationalism: Using Comparative Law For A Better Indonesian Immigration System In Handling The Illegal Immigrant, International Journal of Humanities and Social Sciences. ISSN 2250-3226 Volume 7, Number 1 Research India Publications (2017), pp. 23-33

<sup>18</sup> Etienne verges, procedure penale, ( Litec: Paris, 2005), hal.123

criminal acts under 7 years contrary to the protection of education and the future of children.

The adoption of one of the purposes is to prevent the child from deprivation of liberty, the application of a diversion applied only to criminal acts whose threats are under 7 (seven) years as referred to in the provisions of Article 7 paragraph (2) of Law Number 11 Year 2012 regarding the Criminal Justice System Children, according to the researcher is one form of deprivation of independence for children, so the desire to provide protection of children in conflict with the law will not be realized a justice for children.

Based on the provisions of Article 3 PERMA no. 4 Year 2014 on guidelines for implementation in the criminal justice system of children, it has been stipulated that the crime by ABH that can be conducted by Diversion is a criminal act whose penal imprisonment is under 7 (seven) years or more, while in the provisions of Article 7 paragraph (2) -The Number 11 Year 2012 on the Criminal Justice System of the Child is only a criminal offense whose penal imprisonment under 7 (seven) then the diversion can be done, although there are doubts for investigators in applying Restorative Justice in solving an ABH particular problem, so that with the difference of the arrangement made the "Justice Sense" for ABH becomes difficult to achieve.

Therefore, assertiveness in the application of the Diversity for children in conflict with the law, legal system or jurisdiction is considered as a dignified legal system if the law and its legal system is a manifestation of the spirit of the community (Volksgeist) <sup>[19]</sup>.

Given the threat of criminal prosecution in Indonesia is varied, and there are laws and regulations whose criminal threats over 7 (seven) years of potential perpetrators are children, sometimes the child who is the perpetrator of the crime does not realize that what he is doing is a deed that can be Imprisonment affecting their rights as a child can be threatened because Diversion can not be done, such as the Law on ITE, Narcotics Law, Pornography Law, Student Attacks that cause serious injury or death.

In order for the implementation of the Diversity for children in conflict with the law can be implemented to realize the sense of justice for children facing the law, it is also necessary to reconstruct the provisions of Article 7 paragraph (2) of Law Number 11 Year 2012 on the Criminal Justice System of the Child by removing the provisions Article 7 paragraph (2) so that there is firmness in the implementation of diversions without having any restriction on the criminal acts committed by children.

Based on the above, the reconstruction that needs to be done is to change the provisions in Article 7 of Law no. 11 of 2012 on the juvenile justice system, namely the clause contained in the provisions of Article 7 paragraph 1 of Law no. 11 of 2012 on the juvenile justice system that clause "must strived" is changed to clause "must be done using peace settlement".

Therefore, the provisions of Article 7 paragraph 1 of Law no. 11 of 2012 on the juvenile justice system reads as:

1. At the level of investigation, prosecution, and examination of a Child's case in a district court must be settled using Diversion.

In Addition to, the provisions of Article 7 paragraph 2 of Law no. 11 of 2012 on the juvenile justice system needs to be removed, as opposed to the protection of education and the future of the child, with the abolition of the provision that the handling of children handling the law will create a sense of justice and as a real form of protection of children.

With the change of clause is expected to be a guide in the police so that there are no differences in the settlement of children's problems facing the law (ABH), this change of clause is a real evidence of child protection and as one form of justice-based restorative justice implementation.

### Conclusion

Good law is not sufficient if it is not followed by effective work The law enforcers, the availability of rules-ordered facilities and infrastructure, public legal awareness and the support of the culture of the community greatly influence in the implementation of restorative justice on the protection and handling of ABH therefore the government and the House of Representatives Indonesia in implementing the legislator's function, make changes to the provisions of Article 7 paragraph 1 of Law no. Law No. 11 of 2012 on the juvenile justice system which reads "shall be sought" shall be changed into "shall be settled using", and abolish the provisions of article 7, paragraph 2, explicitly and explicitly and enumerated by law enforcement obligations to resolve the issue of Children in Conflict with the Law The application of Restorative Justice through a justice-based diversion model. In order to realize real and qualified justice, in the settlement of cases of criminal offense against the law (ABH), between perpetrators and victims of crimes who have agreed to make peace, the Investigator and Public Prosecutor, able to provide legal breakthrough to achieve Diversi, As a concrete manifestation of a policy oriented to substantial justice

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