

Reformulation Of Law On Child Protection Through Restorative Justice For Child Victims Of Criminal Offences Based On Values Of Pancasila As An Effort For Criminal Law Reform

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Abstract

Based on the results of research and interviews, protection and recovery of child victims of criminal offences in their original state is ineffective if it is done by solving criminal cases through judiciary. The problem in this research is that how criminal policy in the Law on Child Protection at this time and how reformulation of the Law on Child Protection through a restorative justice approach for Child Victims of criminal offences based on the values of Pancasila as an effort for criminal law reform. The research method used qualitative method with an empirical juridical legal approach. The results is reformulating the Law on Child Protection through restorative justice for child victims of criminal offences based on values of Pancasila as an effort for criminal law reform, by incorporating rules on implementation of case settlement for child victims of criminal offences outside of criminal justice.

Keywords: reformulation, child protection, restorative justice, Pancasila values, criminal law reform.

A. INTRODUCTION

The Convention on the Rights of the Child came into force as international law since September 2, 1990, while Indonesia ratified the Convention on the Rights of the Child on August 25, 1990 through Presidential Decree Number 36 of 1990, which took effect since October 5, 1990. Having ratified the Convention on the Rights of the Child, Indonesia became a participant of which obligation is to fulfill the rights of the child and ensure the implementation of the Convention on the Rights of the Child through the Formation of National Law.

The Indonesian government strives to ensure the fulfillment of the rights of the child and manifest the protection and welfare of the child through formation of Law Number 23 of 2002 on Child Protection. In order to adapt to developments in society, several efforts have been made for criminal law reform in the form of amendment to the Law on Child Protection to the enactment of Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection and Government Regulations in Lieu of Law Republic of Indonesia Number 1 of 2016 on the Second Amendment to Law Number 23 of 2002 on Child Protection which was later promulgated by Law Number 17 of 2016 on Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 on the Second Amendment to the Law Number 23 of 2002 on Child Protection into Law.

The amendment to the Child Protection regulations after the enactment of the 2002 Law on Child Protection, proves that efforts for Criminal Law reform through amendments to the Law on Child Protection still have many shortcomings. Barda Nawawi Arief identified the reasons for the limited capacity of criminal law in tackling crimes as follows:

1. The causes for such a complex crime are beyond the scope of criminal law.
2. Criminal law is only a small part (sub system) of the suggestion of social control, which is impossible to solve the problem of crime as very complex humanity and social problem.

3. The use of criminal law in dealing with crimes is only a “kurien am symptom.” Therefore, criminal law is only “symptomatic treatment” rather than “causative treatment.”
4. Criminal law sanctionis “remidium,” which contains contradictory/paradoxical characteristics and includes elements and negative side effects.
5. Sentencing system is considering fragmentair and individual/personal, rather than structural/functional.
6. Limitations on types of criminal sanctions and formulating system of criminal sanctions that are considering rigid and imperative.
7. The functioning criminal law requires a variety of supporting facilities and demands more “high costs”.

The problem of reformulation for the 2002 Law on Child Protection as a criminal policy does not fully animate the values of Pancasila, as it is still overly focused on merely imposing a special intensified minimum sentence. In fact, based on the End of Year Report of the Temanggung State Prosecutor's Office in 2019, cases of violence against children in Indonesia, especially in the Temanggung Regency area are still very alarming, especially those concerning the issue of the Right to Life of Children, Child Labor, Street Children, and Child victims of sexual violence, sexual exploitation, as well as commercial sexual exploitation. Laws and Regulations as a form of implementation of child protection must be able to ensure the fulfillment of children's rights and provide comprehensive protection for children.

The shortcoming of criminal policy as an effort for criminal law reform, through amendments to the 2014 Law on Child Protection, as it is not really based on the values contained in Pancasila. Regarding legal reform, especially criminal law, Barda Nawawi Arief stated, “Significance and essence of Criminal Law Reform is closely related to the background and urgency of holding the Criminal Law Reform itself.” Background and urgency of holding Criminal Law Reform can be viewed from various socio-political, socio-philosophical, socio-cultural aspects or from various aspects of policy (particularly social, criminal, and law enforcement policy). It means that significance and essence of criminal law reform is also closely related to these various aspects. That is, the reform of criminal law in essence must be a manifestation of changes and reforms to various underlying aspects and policies.

The term of the word “renewal” is identified with various terms such as development, reform, reformulation, coaching, structuring, re-consolidation, review, and evaluation, and other terms that are still included in the framework of the definition of “development.” Legal reform, especially in the criminal, can be regarded as part of the policy in overcoming crime or criminal politics.

Soedarto defines criminal politics as a rational effort by society in tackling crime, this opinion is shared by Barda Nawawi Arief in his book Problems of Law Enforcement and Crime Management Policy, which states that “criminal politics (criminal policy) as a rational arrangement or drafting of efforts to control crime by the community and is inseparable from broader policies, i.e. social policies.” It means that measures to tackle crimes in the State of Indonesia must be carried out through the implementation of Pancasila values into the national criminal law.

B. PROBLEMS

Based on the description above, the problems are:

1. How is the current criminal policy in the Law on Child Protection?
2. How is reformulation of the Law on Child Protection through a restorative justice approach for child victims of criminal offence based on the values of Pancasila as an effort for criminal law reform?

C. DISCUSSION

1. Criminal Policy in the Current Law on Child Protection

Children are an inseparable part of the sustainability of human life as well as a nation and state. In order to be able to take responsibility for the sustainability of the nation and state in the future, every child needs to have the widest possible opportunity to grow and develop in the most optimal way, physically, mentally and socially. Accordingly, it is necessary to make protection efforts to manifest the welfare of children by providing assurances for the fulfillment of their rights without discriminatory treatment.

Ratification of the UN-CRC or better known as the Convention on the Rights of the Child (KHA) on November 20, 1989, became the culmination point of the Children on their human rights to obtain international assurances. Recognition that children are active holders of rights and not merely as passive objects of rights is included in the UN-CRC (KHA). The CRC contains a mixture of rights that are general in nature, such as the right to life development, as well as rights aimed at welfare, besides that the CRC also ensures civil rights, political rights, economic rights, social rights, and cultural rights. The substance of the CRC includes a set of rights provisions that reflect a global perspective on children's rights.

The CRC is an international instrument in the field of human rights with the most comprehensive coverage of rights. Based on its structure, this Convention consists of Preamble that contains the context of the Convention on the Rights of the Child, Section One (Articles 1-4) that regulates the rights of all children, Section Two (Articles 42-45) that regulates the issue of monitoring and implementation of the Convention on the Rights Children, and Section Three (Articles 46-54) that governs the issue of enforcing the Convention.

In the content section, CRC can be divided into 4 (four) categories:

- a. Based on the categorization, the Principal Convention on Human Rights, it is said that the Convention on the Rights of the Child contains civil, political and economic, socio-cultural rights.
- b. Categorization is based on legal subjects that are obliged to implement the Convention on the Rights of the Child, which is the state and adults to fulfill children's rights in general.
- c. Categorization is based on the rights contained in the Convention on the Rights of the Child, which is the right to survival (survival), the right to development (development), the right to protection (protection) and the right to participation in community life (participation).
- d. Categorization is based on the method of division formulated by the UN Committee on the Rights of the Child, which classifies the Convention on the Rights of the Child into 8 (eight) Categories as follows:

- general implementation measures;
- definition of child;
- general principles;
- civil rights and freedoms;
- family environment and alternative care;
- basic health and wellbeing;
- education, leisure time, and cultural activities; and
- special protective measures (relating to the children's right to special protection).

There are 54 (fifty four) articles regulated in the KHA and 1 (one) articles specifically regulate children as victims of criminal acts, which is Article 39 of the KHA that states:

“The Parties of the states shall take all appropriate steps to promote the spiritual and physical restoration and reunification of child victim of any form of neglect, exploitation or abuse; torture or other forms of cruel, inhuman or degrading treatment or punishment; or armed conflict. Restoration and reintegration

as mentioned above must take place in an environment that fosters the health, dignity and self-respect of the child concerned.”

On August 25, 1990, Indonesia ratified CRC (KHA) through Presidential Decree No. 36 of 1990. As a consequence of the CRC ratification, Indonesia is obliged to implement the contained provisions including the obligation to fulfill the rights of children recognized in the CRC, which generally provides protection and respect for children, so that they are protected from acts of violence and oppression.

As implementation of this ratification, the Government has passed Law Number 23 of 2002 on Child Protection, which substantively regulates several things, including the problem of children who are dealing with the law, children from minority groups, children as victims of economic and sexual exploitation, trafficked children, children as victims of riots, children as refugees and children in situations of armed conflict, child protection based on the principle of non-discrimination, the best interests of the child, respect for children's opinions, the right to live, grow and develop.

The birth of Law Number 23 of 2002 on Child Protection is based on consideration that child protection in all its aspects is part of national development activities, particularly in advancing the life of the nation and state.

Regulation of children's rights in Indonesian national law has previously been regulated in Law Number 39 of 1999 on Human Rights that includes the rights of the child, which is in Chapter III on Human Rights and Basic Human Freedom, Section Ten entitled “Regarding the Rights of the Child.” There are 15 articles in Section Ten of the Law of Human Rights, which is Article 52 to Article 66 that specifically regulates the rights of the child, however, juridical basis for implementation of the obligations and responsibilities of parents, family, community, government, and the state to provide protection to children, is regulated in the Law on Child Protection Number 23 of 2002.

Indonesia already has legal instruments that specifically regulate the child protection, but in the course of time, the 2002 Law on Child Protection was not able to run effectively due to rampant crimes against children in society. It requires increased commitment from the Government, Local Government, and the Community as well as all stakeholders related to the implementation of Child Protection.

Efforts to increase commitment in the implementation of Child Protection were pursued by amending Law Number 23 of 2002 on Child Protection, to the enactment of Law Number 35 of 2014 on amendments to Law 23 of 2002 on Child Protection. Amendments to Law Number 23 of 2002 on Child Protection emphasize the need to bind criminal sanctions and fines for crimes offender against children, in order to provide a deterrent effect, and encourage concrete steps to restore physical, psychological, and social back to child victims and/or children as crimes offender.

Even though the number of crimes against children after the enactment of the 2014 Law on Child Protection continues to increase, it was conveyed by the Head of the Division of Women Empowerment and Child Protection, the Office of Population Control, Family Planning, Women Empowerment and Child Protection (DPPKBPPPA) in Temanggung Regency, Tusi Indreswari. The increase in number of crimes against children, proves that reformulation as a criminal policy effort against the 2002 Child Protection Act has not been effective.

There are 2 inherent things in every Indonesian child as mandated by the 1945 Constitution (the second amendment), which in Article 28 paragraph (2) states that “every child has the right to live, grow, and develop and is entitled to have protection from violence and discrimination.” The paragraph emphasizes that in addition to the commitment to protecting children, the government must also ensure the fulfillment of children's rights.

Amendments to the Law on Child Protection are only based on the government's commitment to efforts of children protection, rather than the fulfillment of children's rights. High threat of punishment that the crime offender face against children does not ensure the fulfillment of the rights of child victims of criminal acts, especially assurance for the remedy of child victims to their original condition.

Children, in their capacity as victims of crime, certainly have suffered from violations of their rights. Violation of the rights of the child as a victim certainly has consequences in the form of fulfilling an obligation by the offender. Thus far, the matters that should be responsibility of the crime offender are still being taken over by the government in their implementation.

Article 59 paragraph (1) of Law 35 of 2014 states that "The Government, Local Government, and other State Institutions are obliged and responsible for providing Special Protection to Children," and paragraph (2) states that this special protection includes protection for children who deal with the law (Child Victims of criminal offence), hereinafter Article 59A states:

"Special protection for children as referred to in Article 59 paragraph (1) is carried out through the following efforts:

- a. prompt treatment, including physical, psychological, and social treatment, and/or rehabilitation, and prevention of diseases and other health problems;
- b. psychosocial assistance during treatment until recovery;
- c. providing social assistance for children who come from underprivileged families; and
- d. providing protection and assistance in every judicial process."

Pain (physical) or traumatic (psychic) that a child gets due to a crime he/she has gone through is the responsibility of the crime offender, so that the physical punishment that the offender suffers, unable to compensate for the suffering that the child as victim of criminal offence has endured. Likewise, with the criminal fines that the crime offender must take as regulated in CHAPTER XII on Criminal Provisions in which the party entitled to receive the payment of the fine from the crime offender is the State, rather than the child as the victim.

Based on this study, the government is inconsistent in its efforts to fulfill the rights of children as victims of crime. Furthermore, in determining the punishment policy for crimes against children, legislators must take into account the following points, which is the way to prove, clear definition, how the law enforcement for the crimes against children, and especially other legal means that can provide better results to overcome the criminal act of children. The legislators must also ensure that the prohibition against criminal acts of children is enforced in line with the "moral views" of the majority of society.

Development in the law, especially criminal law, does not only include structural development, which is the development of legal institutions that operate in a mechanism, but must also include substantial development in the form of products as the result of legal system in the form of criminal law regulations and are cultural in nature, which is attitudes and values influencing the enforcement of legal system.

In essence, criminal law policy (penal policy, criminal policy, or strafrechtspolitik) is a comprehensive or total process of enforcing criminal law. Criminal law policy is an action related to the following:

- a. How the efforts of government in tackling crimes with criminal law;
- b. How to formulate criminal law in order to suit the conditions of society;
- c. How the government's policy to regulate society with criminal law;
- d. How to use criminal law to regulate society in order to achieve greater goals."

Based on the description above, criminal policy through criminal law is closely related to the penal approach. It is in line with Barda Nawawi Arief's opinion that efforts to overcome through this penal

route can also be called efforts made through criminal law. This effort is a countermeasure that focuses more on a repressive nature, which are actions taken after a crime has occurred by enforcing the law and imposing penalties for crimes that have been committed. Apart from that, through this penal effort, actions taken in the context of coping with crimes include guidance and rehabilitation.

Criminal policy using penal means is a criminal law policy or criminal law politics. Criminal law politics is part of legal politics. According to Soedarto, legal politics are:

“a. Attempts to create good rules according to circumstances and situation at a time.

b. The policy of the State through the authorized institutions to establish the desired regulations that are expected to be used in order to express what is contained in society and to achieve what is aspired.”

Pancasila as the basis of national legal politics, the essence of Pancasila for Indonesia, which is the Pancasila philosophy with its five principles, provide a perfect life guideline for the entire nation. Pancasila as a social contract, which is as norms that are mutually agreed upon as the basis of social life and statehood. Pancasila, which is related to law, always has a general tendency that it is placed as the highest part of the Indonesian legal pyramid model.

The placement of Pancasila at the top of the Indonesian legal pyramid is in accordance with Hans Kelsen's *stufenbauteorie* or the hierarchical framework of Hans Kelsen's norms, which is the hierarchy of laws and regulations topped by *grundnorm* (basic norms) or what his student Hans Nawiasky calls *Staat fundamental norm* (state fundamental norm).

Shidarta explained that Pancasila is a guiding star or *litsternof* which layers of material contain legal substance and the pillars of the legal structure framework, and the environment in which they live is legal culture. Dardji Darmodihardjo positioned Pancasila as a source of law by describing Hans Kelsen's idea of *Grundnorm* or basic norms as the source of all sources of Indonesian law.

In the Unitary State of the Republic of Indonesia, which is based on Pancasila, the State, including the Government, are involved in structuring the religious life of its citizens. The emergence of religious interpretations and/or activities deviating from principles of religious teachings that somehow did not only damages the religious values adhered to in Indonesia as it contradicts the principles of religious teachings, but also results in the emergence of disturbances to public security and order. These deviations can interfere and disturb public security and order, thus threatening human rights. The domain of belief in God Almighty is the *forum internum*, which is a consequence of the acceptance of Pancasila as the basis of the State.

With regard to efforts in dealing with crimes against Child, Pancasila contains various meanings that every Indonesian human being needs to understand, as for the meanings in question are the following:

a. Principle of Belief in The One and Only God

The Indonesian people believe in and are devoted to God Almighty. Because God is the creator of the universe and all things, both dead and living things, including the greatness of God in creating man (Son) with all the rights attached to him from birth, such as the right to live.

b. Principle of Just and Civilized Humanity

All Indonesian people must have the same opportunity to obtain their rights as human beings without exception the Indonesian children are human beings with high dignity.

c. Principle of Unity of Indonesia

It means the united nations that inhabit the territory of Indonesia. Unity is a form of nationalism. The Indonesian nation places unity, integrity, and significance and safety of the nation and the State above personal or group interests with the aim of advancing public welfare and educating the nation's life and participating in manifesting world peace.

d. Principle of Democracy Guided by the Inner Wisdom in the Unanimity Arising Out of Deliberations Amongst Representatives

The highest power is in the hands of the people, which are also called the people's sovereignty Guided by the InnerWisdom and Deliberationamongst Representatives, meaning that the people in exercising their power or the power exercised on behalf of the people are carried out through representative system, and decisions are taken by common sense and responsibilities that are able to truly fight for the best interests of the child, especially for children in fulfilling the rights of Indonesian children.

e. Principle of Social Justice for the Whole of the People of Indonesia

All Indonesian people (including Indonesian children) must have the same opportunity to become individuals who have access to all sectors of development (social, economic, health, environmental, etc.) with the principle of equality in a decent life.

The discussion of legal politics is a discussion related to the change from an *iusconstitutum* (applicable law) to an *iusconstituendum* (the supposed law). Amendment to the law that have been in effect towards law that should be taken through 2 routes as the following:

a. Establishment of criminal legislation, which means to change, add to and complement the current Criminal Code (reformulation).

b. Preparation of RKUHP to replace the current Criminal Code.

Nyoman's idea can be carried out in the context of overcoming crimes against children through reformulation of the Laws and Regulations on Child Protection. The criminal threat in the provisions of the 2002Law onChild Protection is still considered very lightly that it is not sufficient to animate a sense of "just and civilized humanity" based on the second principle of Pancasila. Especially in the fourth amendment to the 1945 Constitution of 2002, which specifically addresses on child protection, Article 28 B paragraph (2) of the 1945 Constitution states that"every child has the right to survival, growth and development, and the right to protection from violence and discrimination." The children'sright to life in the formulation of Article 28 B paragraph (2) is actually a human right of which existence is ensured by the constitution.

The low number of criminal threats in the 2002Law onChild Protection, one of the considerations is that the death of a child is only considered as a result of violence that the child endures. It means that when a child dies, it is desired by the offender (as an objective) not to be accommodated in the punishment. Such an arrangement does not inspire the 1924 Declaration of the Rights of the Child, particularly principle 2, that is"Children have the right to special protection, and must have opportunities and facilities ensured by the law and other means so that physically, mentally, socially,spiritually,and morally, they can develop healthily and naturally in a state of freedom and dignity" and the principle 8, which states"In any situation, children children must come first in receiving protection and assistance." Damage to the children'sright to life as a goal is basically a form of defamation of the first principle of Pancasila, which is Belief in the One and Only God, asthey are as God's creatures, have the right to live equally to other adult humans.

A long debate then arose when the rules on crimes against the children's right to life in the 2002 Law on Child Protection were compared with criminal rules related to the crime of life (murder) in the Criminal Code, which allowed the threat of death penalty (Article 340). Based on this, on October 17, 2014, the latest Law onChild Protection was promulgated that regulates the punishment of higher penalty than the 2002Law on Child Protection, although it did not reach the maximum penalty, which is the death penalty as Indonesia is one of the countries opposing the death penalty as a a form of respect for the humans right to life, except for narcotics crimes (with a widespread threat to the nation's generation) and crimes against humanity.

The focus of amendments to the 2014 Law on Child Protection as an effort to tackle crimes against children with penal approach, only focuses on establishing a special minimum limit for criminal

sanctions, which are now aggravated and rather than efforts to recover children victims of criminal offence in their original state, as is the spirit of restorative justice.

After the 2014 Law on Child Protection became effective, the number of violence against children continued to increase. The increase in the number of violence against children was influenced by several factors, based on the results of interviews by researchers with the Head of the General Crimes Section at the Temanggung District Prosecutor's Office, BektıWicaksono, stated that "One of them is that the special minimum standard of punishment in the 2014 Law on Child Protection has not been socialized and many child victims still have no courage to report the crimes they have endured, Child Victims often feel reluctant to cope with the long legal bureaucracy, as it is very nerve-racking considering that child victims have the right to get justice, but the end result of the judicial process is often unable to restore the rights of violated children, especially to restore them into its original condition, even though the offender has been sentenced to criminal sanctions."

Efforts to amend the Laws on Child Protection with a penal approach in criminal policies in the State of Indonesia today, are still too focused on increasing the threat of crime for the criminal offenders and do not emphasize the best interests of the child in recovering from its original condition. Reformulation of the Child Protection Law should be based on the values of Pancasila, especially the values of just and civilized humanity that ensure the fulfillment of the right to recognize the dignity of the human-child (dignity of man); human rights-children (human rights); the right to human freedom (human freedom); equal rights before the law and the right to the same legal protection; equality, equal rights and obligations among humans (child).

The State of Indonesia upholds human rights, including the human rights of child (victims of criminal offence) that is indicated with the assurance of protection and fulfillment of child's rights in the 1945 Constitution of the Republic of Indonesia and several provisions of laws and regulations, both nationally and internationally. Based on this, it is necessary to reformulate the Child Protection Law that helps the cases settlement for child victims of restorative justice outside the criminal justice based on Pancasila values as an effort for criminal law reform.

2. Reformulation of Law on Child Protection through Restorative Justice for Child Victims of Criminal Offence Based on Pancasila Values as Efforts for Criminal Law Reform

The Unitary State of the Republic of Indonesia is a State based on Pancasila, thus it is rightly that the penal policy approach in overcoming crimes against children should be based on the values contained in Pancasila. Based on the results of the fourth National Law Seminar held in Jakarta in 1994, one of the materials discussed on the Philosophy of National Law, stated that "the National Legal System, which is also the Pancasila Legal System must be an elaboration of all Pancasila principles as a whole".

Pancasila is the fundamental of the state ideology of the Republic of Indonesia that was officially ratified by the PPKI on August 18, 1945 and listed in the Preamble to the 1945 Constitution, as promulgated in the Official Gazette of the Republic of Indonesia Year II Number 7 together with the Corpus of the 1945 Constitution. In the historical course of the existence of Pancasila as the fundamental of the state ideology of the Republic of Indonesia has undergone various political interpretations and manipulations in accordance with the interests of the authorities for the sake of strengthening and upholding the power protected behind the legitimacy of the state ideology of Pancasila. In other words, in such position, Pancasila is no longer placed as the fundamental of the ideology and way of life of the Indonesian nation and state, but is reduced, limited, and manipulated for the sake of the political interests of the rulers at that time.

Pancasila is referred to as the view of the Indonesian nation as the values contained in these principles have from time to time and properly become an inseparable part of the life of the Indonesian nation.

The values in question are divinity, humanity, unity, democracy, and social justice. The values of Pancasila constitute a whole and integral unity, which is arranged systematically, hierarchically, meaning that the values are interrelated and inseparable.

The divinity value contained in the first principle, which is Belief in the One and Only God, implies that Indonesians actively believe and fear in the God Almighty, meaning that we must always try to put all His commands into practice and stay away from all His prohibitions according to the teachings of their respective religions and beliefs. This principle is the main source of the values of the life of the Indonesian people, which animate, underlie and guide the manifestation of the second to the fifth principle, especially in implementing child protection.

Humanity value is contained in the second principle, which is Just and Civilized Humanity that means upholding human values, awareness of human attitudes and behaviors based on the potential of human conscience in relation to norms and culture in general. Just and civilized humanity is rooted in the teachings of God Almighty, according to human nature as His creation. Human behavior towards each other must be in accordance with human values and nature, as they must respect each other, never look down on or humiliate others, as all humans are equal except for their piety before God.

The value of unity contained in the third principle of Pancasila is that the unity of the nations that inhabit the territory of Indonesia. The Indonesian nation places unity, integrity and the interests and safety of the nation and the State above personal or group interests with the aim of advancing public welfare and educating the nation's life and participating in manifesting world peace. The unity of Indonesia is the embodiment of divinity and humanity values that foster the growth of the unity and integrity of the Indonesian nation, as depicted in the Garuda Pancasila symbol with the motto Unity in Diversity (Bhinneka Tunggal Ika), which contains many kinds but remains one.

The democracy value contained in the fourth principle of Pancasila denotes that the highest power lies in the hands of the people, which is also known as popular sovereignty, meaning that the people are sovereign, powerful, and determining (democracy), which means that the government is considered of the people, by the people, and for the people. Democracy Guided by the Inner Wisdom in the Unanimity Arising Out of Deliberations Amongst Representatives, meaning that the people in exercising their power or power exercised on behalf of the people are carried out through a representative system, and decisions are taken by sound and responsible in mind, both to God Almighty and to the people who are represented by constantly considering the unity and integrity of the nation.

The value of social justice contained in the fifth principle of Pancasila means that every Indonesian citizen receives fair and equal treatment in the fields of law, politics, economy, socio-culture, and defense and security. The meaning of social justice here includes the notion of justice and prosperity. Human life includes both physical and spiritual life, thus justice also includes the one in fulfilling the essential demands for physical and spiritual life or material and spiritual of the humans, which is for all Indonesian people equally (especially children), based on the principle of family system. This principle of social justice is the goal and the preceding (four) principle, as the goal of the Indonesian nation in a state, which is manifested in a just and prosperous society based on Pancasila.

In line with this, the restorative spirit in bringing back the rights of the child to its original state should not stop at the position of the child as the criminal offender. Children as victims of criminal offence definitely have endured violations of their rights beforehand, thus the effort to restore the child victims to their original state is highly important. Putting children to face the law in their position as victims of criminal offence certainly creates a greater risk to threaten the development of the life and future of child victims of criminal offence.

As a comparison, penal mediation at the international level has long been acknowledged, in several conferences such as the 9th UN Congress in 1995, especially those that are correlated with criminal justice management (document A/CONF/169/6) it is stated that the need for all countries to consider

“privatizing some law enforcement and justice functions” and “alternative dispute resolution/ADR) in the form of mediation, conciliation, restitution, and compensation in the criminal justice system.

Then in the International Penal Reform Conference in 1999, it was stated that one of the key elements of the new agenda for criminal law reform (the key elements of a new agenda for penal reform) is the need to enrich the formal judicial system with informal, locally based, dispute resolution mechanisms, which meet human rights standards that identify nine development strategies for reforming criminal law through the development of restorative justice, alternative dispute resolution, informal justice, alternatives to custody, alternative ways of dealing with juveniles, dealing with violent crime, reducing the prison population, the proper management of prisons and the role of civil in penal reform.

Likewise, at the 10th UN Congress of 2000 (document A/CONF. 187/4 / Rev.3), it was stated, among other things, that in order to provide protection for crime victims, mediation and restorative justice mechanisms should be introduced.

The follow-up to the international meeting prompted the emergence of international documents that correlate with restorative justice and mediation in criminal cases in the form of the Recommendation of the Council of Europe 1999 No. R (99) 19 on “Mediation in Penal Matters”, followed by the EU Framework Decision 2001 on “the Standing of Victim in Criminal Proceedings” and The UN Principles 2002 (Ecosoc Resolution 2002/12) on “Basic Principles on the Use Restorative Justice Programs in Criminal Matters.”

In the form of penal mediation in practice in various legal systems, numerous models of penal mediation are presented as follows: a. Informal Mediation, b. Traditional Village or Tribal Moots, c. Victim Offenders Mediation, d. Reparation Negotiation Programs, e. Community Panels or Courts, f. Family and Community Group Conferences.

“a. Informal Mediation, this model is administered by criminal justice personnel in their normal duties, for example: carried out by Public Prosecutors/Police/Judges or supervisory officials by inviting the parties to make informal settlements with the aim of putting an end to the prosecution if it reaches an agreement. It is organized for the benefit of the offender and the victim;

b. Traditional Village or Tribal Moots, this settlement model is suitable for developing countries and has many rural (communal) contours by processing disputes through meetings of all citizens, with the intention of benefiting the community;

c. Victim Offender Mediation, the first type of this model is through the agreement of the parties and ending with settlement, its implementation can be applied to all types of criminal offenders; some specifically for children, some based on a certain type of crime and even for recidivists. The second type in the form of dading, is negotiation of compensation payments. The third type is an agreement within the boundaries of conventional criminal law after a punishment and the goal is an agreement for settlement or remission.

d. Reparation Negotiation Programs, this model is applied solely to assess compensation or remedy that must be paid by the offender to the victim of which goal is material remedy.

e. Community Panels or Court, this model is a program to shift criminal cases from the judiciary to more flexible community procedures, involving mediators or negotiators.

f. Family and Community Group Conferences, this model in addition to victims, it also involves criminal offenders and other community members. The aim is to produce a comprehensive and satisfactory agreement for the victim and can help to keep the criminal offenders out of trouble.”

Furthermore, the application of penal mediation is also known in several laws in the following countries: Austria, Belgium Poland, Slovenia, Canada, United States, and Norway. The Netherlands applies the second type of penal mediation model Victim Offender Mediation in the form of dading, which is negotiation of compensation payments, while for the settlement of cases of Domestic Violence, mediation is applied in the United States, Austria, Poland, Denmark and Finland.

Australia and New Zealand apply the penal mediation model of Family and Community Group Conferences, which involves victims, offenders and the community, with the aim of producing a comprehensive and satisfactory agreement for victims and helping the offenders to solve problems.

Barda Nawawi said that in order to implement the penal mediation, a legal framework/protection (mediation within the framework of criminal law) must still be given, which is integrated into material criminal law (KUHP) or formal criminal law (KUHAP). Mediation within the framework of criminal law is the placement of mediation in the product of laws and regulations, for example the provisions of penal mediation in the following countries:

Austria places penal mediation as part of the Juvenile Justice Act and KUHAP (the Code of Criminal Procedure).

Germany places penal mediation as part of the Juvenile Justice Act and KUHP (the Criminal Code).

Finland places penal mediation as part of the Juvenile Justice Act, KUHAP (the Code of Criminal Procedure) and KUHP (the Criminal Code).

Poland places penal mediation as part of KUHAP (the Code of Criminal Procedure) and KUHP (the Criminal Code).

Belgium and France place penal mediation only as part of KUHAP (the Code of Criminal Procedure).

Norway separately regulates the mediation penal in the Mediation Act, which applies to both children and adults.

Settlement of criminal cases for adult offenders with the position of children as victims should still be based on restorative justice. Efforts to bring back children's rights by emphasizing the settlement of cases that focus primarily on the best interests of child victims of criminal offenders through restorative justice approach based on Pancasila values can be carried out, including in efforts to tackle crimes against children.

The idea that punishment does not make the offender and the victim better is closely related to the existence of the *Ultimum Remedium* Principle. *Ultimum remedium* is one of the principles contained in Indonesian criminal law, which states that criminal law should be used as a last resort in terms of law enforcement. Sudikno Mertokusumo defined *ultimum remedium* as the last device. It means that criminal sanctions can be used if other sanctions are not able to provide a deterrent effect for the offenders.

According to Barda Nawawi Arief that the purpose of punishment policy, which is to determine a crime, is inseparable from the political goals of crime, meaning that the whole is protection of the community to achieve prosperity. In order to respond the purpose and function of punishment, it is inseparable from theories on punishment.

Satochid Kartanegara and several leading criminal law experts, put forward the theory of punishment or sentencing in criminal law that there are two well-known theories, and a combination of the two criminal theories generated another theory of punishment, as the following:

“a. Absolute or vergeldingstheorieën (vergelde/reward theory)

This theory explains that the basis of punishment must be sought on the crime itself to represent crime as fundamental for relationship that is considered as retaliation, reward (*vergelde*) against people who commit crimes. Therefore, the crime caused suffering to the victim.

b. Relative or doeltheorieën (doel/theory of goal or purpose)

In this theory, legal basis of punishment is not considered as *vergelde*, but goal (*doel*) of the crime. Thus this flow relies sentencing on goal and purpose of punishment, meaning that this theory seeks benefits rather than punishment (*nut van de straf*)

c. Vereningingstheorieën (combined theory)

This theory is a reaction from the previous theory, which cannot satisfactorily answer the nature of the purpose of punishment. According to the tenet of this theory, the legal basis for punishment lies in the

crime itself, which is retribution or torture, but in addition, it is also recognized that the basis for punishment is the goal rather than the law.”

Especially for the criminal offenders against children, if the punishment does not make the offender and the victim better and even useless in the context of bringing back the child victim of criminal offence in the original state, then the implementation of case settlement for child victims of criminal offence with restorative justice outside of criminal justice is the most appropriate choice. It is described in the theory of punishment as an objective (**relative or doel theory**) that the purpose of punishment is beneficial, meaning that if it does not benefit, settlement of case can be taken through channels other than punishment.

At first glance, Satochid's theory of relative punishment is similar to Jeremy Bentham's theory of utilitarianism. According to Bentham, the purpose of law is to provide benefits and happiness for as many people as possible. The concept is to put benefit as main goal of law. Whether the law is good or bad, whether it is fair or not, it really depends on whether the law is able to give happiness for humans or not. In principle, benefit is defined as contentment, “the greatest happiness of the greatest number” (the greatest happiness for as many people as possible).

According to Bagirmanan, law enforcement in Indonesia is considered to be “communis opinio doctorum,” meaning that law enforcement, which is now considered to have failed in achieving the objectives indicated by the law. Therefore, an alternative law enforcement is allowed, which is the Restorative Justice System in which the approach uses socio-cultural approach rather than normative approach.

According to the Center for Justice & Reconciliation (CJR), restorative justice is a theory of justice that emphasizes the provision of damages caused by criminal behavior. Restorative justice approach focuses on the needs of both victims and criminals, to help offenders avoid other crimes in the future.

Concept of restorative justice is basically simple. The measure of justice is no longer based on retaliation from the victim to the offender (in the form of physical, psychological, or punishment); however, such excruciating act is healed by providing support to the victim and holding the offender to account, without or with the help of family and society.

In order to ensure a law with justice runs well, it must go through the legal legitimacy stage. Thus, legislation is a key process for manifesting laws that can benefit individuals. In the framework of criminal policy, the legislative process will produce laws that all citizens will observe, as an effort to tackle crime with criminal channel (once criminal act is committed).

Specifically for criminal offence committed against child victims, the main objective is to bring the child back to its original condition and ensure the fulfillment of the rights of child victims of criminal offence. Implementation of child protection based on Article 2 of the Law on Child Protection Number 23 of 2002 is below:

“Implementation of child protection is grounded on Pancasila and is based on the 1945 Constitution of the Republic of Indonesia and the basic principles of the Convention on the Rights of the Child include:

- a. non-discrimination;
- b. best interests for the child;
- c. the right to life, survival, and development; and
- d. respect for children's opinions.”

In the elucidation of Article 2 of the 2002 Law on Child Protection, it states:

“Principle of child protection is in accordance with main principles contained in the Convention on the Rights of the Child.

Principle of best interest for the child means that in all actions involving children are carried out by the government, society, legislative and judiciary board, the best interests for the child must be main consideration.

Principle of the right to life, survival, and development means the most basic human right for children protected by the state, government, society, family, and parents.

Principle of respect for children's opinions means respect for children's rights to participate and express their opinions in decision-making, especially when it comes to matters affecting their life."

Thus, imposition of sentencing for criminal offenders against child victims has not been parallel with the provisions referred to in Article 2. Justice for Child Victims in general is the recognition of the losses they have suffered, and Child Victims receive recovery through the criminal justice system that they undergo.

The government's commitment to fulfill a sense of justice for child victims of criminal offence can be viewed in the birth of regulation on restitution rights as one of the latest sentencing systems in the 2014 Law on Child Protection. According to the Great Dictionary of Indonesian Language, restitution means compensation, repayment, employees have the right to obtain treatment, submitting the remaining portion of the payment. The restitution provisions in Law Number 35 of 2014 are regulated in Article 71 D, which states that:

"(1) Every child who becomes a victim as referred to in Article 59 paragraph (2) letter b, letter d, letter h, letter i, and letter j is entitled to file for the right to restitution to the court, which is responsibility of the offender;

(2) Further provisions regarding implementation of restitution as referred to in paragraph (1) shall be regulated in government regulation."

In the elucidation of the article above, "restitution" means the payment of compensation borne by the offender based on a court decision, which is legally binding for material and/or immaterial damages that the victim or the beneficiary. Especially for children who deal with the law that are entitled to receive restitution are those as victims of criminal offence.

Based on the provisions of Article 5 of Government Regulation Number 43 of 2017 on Implementation of Restitution for Child Victims of Criminal Offence, it states that:

"1. Application for restitution is written in Indonesian on duly stamped paper,
2. Application for Restitution to the Court is filed before the court's decision, through the following stages:

a. investigation

Investigator informs the victim about the rights of children who are victims of criminal offence to get restitution and the procedure for filing it.

b. prosecution

3. Apart from investigation or prosecution stage, application for restitution can be filed through the LPSK – Witness and Victim Protection Agency."

Mardison, Head of the Temanggung District Court stated that "since the 2014 Law on Child Protection became effective, no child victims of criminal offence has filed application for restitution at the Temanggung District Court to this date, even the Indonesian Supreme Court has never received application for restitution to this date, perhaps the obstacle in fulfilling the right of restitution for child victims of criminal offence is the bureaucratic process and other formalities." This statement seems to describe that the government's efforts to fulfill a sense of justice for child victims of criminal offence through restitution arrangements are considered to be ineffective. According to Mardison, if restitution has really become one

of the alternatives to the basic punishment like a fine, perhaps the fulfillment of the rights of child victims of crimes can be more secure.

The author does not agree with Mardison, according to the author, it is very unlikely if restitution is used as an alternative to basic sentencing like a fine, as it is certainly contrary to the provisions in Article 10 letter a of the Criminal Code, which have regulated the limits of main sentencing in a limitative manner only includes capital punishment, imprisonment, confinement, fines, and detention. Armed with the spirit of restorative justice, the government through law enforcement officials should be able to present penal efforts as a form of criminal policy for child victims of crimes in regaining their rights.

Like diversion, it has so far been held at each stage of handling a criminal case, especially for child offenders. Children in the position of victims of crimes should have the same opportunity in the recovery process to their original state. Criminal policies for Children Victims of criminal offence based on Pancasila values can be pursued through the implementation of case settlement for child victims of criminal offence with restorative justice outside of criminal justice in the framework of fulfilling the rights and bringing the children back to their original state.

Based on Divinity Principle, the starting point for implementation of case settlement for child victims of restorative justice outside of the criminal justice is the offender's commitment to improve his/her morals and characters so that the committed crimes will not be recurred in the future. The role of the government and education is very decisive, while in its implementation, the government can provide and/or appoint educational institutions (podok/foundations), where the offenders have an obligation to improve themselves.

Based on the Humanity Principle, responsibility is generated for the offender to bring victims of criminal offence back to their original state. The principle of accountability for criminal offenders is limited to the damages that child victims of crimes may endure, both physically and psychologically. Material loss endured by the child victim of crimes must be reimbursed/recompensated by the offender, and physical loss of the child victim of crimes is the responsibility of the offender to bear all medical expenses for the recuperation of Child Victim of crimes, while responsibility of the offender for psychological harm of the Child Victim of crimes is to include the Child Victim of crimes in the counseling class, find a psychiatric expert as companion and the like for the recovery of the child victim of crimes, including potential loss of Child Victim of crimes incurred due to the offender's actions (for example, obstruction of the learning process of the Child Victim of crimes, and the like) is entirely the responsibility of the offender.

Based on the Principle of Unity, within the period of fulfilling the agreement of case settlement for Child Victims of criminal offence that are considering restorative justice outside of criminal justice, the offender must prioritize the best interests of Child Victims of criminal offence first than their personal interests, as a consequence of the successful implementation of the agreement.

Based on the Principle of Democracy, that implementation of case settlement for child victims of criminal offences that are considering restorative justice outside of criminal justice is carried out in the spirit of deliberation to reach a consensus solely for the best interests of child victims of criminal offences, so that a pure agreement is brought forth without any pressure, coercion or intervention from any party without exception.

Based on the Principles of Justice, that the principle of justice applied in the structure and order of Indonesian society is the one in the context of society, rather than individualistic justice. As a result, restorative justice can be used to cure children in the face of the law as well as to remedy the social conditions infected by the offender's legal actions. Thus, all kinds of arising (social) impacts due to the offender's crimes are the responsibility of the offender.

Implementation of case settlement for child victims of criminal offences that are considering restorative justice outside of criminal justice should be formulated in the Law on Child Protection as a form of formal legality of the efforts for handling crime with penal approach based on the values of Pancasila. Efforts to amend the Law on Child Protection that have been taken later with promulgation of Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection must be attempted once again by accommodating the best interests of the child through cases settlement of child victims of criminal offences that are considering restorative justice outside of criminal justice. Reformulation of the Law on Child Protection related to the cases settlement for child victims of criminal offences that are considering restorative justice outside of criminal justice is very necessary to provide legal certainty in fulfilling the rights of child victims of criminal offences.

D. CLOSING

1. Criminal policy in the Law on Child Protection currently still focuses on establishing a special minimum standard for severe criminal sanctions and emphasizes no efforts to restore child victims of criminal offences to their original state. In fact, after Law Number 35 of 2014 on Amendment to Law Number 23 of 2002 on Child Protection became effective, the number of crimes against children continued to increase. This is because the amendments to the 2002 Child Protection Law have not been truly based on the values of Pancasila, especially the second principle, just and civilized humanity principle that ensures the fulfillment: the right to recognize the dignity of man-child (dignity of man); child-human rights (human rights); the right to child-human freedom (human freedom); equal rights before the law and the right to the same legal protection; equality, equal rights and equal obligations among humans (child). One of the ways to tackle the occurrence of crimes against children is by providing protection for child victims of criminal offences and ensuring the fulfillment of children's rights as well as efforts to restore children victims of criminal offences to their original state through implementation of cases settlement for children victims of criminal offences that are considering restorative justice outside of criminal justice.

2. Criminal policy in the Law on Child Protection based on Pancasila values through implementation of case settlement for child victims of criminal offences that are considering restorative justice outside of criminal justice based on Pancasila values as an effort for reform of Criminal Law must be formulated in the Law on Child Protection for the sake of providing legal certainty in the form of formal legality in fulfilling the rights of child victims of criminal offences and restoring child victims of criminal offences in their original state

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