

CRIMINAL JUSTICE SYSTEM OF CHILDREN: AN OVERVIEW RESTORATIVE JUSTICE CONCEPT IN INDONESIA AND OTHER COUNTRIES

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Abstract

The pattern of repression in Act No. 3 of 1997 has been changed to a restorative justice through diversion in Act No. 11 of 2012 considering the repressive punishment does not reduce the number of juvenile criminal but increasing. The purpose of this research is to examine the concept of restorative justice in order to see the form of the application of the concept of restorative justice in Indonesia and other countries. The method of this research is judicial normative with secondary data and analyzed based on content analysis. Based on this research, the concept of restorative justice both in Indonesia and other countries is applied through a diversion for the best interest of children (actor), which are implemented in the form of mediation so the children can take their responsibilities for their actions without court trial.

Keywords: juvenile justice system, comparative studies, restorative justice, diversion

Abstrak

Pola represif dalam Undang-Undang Nomor 3 Tahun 1997 telah bergeser menjadi keadilan restoratif melalui diversifikasi dalam Undang-Undang Nomor 11 Tahun 2012 mengingat pemidanaan represif tidak menurunkan angka pidana anak tetapi justru meningkat. Tujuan penulisan ialah mengkaji konsep keadilan restoratif sehingga dapat dilihat bentuk penerapan konsep keadilan restoratif di Indonesia dan Negara lain. Metode penulisan yang digunakan ialah yuridis normatif dengan data sekunder dan dianalisis berdasarkan *content analysis*. Berdasarkan hasil penelitian, konsep keadilan restoratif baik di Indonesia dan Negara lainnya dilakukan melalui diversifikasi untuk kepentingan terbaik (pelaku) anak yang diimplementasikan dalam bentuk mediasi sehingga anak dapat mempertanggungjawabkan perbuatannya tanpa melalui pengadilan.

Kata kunci: sistem peradilan pidana anak, studi komparasi, restorative justice, diversifikasi

Preface

Children Criminal Justice System (SPPA) is basically aimed at the welfare of the child, as defined in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.¹ As a country that is part of the Convention on the Rights of the Child (Convention on the Rights of the Child), Indonesia also provide special protection to children in conflict with the law through the establishment of Law No. 3 of 1997 about Juvenile Court (Law 3/1997) and Law No. 23 of 2002 about Child Protection.

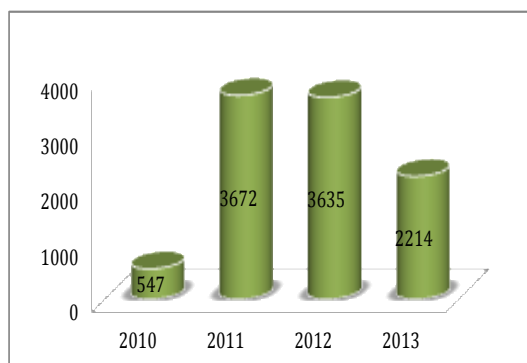
SPPA in Law 3/1997 do not provide optimal protection for the child considering the law still using formal juridical approach by emphasizing punishment (retributive) that could potentially restrict the freedom and independence depriving children.² The concept of punishment contained in Law 3/1997 not make the number of juvenile criminal diminishing, but increasing from year to year, as can be seen in Figure 1 below.³

¹ Vanessa Coppins, Sharon Casey, dan Allan Campbell, "The Child's Best Interest: A Review of Australian Juvenile Justice Legislation", *The Open Criminology Journal*, Vol. 1 No. August 2011, page 23.

² Sufriadi Pinim dan Erasmus Napitupulu, 2013, *Studi Atas Praktik-Praktik Peradilan Anak di Jakarta*, Jakarta: Institute for Criminal Justice Reform, page 14.

³ Yutirsa Yunus, "Analisis Konsep Restorative Justice Melalui Sistem Diversi Dalam Sistem Peradilan Pidana Anak Di Indonesia", *Jurnal Rechts Vinding*, Vol. 2 No. 2nd Au-

Figure 1. Number of Child Prisoners in 2010 - 2013



Overcome the weaknesses of Law 3/1997, was issued Law No. 11 of 2012 on Juvenile Justice System (Law 11/2012), which uses the approach of restorative justice through diversion system. Diversion system is the transfer of the settlement of the child to outside the criminal justice process that involves a dialogue with victims, perpetrators, law enforcement officials, and the public. The concept of diversion given by Law 11/2012 which is different from the law 3/1997 only allows versioned conducted by the investigator based on the discretionary authority by submitting the return of the child to the parent, guardian, or foster parents. Implementation of restorative justice is not only applied in Indonesia, but also in different countries applied for criminal cases in children and adolescents as in Illinois, Germany, Canada, Austria, Poland, and Spain.

Problem

Based on background above, therefore this research is intended to answer the problem as follows: *first*, how is the concept of restorative justice for children in conflict with the law in Law 11/2012; and *second*, how is the concept of restorative justice for children in con-

flict with the law in the regulations in other countries.

Research Methods

This research is using normative juridical approach. Normative research is a legal research using secondary data including legislation, books, and research literature related to the research topic. Furthermore, the data were analyzed with content analysis to analyze the formulation of the problem and then made a conclusion and suggestion.

Discussion

The concept of Restorative Justice through Diversion in Law 11/2012 in Indonesia

Children facing conflict with the law in Article 1 point 3 Law 11/2012, is a children at least 12 years old but not yet 18 years old. Concept and theories of punishment continues to develop. The goal is to address children in conflict with the law. Starting from the traditional theory of justice that includes retributive justice, restitutive justice, to the modern theory of justice such as restorative justice.⁴

Most of the criminal law experts, psychologists, and child behavior experts consider that the theory of restorative justice and a good right to be applied in the juvenile criminal justice system.⁵ The involvement of the parties is a major prerequisite to the implementation of the juvenile criminal justice system based on restorative justice. The roles of the parties in criminal justice-based subsidiary of restorative justice is as follows in Table 2.⁶

Law 11/2012, being passed on July 30, 2012, has embraced the paradigm of restorative justice through diversion system. As for the substance of the changes in Law 11/2012 of the most fundamental is expressly settings on restorative justice and diversion intended to avoid

gust 2013, Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nasional, page 232.

⁴ Eva Achjani Zulfa, "Keadilan Restoratif dan Revitalisasi Lembaga Adat di Indonesia", *Jurnal Kriminologi Indonesia*, Vol. 6 No. 2nd August 2010, page 185

⁵ Kristine Buffington, Carly Dierkhising, dan Shawn Marsh, "Ten Things Every Juvenile Court Should Know About

Trauma and Delinquency", *Juvenile and Family Court Journal*, Vol. 61 No. 3rd Agustus 2010, page 18.

⁶ Gordon Bazemore dan Susan Day, "Restoring the Balance: Juvenile and Community Justice", *Journal of the Office of Juvenile Justice and Delinquency Prevention*, Vol. 3 No. 1st March 2010, page 9.

and keep children out of the judicial process so as to avoid stigmatization of children in conflict

with the law and is expected child can return to the social environment reasonable.

Table 1: The Differences between Retributive Justice, Restitutive Justice, and Restorative Justice⁷

<i>Retributive Justice</i>	<i>Restitutive Justice</i>	<i>Restorative Justice</i>
<ul style="list-style-type: none"> • Emphasizing justice to re-tailation; • Children are in a position as an object; • Settlement of legal issues imbalanced. 	Emphasizes equity compensation	<ul style="list-style-type: none"> • Emphasizing justice in the repair/recovery state; • Oriented to the victim; • Provide opportunities for actors to express annoyance to the victim and responsible; • Provide an opportunity for the offender and the victim to meet in order to reduce hostility and hatred; • Restoring balance in society; • Involving community members in an effort to elections.

Source: Rosida

Table 2: Role of Parties in the Restorative Justice Model for Children

	Criminalization through Accountability	Rehabilitation through Competence Development	Improving Public Sector Security
Actors	Contributing actively to recover losses suffered by the victim and the community and must meet the victims.	Actively involved as a human resources who should improve the quality of life in the community and have a stock of knowledge, experience, and self-esteem as a productive human resources to carry out positive activities.	Involved in the development of self-competence and restoration activities; Increasing self-control, to make new friends, and active in the organization.
Victim	Involved in the development of self-competence and restoration activities; Increasing self-control, to make new friends, and active in the organization.	Providing input to the process of rehabilitation; Suggest the implementation of social services for offenders; Participate in association victim or victim awareness training to staff and actors.	Participating in creating sustainable security in the public sector; Support other victims.
Community	Acting as a mediator; Developing social services and the opening of employment for offenders; Assistance to victims and provide support to the actors in carrying out its obligations.	Develop new employment opportunities for young people to increase productivity, competence, and a sense of belonging (self of belonging).	Provide protection to the perpetrators, mentoring, and provide input to the child criminal system in order to provide security to the perpetrator; Overcome the problems that exist in the community related to kenalana children.
Professionals	Facilitators of the mediation; Ensuring restoration actions (by providing a way for actors to raise funds for restoration); Develop creative community/community social services; To educate the public in accordance with the role.	Developing new roles for actors so as to make them learn and demonstrate competencies learned; Assess and build the strength of youth and the community; Develop cooperation between communities.	Accompanying the school and community to control and maintain the offender in the community; Develop the ability to prevent repeat offenders actions.

Source: Bazemore and Day

The use of restorative justice approach in the juvenile criminal justice system defined in Article 5 paragraph (1) of Law 11/2012 that the juvenile criminal justice system shall prioritize restorative justice approach. Restorative justice is the completion of criminal cases involving perpetrators, victims, families' perpetrator/victim, and other relevant parties to work together to find a fair settlement with emphasis on restoring

back to the original state, and not retaliation. Restorative justice approach is then implemented through a system of diversion. Diversion is the transfer of the settlement of the child to the criminal justice process outside the criminal justice process. Philosophically, the concept of diversion based on the opinion that the court will give stigmatization of children for their actions as a child is considered evil, so it is better to

⁷ Nikmah Rosidah, "Pembaharuan Ide Diversi dalam Implementasi Sistem Peradilan Anak di Indonesia", *Jurnal*

avoid it out of the criminal justice system.⁸ Diversion is granted because it fit with the philosophy of juvenile criminal justice system to protect and rehabilitate child criminals.⁹ In addition, the diversion is also performed as an actor prevention of child become adult criminals. Child prevention efforts that brought law enforcement officers to take discretionary authority or in the United States is often referred to as deinstitutionalization of the formal criminal justice system.¹⁰

Diversion through the concept of restorative justice in Law 11/2012 is appropriate and consistent with the goals of diversion contained in the Beijing Rules namely: (i) In order to avoid arrest; (ii) to avoid stamp/stigmatized as cri-

minals; (iii) to improve the skills of life for the child actors; (iv) that the perpetrators responsible for their actions; (v) to prevent the repetition of crime; (vi) to promote the necessary interventions for victims and perpetrators, without having to go through a formal process; (vii) the program will also prevent the diversion of children follow the justice system.¹¹

Further, in Article 5 paragraph (3) of Law 11/2012 mentions, that the compulsory diversion system to be at the stage of investigation, prosecution, and trial. This liability is increasingly defined through various provisions that oblige the law enforcement agencies include the investigator, the public investigator, and the judge to seek diversion, as follows:

Table 4: Liability for Diversion Efforts Law Enforcement under Law 11/2012

Provision Law 11/2012	Liability for Diversion Efforts
Article 7	Start checking at all levels of investigation, prosecution, and examination of the matter in court is obliged to seek diversion.
Article 28	The investigator is obliged to seek diversion within 7 days after being found with the child.
Article 37	The public prosecutor is obliged to seek diversion.
Article 49	The judge is obliged to seek diversion.

Source: Processed under Law 11/2012

Under Law 11/2012, the diversion is done through deliberations involving the child and the parent/guardian, the victim and/or parent/guardian, the civic, and the supervising social worker professionals. In case necessary, the deliberations can also involve social welfare personnel, and/or the community. As the process of diversion in a nutshell can be shown in Figure 2.

Diversion can be carried out by the community in a way to reconcile both parties i.e. victim and perpetrator. However, diversion can only be done with the permission of the victims

and the families of the victim, as well as the willingness of the offender and his family. Attempts to resolve the matter outside of court should take precedence, even the mediation process was still possible even though the matter had been entered in court. The Tribunal judges who adjudicate must facilitate when requested by the parties, and if the litigants agrees to terms the Council immediately halted. Here it is seen that the criminal law as a remedial absolutely ultimatum applied.

⁸ Robert John Zagar, "Delinquency Best Treatments: How to Divert Youths from Violence While Saving Lives and Detention Costs", *Behavioral Sciences & The Law*, Vol. 31 No. 3rd June 2013, page 385.

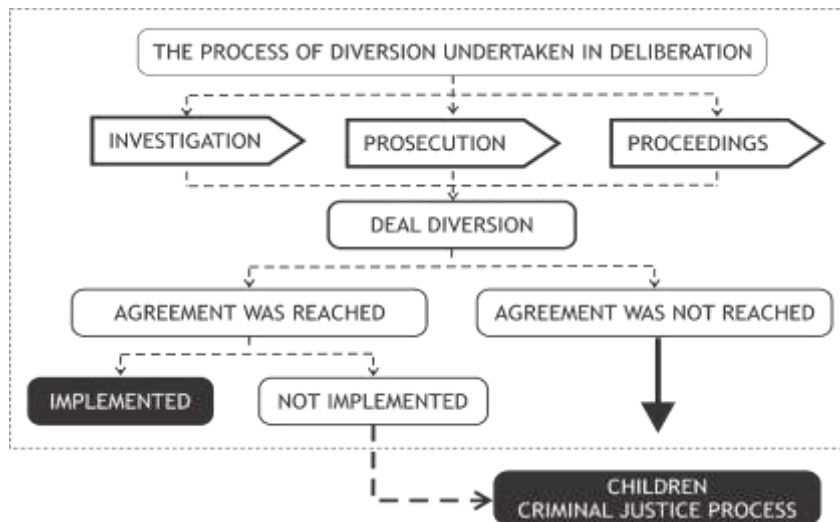
⁹ Douglas Abrams, "A Primer on Juvenile Protective Legislation", *Juvenile and Family Court Journal*, Vol. 65 No. 3rd September 2014, page 25.

¹⁰ Shelly Jackson, Janet Warren, dan Jessica Jones Coburn, "A Community-Based Model for Remediating Juveniles

Adjudicated Incompetent to Stand Trial: Feedback From Youth, Attorneys, and Judges", *Juvenile and Family Court Journal*, Vol. 65 No. 2nd January 2014, page 25.

¹¹ John Muncie, "International Juvenile (in) Justice: Penal Severity and Rights Compliance", *International Journal for Crime, Justice and Social Democracy*, Vol. 2 No. 2nd July 2013, page 55.

Figure 2. Diversion Process under Law 11/2012



Source: Processed Under Law 11/2012

The SPPA Concept of Restorative Justice in Other Countries

The SPPA concept of restorative justice in Indonesia also set up in other countries like Illinois, Germany, Canada, Austria, Poland, and Spain. As for the age limit for children who are dealing with the law in those countries is as follows:

Table 5: Limitation Age of Children dealing with Law in Other Country

Age (Years)	Country
14-18	Germany, Austria
10-16	Illionois, United States
12-18	Canada
16-18	Spain
15-17	Poland

Source: Processed from Several Sources

The SPPA Concept of Restorative Justice in Illinois, United States

Provisions of the SPPA in Illinois, the United States set in the Illinois Juvenile Court Act of 1987 which amended through the Juvenile Justice Reform Provisions of 1998. As for such a significant change is the adoption of restorative justice or negotiations (balanced or restorative

justice orientation). The implementation of restorative justice through versioned also applied in 17 areas in Illinois but not yet in the entire region.¹²

The implementation of the principle of balanced and restorative justice seeks to balance all the affected parties of any crimes committed by children, as victims, perpetrators, and communities. The purpose of the concept of restorative justice or negotiations (balanced or restorative justice orientation) is as follows in Table 6.¹³

The Prosecutor in children’s condemnation will provide the opportunity for the defendant to undergo a program of restorative justice through the system are versioned. As for restorative justice programs through the diversion system offered in Illinois, among other community mediation panels, negotiations between the victim and offender, social services programs, restitution, and other programs that can provide opportunities for children to be responsible for his actions at once aimed at rehabilitation and restoration without the need through the judiciary.¹⁴ Community mediation panels

¹² Korey Wahwassuck, “The New Face of Justice: Joint Tribal-State Jurisdiction”, *Juvenile and Family Court Journal*, Vol. 60 No. 1st December 2009, page 15.

¹³ Erna Olafson dan Julie Kenniston, “Obtaining Information From Children In the Justice System”, *Juvenile and*

Family Court Journal, Vol. 59 No. 4th November 2008, page 80.

¹⁴ Illinois Criminal Justice Commission, 2012, *Policies and Procedures of The Illinois Juvenile Justice System*, Chicago: Illinois Criminal Justice Information Authority, page 10-12.

forms by the country's lawyers to provide an opportunity for members of the community to be involved in child delinquency which is through community involvement is expected to help the

child understand the seriousness of the acts that he did, and the effects of his actions to the public.

Table 6. The Purpose of Restorative Justice Concept in Illinois

Form as Accountability	Security Community	Development of Competencies
The concept of restorative justice or negotiations (balanced or restorative justice orientation) is intended to provide the opportunity for the child to being able the perpetrators responsible for the crimes that have been made and simultaneously provide the opportunity for players to improve his offense.	The concept of restorative justice or negotiations (balanced or restorative justice orientation) is keep the security community. The security community can be created with this principle by means of building relationships and strengthening communities to take on the role for the welfare of its members.	The concept of restorative justice or negotiations (balanced or restorative justice orientation) seeks to improve the competencies of competence the principals that can be useful for social life.

Sumber: Olafson and Kenniston

The SPPA Concept of Restorative Justice in Germany

Children's condemnation in Germany is regulated in the Code of Criminal Law (article 46a), the Code of Criminal Procedure (article 153a) and the Juvenile Justice Act 1953 as amended Youth Court Law Amendment Act 1990. Article 45 and article 47 of the Juvenile Justice Act 1953 as amended Youth Court Law Amendment Act 1990 makes it clear that the Prosecutor and judge must consider measures of non-condemnation compared to the overthrow of the criminal.

In Brandenburg, the Prosecutor must refer any case children toward good mediation outside the courts or special case of children use a mediator to conduct mediation in juvenile court. If the mediation is successful, then the Prosecutor will terminate the case in respect of crimes committed are not serious, while serious

crime for which the perpetrators have significant criminal records then the public prosecutor must still process such still pay attention to the results of mediation.¹⁵

The SPPA Concept of Restorative Justice in Canada

Section 717 Criminal Code and The Young Offenders Act 4 of 1984 set about restorative justice through versioned on children's condemnation. The existence of such provisions effected because the police and the Court considers criminal justice was not in accordance with the principle of the best interests of the child or the public. Therefore, it takes a step outside the court that can encourage the involvement of families and communities in solving cases, i.e. through restorative justice programs. These are some programs restorative justice for criminal offenders, as follows:¹⁶

Table 7: Restorative Justice Programs for Children in Canada

Program	Description
<i>Pre-Charge Restorative Program</i>	A move made after a child caught doing the deed, but on condition that certain criminal police would not specify the perpetrators as a defendant. As for the conditions that must be met is that the offender must be willing to participate in the pre-charge restorative programs defined as a form of accountability. In addition, the police can also recommend family actors to participate in this program.
<i>Post-Charge Restorative Program</i>	A move made after the offender has children is officially designated as a defendant in a court procedure but has not started yet.

¹⁵ Arthur Hartmann, "Victim-Offender-Mediation in Germany", *British Journal of Community Justice*, Vol. 6 No. 2nd April 2008, page 145.

¹⁶ Andrew Becroft, "Children and Young People in Conflict With The Law: Asking The Hard Questions", *Juvenile and Family Court Journal*, Vol. 57 No. 4th September 2006, page 25.

Post Sentence Program	A move made after the offender has been sentenced by a juvenile court. In the verdict, the judge may decide that the offender participate in certain programs as part of the punishment, or in addition to punishment.
Youth Justice Committees	Juvenile Court Committee is one of the program's implementation of the principles of restorative justice in the criminal process. In this case the members of the Committee met with the victim, the defendant's son, and parents (both the defendant and the victim) to negotiate the best course of action that can be performed by actors in order to improve his offense. In addition, the Committee also takes care of the implementation program of pre-and post-charge given to the perpetrators. Further, the Committee will ensure there is community support to child abusers by means of involving actors in social activities and schedule of certain members of the public to provide mentoring and supervision. The Committee will also assist coordination between child protection agencies by the SPPA.
Restorative Conferences	Restorative talks provided for in Section 19-Young Offenders Act 1984. The talks are aimed at increasing the involvement of the victim and members of the community in the criminal case of the child. As for the negotiations are negotiations involving restorative principals, orban, and members of the community and produce a verdict which is to provide compensation to victims for acts committed by the offender. As for the kinds of negotiations can be restorative (i) family group conferences; (ii) youth justice committee, (iii) reconciliation between the victim and the offender; (iv) sentencing circles ¹⁷ ; (v) community accountability panels ¹⁸ ; and (vi) inter-agency case conferences. As for the purpose of these negotiations is to provide opinions on the type of the corresponding punishment that can be meted out to the perpetrators.

Source: Becroft

The SPPA Concept of Restorative Justice in Austria

Children's condemnation Austria is regulates in article 7 and article 8 the Juvenile Act of 1988. The implementation of restorative justice in Austria is carried out through the mediation of the penal (Victim-Offender Mediation) in which the final outcome of mediation was reported to the public prosecutor. Mediation can be done directly, where victims and perpetrators are present together, or indirectly, where the victim and the offender does not meet the facilitated by the mediator (shuttle mediation).¹⁹

The SPPA Concept of Restorative Justice in Poland

Poland does not control the restorative justice expressly in the Juvenile Justice Act, however indirectly steel penal mediation for criminal offenders committed by juvenile court judge

or by a registered mediator. Mediation is done in the early stages of the trial in order to reach an agreement on how the offender can account for his actions. The results of the mediation will be strengthened in the judge's ruling. Results on mediation in General may include actions that can be performed by the offender accountable for his actions but still has elements of educational, non-conditional, or returned to the parents.²⁰

The SPPA Concept of Restorative Justice in Spain

The application of the concept of restorative justice through versioned in system children's condemnation is regulated in Law 4/92 as amended by Law 5/2000 regarding in criminal justice system for children. Basically penal mediation can be used in 2 ways:²¹

¹⁷ In this case, victim, offender, family, and community members meet the judges, lawyers, and others to give recommendation for the judge about the kind of punishment that should be accepted by the offender.

¹⁸ A negotiation which was attended by community leaders, perpetrators, victims (if wanted), and parents actors to reach an agreement fixes the error.

¹⁹ Gordon Bazemore, Jay Zaslav, dan Danielle Riester, "Behind the Walls and Beyond: Restorative Justice, Instrumental Communities, and Effective Residential Treat-

ment", *Juvenile and Family Court Journal*, Vol. 56 No. 1 January 2005, page 60.

²⁰ Anna Mestitz, "Organisational Features of Victim-Offender Mediation with Youth Offenders in Europe", *British Journal of Community Justice*, Vol. 6 No. 2 April 2008, page 66.

²¹ Lindsay Arthur, "Tomorrow's Choices", *Juvenile and Family Court Journal*, Vol. 61 No. 3 July 2010, page 30.

Table 8: Limitation of Children Age Dealing with Law in Other Country

As a form of Diversion by Prosecutors Before the case is tried	Upon request of the public prosecutor or the other Parties For Delays Condemnation by the Court until the Penal Mediation Completed
The public prosecutors can refer to penal mediation implementation allows the perpetrator to fix or show his desire to improve his offense to the victim. In this case, the public prosecutor shall not take any action to force abusers as well as meet its stated in the mediation agreement.	In this case, the judge will ask mediator of the initial report stated that the case deserves to do mediation. When the mediation has been completed and there has been agreement on a results agreement of mediation, the mediator shall submit a final report to the judge and the judge will consider the results of the mediation decision whether mediation is appropriate decision or need to be sentenced to another.

Source: Arthur

Closing

Conclusion

The enactment of Law 11/2012, the SPPA in Indonesia has implemented the concept of restorative justice through versioned. This provision simply accommodate the concept of restorative justice through diversion system with thrust of things regarding: (a) the obligation to give precedence to the completion of the child through the process of criminal diversion; (b) the duty of every law enforcement agencies to seek diversion at every level examination; and (c) the existence and tasks of professional social workers, social welfare personnel, as well as the community supervisor. As for the diversion process is done through deliberations involving the child and the parent/guardian, the victim and/or parent/guardian, the civic, and the super-

vising social workers professionals. Deliberation can involve social welfare personnel, and/or the community, in the event it is necessary.

Besides Indonesia, many in other countries are first applied the concept of restorative justice through versioned. In General, any other country done diversion for the best interests of the child (the perpetrators) are implemented in the form of mediation. Children are expected to account for his actions without going through the courts.

Suggestion

Needed the support of the various parties in order to implement the concept of restorative justice through the system are versioned. The support, among others, as follows:

Makers of Laws and Regulation	Law Enforcement Officers	Community
To speed up the formation of a government regulation that governs technically on the implementation process of the diversion, the procedures, the implementation and coordination of versioned, as mandated in article e15 of ACT 11/2012.	In the future, the law enforcement agencies would also have to change the paradigm of retributive to restorative in the resolution of criminal cases. In addition, it would also increase the capacity and quality of the law enforcement officers through adequate education and training, in order that the process carried out in accordance with the diversion approach the concept of restorative justice which is ideal.	To improve the effectiveness of the implementation of the concept of restorative justice through versioned system then needed an increase in community awareness regarding the understanding of children's rights and the process of diversion. So it can be created in common views and community participation in the protection of the right of the child through the process of diversion. In addition, it takes the cooperation with the community to provide support and accept the criminal perpetrators of the community again.

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