

# The Ideal Concept of Criminal Responsibility for The Protection Of Juvenile Within The Indonesian Criminal Court System

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**Abstract.** The current child protection still fails to provide adequate protection through the procedure law and other related laws such as the law on juvenile justice and provisions such as diversion which practically do not go with the human rights. Recidivists' juveniles are not treated equally compared to other children in the judicial process. It is well-known that the philosophy of the Child Protection Law is to provide protection for the child to prevent them from being punished. The method used in this research is a normative legal research method / descriptive analysis approach focusing on several cases concerning minimal criminal liability to children involved in crime based on Indonesian criminal justice system. The data included primary, secondary, and tertiary legal materials which were analyzed qualitatively and normatively (systematic and holistic). It is found that the concept of criminal responsibility with the settlement of cases outside the court through penal mediation applied in the trial process is a new development of criminal law. It implies that the private dimension is not brought to the public law domain. The main objective of penal mediation is not obtaining formal justice through the Criminal Justice sub-system which is regulated in formal legal regulations. The penal mediation philosophically contains the principle of applying a "win-win" solution instead of "lost-lost" or "win-lost" situation.

**Keywords:** Child Protection; Diversion, Penal Mediation, Criminal Justice System

## 1 Introduction

The increasing number of crimes committed by juveniles is inherently an unsettling problem. It puts children in an unfamiliar legal process with law officers they have never been exposed to before. According to Romli Atmasasmita, two motivations cause juvenile delinquency. The first is intrinsic motivation (from within), which encompasses intelligence, age, sex, and position within the family. The second is extrinsic motivation, including household condition, education and school environment, social setting, and mass media consumption [1].

The children's crimes can also be traced to what children perceive in the media. The internet and television often show programs with sexual violence content, and they surely affect children's behavior patterns and environment and triggers criminal acts. With that, they become the perpetrator and the victim of unfiltered technological advancement simultaneously [2]. Moreover, children have not developed stable psychological conditions, especially related to

decision-making and cognition ability. Children have not fully understood the meaning and the effects of their actions on other people [3], making legal protection for children under 18 necessary.

Regarding child protection, Moch Faisal Salam [4] defines it as an attempt to support the implementation of rights and obligations. Similarly, Irma Setyowati Soemitro stated that child protection has a legal aspect, and it concentrates on law-based children's rights and not their obligations. This is because, legally, the child has not yet understood the notion of obligation [5]. With that in mind, H. De Bei formulated the aspect of child law (*kinderrecht*) as the entire law on the children protection, guidance, and justice as regulated in the *Burgerlijk Wetboek* (BW), Civil Procedure Law, Criminal Codes, Criminal Law Procedure, and its regulations and implementation [6].

Against that background, child protection needs to focus on children, both in civil law and criminal law. The aim is to protect the interests of the children themselves and ensure their rights and welfare. Barda Nawawi Arief opined that legal protection could be interpreted as an effort to introduce children to various freedoms, human rights (such as their fundamental rights and their own type of freedom), and children's welfare [7].

Law Number 23 of 2002 concerning Child Protection (State Gazette Number—*Lembaran Negara* (LN) 109 and Addition to State Gazette—*Tambahan Lembaran Negara* (TLN) Number 4235) and Law Number 35 of 2014 concerning Child Protection (LN Number 297, TLN Number 5606) in Article 1 number 2 define child protection as all activities related to guaranteeing and protecting children and their rights. The purpose is to make them live, grow, develop, and participate optimally with human dignity and protection from violence and discrimination.

The government and other state institutions are obliged and responsible for providing special protection to various children that may lose their rights. It ranges from children in an emergency, children with criminal problems, children from minority and isolated groups, children economically and/or sexually exploited, and trafficked children. In addition, there is also an obligation to protect children who are victims of abuse of narcotics, alcohol, psychotropic substances, and other addictive substances (illegal drugs), children who are victims of kidnapping or trafficking, children who are victims of physical and/or mental violence, children with disabilities, and children who are victims of abuse and neglect (Article 59 of Law Number 23 of 2002). The provision of special protection for juveniles is an obligation and responsibility of the state as regulated in Article 64 of Law Number 23 of 2002.

## **2 Research Methods**

The method used in this research is a normative legal research method/descriptive analysis approach. Analytical descriptive describes the object of critical research through qualitative analysis. Since this study falls into legal science, the normative approach is utilized by explaining legal principles, synchronizing laws and regulations, and inconcrete legal discovery efforts [8]. The descriptive analysis approach focuses on several cases concerning minimal criminal liability for juveniles in the Indonesian criminal justice system. The data obtained are primary, secondary, and tertiary legal materials and were analyzed qualitatively normatively or wholly and systematically.

### 3 Results and Discussion

The legal basis for the judge's authority to conduct penal mediation is contained in the provisions of Article 16 (3) of Law Number 23 of 2002 concerning Child Protection (TLN No. 109 TLN No. 4235), which states that the arrest, detention, and imprisonment of a child should be the last resort [9]. In addition, the Juvenile Court Law also states that judges can impose penalties in lieu of imprisonment, such as returning them to their parents, placing them in social service or social foundation, or making them a ward of the state.

This action is carried out by considering the principles and objectives of child protection and the basic principles of the child's rights convention, including the child's best interests. All actions concerning children executed by the government, society, all legislative bodies, and judicial bodies on children's behalf must put children's interests as the primary consideration.

The author contends that a breakthrough in penal mediation as an instrument of restorative justice has been able to be executed by the judges, prosecutors, and investigators. This reasoning is based on a Joint Decree of the Chief Justice of the Supreme Court, the Attorney General, the National Police Chief, the Minister of Law and Human Rights, the Minister of Social Affairs, and the Minister of Women and Children Empowerment regarding juveniles (Anak yang Berhadapan dengan Hukum—ABH) which emphasizes the principles of restorative justice.

The author explains the practice of penal mediation executed in five district courts where the author has served and is currently serving as a child judge and mediator. The district courts mentioned are Bandung District Court, West Jakarta District Court, Stabat District Court (North Sumatra), Cibinong District Court, and Bale Bandung District. This section describes the practice of penal mediation from various perspectives of the juvenile judge, juvenile prosecutor, police assigned in a juvenile case, and chief counselor (Pembimbing Kemasyarakatan—PK) of the Social Service (Balai Pemasarakatan—Bapas) as the mediator to provide a comprehensive picture of the practice of penal mediation. This section also describes relevant parties in the process of penal mediation, the time and place, and the decision result.

There are two most basic principles of justice; the principle of greatest equal liberty and the difference principle or inequality principle [10]. The latter argues that inequality can be justified through controlled policies to benefit the disadvantaged community. This principle requires a commitment to the equality of basic rights and obligations [11]. With that in mind, social justice must strive for two stages. Firstly, performing corrections that ameliorate the injustice condition experienced by the disadvantaged groups by establishing social, economic, and political institutions that empower them. Secondly, every provision or regulation must position itself as a guide in developing policies to do so [12].

The elemental principles executed when creating justice are maximizing equal freedom to benefit all parties, especially disadvantaged groups. This principle is a combination of differences and fair equality of opportunity. In combination mentioned, realizing a just society needs the freedom of basic rights as the highest value, and it must be followed by guaranteeing equal opportunities for everyone. Certain societal differences are acceptable as long as they increase the benefit to the most disadvantaged people.

In addition, based on compensatory justice, business actors who commit negligence in their business activities that inflict losses to other parties have a moral obligation and responsibility to pay compensation to them based on the principle of justice [13]. Compensation payments to the victim as the party who suffered the loss is intended for a full restoration to accomplish a condition before the loss occurred [14]. Essentially, justice strives to give everyone an equal opportunity for the interest of his rights. This is where the importance of settlement with restorative justice in juvenile cases lies. By assembling a mediation for the

victims, perpetrators and their respective families and certain communities can resolve the case in the best way to benefit all relevant parties.

Juvenile Criminal Justice with Non-Litigation Path is external to the court. The Non-Litigation Paradigm (Paradigma Non-Litigasi—PnLg) is a unity of assumptions and basic values believed and used by the community in determining ways to resolve disputes. This value is different from litigious and adversarial values based on a win-lose solution approach. Instead, this value emphasizes justice with a consensus and interested to achieve a win-win solution.

In the Indonesian legal system derived from the continental legal systems, judges can diversify after an indictment has been submitted to the court. Provisions regarding diversion for children are regulated in the convention on the Rights of the Child. The regulation has been ratified by Presidential Decree Number 36 of 1990 concerning Ratification of the Convention on The Child's Rights [15]. Furthermore, according to Law Number 11 of 2012 concerning Juvenile Justice, this law raises two major settlement modes in the judicial settlement: restorative justice and diversion. Restorative justice is the settlement of criminal cases by involving the perpetrator, victim, their respective families, and other relevant parties to seek a fair solution by aiming for restoration instead of retaliation. On the other hand, diversion is the transfer of the settlement of juvenile cases to an external means of justice outside of the court system.

In the diversion, children are entitled to receive guidance and assistance from social workers. Professional social workers and welfare workers are tasked with guiding, assisting, protecting, and assisting children through programs of social consultations and restoring children's confidence, social assistance and advocacy, mentoring children, and creating a conducive atmosphere through recovery assistance and behavioral therapy. They can also make and submit a report to the chief counselor regarding the results of those activities about the juvenile who receive sentences from the court, provide consideration to law enforcement officers for handling the juveniles' social rehabilitation, escort them to their parents, government agencies, or community institutions, and persuade the community to reintegrate them.

When performing these duties, social and welfare workers coordinate with the counselors of other institutions such as Islamic boarding schools, social institutions, and other related institutions by considering the religious background of the juveniles. If the diversion legislation is done, it shall deliver the selected criteria and procedures for determining which cases are qualified for diversion. Four alternative methods to commit diversion lies in the form of permanent regulations or regulations that are enforced based on the law that conceives ideas on what constitutes diversion and its future options, mandatory input by a court when deciding a diversion, and what qualifies as discretionary in a diversion, and detailed guidelines for police, probation officers, prosecutors, and officers or other relevant officers.

The diversion agreement must obtain the victim's approval, perpetrators, and their respective immediate family, except for criminal acts in infractions, misdemeanors, victimless crime, or other crimes that cause loss to the victim is worth no more than the local minimum wage. The diversion agreement to resolve the criminal act as referred above can be acted upon by the investigator to cooperate with the perpetrator and/or their family, community chief counselor, and community leaders. The results of the diversion agreement can be in the form of 1) reconciliation with or without compensation, 2) return custody to parents or guardians, 3) participation in education or training institutions (Lembaga Pelatihan Kerja Swasta—LPKS) for a maximum of 3 months or 4) community service.

## 4 Conclusion

The concept of criminal liability with the settlement of cases external to the court system through penal mediation during a trial process is a new development in the domain of criminal law. It implies the implementation of the private dimension into the public law. In this penal mediation dimension, what it intends to achieve is not formal justice through the Criminal Justice sub-system regulated in the formal legal regulations. From the philosophical perspective, the existence of penal mediation contains the principle of applying a “win-win” solution and instead of a “lose-lose” or “win-lose” situation.

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