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The Diversion Based on Philosophy of Restorative Justice Indonesia Version: Between Ideality and Reality in Settlement of Child's Cases by An Investigator

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Abstract

The purpose of this article analyzes the alignment between the diversion which was made by the investigator and the concept of restorative justice Indonesia version of the Child Criminal Justice System and the restorative justice philosophy according to Howard Zehr. This article is based on the results of juridical-empirical research in Police Resort of Malang - East Java as one of the Police Resort that had succeeded in doing diversion in the last 5 years. The data collected through interviews, observations and documentary study on decisions of the court were analyzed by using prescriptive techniques. Based on the results of the research showed that based on Act of the Child Criminal Justice System. The investigator had done diversion as the only technique to achieve restorative justice of the Indonesia version. Prior to the application of the on the Act of the Child Criminal Justice System, the penal mediation technique was used by the police for the settlement of several child's cases based on the discretion. The difference between the two techniques based on the status of the child is that the child's diversion technique is designated as a suspect in advance by the investigator before being diversified, then if the diversion is successful then the child's case is terminated. While in penal mediation technique, before the mediation process of child penal is not always specified as a suspect in advance. The investigator had been able to carry out all five aspects in the characteristic of diversion based on the restorative justice in the Indonesia version (i.e aspects: requirement, objective, process, result, and indicators of restorative justice elements), but not all indicators in every aspect were capable. Normatively, the provision of diversion in Act of the Child Criminal Justice System had been suitable with the philosophy of restorative justice as said by Howard Zehr. The investigator had not been able to achieve all the indicators of diversion based on restorative justice Indonesia version and Howard Zehr's criminal philosophy, because it had not presented all parties in the deliberation of diversion so that the indicators of restorative justice in the form of recovery of perpetrator, victim, and the community had not been optimally fulfilled.

Keywords: Diversion, Philosophy of Restorative Justice, Indonesia, Child, Investigator

1. Introduction

The child as a doer of criminal acts who have been 12 years old but if he/she has not reached 18 years old will be processed in the Criminal Justice System,¹ that is through the whole process of settlement of child's cases in conflict with the law, from the investigation phase to the guidance phase after he/she has already served a criminal.² In some countries, however, the settlement of child's cases through the criminal justice system is only a last choice, the main option being through restorative justice approaches, for example by diversion technique, community conference,³ because it is beneficial for the child.⁴ The restorative justice approach is not aimed at reducing the right to criminal law or even remodel the criminal justice system that can also function well.⁵ In Act number 11 in 2012 on the Child Criminal Justice System as a Child Criminal Act regulates that before commencing criminal process, an investigator, a prosecutor, and a judge are required to conduct diversion,⁶ against child who carries out a criminal (i.e those who first perform criminal, threat of criminal sentence maximum 7 years).⁷ Therefore, the definition of diversion based on restorative justice philosophy Indonesia version of is a solve technique of child criminal through a path outside the criminal process conducted by involving perpetrator, victim, public, law enforcer, and other parties concerned in a deliberation to find out a peaceful solution to anticipate the harmful impact of a crime while restoring victim and the community in accordance with a Child Criminal Act. The diversion is carried out by 2 phases, namely (a) the diversion process, and (b) the implementation of the result of the diversion agreement.

¹ Article 1 number 3 Act number 11 in 2012 about the Act of Child Criminal Justice System

² Article 1 number 1 in the Act of Child Criminal Justice System

³ Ruth Ann Stickland, *Restorative Justice*. Peter Lang Publishing, New York, 2004. p. 9

⁴ Marlina, *The Implementation of Diversion Concept Toward The Child of the Criminal perpetrator*, <http://repository.usu.ac.id>

⁵ Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, Journal of Law & Policy, Vol. 24:301, 2007, p. 304

⁶ Article 7 point (1) the Act of Child Criminal Justice System

⁷ Article 7 point (2) the Act of Child Criminal Justice System

One of the important phases of the implementation of restorative justice in Indonesia is the diversion made by an investigator of the child (hereinafter referred to as investigator) because the child is first encountered by law enforcement. The all criminal justice process is initiated from the investigation phase by the police, so the function of the police is as “gate keeper” of the criminal justice system.¹

The quality and quantity of an investigator in the diversion process and the supervision of the results of the diversion agreement are urgently needed in order to diversion achieve the goal. Therefore, an investigator needs to understand the characteristic of the child when determines the identity who his/or her mind is very unstable that very easily affected by environmental influences²; and lack of experience.³ The success of the diversion process is much more carried out the police because of they have been specially trained about the technique and justice orientation of restorative.⁴ The crime in East Java Province was ranked 6th out of 34 sequences based on the largest crime category in Indonesia, i.e 16,913 cases,⁵ and only 8.051 (47.60%) of criminal cases were resolved by the police. The crime in East Java occurred every 00.31'04", which is ranked 15th the most common from the 34 sequences.⁶ The Police Resort of Malang-East Java is a police unit that has a vast area of 3,534.86 km², i.e. it contains 2,544,315 people spread in 33 subdistricts, 378 villages, and 12 the lowest local governments,⁷ and in 2016 there was an increase in the number of child as a doer of crime in The Police Resort of Malang was 61 cases, whereas in 2015 only 56 cases. Each case might involve more than one child so that in hundreds of children committed a crime.⁸ Based on data in the Women and Child Service Unit of The Police Resort of Malang, in 2014 there were 290 children dealing with the law, both as a perpetrator and victim.⁹ The majority of child's cases were resolved through court, as they did not meet the requirements for diversion or investigator had sought diversion but failed to reach a diversion agreement. Since 2014 it had been more than 30 times of diversion process were a success.¹⁰

Before and after putting into effect of the Child Criminal Justice System, the implementation of diversion in Indonesia got many obstacles, for example not all victims or their families were willing to accept the diversion because they wanted the perpetrators imprisoned; the enforcers of law supported diversion,¹¹ it was difficult to expect participation of community in restorative settlements because it did not provide legal certainty for child, victim, and community¹², the community wanted punitive and retributive sanction to be fair,¹³ limited the ability of investigator in diversion, victim wanted a perpetrator imprisoned,¹⁴ the implementation of diversion was still less effective,¹⁵ the leader of community is less supportive, the victim had repeatedly become the victim of crime by the different perpetrator.¹⁶

Based on the orientation and argumentation of introduction above, so the purpose of writing of this article is to analyze comprehensively about whether the implementation of the diversion of child suspects by the investigator of police has created the restorative justice in Indonesia version.

¹ Harkrisnowo, Harkristuti. *The Reconstruction of the Criminal Concept: A Lawsuit to Legislation and Criminalization Process in Indonesia. Speech Inauguration of Professor, Indonesia University, Jakarta, 2003, p. 2.*

² Kartini Kartono, *Psychic Disorders*. Sinar Baru, Bandung, 1981, p. 187.

³ R.A. Koesnoen, *The Criminal Structure within the Socialist of Indonesia State*. Sumur, Bandung, 1964, p. 120

⁴ Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence*, The Smith Institute, 2007, p.88, <http://www.iirp.edu>

⁵ *The Criminal Statistics in 2014, the Central Statistics Agency, Jakarta, 2014, p. 18*

⁶ *The Criminal Statistics in 2014, the Central Statistics Agency, Jakarta, 2014, p. 27*

⁷ *Overview*, <http://www.malangkab.go.id>

⁸ *In 2016, The Child Become Criminals Still Increasing*, <http://m.timesindonesia.co.id>

⁹ *Secondary Data on Women and Children Services -Police Resort of Malang on 8th October 2014*

¹⁰ The result of interview with the Leader of *Women and Children Services -Police Resort Unit of Malang*, Iptu Sutiyo, di Polres Malang

¹¹ Dwi Hapsari Retnaningrum dan Manunggal K. Wardaya, *Protection of Child Who Crime (Review of Non-Litigation Settlement in Case of Child Crime in Banyumas, Purbalingga, Banjarnegara, Kebumen, and Cilacap)*, Research Report, Law Faculty of s Djerba Soedirman University, 2008, p. 59.

¹² Subekhan, *Case Restoration of Children in Restoration in Implementation of Child Criminal Justice System*, Thesis, of Indonesia University

¹³ Apong Herlina, *The role of Child protection commission In Implementing Monitoring and Evaluation of Child Criminal Justice System*, <http://srsg.violenceagainstchildren.org>

¹⁴ Meinardus Yudiansyah, *Implementation of Diversion and Restorative Justice as Efforts to Protect Children of Criminal Officers at the Investigation Stage in Pontianak City Police*, Journal Nestor Magister Law Vol. 3, Number 5 (2013): Journal of Students of Law Magister of Tanjung Pura University, p. 23

¹⁵ Imran Adiguna, Aswanto, Wiwie Heryani. *Implementation of the Diversion of Child Faced with the Law in the Criminal Justice System*, Faculty of Law, Hasanuddin University, 2014, p. 1

¹⁶ Imran Adiguna, Aswanto, Wiwie Heryani, *The Implementation of Diversion against Child Faced with the Law in the Criminal Justice System*, <Http://Pasca.Hasanuddin.ac.id>, diakses tanggal 17 April 2014

2. Theoretical Framework

In a historical perspective, the approach of restorative justice started from practice in some countries such as Canada, Australia, New Zealand, and the United Kingdom. The starting point of the implementation of restorative justice begins from the solving program out of a conventional court done by a citizen who is called by the term "mediation of offender and victim" in the 1970s in Canada.¹ Due to its success, the current restorative justice has become a global phenomenon in the criminal justice system, so although its concepts have developed differently from region to region, yet in law in almost all countries have governed them. The restorative justice responds differently to the criminal justice process by adopting the original conception of the native justice of society through an alternative offer of restoration for example through mediation and restoration techniques,² so there were 2 key concepts in restorative justice i.e. danger and improvement,³ or restoration of victims and society.⁴

According to Howard Zehr that the philosophy of restorative justice rests on five principles: (a) Justice focused on the hazard of offense and its consequence to the need of victim, community, and offender; (b) The obligation of the perpetrator and the community to overcome the harm resulting from the violation; (c) the implementation of collaborative and inclusive process; (c) the parties who have a role and authority in the community should be involved, including victim, violator, member of the community; and (e) Trying to fix mistake.⁵

The restorative justice is a set of ideals of justice that assume the generosity, empathy, supportive and rationality of the human soul,⁶ through group counseling involving victim and perpetrator,⁷ so that its vision is always based on values that care for the individual.⁸ Therefore, restorative justice is an incorporation of the conception of relational justice with participatory or consensual justice then formulated in the techniques of solving criminal based on the design, implementation, and evaluation of the participatory program.⁹

The diversion is one of the techniques or method to achieve restorative justice, which is essentially a process of settling a criminal by involving all parties affected by a criminal act with the aim of correcting the damage caused by the criminal act,¹⁰ through non-judicial. The approach of restorative justice is suitable with the equilibrium model of Interest,¹¹ as its main focus is on the needs of the victim, not just the doer's need.¹²

The restorative justice has superiority and weakness. The superiority of restorative justice is providing a framework for measuring and reporting the results of measuring justice for adolescent, thereby facilitating accountability to the community.¹³ The conception of restorative justice is a great tool and has positive and real results in solving criminal act.¹⁴ While the weakness, namely there is the possibility of offender gets double suffering. The first suffering, because the offender has already passed through the process of diversion, and the second suffering will occur if the failed version then it is continued with criminal justice process. In general, however, the restorative justice has proven to provide the necessary improvements in reducing the weakness of the retributive justice system,¹⁵ even the restorative justice will prevent child criminal activity in the future.¹⁶

The restorative justice endeavors to provide a solution of conflict and endeavors to explain to the perpetrator of a criminal act that the violation of the law is unforgivable by the nation, but the nation at the same

¹ Allison Morris and Gabrielle Maxwelle. *Restorative Justice for Juvenile; Conferencing, Mediation&Circle*, Oxford-Portland Oregon USA, Hart Publishing. p. 4.

² Daniel W. Van Ness, *An Overview of Restorative Justice Around the World*, Workshop 2: Enhancing Criminal Justice Reform, Including Restorative Justice United Nations 11th Congress on Crime Prevention and Criminal Justice Bangkok, Thailand April 22, 2005, <https://assets.justice.vic.gov.au>

³ Cassia Spohn and Craig Hemmens, *Courts: A Text/Reader*, Sage Publication Inc., California, 2012, p. 547

⁴ Frank Schmalleger and John Ortiz Smykla, *Corrections in the 21st century*, McGraw-Hill, New York, 2004, p. 80

⁵ Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated*, Skyhorse Publishing, Inc., 2014.

⁶ Kathleen Daly, *The Limits of Restorative Justice*, 2005, p. 2, <http://www.antoniocasella.eu>

⁷ George Pavlich, *Governing Paradoxes of Restorative Justice*, GlassHouse Press, London, 2005, p. 25

⁸ Mark S. Umbreit, and Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, Washington University Journal of Law & Policy, Volume 36 *Restorative Justice*, p. 82

⁹ Arlene Gaudreault, *The Limits of Restorative Justice*. Article Published in The Proceedings of the Symposium of The École nationale de la magistrature, Édition Dalloz, Paris, 2005., <http://www.victimweek.gc.ca>

¹⁰ *Restorative Justice in New Zealand: Best Practice*, <http://www.justice.govt.nz>, diakses tanggal 24 April 2014.

¹¹ Muladi, *Capita Selecta Criminal Justice System, Publisher Agency of Diponegoro University*, Semarang, 1995, p. 5.

¹² Chris Marshal, *Restorative justice – a third way*, <http://jas.smartmailpro.com>, accessed 20 April 2014.

¹³ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, Justice Policy Journal, Volume 2, Number 13, 2016, p.13

¹⁴ Chris Marshal, *Restorative Justice – a Third Way*, <http://jas.smartmailpro.com>, accessed 20 April 2014.

¹⁵ Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, Journal of Law & Policy, Vol. 24:301, 2007, p. 325

¹⁶ Margo Chaly, *Juveniles and the Law: More Than A Diversion, Restorative Justice Allows For Restitution By And Rehabilitation For A Youthful Offender*, Law School Student Scholarship, 2014, <http://scholarship.shu.edu>

time strives to support and respect individual to become better,¹ in order to rehabilitate crime victim.²

There is a category of need that must be realized by the restorative justice, namely: (a) The liability of offender to overcome the harm caused, encourage empathy and responsibility, and change the disgrace; (c) The encouragement to undertake a personal transformation of offender, including healing of the cause of deviation of violator's behavior, chance of offender to obtain treatment for addiction and / or other behavioral problems, and increased personal competence of offender; (c) the encouragement and support to violator to integrate into the community; and (d) The need for restraint some offenders.³ Therefore, Kratoski said that there are three categories in the orientation of the implementation of the diversion program in the police force: (1) the social service by the community to the offender, (2) the balance or restorative justice orientation, (3) the implementation oriented to the supervision of society.⁴

The implementation of restorative justice in Britain is more successful in creating justice for children because the solution is restorative, compared to the settlement through criminal justice which relies more on punitive sanction, because a judge and a prosecutor are more likely to convict someone than the public.⁵ Even restorative justice approach is more effective in reducing recidivism.⁶ The diversion based on a restorative justice proved capable of avoiding subsequent crime, although there is no model of care and prevention that is most effective in crime prevention.⁷

In Canberra-Australia, In approximately 90% of the case settlement, 48-78% of violators trust the police, after going through a process of case settlement in the court process, in fact, the confidence of a violation to the police is an increase.⁸ The victim and community benefit from a restorative justice, by engaging in family group conferences and community reparation council.⁹

In fact, 89% of adolescents who participated in a restorative justice-based diversion program in Maricopa County (Arizona) and 86% of adolescents in the comparison group successfully completed the program in which they were involved.¹⁰ The most states in the United States have incorporated a restorative justice approach within the law or code in which regulates general term and objective, application, funding, and evaluation.¹¹

The definition of restorative justice of Indonesia version is the settlement of a criminal case involving perpetrator, victims, a family of perpetrator or victim, and other parties concerned to jointly seek a fair settlement by emphasizing restoration to the original condition, rather than retaliation.¹²

Based on the definition, it can be understood that there are 2 elements in the basics of restorative justice of Indonesia version, namely: (a) the settlement of criminal case involving doer, victim, family of doer or victim, and other related parties; (b) the settlement of a fair criminal case by emphasizing on: (1) the restoration of the original situation, and (2) the settlement is not retaliation to the offender. The achievement of the restorative justice of Indonesia version is carried out by the diversion technique,¹³ ie it is carried out by the investigator, or the prosecutor, or the judge.¹⁴

Conceptually, the purpose of the implementation of the diversion program in Indonesia is to prevent the occurrence of child's crime in the future i.e it is done in the form of community oversight, restitution, compensation, fine, counseling or activity involving the family (family intervention),¹⁵ The provision of

¹ B.E. Morrison, The school system: Developing its capacity in the regulation of a civil society, in J. Braithwaite & H. Strang (Eds.), *Restorative Justice and Civil Society*, Cambridge University Press, Cambridge, 2001, p. 195.

² Mudzakir, *Analysis Restorative Justice: History, Scope, and Its Application*, <http://pkbh.uui.ac.id>, accessed 26 April 2014.

³ Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, *Journal of Law & Policy*, Vol. 24:301, 2007, p. 325

⁴ Peter C. Kratoski, *Juvenile Justice Administration*, CRC Press, Boca Raton, 2012, p.146

⁵ Philippe Gailly, *Restorative Justice in England and Wales*, p. 7, www.arpegeasbl.be

⁶ Holly A. Wilson and Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, *Criminal Justice And Behavior*, Vol. 40, No. 5, May 2013, p. 497.

⁷ Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, volume 88, Issue 6, 2000, p. 2477

⁸ John Braithwaite, *Restorative Justice: Theories and Worries*, *Papaers 47*, 123rd International Senior Seminar Visiting Experts', p. 54, <http://www.unafei.or.jp>

⁹ Leanne Fiftal Alarid & Carlos D. Montemayor, *Implementing Restorative Justice in Police Departments*, *Police Practice and Research*, An International Journal, Volume 13, 2012 - Issue 5, p.450, <http://www.tandfonline.com>

¹⁰ Kimberly de Beus and Nancy Rodriguez, *Restorative Justice Practice: An Examination of Program Completion and Recidivism*, *Journal of Criminal Justice* Volume: 35 Issue: 3, May/June 2007, p. 337

¹¹ Sandra Pavelka, *Restorative Justice in The States: An Analysis of Statutory Legislation and Policy*, *Justice Policy Journal*, Volume 2, Number 13, 2016, p.1

¹² Article 1 point 6 of the Act of the Child Criminal justice system

¹³ The General explanation of the Act of Child Criminal justice system

¹⁴ Article 7 paragraph ayat (1) of the Act of Child Criminal justice system

¹⁵ Gregorius H. Kristyanto, Slamet Sampurno, Said Karim, and Syamsuddin Muchtar, *Legal Protection of Children in Conflict with The Law Through Restorative Justice Principle (A Review of the Prosecutor's Role)*, *International Journal of Advanced Research*, 2015, Volume 3, Issue 7, p. 1358

diversion and restorative justice in the the Act of Child Criminal Justice System is suitable with the latest paradigm in the settlement of child's case, that the settlement of crimes committed by child does not have to go through criminal justice, but it is attempted to transfer the settlement of criminal act through outside the process of a criminal law,¹ or it can be called a diversion. However, the diversion in the Act of Child Criminal Justice System still contains the retributive justice.²

Based on the provisions of the Act of Child Criminal Justice System, it can be briefly explained that the characteristic of diversion based on the rhetorical justice of Indonesia version can be spelled out in 5 aspects: the term, objective, process, the outcome of the agreement, and the indicator of justice to be achieved.

- a) The aspects of the requirement of the case that can be diversified, namely the perpetrator have been 12 years old but have not reached 18 years of the first time of committing a crime is threatened with imprisonment of fewer than 7 years.
- b) The aspects of diversion purpose, namely (a). Achieving peace between the victim and the child; (b). The settlement of the Child's case outside the judicial process; (c). Preventing the Child from deprivation of liberty; (d) Encouraging society to participate; and (e) Building a sense of responsibility to the Child.
- c) The aspects of the diversion process, namely: (a) the diversion may only be conducted chronologically by the investigator, the prosecutor, and the judge by involving the parties concerned; (b) it is done by direct face-to-face meeting in a room for deliberation, with the obligation to pay attention to the interest of the victim, the welfare and responsibility of the child, the avoidance of negative stigma, avoidance of retaliation, community harmony, and propriety, decency, and public order; (c) the child of the perpetrator of a crime must be determined to become a suspect first by the investigator; (c) the diversion is done in two phases, namely the diversion process and the implementation of the diversion agreement; (e) if the diversion process does not reach an agreement, then the case will be settled through the criminal justice system; (f) If the diversion agreement is fail, then the process of settlement of the case will be committed to the criminal justice system; (g) the evidence of success of the diversion shall be a legal document in the form of a decision of court of justice; (h) if the diversion agreement has already been executed then the case will be closed.
- d) The aspects of the result of the diversion agreement, namely: (a) peace with or without compensation; (b) resignation to parents or a guardian; (c) participation in education or training in educational institutions or Social Welfare Provider for a maximum period of 3 months; or (d) community service.
- e) The aspects of indicator of restorative justice elements to be achieved, namely (a) Indicator Element "settlement of criminal case involving perpetrator, victim, family of perpetrator or victim, and other related parties"; (c) The element of indicator "to jointly seek a fair settlement by emphasizing on: (1) the restoration of the original condition, and (2) not retaliation".

3. Research Methods

This study belongs to the juridical-empirical study, which examined the provision of the implementation of the diversion as set forth in the the Act of Child Criminal Justice System in the Police Resort of Malang, because the juridical-empirical approach is useful to know the implementation of juridical provisions in the field³, namely the implementation of the version based on restorative justice of Indonesia version.

The position of the researcher as a planner, implementer, and reporter⁴, so it is very strategic in the implementation of research. Looked at the type of data by source, the data required for the discussion of matter consists of primary data and secondary data. The primary data is obtained directly from an Investigator and a Social Advisor through in-depth interview, and observation of the diversion process to observe the social situation and the deliberate parties. While the secondary data obtained from library materials, in the form of Community Research Report, Official Report of Investigation, and Court Decision by copying.

The data that had been obtained then analyzed by descriptive-analytical, and prescriptive analysis, i.e the analysis starting from juridical-systematic analysis to the provision of the Act of Child Criminal Justice System, then the result was associated and supplemented by empirical analysis through comparison⁵, between the implementation of the diversity on in the Police Resort of Malang with the provision of diversion in the Act of Child Criminal Justice System and the philosophy of restorative justice according to Howard Zehr.

¹ Albert L. Robert (Edit), *Juvenile Justice Source Book: Past, Present, and Future*, Oxford University Press, Oxford, 2004, p. 184.

² Andi Sofyan, *The Value of Justice in Child Criminal Justice Syatem: A Review of Inondesian Criminal Law*. International Journal of Scientific & Technology Research, [Volume 5 - Issue 2, February 2016](#), p. 46

³ Barda Nawawi Arief, *Legislative Policy on Crime Prevention with Criminal Crimes*. Publishing Agency of Diponegoro University, Semarang, 1997, p. 62.

⁴ Lexi J. Moleong, *Qualitative Research Methodology*. Remaja Rosdakarya, Jakarta, 1994, p. 121.

⁵ Hartono, Sunaryati. *Return to Legal Research*. Law Faculty of Padjadjaran University, Bandung, 1984, p. 38

4. Result and Discussion

a. The Diversion Based on Restorative Justice: A Practice in the Women and Child Service Unit in the Police Resort of Malang East Java

The diversion was applied to every child, without exception and without distinguishing any elements including against child who committed a crime without a victim. The diversion process always involves the parties in accordance with the provisions of the Government's Regulation of Diversion, but especially for professional social worker had not been involved. The Community Counselor involved was the government employee in the First Class of Correctional Hall of Malang who had the status as a social counselor and he or she was given assignment by his or her superior.¹

The preparations are always conducted jointly between the Child Investigator and the Community Counselor in each office. The process that was undertaken in carrying out the diversion process is as follows: (a) The Investigator of Child made the arrest; (b) conducting examination of evidence to establish the suspect; (c) requesting the Correctional Officer to make a Community Research; (d) determine whether the child meets the requirements of diversion or not; (e) in conjunction with the Correctional Officer to prepare the diversion process, including inviting the parties who joined in the diversion; (f) implementing a diversion; (g) asking the Correctional Officer to accompaniment, guidance, and supervise to the child of the suspect, and report on the implementation of the result of the diversion agreement; (h) the investigator reported on the fulfillment of the diversion agreement to the Unit Head of Child and Women Service; (i) the Unit Head of Child and Women Service submitted follow-up report to Head of Detective and Criminal Unit of the Police Resort of Malang; (j) the Head of the Police Investigation and Criminal Unit sent a letter requesting the court to the District Court of Kepanjen; (k) the Child Investigator, the Community Counselor, and the Parties involved in the diversion would receive a copy of the Court Decision about the Determination of the Diversion of a Child on behalf of the child of the suspect; (l) The Child Investigator stops the investigation of the child who become suspect.²

Based on the results of documentation study in the Unit of Woman and Child service of Police Resort of Malang known that many cases of the child which had been handled by the Unit of Woman and Child Service of Malang. But in 2016 there were 3 cases that had been successfully diversified and all of them had found out a decision from the District Court of Kepanjen. The number of suspected child diversified was very many, but only a few cases had succeeded in reaching a diversion agreement. All child who becomes suspect whose case had been diversified had been terminated. The three cases are as follows.

- 1) The case on behalf of FP (male perpetrator of a criminal act of torture). The parties involved in the diversion are as follows: The perpetrator (FP) and his parents (Fatmawati); Victims (Badrus Zaman) and his parent (Syamsul Arifin); Social Advisor of the Correctional Hall of the first class of Malang (Imam Munali); Legal Counsel (Bambang Suhernowo). The Investigator of Child played as facilitator and Community Guidance as facilitator representative in the diversion process. The contents of the Diversion Agreement are as follows: a kinship settlement because the offender was still study; the victim requested that the investigation be discontinued and the matter resolved in a kinship manner; the decision of a child investigator to make a diversion was based on the results of a Community Research conducted by the Community Guidance of Correctional Hall. Based on the Decision of Court Number 11 / Diversion / 2016/PN.Kpn, 21 April 2016, the Child Investigator was ordered to stop the investigation, and it will proceed if the diversion agreement was not implemented. The result of the diversion agreement had already been executed, so the diversion had completed and the case was terminated³.
- 2) The case on behalf of IMA (male as the perpetrator of a crime of persecution). The Deliberation Diversion held 2 times⁴. The parties involved in the diversion were: Sugianto (father of Victim of Crime / Reporter); IMA (Suspect / Reported Party); Hartono (the parent of Suspect / Reported); Erna Yulianti (Community Counselor from the First Class of Correctional Hall of Malang); and Bambang Suhernowo (Advocate). In such diversions, the Child Investigator played as a facilitator and a Community Counselor as a deputy facilitator⁵. The Contents of the Agreement: a kinship settlement of the case because the offender was still studied; The victim or reporter requested that the investigation is discontinued and the matter resolved in a kinship manner. Based on the Decision of Court Number 14 / Diversion / 2016 / PN.Kpn, September 2nd, 2016, the Investigator of Child was ordered to stop the investigation since the agreement had been executed, the case was terminated.
- 3) The case on behalf of ANP (Woman as a perpetrator of criminal acts of persecution). The parties involved in

¹ Wawancara dengan Triono Budi Santoso (Kepala Sub-Seksi Bimbingan Kerja BKA Bapas Kelas I Malang, *sekaligus* Pembimbing Masyarakat), di Kantor BAPAS Kelas I Malang

² Interview with Investigator's Child, Yogi Teja Mukti, dan Erleha Br. Maha The Unit of Woman and child service office in the Police Resort of Malang

³ Documentation Study on the content of State Court Decision of Kepanjen Number. 11/Diversi/2016/PK.Kpn

⁴ Interview with Investigator's Child, Puji Lestari, The Woman and child service office in the Police Resort of Malang

⁵ Interview with Investigator's Child, Erleha Br. Maha, in Woman and child service in the Police Resort of Malang

- diversion deliberation were: Erwin Rifani (the parent of victim of criminal act/reporter); Luluk Lailatul Urifah (the mother of suspect/ reported party);
- 4) ANP (Suspect/reported party); Suryono (Community Counselor of First Class of Correctional Hall of Malang); Bambang Suhernowo (Advocate). The Investigator of child played as a facilitator and Community Counselor as the duty facilitator in the diversion process.¹ The contents of the Agreement were: a kinship settlement of the case because the offender was still studied; the victim/reporter requested that the investigation is discontinued and the matter resolved in a kinship manner; the suspects returned to parents for obtaining guidance. Based on the Decision of Court Number 19 / Diversion / 2016 / PN.Kpn, November 23, 2016, the Investigator of Child ordered to stop the investigation, and because the contents of the agreement had been implemented then the case was terminated.

The role of the investigator as facilitator and counselor of the community as a duty facilitator is in accordance with the provisions of the Act of the Child Criminal Justice System.² It is suitable with the result of previous research, that investigator in the settlement of this restorative justice only play as a facilitator and only provide advice, because the core of the settlement of peace was determined by the perpetrator and victim and other related parties.³

In relation to the diversion agreement in 3 cases of child in Indonesia, then associated with the opinion of Peter C. Kratcoski, then the diversion in Indonesia according to category 2, namely equilibrium or restorative justice orientation, namely the dominant effort to protect the community, So that the police given chance for offender to be directly accountable to the victim and the community, by making a collective agreement between the victim, the perpetrator, and the community. In Fact, the Investigator only acts as a facilitator to protect the interest of the community, while the parties (ie the perpetrator, victim, and the community were asked to make their own agreements to settle the criminal.

b. The Comparison between Diversion Implementation in the Women and Child Service Unit in the Police Resort of Malang East Java with Characteristic of Diversion Based on Justice Restorative Philosophy of Indonesia Version

Based on the the Act of the Child Criminal Justice System, the characteristic of diversion based on the restorative justice philosophy of Indonesia version are 5, namely (1) the aspect of diversifiable case requirements, (2) the aspects of diversion objective, (3) the aspect of the diversion process, (4) the aspect of the agreement of diversion, and (5) the aspect of the indicator of restorative justice element to be achieved. If the result of the research was related to the 4 characteristics of diversion based on restorative justice Indonesia version, it can be understood that (1) the aspect of case requirement can be diversified by the investigator, (2) the aspect of diversion purpose had been attempted by the investigator, (3) the aspect of diversion process has been done, i.e by the investigator and all parties, (4) the aspect of the form of the outcome of the diversion agreement had been reached, namely to return the child to the parents. The determination of the court for child's diversion as a legality of successful diversion had been issued, and the closing of child cases has also been carried out by the investigator.

If the implementation of the diversion carried out in the Unit of Woman and Child Services of the Police Resort of Malang was associated with the fifth aspect of characteristic of diversion based on restorative justice Indonesia version, (5) the indicator aspect of the restorative justice element to be achieved, in the form of (a) the Element Indicator of "criminal case settlement involving perpetrators, victim, family of perpetrator / victim, and other related parties"; (b) The element indicator "to jointly seek a fair solution by emphasizing on: (1) the restoration of the original condition, and (2) not discussion", the following results are obtained

- 1) The element of "settlement of criminal cases involving perpetrator, the victim, a family of perpetrator/victim, and other related parties" had not all been fulfilled.
- 2) The Procedural processes of completion of 3 children who become a suspect fulfill the requirement that is an element of "settlement of crime." The proof, the crime committed by 3 children has been declared closed, in the form of Letter of Determination of Termination of Investigation which was made on the basis of Court Decision. However, from the element of the diversion that "involved the perpetrator, the victim, the family of the perpetrator / victim, and other related parties" had not fulfilled the requirements, because the investigator had not presented all the parties that were obliged or may be presented, namely the Professional Social Worker, the Social Welfare Worker, and/or the community as stipulated in Article 8 point (1) and (2) the Act of the Child Criminal Justice System. The definition of social welfare worker is clear, that is a person who is trained and trained professionally to carry out the task of service and handling social problem and / or a

¹ Interview with Investigator's Child, Erleha Br. Maha, The Woman and child service office in the Police Resort of Malang

² Interview Iptu H. Sutiyo, S.H., M.Hum., the head of the Unit of Woman and child service office in the Police Resort of Malang

³ *Principle of Restorative Justice In the process of investigation of children as perpetrator of criminal intercourse (Study in the Police Resort Regency of Malang)* Anisa Pasha R, Nurini Aprilianda, dan Lucky Endrawati

person who works, both in government and private institution, the scope of activities in the social welfare of child field,¹ while the definition of society among others religious leader, teacher, and community leader.² At the Police Resort of Sleman of Yogyakarta also had not involved professional social worker in diversion.³

- 3) Before involving the professional social worker and social welfare worker by the investigator is reasonable because of the limited number of a professional social worker in Malang and the budget in the Unit of the Woman and Child Service. The professional worker and the social welfare worker who fulfill the requirements of Article 66 of the Act of the Child Criminal Justice System had not been much in Malang, because there were 33 welfare workers at district level, but they do not meet the criteria of Article 66 of the Act of the Child Criminal Justice System. Based on the explanation of the Social Minister of Indonesia Republic, the number of social workers who attended the certification is only 264 of the total number of social workers were 15,522 in Indonesia. If the investigator has to present them from outside Malang then it will cost a lot, while in the Unit of the Woman and Child Service there was a limited budget. Not involving some parties in this diversion is as sophisticated with other research results, that the implementation of diversion in Indonesia faced many obstacles, among others, the inadequate facilitators and social worker, the facilities that were less able to support the guidance and assistance of violator.⁴
- 4) In the future it is necessary to develop the style and role of facilitator, certification of stakeholder, participation requirements of stakeholder in training, professional standard determination, and other related issues will continue to be demanded to improve individual performance in cooperation in diversion.⁵
- 5) The element "to jointly seek a just settlement by emphasizing: a. the restoration to its original condition, and b. not vengeance" is also not fulfilled. Its goal is to jointly seek a fair solution by emphasizing the following two aspects.

(a) The sub-element "Restoration of the original condition" had not been met.

The author argued that in the aspect of the target, the meaning of the phrase "restoration of the original status", not only restoration of the return of material and non-material harm to victims and society, but also the restoration of the perpetrator so as not to have the opportunity to commit a crime. It is based on the consideration that the nature of restorative justice is the element of harm from an offense and its consequences to the needs of victims, community, and offender,⁶ so that it is necessary to eliminate these hazards as well as to improve the circumstances evoked by crime,⁷ including the restoration of victim and society.⁸

Referring to the meaning, then the content of the diversion agreement in Police Resort of Malang in the form of returning the goods embezzled to the victim, an apology to the victim and the family, the return of the perpetrator to the parents can not restoration all the circumstances. The recoverable circumstance only goods that become the object of crime through the return of the goods to the victim. The physical injuries and trauma of victim of abuse have not yet been restored, as there was no treatment financing in the agreement and trauma healing from the competent party. The trauma can be caused by an injury sustained and/or because the victim was reunited with the perpetrator during the diversion process. The condition of society was not necessarily recovered as before because in the deliberation of the diversion did not present the public so did not know what was wanted by society so that society condition recovered. Similarly, from the aspect of the offender, agreement in the form of an act of returning an offender to parents did not necessarily rehabilitate the psychic condition of the offender so as not to repeat a similar criminal because not all parents can educate their children. In addition, it fact, guidance and assistance to violator by the Counselor of Society as regulated in Article of the Act of the Child Criminal Justice System also not done.

The non-fulfillment of the element of recovered of the doer, victim, and community as occurred in Indonesia, also occurred in some places in the United States, i.e often in the diversion based on restorative justice had weakness, namely the lack of respect to victims, not involving stakeholder in the diversion process, or the offender neglected to carry out an agreed responsibility.⁹ The same situation

¹ Article 1 number 15 on The Act of Child criminal justice system

² Explanation of article 8 section (2) on The Act of Child criminal justice system

³ Marlita Nidi Savitri, *Implementation of Diversion Concept on Child Investigation Process at The Police Resort Selman of Yogyakarta*, *Syari'ah* Faculty and Law, The State Islamic University of Sunan Kalijaga Yogyakarta, 2016, p. 1

⁴ Yohanis S. Bakti, Andi Sofyan, Slamet Sampurno S, and Syamsuddin Mughtar, *Application of Diversion and Restorative Justice of The Children Criminal Justice System in Indonesia*, International Journal of Advanced Research, 2016, Volume 4, Issue 6, p. 153

⁵ Johnson, Daniel van Ness, *Handbook of Restorative Justice*, Willan Publishing, London, 2007, p. 223.

⁶ Howard Zehr, *The Little Book of Restorative Justice: Revised and Updated*, Skyhorse Publishing, Inc., 2014

⁷ Cassia Spohn and Craig Hemmens, *Courts: A Text/Reader*, Sage Publication Inc., California, 2012, p. 547

⁸ Frank Schmalleger and John Ortiz Smykla, *Corrections in the 21st century*, McGraw-Hill, New York, 2004, p. 80

⁹ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, Justice Policy Journal,

also occurred in some places in Australia, because the critical issue today was Lack of effectiveness of the main objective of restorative justice achievement, namely improving the damage caused by the criminal of the perpetrator, the victim, and the community. Its proof was that there was still repetition of violation committed by the violator, and the impact of recovery on the victim was also not felt.¹

Related to the unrecovered wound and trauma of the persecution victim, it was not only happening in Indonesia but also in Australia. Heather Strang and Kathy Daly's study in Australia showed that some crime victims experienced worse condition as a result of the restorative justice process, especially in fear and shame. They were afraid because the perpetrator was more powerful and looked scary.²

To anticipate the trauma of the victim, it was needed comprehensive trauma healing program, including the good practice that was practiced in Britain during the 1980s, did not bring the perpetrator and the victim directly, unless the victim was ready to face him or her. In essence, the restorative justice should not treat victim simply as a means of rehabilitating victim, without being followed up with adequate rehabilitation.³

(b) Sub element "The settlement was not a retaliation against the perpetrator/suspect" had been fulfilled.

There was not a single clause in the agreement of diversion described that the "Retaliation of the persecution to doer by the victim or another party", whereas 2 of the 3 versions were a case of mistreatment committed by a child to a person. Similarly, in the case of torture, there was also no excess burden for the return of compensation. It showed that in diversion there is no retaliation attempt to persecute or reciprocate to the child as suspect to do anything beyond his or her mean.

If it was compared to the achievement of indicator of diversion based on the restorative justice of the Indonesia version with the implementation of the diversion in the Woman and Child Service Unit in the Police Resort of Malang, it can be known that the practice of diversion in the Woman and Child Service in the Police Resort Unit had not fully reflected restorative justice, especially in achievement of the victim restoration, restoration of condition of society, and psychic restoration of the perpetrator so as not to become a recidivist.

c. The Comparison between the Diversions of Indonesia Version Restorated Justice with Restorative Justice Philosophy by Howard Zehr

If It was compared normatively between the version-based on the restorative justice of Indonesia version as stipulated in the Act of The Child Criminal Justice System with the restorative justice philosophy according to Howard Zehr then Act of The Child Criminal Justice System had met 5 criteria, as follows.

- 1) the justice has focused on eliminating the danger of violation and its consequence for victim's need (eg compensation), society (eg society gets social service from violator for a maximum of 3 months), and offender (eg following medical and social rehabilitation; education or special training).
- 2) The duty of the perpetrator and the community to overcome the harm caused by the violation, in form of the perpetrator's obligation to follow the behavior in accordance with the forms of the diversion agreement in order not to be harmful (eg medical and psychosocial rehabilitation). While for the community there is an obligation to participate in educating a child, for example, if the child is admitted to the educational institution, the obligation of parents is educating the violator if he or she is returned to the parents.
- 3) The compulsion of using the collaborative and inclusive process. The collaborative because diversion at all levels always involves collaboration between Investigators / Prosecutor / Judge and the Community Counselor. The inclusive because it always involves The advocate, Professional Social Worker, Social Welfare Worker, perpetrator and victim with family, community.
- 4) The parties who have important role and authority in the community should be involved, ie investigator or prosecutor or judge, victim, offender, family member of offender and victim, community member, professional social worker, social worker)
- 5) Trying to correct the mistake, i.e the obligation to the perpetrator to follow the diversion agreement, the parents to educate the offending child; a Community Counselor to conduct guidance and mentoring; state to provide facility and resource.

5. Conclusion

- a. The investigator has been able to implement the five aspects of diversion based on the restorative justice philosophy Indonesia Version, but not all indicators in every aspect are capable. (1) The aspect of the

¹ Jacqueline Joudo Larsen, *Restorative justice in the Australian criminal justice system*. AIC Reports Research and Public Policy Series 127, Australian Institute of Criminology 2014, p. 35

² John Braithwaite, *Restorative Justice: Theories and Worries*, PAPERS 47, 123rd International Senior Seminar Visiting Experts', p. 51, <http://www.unafei.or.jp>

³ *Ibid.*

- diversified requirements of the case had been carried out by the investigator, (2) the aspect of the purpose of diversion had been attempted by the investigator, (3) the aspect of the diversion process had been carried out, but investigator had not involved professional social workers, social workers, and community members; (4) the aspect of the diversion result form had been achieved, ie returning the child to the parents; (5) the aspect of the indicator of restorative justice element to be achieved had not been fulfilled, especially in the recovery of the perpetrator, the victim and the community had not been done optimally. However, all diversions had been implemented, and the settlement of the case did not reflect retaliation.
- b. Normatively, the provision of diversion in the Act of the Child Criminal Justice System was in accordance with the philosophy of restorative justice as said by Howard Zehr. However, if it was related to the divergent practice of the investigator, the philosophy of restorative justice had not been achieved, especially in the involvement of the parties in the process and the achievement of the justice indicator in the restoration of the perpetrator, the victim, and the community. Not reaching the philosophy is not only in Indonesia but also in some places in the United States and Australia.

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