

## Protection of Papuan Native Children Conflicting with Law through a Restorative Justice Approach

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### ABSTRACT

Crime can occur anywhere and anytime and can be done by anyone. Both adults, young people and even children. Even though the crimes committed by children and adults are the same, however different forms of treatment need to be taken. Especially for children in Papua with all kinds of limitations and shortcomings they have. For this reason, special treatment or special treatment is needed for children in conflict with the law. This study aims to hope that in the future the form of handling restorative justice will be put forward in dealing with criminal cases committed by children. So that children in conflict with the law are better protected by this form of handling.

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### 1. INTRODUCTION

Child delinquency problems today remain an actual problem, in almost all regions in Indonesia including Papua. Attention to this issue has been devoted to much thought, both in the form of discussions and in seminars which have been held by government organizations or agencies that are closely related to this problem.

The process of fostering children can be started in a family life that is peaceful and prosperous in birth and spirit. On the basis of children's welfare is not the same, depending on the level of welfare of their parents. We can see in Papua there are still many children who live in slums and among them have to struggle to make a living to help their families. Poverty, low education, a broken family and a social environment will affect the life or growth of a child.

Facing and overcoming various acts and behaviors of naughty children, it is necessary to consider the position of the child with all the characteristics and characteristics of the child. Although children have been able to determine their own steps based on their thoughts, feelings and desires, but the surrounding conditions can affect their behavior. Therefore, naughty children, parents and the surrounding community should be more responsible for fostering, educating, and developing these behaviors. Given its special nature which provides a national legal basis for the younger generation through a special order of justice for children who have deviant behavior and violate the law.

The Child Criminal Justice System can be translated as a criminal justice system that is related to the handling of children in conflict with the law. In this case the position of the child can be a victim and can also be a perpetrator of a crime. Whereas what is meant by children in conflict with law are children who are 12 (twelve) years old, but not yet 18 (eighteen) years old who are suspected of committing a criminal act. The goals to be achieved in the implementation of the Child Criminal Justice System are more directed at resocialization and rehabilitation and for the welfare of the child itself. Therefore related to the implementation of the function of the Child Criminal Justice System, the handling of this child problem must be based on achieving its main objectives, namely the fulfillment and protection of children's rights as stipulated in various international provisions and various national legislation in handling and child protection<sup>1</sup>.

Efforts to provide protection and welfare for children in the Criminal Justice System mechanism, it is not enough to just rely on conventional processes like today. Law enforcement officials must continue to develop methods and mechanisms that have justice for native Papuan children in carrying out their duties. One method that needs to be developed is the concept of diversion and restorative justice in handling problems of children, especially children native to Papua.

Protection of native Papuan children who are faced with the law is very necessary, since often in the process of examination at the investigation stage, only looking at the interests of the legal process without regard to indigenous Papuan child welfare. For that we must pay attention and serve them, because they are very sensitive to various threats of mental, physical and social disorders. Children who are faced with the law often cannot protect themselves because of situations and conditions.

Why in this writing is the focus on children native to Papua? Because we see many children who seem neglected, some are on the streets like children who breathe aibon glue and are everywhere. This is a generation that we must save.

Law No. 11 of 2012 concerning the Child Criminal Justice System uses the principles of restorative justice to handle cases involving adolescents, including rehabilitation, and introduces mechanisms to further streamline diversion, namely settlement out of court. However, there are parts of the law that are still not in accordance with international standards. For example, the best interests of children are not always the main consideration in the procedure and the minimum age of criminal responsibility is 12 years. In many cases, the implementation of diversion depends on

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<sup>1</sup> Mahmud Mulyadi. (2008). Perlindungan terhadap Anak yang Berkonflik dengan Hukum: Upaya Menggeser Keadilan Retributif Menuju Keadilan Restoratif. *Jurnal Equality* Volume 13 No. 1., pp. 90

the consent of the victim. Delivery of children to institutions is one option in diversion, among other options, which can lead to administrative or de facto detention without full legal guarantees.

The absence of clear authority for legal protection services for native Papuan children at the provincial and district levels causes fragmented and less coordinated actions. Local governments do not allocate adequate budgets for child protection, and capacity for implementation is generally weak.

The implementation of the concept of diversion in the form of formal justice which has been prioritizing has prioritized efforts to provide protection for children from imprisonment. In addition, it can be seen that child protection with diversionary policies can be carried out at all levels of justice starting from the community before the occurrence of a crime by carrying out prevention. After that, if a child commits a violation, it does not need to be processed by the police<sup>2</sup>.

The police as the first gate to handle children in conflict with the law determine whether a child will proceed to a judicial process or other informal action. Child investigator police must pay attention to the soul of the Child Criminal Justice System Act, the Child Protection Act and the Child Welfare Act which in essence is "the best interests of children are the top priority". Child investigator police must pay attention to international instruments, especially The Beijing Rules, which require that the discretionary authority that exists or is attached to the police to be applied for the future of the child<sup>3</sup>.

According to data from 2013-2016, the number of native Papuan children who faced the law as many as 50 consisting of 43 children was completed in diversion and returned to parents and 7 children were sentenced to convictions within the Merauke Class II Correctional Institution, and those who became prisoners.<sup>4</sup>.

The presence of children in this prison indicates that arrest, detention and punishment / imprisonment of native Papuan children who are in conflict with the law is no longer the last resort (*ultimum remedium*) and returning children to parents is not the right solution regarding protection and fulfillment native Papuan children's rights to restore mental, psychological and social conditions.

For this reason, the problem that will be discussed in this research is how is the restorative implementation of justice for native Papuan children facing the law in the juvenile justice system? And what strategic steps have or are being made to overcome the problems that arise related to native Papuan children who are in conflict with the law?

## **2. METHOD**

The research was carried out in Merauke City with research locations in Merauke Regency, Papua Province, specifically in Merauke Resort Police Agency, Merauke Correctional Center Class II, Merauke Class IIB Correctional Institution, Merauke District Social Service and Merauke Regency Women's Empowerment and

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<sup>2</sup> Marlina. (2008). Penerapan Konsep Diversi terhadap Anak Pelaku Tindak Pidana dalam Sistem Peradilan Pidana Anak. *Jurnal Equality*, Volume 13 No. 1., pp. 102

<sup>3</sup> Abintoro Prakoso. (2010). Vage Normen sebagai Sumber Hukum Diskresi yang Belum Diterapkan oleh Polisi Penyidik Anak. *Jurnal Hukum NO. 2 VOL. 17.*, pp. 268

<sup>4</sup> Data from Merauke Class IIB BAPAS, 2017

Child Protection Office. The location of this study was chosen based on the authority approach and the level of involvement of the institution.

The method of approach used in this study uses an empirical juridical approach, which is an approach that examines secondary data first and continues by conducting primary data research in the field. Juridical factors are Law Number 11 of 2012 concerning the Child Criminal Justice System and other Implementation Regulations relating to Children in conflict with the law. Empirical factors look at implementation and issues related to legal protection for children in conflict with the law, especially children native to Papua.

The subjects of this study were parties related to the implementation of legal protection for children in conflict with the law in Merauke Regency, as informants, namely: 2 Child Investigators in Merauke Regional Police Station. 1 Official Bapas Class IIB Merauke. 1 Official of Class IIB Lapas Merauke. 1 Official of the Merauke Regency Social Service. 1 Official of the Women's Empowerment and Child Protection Service of Merauke Regency. 2 Child Prosecutors in the Merauke District Prosecutor's Office. 1 Child Judge in the Merauke District Court. 3 Children of Assisted Citizens in the Class IIB Lapas Merauke.

The data needed in this study is divided into two types of data are: Primary Data and Secondary data. A scientific work requires a means to determine and know more deeply about certain symptoms that occur in the community. As a follow-up in obtaining the data as expected, the authors carry out data collection techniques in the form of. Library research or library research, field studies or field research, in this study the authors conducted data collection by interacting with the object under study. In this case conducting interviews directly with competent parties in order to obtain accurate data. Observation, which is a direct observation of a symptom that appears at the research site that is useful as a study material to be studied and discussed in accordance with the reference theory and legislation. In this observation the author conducted a direct observation and observation of locations that handle children in conflict with the law. Primary data and secondary data that have been collected are then processed and analyzed qualitatively. Qualitative analysis in this case is an analysis that examines in depth the data that is then combined with other data, then combined with supporting theories and then draw conclusions.

### **3. RESULTS AND ANALYSIS**

#### **3.1. Legal Protection of Indigenous Papuan Children in the Criminal Justice Process**

Juridical protection basically involves legal protection given to children both in the field of written law and customary law which guarantees the protection of children according to their needs so that they can enjoy their rights properly. Whereas non-juridical forms include protection in the social, health, and education fields, so the principle of child protection, namely: a. the state must intervene in matters of child protection because children cannot fight alone; b. every decision regarding a child must always lead to the best principle of interest for the child; c. child protection must

be done early and continuously; d. child protection requires contributions from various sectors of life and from all levels of society<sup>5</sup>.

Regarding the concept and scope of children as perpetrators of child crime is very important because children are the potential of human destiny for the next day, it is children who play a role in determining the history of the nation while mirroring the attitude of the nation's future<sup>6</sup>.

### **3.2. Child Protection at the Investigation Stage**

The process of investigation and investigation is very important in criminal law, because in its implementation it must repeatedly offend the degree and / or dignity of individuals who are in suspicion, therefore one of the important slogans in the law of pudana is "The essence of criminal case investigations is to clear up the problem, to pursue the perpetrators of the crime, while avoiding innocent people from actions that should not be".<sup>7</sup>

The period of detention for the purpose of investigation is no later than 20 (twenty) days. If for the purpose of the inspection that has not been completed, it can be extended for a maximum of 10 (ten) days. Within 30 (thirty) days, the Investigator must have submitted the case file to the public prosecutor. The period of juvenile detention is shorter than the detention of adults.<sup>8</sup> This is a positive action because of the aspect of child protection, the child does not need to be too long in detention so as to minimize the occurrence of disruption in the growth of children both physically, mentally, and socially.

In Article 45 of Law Number 11 of 2012, it is stated that detention is carried out after seriously considering the interests of the child and / or the interests of the community. Based on these provisions, the conduct of detention investigators must first carefully consider all the consequences that will be experienced by the child from the act of detention in terms of the interests of the child and consider the existence of elements of community interest to obtain a safe and secure situation. The provisions of Article 42 paragraph (1) of Law Number 11 of 2012 which states that investigators are required to examine suspects in a family atmosphere, requiring that the examination be carried out with an effective and sympathetic approach.

An effective approach can be interpreted that the examination does not take a long time, by using language that is easy to understand and can invite suspects to give information as clearly as possible. While the sympathetic approach has the intention that at the time of examination, the investigator must be polite and friendly and not scare the suspect<sup>9</sup>.

Article 42 paragraph (2) of Law Number 11 of 2012 states that in conducting investigations on Naughty Children, investigators must ask for consideration or advice from Community Counselors, and if necessary can also ask for consideration or advice from education experts, mental health professionals, experts religion or other

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<sup>5</sup> Layyin Mahfiana. (2011). Perlindungan Hukum Terhadap Tersangka Anak Sebagai Upaya Melindungi Hak Anak. *Jurnal Muwazah* Vol. 3, No. 1., pp.396.

<sup>6</sup> Wagiati Soetedjo. (2006). *Hukum Pidana Anak*. Bandung: PT. Refika Aditama, pp. 10

<sup>7</sup> Andi Sofyan. (2013). *Hukum Acara Pidana Suatu Pengantar*. Yogyakarta: Rangkang Education,, pp. 87.

<sup>8</sup> Maidin Gultom, *Op.cit.*, pp. 98-99

<sup>9</sup> Ibid, pp. 101.

community officers. This reflects a legal protection so that the resulting decision has a positive impact, both for the child and for the disadvantaged party and for the community.

In the provisions of Article 42 paragraph (3) of Law Number 3 of 1997 states that the process of investigating the case of a Naughty Child must be kept confidential. The investigator's actions starting from the investigation stage up to the investigation stage must be carried out in secret. Law No. 11 of 2012 does not provide strict sanctions against investigators if the obligation is violated and does not regulate the legal consequences of the results of the investigation. It can affect the quality of work of the investigator and cause harm to the child both physically, mentally and socially because it can hinder the development of a child's life.

### **3.3. Child Protection at the Prosecution Stage**

Law No. 11 of 2012 concerning Juvenile Justice in principle requires that each District Prosecutor's Office has a Public Prosecutor (in accordance with the meaning of the Public Prosecutor referred to in Article 1 number 6) to deal with the Naughty Child.

But if the District Attorney does not have a Public Prosecutor because there is no one who meets the specified conditions or because of transfer / transfer, then the task of prosecuting Bad Boy cases is charged to the Public Prosecutor who performs the prosecution for criminal offenses committed by adults, in accordance with the provisions in Article 53 paragraph (3) of Law Number 3 Year 1997.

This is when viewed from the aspect of child protection, it can be said that the child does not get protection. If the Naughty Child prosecution is not carried out by the Public Prosecutor, it is feared that the target of child protection will be ignored because the Public Prosecutor in question does not understand the problem of the child, so that legal actions taken in prosecution have the possibility of not reflecting the principles of child protection. The Public Prosecutor in carrying out his duties is to examine the minutes submitted by the Investigator, if deemed necessary and with the approval of the Judge of the Child, there is no need to submit a child to the Court. Children are simply returned to their parents by reprimand and advice. Parents / guardians / foster parents need to be warned and advised.

With the permission of the Judge of the Child, the Public Prosecutor can request assistance from experts or form his own team. Social workers such as from the Correctional Center and parents / guardians / foster parents of children are also involved in handling and fostering children. This is done on the consideration that children need attention, love, care, protection, formation, education and security and peace both spiritually and physically<sup>10</sup>.

### **3.4. Criminal System Against Children As Criminals**

It is well known that the problem of child protection in Indonesia is very heavy and complex. One problem that is serious and urgent to get attention is the handling of children who are dealing with the law because: (1) in the judicial process there tends to be human rights violations and even a lot of evidence shows that there are practices of violence and torture in children in judicial machinery ( 2) the child's perspective has not colored the judicial process, (3) prisons that become a place of punishment for children are proven not to be the right place to foster children to reach the expected

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<sup>10</sup> Ibid, pp. 111

maturation process, (4) during the judicial process children with legal rights lose their basic rights communication with parents, the right to education, and the right to health, and (5) there is a stigma attached to the child after the judicial process is finished so that it will be difficult for future psychological and social development<sup>11</sup>.

The theories of punishment develop according to the dynamics of people's lives as a reaction to the emergence and development of crime itself which always colors the social life of society from time to time. In the world of criminal law itself, developed several theories about the purpose of punishment, namely absolute theory (retributive), relative theory (deterrence / utilitarian), the theory of merging (integrative), treatment theory and the theory of social protection (social defense). Criminal theories take into account the various aspects of the objectives to be achieved in the imposition of criminal penalties<sup>12</sup>.

Absolute theory (retributive theory), considers that punishment is a retaliation for the mistakes that have been made, so it is oriented to the deed and lies in the crime itself. Criminalization is given because the offender must accept the sanction for his fault. According to this theory, the basis of punishment must be sought from the crime itself, because the crime has caused suffering to others, in return (vergelding) the perpetrator must be given suffering<sup>13</sup>.

Deterrence, this theory views punishment not as a retaliation for the wrongdoing of the perpetrator, but as a means of achieving a useful goal to protect society towards prosperity. From this theory, the purpose of punishment appears as a means of prevention, namely general prevention aimed at the community. Based on this theory, the sentence was imposed to carry out the purpose or purpose of the sentence, namely to correct community dissatisfaction as a result of the crime. The purpose of punishment must be viewed ideally, apart from that, the purpose of punishment is to prevent (prevent) crime<sup>14</sup>.

Deterrence, this theory is a way to protect the perpetrator, but a means of protecting the society towards prosperity. From this theory, the purpose of punishment is a general prevention aimed at the community. Based on this theory, the sentence is meant to correct the community. The purpose of punishment must be viewed ideally, apart from that, the purpose of punishment is to prevent (prevent) crime<sup>15</sup>.

Combined (integrative) theory bases the criminal on the principle of retaliation and the orderly principle of defense of public order, in other words the two reasons are the basis of criminal imposition. Basically combined theory is a combination of absolute theory and relative theory. The combination of the two theories teaches that the imposition of punishment is to maintain the rule of law in society and improve the person of the criminal<sup>16</sup>.

Treatment theory, suggests that punishment is very appropriate directed at perpetrators of crime, not to their actions. This theory has features in terms of the

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<sup>11</sup> Hadi Supeno.(2010). Dekriminalisasi Anak. KPAI., pp. 15

<sup>12</sup> Dwidja Priyanto. (2009). *Sistem Pelaksanaan Pidana Penjara Di Indonesia*. Bandung: PT. Rafika Aditama., pp. 22

<sup>13</sup> Leden Marpaung. (2009). *Asas-Teori-Praktek Hukum Pidana*. Jakarta : Sinar Grafika., pp. 105.

<sup>14</sup> *Ibid*, pp.106.

<sup>15</sup> Dwidja Priyanto, *Op. Cit*, pp.26.

<sup>16</sup> Leden Marpaung, *Op. Cit*, pp. 107

process of re-socialization of actors so that it is expected to be able to restore the social and moral quality of society in order to be able to integrate again into society. According to Albert Camus, perpetrators of crimes are still human offenders, but as human beings, a perpetrator of crime remains free to learn new values and new adaptations. Therefore, the imposition of sanctions must also educate, in this case a perpetrator of a crime requires treatment sanctions.

Social protection theory is a further development of the modern school with its famous figure Filippo Gramatica, the main purpose of this theory is to integrate individuals into social order and not punish their actions. Social protection law requires the elimination of criminal liability (error) to be replaced by the view of anti-social actions, namely the existence of a set of rules that are not only in accordance with the need for shared life but in accordance with the aspirations of the community in general.

Based on the criminal theories proposed above, it can be seen that the purpose of the punishment for the child itself is to form a combination of the reasoning and non-reasoning policies in terms of overcoming crime. This is where the role of the state protects the community by upholding the law. Law enforcement officials are expected to be able to tackle crime through the container of the Criminal Justice System.

### 3.5. Restorative Justice Approach

The definition of restorative justice quoted from the notion of restorative justice in general is "restorative justice is concerned with healing victims wounds, restoring offenders to law abiding lives, and repairing harm done to interpersonal relationships and the community" (restorative justice relating to healing wounded victims, restoring violators of law-abiding life, and repairing damage done for interpersonal and community relations) which means more or less restorative justice focuses on healing the wounds suffered by victims (physical and psychological), making perpetrators become law-abiding, improving relations with fellow humans and to community due to a crime. According to Law No. 11 of 2012 concerning the Child Criminal Justice System, restorative justice is "the settlement of criminal cases by involving the perpetrators, victims, families of the perpetrators / victims, and other parties concerned to jointly seek a just solution by emphasizing recovery back to its original state and not retaliation.

Bazemore and Walgrave define "restorative justice is every action that is oriented toward doing justice by having been caused by a crime" (restorative justice as any action to uphold justice by repairing the damage caused by a crime). This theory stems from the common law and tort law traditions that require all guilty people to be punished. Penalties according to this theory include community service, compensation and other forms of prison sentences that allow convicts to remain active in society<sup>17</sup>.

Restorative justice is a theory which states that the victim or his family has the right to treat convicts just as he treats victims. This theory rests on important differences in retributivism, namely: between negative retributive and positive retributive<sup>18</sup>.

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<sup>17</sup> O.C., Kaligis. (2006). *Perlindungan Hukum atas Hak Asasi Tersangka. Terdakwa dan Terpidana*. Bandung: Alumni., pp. 125

<sup>18</sup> *Ibid*, pp. 126

The basis of the theory of restorative justice is the necessity to believe and strive that victims of crime or their families can return to their original state as before the crime. The aim of restorative justice is to get clarity from the events that occur by encouraging the perpetrators, returning victims' losses, reintegrating victims to the community and joint accountability. The target is to provide opportunities for victims to be directly involved in discussions and decision-making regarding violations that occur to them with appropriate sanctions for the perpetrators and to directly hear the explanations of the perpetrators about violations that occur, then increase the awareness of the perpetrators of the consequences to others and provide opportunities the perpetrator is fully responsible for his actions other than that for the family or the perpetrator can jointly determine sanctions for the perpetrator and guide him after the mediation takes place. The last is to provide opportunities for victims and perpetrators to relate to each other in strengthening the community order which was once divided due to violations by the perpetrators of the victims<sup>19</sup>.

Restorative justice is not only directed at perpetrators as the main subject of the process, on the contrary to rehabilitating justice and law. This restoration theory assumes that criminal prosecution does not provide "retaliation" and "repairs" to the perpetrators of crimes, but does not deny that the perpetrators of the crime must get sanctions. It's just that this theory focuses more on resolving conflicts than imprisonment. According to this theory imprisonment is not the best way to deal with crime. Imprisonment according to this theory is a form of civilization of criminal law.

### **3.6. Implementation of restorative justice for native Papuan children who are faced with the law**

Delinquency in a child is a common occurrence. No one does not pass this negative phase / phase or does not commit mischief at all. This problem does not only affect several groups of street children in a certain area. This situation occurs in every place, layer and area of society. Forms of delinquency in street children are divided into 3 criteria, namely:<sup>20</sup>

“Incidentally, sometimes, and as a habit, which displays the level of adjustment with high, medium and low fracture points. Other scientific classifications use Tripartite classification, namely: historical, instinctual, and mental. All of them can combine with each other. For example regarding the causes of incidental delinquency can be seen from aspects of greed, aggressiveness, sexuality, family breakdown and anomalous anomalies in group encouragement”.

Delinquency occurs due to the two elements that meet, including the intention to commit a violation and the opportunity to carry out that intention so that if one of the two elements is incomplete, nothing will happen. If someone has the intention to commit an offense, but because there is no opportunity to carry out this intention, there will be no violation. On the contrary, although there is an opportunity to commit a violation, but the intention to commit a violation does not exist, there will also be no such violation. Both elements of intention and opportunity are very important in the event of mischief in street children.

Based on the research that the authors conducted on the children assisted by children in the Class II b Merauke Penitentiary Institution in 2018, data obtained that

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<sup>19</sup> *Ibid*, pp.189.

<sup>20</sup> Kartini Kartono. (2010). *Patologi Sosial 2 Kenakalan Anak*. Jakarta: Grafindo Persada., pp. 47.

the most committed crimes were those aged 16 to 18 years. The crimes committed by these child prisoners are: Susila Crime, Murder Crime, Crime of Torture, Crime Destroying property. Narcotics Crime.

Seeing from the results of these studies, it turns out that the age of a child who often commits delinquency or crime is ranging from 16 to 18 years. To clarify the study of symptoms of juvenile delinquency that lead to crime, especially children native to Papua, it is necessary to know the causes of the emergence of child delinquency or the factors that encourage children to do delinquency or can also be said background so need to know their motives. Motivation is an impulse that arises in a person consciously or unconsciously to do an action with a specific purpose.

Data obtained from the results of research can be determined there are two kinds of motivation, namely motivation born in oneself and encouragement born from outside a person. The following is about motivation within and outside a person:

1. Which includes motivation within themselves rather than child delinquency are:
  - a. General Knowledge Factors;
  - b. Age factor;
  - c. Sex Factor;
  - d. Position factor of children in the family.
2. What includes outside motivation of a person is:
  - a. Household factors;
  - b. Educational Factors;
  - c. Factors of child association.

Culture or culture in this case involves a collection of values and norms that demand a form of own responsive behavior that is typical of the group members. The sub term identifies that the cultural form can appear in the middle of a more inclusive system.

According to this sub-culture theory, the source of delinquency is the characteristics of a social structure with a cultural pattern (sub-culture) that is typical of the family environment, neighbors and society experienced by these naughty children. The characteristics of the community include: a) Having a densely populated population, b) Socio-economic status of low occupants, c) The physical condition of villages is very poor, d) Many high-level family and social disorganizations.

Based on the results of interviews with fifteen street children in Merauke City can be classified as follows:<sup>21</sup>

1. Deflate motorcycle tires if not rewarded after maintaining the motorbike in the parking area. Based on the results of interviews with seven street children who worked as parking attendants.
2. Ngelem when not working and gathering with friends who are also working. Based on the results of interviews with five street children who worked as scavengers.
3. Damage or scratch the paint of a car or motorcycle when not given money when asking on the streets. Based on the results of interviews with three street children who work as beggars.

The role of parents in preventing juvenile delinquency especially native Papuan children runs less effectively. Mothers are busy working, so they pay less attention to their children's education and activities everyday. While the inhibiting factor is the

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<sup>21</sup> Interviews with fifteen street children in the Shop Emperors on October 4, 2018

uncertainty of parents in educating children, freeing children to play at will, activities of children who often play, environmental influences, the influence of friends in this game can be seen from the many children native to Papua who roam in the shops and public facilities.

The factors that cause child delinquency as described above are internal and external factors. Internal causative factors are causes that originate from within the child because of their own choice, motivation or willingness to do mischief. This is in accordance with the Rational Choice Theory which states that delinquency committed by adolescents occurs because of his own choice, interest, motivation or his own will. External factors are factors that cause juvenile delinquency that come from outside the child, such as factors that come from the environment, the influence of playmates and the availability of parents' time to educate their children. The community environment is one of the factors that can shape children's mental development. The child will do good or bad can depend on the condition of the environment in which the child lives. In the community, children live and interact with other people and experience life. The association carried out by the child more or less will bring various influences on the child. If a child's playmate is good, the child will be affected as well as vice versa.

A child who commits or is suspected of committing a crime is very much in need of legal protection. The issue of legal protection for children is one of protecting the nation's shoots in the future. Legal protection concerns all applicable legal rules. This protection is necessary because children are a part of society that has physical and mental limitations. Therefore children need special protection and care.

In Law No. 23 of 2002 in conjunction with Law No. 35 of 2014 concerning Child Protection, stated that:

"Governments and other state institutions must provide special protection to children in emergency situations, children facing the law, children from isolated minority groups, economically or sexually exploited children, trafficked children, children who are victims of narcotics abuse, alcohol , psychotropic, other addictive substances, children abducted, sold, and trafficked, children victims of both physical and mental violence, children who are disabled, and children victims of mistreatment and neglect."

One of the points in the article mentions children who are faced with the law. Look at everyone when they hear children who are dealing with the law as if they are co-opted in the understanding of children who are perpetrators of criminal acts. Even though it has been stated in Law No. 23 of 2002 in conjunction with Law 35 of 2014 concerning the Protection of the Child that: "Special protection for children facing the law as referred to in Article 59 includes children in conflict with the law and children victims of criminal acts.

In connection with the protection of children according to Law No. 11 of 2012 concerning Criminal Justice System This child is not always the child who is a criminal offender must get a prison sentence. As confirmed in Article 71 of Law No. 11 of 2012 concerning the Child Criminal Justice System, that actions that can be imposed on children in conflict with the law, in the form of returning to parents, guardians / foster parents or submitting to the State to take part in education, coaching and training or submit to social departments or community social organizations engaged in education, coaching and work training.

The issue of legal protection and its rights for children is one side of the approach to protect Indonesian children specifically for indigenous Papuans. In order for the protection of children's rights to be carried out regularly with the approach of

restorative justice, legal regulations are needed that are in line with the development of Indonesian society which is fully imbued by Pancasila and the 1945 Constitution.

Facing the case of children involved in legal matters, of course the resolution and treatment must be different from the adult procedure. In the process it must be done carefully, so that the child still gets maximum protection. This awareness encouraged the issuance of Law Number 11 of 2012 concerning the Child Criminal Justice System.

Law Number 11 of 2012 implies that cases of children involved in legal matters must be handled specifically, especially children of indigenous Papuans, namely starting from the investigation phase up to the stage of coaching after undergoing criminal proceedings.

This juvenile criminal justice system prioritizes the Restorative Justice approach, namely the settlement of criminal cases by involving perpetrators, victims, families of the perpetrators / victims and other parties involved to jointly resolve a solution by emphasizing recovery in its original state and not in retaliation.

Based on observations in the field, then when talking about the discretion of the police in the juvenile justice system, a relationship between the law, discretion, police, investigation and the criminal justice system will be found. So the main problem obtained is the fact that the law has not worked and the police discretion against children is faced with the law.

In the field of criminal law discretion is inherent and exclusive to certain matters which are specifically given, both to investigators, public prosecutors and judges, which if carried out by people outside the investigator, public prosecutor and judge can constitute a criminal act. Besides that, it is also open that inherent discretion can be taken by investigators, public prosecutors, or judges because of their conditioning nature.

In the practice of discretion it can be called a broad authority or can also be called freedom to act. In the field of criminal law, despite its discretionary nature, it must remain within the legal corridor and be measured because it is related to Human Rights. With the possession of discretionary power by the police, the police have great power because the police can make decisions where decisions can be outside the provisions of the law, but are justified or allowed by law. So that at the stage of investigation and investigation at the Merauke Resort Police and the Merauke District Attorney's Office, the restorative justice approach can be used and optimized based on discretionary powers.

Investigators in the case of conducting an investigation of a reported child or complaining of a criminal offense must ask the Investigator in conducting an investigation of the reported child or complaining of a criminal act must ask for consideration or advice from the Community Advisor, and if necessary can also ask for consideration or advice from

education experts, psychologists, psychiatrists, religious leaders, professional social workers or social welfare workers, and other experts.

If the investigation is carried out without involving Community Counselors from the Correctional Center (Bapas), investigators can be subject to administrative sanctions. Bapas within 3x24 hours must submit the results of the social research to the investigator, this is so that the results of the investigation in the investigation process are in accordance with the actual situation. Based on the results of the Community Research, Child Investigators can consider whether or not the case file / Examination Report (BAP) will continue for the prosecution process.

The Child Criminal Justice System Law also states that as long as the child is detained, the physical, spiritual and social needs of the child must be fulfilled. To protect the security of the child, a child can be placed in an Institution for Organizing Social Welfare (LPKS), so that if there is no Temporary Child Placement Institution in the area where the child is detained, detention can be carried out at the local LPKS. Social and Women's Empowerment and Child Protection Service or Integrated Service Center for Women and Children Protection (P2TP2A).

According to Barda Nawawi Arief, in the probation there was no final sentence, because people who were given probation were planned to be rehabilitated under the supervision and guidance of trained social workers for a period of 1 (one) year to 3 (three) years.<sup>22</sup> Such a punishment system according to the author is a delay in the punishment of a child who has committed a crime. Because besides aiming to avoid stigma towards children, there is also the impression of protecting children so that they can live their lives normally without being alienated from the community.

Law No. 11 of 2012 concerning the Child Criminal Justice System in Article 1 numbers 20, 21 and 22, 3 (three) names of institutions have been mentioned to place children who have committed criminal acts, namely:

1. The Child Special Development Institution, abbreviated as LPKA, is the institution or place for children to undergo their criminal period.
2. Temporary Child Placement Institutions, abbreviated as LPAS, are temporary places for children during the judicial process.
3. The Institution for Organizing Social Welfare abbreviated as LPKS is an institution or place of social service that carries out the implementation of social welfare for children.

Observing the three institutions above, according to the author, it seems that the placement of children under supervision referred to in Article 77 cannot be done in one of the three institutions. On that basis, it is deemed necessary to formulate explicitly about the place of supervision of children, and so as not to cause traumatic effects on children, these types of institutions must be changed immediately, adapted to the purpose of restoring mentally ill children.

Jurisdictional problems can arise because, all this time, criminal offenses against children, it seems that children are still positioned as objects, so they tend to harm children. The role of judges in this case is more than the role of investigators and prosecutors, because the retributive justice model is still used which emphasizes punishment more, and has not been regulated regarding diversion, namely the restorative justice model in the form of transferring child cases outside the formal justice line. As a result of this, the retributive justice model in the community has not been able to provide adequate mental development for children, but rather has a bad influence. Based on the results of the research that has been conducted, it is proven that imprisonment is very detrimental to children as convicts because criminologically imprisonment can lead to bad "stamp / label" or "stigma" in children even though they have been nurtured and have undergone a socialization process which then returns in the midst of the community, but he still carried the stigma. The process of integrating an ex-prisoner into the community is essentially a cultural transfer process. Because of the culture of people who always or often give labels to former inmates.

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<sup>22</sup> Barda Nawawi Arief. (1996). *Bunga Rampai Hukum Pidana*. Bandung: PT.Citra Aditya Bakti., pp.73

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**Tabel 3.1 Ethnic Background of Child Prisoners**

No	Ethnic Background of Child Prisoners	Volume
1	Marind	8
2	Kei	1
3	Bugis	3
4	Jawa	3
5	Makasar	1

Data source: Bapas Merauke

Looking at the description above, it shows that in the Merauke Class II Prison Penitentiary Institution is inhabited by ethnic groups or ethnic Papuans.

**Tabel 3.2 Educational Background for Parents of Child Prisoners**

No	Education	Volume
1	SD	15
2	SMP	10
3	SMA	7

Data source: Merauke Class IIb Lapas

Then when examined further, people included inmates, 15 people did not complete elementary school, 10 people graduated from junior high school, and 7 more people they were educated at high school.

**Tabel 3.3 Background on Child Delinquency and the Criminal Code that are worn**

No	Background on Child	Article of the Criminal Code imposed	Volume
1	SMP & SMA	Theft	8
2	SMP	Theft With Violence	2
3	SMA	Stealing with weight	2
4	SMP & SMA	Copulation of children under Age	4
5	SMA	Murder	1

Data source: Merauke Class IIB Lapas

The table above provides information that from child prisoners, 8 of them with their criminal backgrounds took other people's property (Theft) were subject to Article 362 KUHP sanctions, 2 people committed theft with violence subject to sanctions Article 365 of the Criminal Code, and 4 people committed immoral crimes with Article 287 of the Criminal Code sanction, the next 1 person commits a murder crime with sanctions Article 340-365 of the Criminal Code.

According to data obtained by researchers from the Merauke Resort Police (Merauke Regional Police), the types of criminal cases with child offenders that are often dealt with so far include theft cases (Article 362 and 363 of the Criminal Code), beatings (article 170 of the Criminal Code), persecution (Article 351 of the Criminal Code), Murder (Article 338), child copulation (Article 81 of Law 35/2014 concerning child protection).<sup>23</sup>

Related to implementation of diversion in Law No. 11 of 2012 concerning the Criminal Justice System for Children, the Merauke Regional Police has only been prepared if the results of the diversion as stipulated in Article 11 of the SPPA Law are in the form of peace and the return to parents / guardians. Submission of children in conflict with the law to their parents / guardians, especially indigenous Papuans, is not appropriate to see the economic and environmental conditions of parents / guardians. The form of diversion that is applied with children in conflict with tribal special laws from other origin (Bugis, Javanese, Batak, Ambon etc.) is only required to report to the perpetrators every Monday and Thursday because there are guarantees given from the family and the school. Investigators should involve Indigenous Leaders and Religious Leaders in terms of diversion, and supervision in schools in collaboration with the Education and Teaching Office of Merauke Regency. There needs to be other forms of diversion such as social work and education / training as stipulated in Article 11 of Act No. 11 of 2012 concerning the Child Criminal Justice System involving the social service of the Merauke Regency Government and the Integrated Service Center for Women and Children Empowerment (P2TP2A).

**Tabel 3.4 The Amount of Cases Diversion**

No	Year of Case for Child Prisoners	Volume Child Prisoners	Indigenous Papuans	Diversion
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<sup>23</sup> Data is processed from case documents entered in the Merauke Regional Police Pidum Unit in 2018.

<b>1</b>	<b>2015</b>	<b>15</b>	<b>13</b>	<b>11</b>
<b>2</b>	<b>2016</b>	<b>35</b>	<b>26</b>	<b>27</b>
<b>3</b>	<b>2017</b>	<b>47</b>	<b>34</b>	<b>5</b>

Source: Merauke Regional Police

From the table above shows the number of children in conflict with the law originating from Papuan Orangutan Breadfruit (OAP) in 2015 out of 15 cases, 13 OAP 11 people could be Diversified, in 2016 out of 35 cases, 26 OAP 27 people could be Diversified, in in 2017 from 47 cases, 34 OAP 5 people could be diversified.

Specifically until July 2018, there were only two cases of child offenders who followed the procedures as stipulated in the Child Criminal Justice System Act, namely cases of abuse. Both of these murder cases cannot be subject to diversion because the threat of punishment is more than 7 (seven) years.

In addition, based on the results of interviews with several PPA Unit investigators in Merauke Resort Police, the main problem that arose was the lack of infrastructure that supported the implementation of the Child Criminal Justice System Law. Another problem internally is that the technical procedures of police investigators which are usually in the form of SKEP (Chief of Police Decree) regarding the implementation of the Child Criminal Justice System Law are also not well-socialized, which results in the investigation of child cases in each resort police department is not uniform.

The lack of staff in the Correctional Center (Bapas) and the lack of good communication with Investigators and Prosecutors is also a problem, even though in the implementation of diversion as emphasized in Article 8 paragraph (1) the Child Criminal Justice System Law resolves child criminal cases by means of deliberation other than involving children and parents / parents, victims and / or parents / parents must also include community mentors and professional social workers. According to the Merauke Regional Police, even though it has partnered with the Correctional Center (Bapas), the minimal number of community counselors has made the diversion process feared to be longer than the law requires.

As stipulated in the Regional Regulation on Child Protection and the Regional Regulation on Women's Protection, the existence of P2TP2A in Merauke Regency coordinated by the Office of Women's Empowerment and Child Protection has not been very helpful in resolving some of the problems arising from the enactment of the Child Criminal Justice System Law. As stated by the Merauke Regional Police PPA Kanit that the possibilities for handling child offenders have been discussed by the Merauke P2TP2A. Currently the Office of Women's Empowerment and Child Protection as one of the elements of P2TP2A in Merauke Regency is looking for a diversion model in the form of community services tailored to the characteristics of regency districts such as involving diversified children to social-religious activities so that the role of the Social Service is in empowering children and fostering street children involved in criminal cases.

All of the above are being sought formulation by disseminating and strengthening cooperation with community organizations and Muspida elements (Regional Leadership Consultations) so that in the future implementation of diversion is truly in accordance with the spirit of restorative justice by not eliminating the element of local wisdom.

Implementation of diversion in the court area begins with preparation for diversion. After accepting the decision of the chief of court to handle cases that must be sought for diversion, the judge issues a day of diversion deliberation. Determination of the judge contains an order to the public prosecutor who bestows a case to present the relevant parties. Those in question are children who are faced with the law and victims along with their parents or guardians or their assistants. "In addition, it also presents related parties such as calling for a correctional agency, social advisors, social workers and others who are deemed necessary. It must be called upon all to sit together, then listen to their views."<sup>24</sup>

The handling of children in conflict with the law is urgently needed to have a common perception between law enforcement in handling children in conflict with the law so that an integrated judicial system will be realized. In line with this discourse law enforcement officials have made an agreement with a joint decree dated December 22, 2009 namely between the Chair of the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, the Head of the National Police of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Minister of Social Affairs of the Republic of Indonesia, and the Republic of Indonesia's Minister of Women Empowerment.

There is no policy regarding the concept of diversion in the Attorney General's Office so that there is a discrepancy between the number of cases of child cases that have entered and those that have been successfully diversified at the prosecution level in the Merauke District Prosecutor's Office. After observing the Merauke District Prosecutor's Office, there were a total number of cases of child cases entered in 2017 totaling 16 cases, but unsuccessful attempts were made on the number of cases entered.

There are special technical guidelines at the level of the public prosecutor with the issuance of the Attorney General's Regulation No. 006 / A / JA / 2015 concerning the Implementation Guidelines for Diversion at the Prosecution Level in which there are rules regarding the implementation of Diversion, and in these rules is a glimmer of hope for all the people who are waiting for justice especially for child cases in conflict with the law, which remember the increasing criminal acts carried out by children, especially native Papuan children in the Merauke region, therefore to control crime rates and protect the rights of children vulnerable to discrimination the concept of diversion is ideal for transferring judicial processes from the formal justice system to the informal justice system.

In Perma No. 4 of 2014 concerning the Implementation Guidelines for Diversification in the Child Criminal Justice System is explained, diversion is applied to children who are 12 years old but not yet 18 years old, or 12 years old even though they have married but are not yet 18 years old, who are suspected of committing a criminal act. Child judges must seek diversion in the event that a child is charged with a criminal offense that is threatened with imprisonment under 7 years. Or to a child charged with a criminal offense that is threatened with imprisonment of 7 years or more in the form of subsidaritas, alternative, cumulative, or combination (combined) indictments, if in the deliberations the peace ends, meaning there is a diversion agreement. In diversion, every child who is faced with the law is avoided wherever possible from imprisonment.

In diversion, there needs to be some penalty renewal. prison terms should be avoided for children who are faced with legal cases.

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<sup>24</sup> Interview Results of District Court Judges August 2, 2018.

"There are so many choices of sentences. Conditional orders to do social work. Ordered to enter the education center. Also orders to be sent to special schools are included in rehabilitation if he is a drug user. With the provisions of Law No. 11 of 2012 concerning the Child Criminal Justice System Ridwan added, the requirement for diversion is the existence of peace. In the case of beating, for example, the perpetrator must first admit his actions and the victim wants to be resolved by means of diversion. "If there is no diversion in the process, then proceed with an ordinary children's trial. In conducting examinations, the judge must consider giving protection to this child, "If the diversion is successful but the child who is the perpetrator violates the agreement, then diversion is considered null and void.

The approach to restorative justice is very important to be applied in handling cases of child crime, especially children of native Papua, with reference to Law No. 11 of 2012 concerning the Child Criminal Justice System in the settlement of criminal cases involving the perpetrators, victims, families of the perpetrators / victims, and other parties such as Religious Leaders, Customary Figures, Social Services and P2TP2A related to jointly seeking a fair solution by emphasizing recovery returns to its original state, and not retaliation.

So that it can be concluded based on Article 5 to Article 14, Article 29, Article 42 and Article 52 paragraph (2) to paragraph (6) of Law Number 11 Year 2012 concerning the Child Criminal Justice System which is required to seek Diversion at the level of investigation, prosecution, and examination of Child cases in the court by prioritizing the Restorative Justice approach.

### **3.7. To Overcome Problems That Appear Related to Papuan Native Children Conflict with Law**

There are many challenges faced in seeking diversion for child criminal cases. For example, a type of crime involving a child cannot be converted because the threat is more than 7 years in prison. "That is the most reason why diversion efforts cannot be done.

So it is necessary to recommend the government to conduct a legislative review regarding the implementation requirements for diversion, especially criminal offenses with a threat of more than 7 years, but there are no victims in the crime alleged to the child. The government should specify what kinds of criminal offenses can be carried out diversion or not. Then there needs to be more rigorous supervision of the implementation of diversion at each stage of the police, prosecutors and courts to prevent abuse of authority regarding diversion.

Investigators in conducting diversion against child criminal cases have errors in the procedures they have taken to carry out diversion because it is not through court determination. There are still many police investigators who have not received training in the Child Criminal Justice System. Even though there are officers who attend training but are transferred to other units. Even though untrained HR can hinder diversion efforts. "The provisions stipulated in the Child Criminal Justice System Law are ideal but the implementation is difficult,"

In a child criminal case in Papua, the victim's family agrees to be diverted but gives a condition in the form of customary fines such as a pig. Seeing the conditions that are so heavy the perpetrators' family does not support it. Therefore, diversion does not only have to go through the consent of the victim because it is also regulated in the Child Criminal Justice System Act. Article 9 paragraph (2) of the Child Criminal Justice

System Law describes four types of criminal offenses that are excluded for approval by the victim, namely criminal offenses in the form of violations; minor crime; victimless crime; or the value of the victim's loss is not more than the value of the local provincial minimum wage.

There are several approaches that can be done in overcoming the probabilities of children in conflict with the law including decision making and diversion. The Child Criminal Justice System Law mandates that if a child is not even 12 years old commits or is suspected of committing a crime, the investigator, community guide, and professional social worker make a decision to do a number of things, one of which is to give the child back to the parent / guardian, but if the condition of parents / guardians such as the economy and the environment is very worrying, the child should be handed over to the Social Service to be placed in a halfway house.

To overcome the problem of children in conflict with the law, the Government in this case is responsible for providing special handling and protection for children in conflict with the law as regulated and mandated based on national-scale policies in the Regulation of the State Minister for Women's Empowerment and Child Protection No. 1 of 2010 concerning Minimum Service Standards for Integrated Services for Women and Children Victims of Violence through the Regional Regulation on Child Protection with the establishment of the Integrated Service Center for Empowering Women and Children (P2TP2A) Merauke. The establishment of P2TP2A Merauke Regency is under the coordination of the Office of Women's Empowerment and Child Protection and is a technical implementation element of the program and community-based empowerment and protection services for women and children.

The handling of children in conflict with the law by P2TP2A should be the same as the handling of advocates in general. However, all legal intrigue can not be applied to children. If it has been reported to the police, P2TP2A should accompany the child during the examination but for now assistance has not been optimally implemented. Mentoring needs to be done because it requires counseling before it is examined. Because, sometimes the police don't really understand the language of children, sometimes children feel intimidated so they don't say the truth. P2TP2A is part of the psychologist, so they can see the child's body language and help him explain in detail how he did it, what the consequences of his actions were, and the chronology of his case.

#### **4. CONCLUSION**

In the implementation of the Restorative approach Justice for children in conflict with the law has not been implemented effectively because there are still cases of handling children as perpetrators of crimes processed in the criminal justice system of children and some have been resolved in diversion. The implementation of the strategies implemented on children in conflict with the law, especially native Papuan children by related parties has not met the existing legal protection standards, so there needs to be special handling of native Papuan children in conflict with the law.

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