Diversion and Local Wisdom in Constructivism Paradigm
(Study on The Implementation of Diversion at Konawe of Southeast Sulawesi)

Rahmi Yunita
Univertitas Diponegoro, Jl. Prof. H. Soedarto, S.H. Tembalang, Tembalang, Kota Semarang, Jawa Tengah 50275, Indonesia
Email: rahmiyunitaalimin@gmail.com

Abstract: Nowadays, In the criminal justice system for children in Indonesia, there is a process which has been known as diversion. Diversion is a transfer settlement a criminal case by the child from the court into out of the court. The primary goal of diversion is to achieve peace among the victims of the child abuser, penal mediation, to prevent children from deprivation of liberty, instil a sense of responsibility in children. Before, Indonesia has Juvenile Justice Act Number 03/1997 that revised by the Act Number 11/2012 about The Juvenile Justice System. It began to be useful to apply two years after 2012. So, in 2014, the law enforcement of diversion should be referred to the investigation, the prosecution and in front of the court process. In applying the law number 11/2012, the judicial administrator in a region certainly has obligation to understand the value of life and thrive in a society which is manifested in local wisdom. This research would provide analysis about the applying of diversion in a children cases related to local wisdom in Indonesia, especially in Konawe District, Southeast Sulawesi. The method of this research used socio-legal with constructivism paradigm of Lincoln and Guba.

Keywords:

1. Introduction

This paper will discuss the application of diversion in the handling of the children criminal cases in the District of Konawe, Southeast-Sulawesi, Indonesia in related with local wisdom, viewed from constructivism paradigm of Lincoln and Guba. Paradigms are the way of thinking. The use of Paradigm as the shared set of beliefs and practices that lead and guide a field in doing scientific studies. Lincoln and Guba differentiate the paradigms based on their component: ontology, epistemology, and methodology. According to Lincoln and Guba, constructivism paradigm in ontology perceived the compound reality and diversified based on the social experience, individual, local and specific (relativism). In methodologies, constructivism is dialectical or hermeneutical, construction resultant.

The present paper is arranged firstly, suggested the idea and the meaning of diversion, followed by the form of the local wisdom of Konawe society. Next, will also present the data of criminal cases by children started 2014 up to 2016 that are obtained from The District Attorney's Office and The District Court of Konawe. From the database of criminal cases by children, will be known about the implementation of the diversion, and analysis about the relationship between the diversion in the criminal justice system of Indonesia with the local wisdom.

The primary purpose of Juvenile Justice System is to the welfare of the children. It as intended in United Nations Standard Minimum Rules for The Administration of Juvenile Justice. It stated that
The Juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence" (Rule 5 of United Nations Standard Minimum Rules for the Administration of Juvenile Justice).

That rule refers to two of the most important objective of Juvenile justice. The first objective is the promotion of the well-being of juvenile. It is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasised in the legal system that follows the criminal court model, thus contributing to the avoidance of merely punitive sanction. The second objective is "the principle of proportionality". This principle is well-known as an instrument for curbing punitive sanctions, mostly expressed regarding the deserts in with the gravity of the offence. The response to young offenders should be based on the consideration not only of the gravity of the crime but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal conditions) should influence the proportionality of the reaction (for example by having regard to the offender's endeavour to indemnify the victim or to her or to his willingness to turn to wholesome and useful life). The idea of diversion for the first time introduced in The Beijing Rules as the international standard in the implementation of the Juvenile justice which is followed by the United Nation meeting about "Children Juveniles in Detention of Human Right Standards" in Vienna, Austria, 1994. In Indonesia, the idea of diversion became one of the recommendation in the national conference on Juvenile Justice, hosted by The Law Faculty of Padjajaran University in Bandung October 5th/1996.

One of the characteristics that are inherent in Juvenile Justice system in Indonesia is that the structure of the law enforcement can stop the judicial process at any time since the particular circumstances known by the authorities. This is referred to as diversion based on restorative justice concept. In Indonesia's legal system, the national instrument which arranged about the Juvenile Justice is The Juvenile Justice Act Number 11 of 2012. According to Article 1 number 7 of The Juvenile Justice Act (UU No.11/2012), "Diversion" is an expropriation settlement human children of the criminal justice to the process of beyond the criminal prosecution. Before, in the texts academic of the draft of the Juvenile Justice System Act, that was stated that diversion is an expropriation of the settlement of the criminal cases of a child who is suspected of committing certain crimes from formal procedures to a peaceful solution between the perpetrator of the child with the victim that facilitated by their family and or the community, the police, public prosecutors or judge. The intent and purpose of diversion as Article 6 of The Juvenile Justice Act (UU No.11/2012) is as follows: (1) Achieving peace between the victim and the child; (2) Children resolve the case outside the court process; (3) Avoiding Child of deprivation of liberty; (4) Encouraging people to participate, and (5) Instill a sense responsibility to the child.

Based on Article 7 of The Juvenile Justice Act, all the criminal cases by children must be pursued diversion at the level of investigation, prosecution and court proceedings. Diversion shall be implemented in the case of criminal offences committed: (1) Punishable by imprisonment under the 7 (seven) years, and; (2) Not a repetition of the criminal act. In relation with implementation of diversion in Indonesia, The Supreme Court issued the technical guidance which is called PERMA No.4 of 2014 about The Guidelines of Implementation of Diversion in Juvenile Justice System. Similarly, The Attorney General issued The Attorney General Regulation (PERJA) No: PER-006/A/JA/04/2015 about the technical guidance of the implementation of diversion for public prosecutor in prosecution. When the diversion has been implemented at the investigation level, prosecution and court proceedings, then the results of the diversion agreement can be formed: (a). Peace with or without compensation; (b). Handing back to parents
or guardians; (c). Participation in education or training in educational institutions or LPKS rather than three months; (d). Community services.

The victim must approve diversion agreement and or family children victims and children with their families as well as the willingness, except for The Criminal Offence; Misdemeanor; Criminal offence without victim; or value casualty losses not more than the value of the local, provincial minimum wage. Then, the Process of diversion done through consultations involving children and parents/guardians, the victims and or parents/guardian, Supervising Social and Professional Social Workers based approach Restorative Justice. Diversion process shall take into account the interests of victims, child welfare and responsibilities, avoidance of negative stigma. Another crucial issue on The Juvenile Justice System Act No.11 of 2012, is the boundaries provision in child's penalty responsibility from 12 (twelve) years old until almost 18 (eighteen) years old, while the age boundary for children who can be charged for detention are 14 (fourteen) years old until almost 18 (eighteen) years old.

From the international instrument and national instrument about the Juvenile Justice system above, the diversion is formed of the restorative justice concept that is a process involves as much as possible all parties who have a role in the occurrence of a criminal offense to collectively identify and understand the losses incurred with the aim to recover and put everything in place as best as possible. These things are linear meaningful with penal mediation, mediation in criminal cases, mediation in penal matters, victim-offender mediation, offender-victim arrangement (English), strafbemiddeling (Dutch), De Mediation Penale (French). Another term of this, similar with deliberative institution (lembaga musyawarah), forgiveness (permaafan) in criminal settlement embodied in the variety form of local wisdom of the culture of Indonesian people.

The term of local wisdom consist of two word, “local” and “wisdom” that is generally understood as the local ideas that are wise, full of wisdom and well worth it. Local wisdom can also be conceived as a local policy which contains the attitudes, views of life, science as well as various strategies life intangible activities undertaken by the community in responding to various social problems. Indonesia has a variety of the ethnic group, dan culture. According to the data from The Central Bureau of Statistic of Indonesia, the amount of variety of ethnic and culture in Indonesia about + 1.128, included therein is a Tolaki ethnic located in Southeast Sulawesi, Indonesia. Because of the study if the implementation if diversion located at Konawe District, Southeast Sulawesi-Indonesia, so, it is necessary to explain about the local wisdom of Konawe or Tolaki intended. According to cultural observers Basaula Tamburaka, the Tolaki indigenous communities in Konawe believe in Kalosara. Kalosara as the ancestral heritage that must be used to create a legal order dan social order in the interaction of the Tolaki indigenous communities. Kalosara consists of two words, "kalo" and "o'sara". "Kalo" as regalia (as the greatness custom objects of the Konawe Kingdom in the past) and "O'sara" means usual rules regarding prohibited things to do and things that are allowed to be performed in the family or individual. Kalosara as a symbol of the strengthening of the integration and solidarity of the Tolaki indigenous communities. In the various aspects of life, the Tolaki indigenous communities in Konawe, understand and interpretive that Kalosara as a symbol of customs which reflect the system or the social and cultural values, norms in the special rules that apply in their daily life. Through O'sara, the Tolaki indigenous communities are obedient and faithful to the decision of customary institutions whenever there're disagreement or dispute between individuals or families.

In the case of a criminal offence custom, then the Tolaki indigenous communities will bring kalosara to the victims (family) as a form of apology. If the victims (or her family) agree and accept the kalosara, the victims (or her family) then asking for a fine called peohala. The criminal offender must pay for some money as custom fine or peohala and all the requirement that need. Peohala intended as the custom settlement by paying the customary penalty by a person who has violated the customs values.
Thus, what is intended as a local wisdom in the Tolaki indigenous communities in Konawe is Kalosara and Peohala.

2. Method

This research review to two issues, firstly about how the implementation of diversion in handling criminal cases by the juvenile in Konawe District since 2014 until 2016. Secondly about the relation between diversion result with local wisdom in Konawe District. Sociolegal methodological is used in this research. Sociolegal studies are the study of the law by using the law-science approach and social sciences. Types of data are used primary data and secondary data. The secondary data obtained from the result of literature review related to the research material. The instrument of data collection by in-depth interviewing and study of documents. In this research, data analysis applied of quantitative and qualitative. This research was descriptive qualitative. Its held at Prosecutor Office in Konawe District Southeast Sulawesi, Indonesia. The data sources were acquired from data of criminal cases by children at The District Attorney's Office and The District Court of Konawe. An interview with public prosecutors, and local figure. The result of this research will be analysis used constructivism paradigm of Guba Lincoln. According to Guba Lincoln, constructivism paradigm in ontology perceived the compound reality and diversified based on the social experience, individual, local and specific (relativism). In methodologies, constructivism is dialectical or hermeneutical, construction resultant.

3. Findings and Discussion

3.1 The Data of Diversion Implementation in Handling Criminal Cases by Juvenile in Konawe District (Period 2014 Up To 2016).

The results of this research show that criminal cases by a juvenile (about 13 years old – 18 years old) occur in Konawe District. Here is the data on juvenile cases and its judge's decision. (1). In 2014 there are 6 cases consist of 3 theft cases, 1 fraud case, 1 case of sharp weapons, and 1 immoral case. From all that cases, there aren't diversion implementation because the cases occur before August of 2014. The child offender sentenced by the judges lighter than punishment for adults. Although there has been The Act Number 11 of 2012, the police, public prosecutor and the judges as the structure of law enforcement need some technical instructions for the implementation of diversion. (2). In 2015 there are 8 cases consist of 2 theft cases, 1 case of sharp weapons, and 5 immoral case. Here, there 3 diversion implementation for 3 immoral cases. The investigator, the public prosecutor as diversion facilitator but it does not find agreement between the offender (family) and the victims (family), then the cases must be punished by judges. (See, Put.No. 11, 12, 13/ Pid.Sus.Anak/2015 /PN.Unh Tg.11 Desember 2015). (3). In, 2016, there are 10 cases consist of 3 theft cases, 1 case of narcotics, and 6 immoral cases. Here, all cases make diversion implementation but only 1 immoral case success for diversion agreement in the prosecution step.

The content of diversion agreement is as follows: (1). The offender and his family agree to bring Kalosara to the victim's family as an apology and peace; (2). The offender (15 years old) and his parents agree to the fine as the custom pay which is called "Peohala" given to the victim's parents; (3). The offender regret his action dan promised wouldn't do it again. The result of the agreement stipulated in the agreement form diversion and shall be submitted by the direct supervisor of the responsible officials to the district court within legal jurisdiction within three days after the agreement was reached to acquire determination. The determination shall be conducted within 3 (three) days from the receipt diversion agreement. In this case, diversion succeeded in the prosecution then the prosecutors made a report of diversion implementation and applied for diversi determine to the District Court. Then, the prosecutor issuing the determination of termination of prosecution (See the resolution of termination of prosecution - SKPP No. Kep-24/R.3.14/Euh.3/05/2016, 10 May 2016). Jo The Designation letter of the chairman of the
Unaaha district court about Diversion Agreement No.07/Pid.Sus.anak/2016/PN.Unh, 26 April 2016). In this case, diversion done with peace and compensation essentially is the value of the local that must be supported by the responsible official and the society.

Table.1. The Judge’s Decision of Criminal Case by Juvenile in 2014
at Konawe District Southeast Sulawesi Province

| No | Case/Number of judge’s decision |
|----|--------------------------------|
| 1  | Ps.363-362 KUHP (Thieving)      |
| 1.1| Number of judge's decision: 34/Pid.B/2014/PN.Unh tg.12 Maret 2014: (Age of Juvenile 16 years old): imprisonment for 5 months |
| 1.2| Number of judge's decision: 41/Pid.B/2014/PN.Unh tgl.21 April 2014: (Age of Juvenile 17 years old): imprisonment for 3 months |
| 1.3| Number of judge’s decision: 57/Pid.B/2014/PN.Unh tgl.12 Mei 2014: (Age of Juvenile 16 years old): imprisonment for 3 months |
| 2  | Ps. 378, 372 KUHP (Deception)  |
| 2.1| Number of judge's decision: 65/Pid.B/2014/PN.Unh tgl. 20 Juni 2014: (Age of Juvenile 17 years old): imprisonment for 5 months |
| 3  | Ps. 1 Ayat (1) UU Drt.No. 12/1951 Jo.Ps. 55 (1) KUHP (the Sharp weapon ownership) |
| 3.1| Number of judge’s decision: 31/Pid.B/2014/PN.Unh tgl.12 Maret 2014: (Age of Juvenile 16 years old): imprisonment for 5 months |
| 4  | Ps. 81 of The Act No. 23 Tahun 2002 About the protection of children. |
| 4.1| Number of judge’s decision: 53/Pid.B/2014/PN.Unh tgl.05 Mei 2014: (Age of Juvenile 16 years old): imprisonment for 3 years and fine Rp.60.000.000 Subs. 6 months imprisonment |

Table.2. The Judge’s Decision of Criminal Case by Juvenile in 2015
at Konawe District Southeast Sulawesi Province

| No | Case/Number of judge’s decision |
|----|--------------------------------|
| 1  | Ps.363-362 KUHP (Thieving)      |
| 1.1| Number of judge's decision: 09/Pid.Sus.Anak/2015/PN.Unh tgl.18 November 2015 (Age of Juvenile 18 years old): imprisonment for 9 months |
| 1.2| Number of judge's decision: 15/Pid.Sus-Anak/2016/PN.Unh Tanggal 15 Desember 2016 (Age of Juvenile 17 years old): imprisonment for 1 year |
| 2  | Ps. 81, 82 of The Act No. 23 Tahun 2002 About the protection of children. |
| 2.1| Number of judge’s decision: 01/ Pid.Sus.Anak/2015/PN.Unh Tg.25 Maret 2015 (Age of Juvenile 17 years old): imprisonment for 3 years and fine Rp.60.000.000 Subs. 3 months for job training in the social department. |
| 2.2| Number of judge’s decision: 11/ Pid.Sus.Anak/2015/PN.Unh Tg.11 Desember 2015 (Age of Juvenile 17 years old): imprisonment for 1 year and fine Rp.60.000.000 Subs. 1 month for job training in the social department. |
| 2.3| Number of judge’s decision: 12/ Pid.Sus.Anak/2015/PN.Unh Tg.11 Desember 2015 (Age of Juvenile 17 years old): imprisonment for 1 year and fine Rp.60.000.000 Subs. 4 months for job training in the social department. |
| 2.4| Number of judge’s decision: 13/ Pid.Sus.Anak/2015/PN.Unh Tg.11 Desember 2015 (Age of Juvenile 17 years old): imprisonment for 1 year and fine Rp.60.000.000 Subs. 6 months and fine Rp.60.000.000 |
Subs. 4 months for job training in the social department.

2.5 Number of judge’s decision: 16/Pid.Sus.Anak/2015/PN.Unh Tg.28 Desember 2015 (Age of Juvenile 17 years old): imprisonment for 1 year and fine Rp.60.000.000 Subs. 4 months for job training in the social department.

3 Ps. 1 Ayat (1) UU Drt.Nomor 12/1951 Jo.Ps. 55 (1) KUHP: (the Sharp weapon ownership)

3.1 Number of judge’s decision: 10/Pid.Sus-Anak/2015/PN.Unh, 19 November 2015. (Age of Juvenile 17 years old): imprisonment for 2 months

Table 3. The Judge's Decision in Criminal Case by Juvenile in 2016
at Konawe District Southeast Sulawesi Province

| No | Case/Number of judge’s decision |
|----|---------------------------------|
| 1  | Ps.363-362 KUHP (Thieving)      |
| 1.1| Number of judge’s decision: 08/Pid.Sus.Anak/2016/PN.Unh, 14 September 2016. (Age of Juvenile 13 years old): the action without punishment to be guided by their parents. |
| 1.2| Number of judge’s decision: 07/Pid.Sus-Anak/2016/PN.Unh, 14 September 2016. (Age of Juvenile 16 years old): imprisonment for 4 months |
| 1.3| Number of judge’s decision: 05/Pid.Sus-Anak/2016/PN.Unh, 01 September 2016. (Age of Juvenile 16 years old): imprisonment for 4 months |
| 2  | Ps. 81, 82 of The Act No. 23 Tahun 2002 About the protection of children. |
| 2.1| The Determination Letter of termination of prosecution (SKPP) No. Kep-24/R.3.14/Euh.3/05/2016 tanggal 10 Mei 2016 Jo The Designation letter of the chairman of the Unaaha district court about Diversion Agreement No.07/Pid.Sus.anak/2016/PN.Unh, 26 April 2016 (Age of Juvenile 15 years old) |
| 2.2| Number of judge’s decision: 03/ Pid.Sus.Anak/2016/PN.Unh, 2016 (Age of Juvenile 16 years old): imprisonment for 1 year and 6 months, AND Fine Rp.60.000.000 Subs. 2 months for job training in the social department. |
| 2.3| Number of judge’s decision: 09/ Pid.Sus.Anak/2016/PN.Unh 2016 (Age of Juvenile 13 years old): the action without punishment to be guided by their parents. |
| 2.4| Number of judge’s decision: 02/ Pid.Sus.Anak/2016/PN.Unh 2016 (Age of Juvenile 18 years old): imprisonment for 2 years AND Fine Rp.60.000.000 Subs. 2 months for job training in the social department. |
| 2.5| Number of judge’s decision: 10/ Pid.Sus.Anak/2016/PN.Unh 2016 (Age of Juvenile 17 years old): imprisonment for 1 year AND Fine Rp.60.000.000 Subs. 3 month for job training in the social department. |
| 3  | Ps. 127 of The Act No. 35 Tahun 2009 About Narcotics. |
| 3.1| Number of judge’s decision: 04/ Pid.Sus.Anak/2016/PN.Unh. (Age of Juvenile 17 years old): imprisonment for 4 months. |

3.2 Relation Between Diversion Result With Kalosara And Peohala As Local Wisdom

The relation between diversion result with kalosara dan Peohala as the local wisdom of the Konawe People is as follows. (1) The diversion agreement only can be reached (in investigation step,
prosecution step or the court proceeding) if the victim's family accept the apologies from the offender and his family. (2) For the Konawe people, the apologies which asked by the offender must be done by bringing the Kalosara and pay the customary agreed. (3) When the family of the victim receive kalosara and peohala, then based on the diversion agreement, the case will be terminated. So, the child abuser does not become subject to imprisonment but handing back to parents to be guided and supervised. (4) When the diversion agreement was reached between the parties, but the child abuser and his family deny the diversion agreement result, the diversion will fall by itself and do not apply. So that, the child abuser will still be processed to the trial and will be punished by the judge. (5) If diversion has been attempted in every level of the investigation, prosecution and the court proceeding but the victims or her family don't agree dan don't want to receive the kalosara and peohala. Then the case will be continued to the court proceeding until the child abuser gets punishment or measured by the judge. (6) The relation between diversion implementation and local wisdom is the implementation of local wise values in line with restorative justice values. In constructivism paradigm, this association constructed based on experiential reality to make resultant together, following the context of time and space.

4. Conclusion

It can be concluded that The Juvenile Justice Act No.11 of 2012 has set an obligation to give priority to children through Diversion. Diversion as an out of the court settlement must be implemented by the law enforcement officers (Investigator, Public Prosecutor and Judges) in the criminal cases by a juvenile (12 years old until 18 years old). Diversion shall be implemented in the case of criminal offences committed: (a). Punishable by imprisonment under the 7 (seven) years, and; (b). Is not a repetition of the criminal act. There are two forms of the Diversion result: (1). Diversion successfully reached an agreement and executed as specified by the parties; (2). Diversion was implemented but did not reach an agreement. The success of the implementation of diversion in the Konawe people is determined by the values of the local wisdom, for example Kalosara and Peohala.

5. References

[1] Samekto A 2015 Pergeseran Pemikiran Pemikiran Hukum dari Era Yunani Menuju Postmodernisme. Jakarta, Konstitusi Press.
[2] Morgan DL 2007 Methodological Implications of Combining Qualitative and Quantitative Methods. *J. Mix. Methods Res.* 1 48–76.
[3] Fazlıoğulları O 2012 Scientific Research Paradigms in Social Sciences *. Int. J. Educ. Policies.* 6 (1) 41–55.
[4] Wiyono R 2016 Sistem peradilan pidana anak di Indonesia. Jakarta, Sinar Grafika.
[5] Wahyudi S 2011 Implementasi Ide Diversi dalam pembaruan system peradilan anak di Indonesia, *Jogjakarta, Genta Publ.*
[6] Yunus Y 2013 Analisis Konsep Restorative Justice Melalui Sistem Diversi Dalam Sistem Peradilan Pidana Anak Di Indonesia. *J. Rechts Vinding Media Pembin. Huk. Nas.* 2(2) 231–245.
[7] Mulyadi L 2013 Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori dan Praktik. *Yust. J. Huk.* 2(1).
[8] Prabawati S, Natangsa Surbakti 2016 Peranan Dinas Kehutanan Dalam Menanggulangi Tindak Pidana Illegal Logging (Studi Dinas Kehutanan Dan Perkebunan Kabupaten Wonogiri). Universitas Muhammadiyah Surakarta.
[9] Zaidan MA 2015 Menuju pembaruan hukum pidana. Jakarta, Sinar Grafika.
[10] Budimansyah D 2015 Fundamental sociological symptoms as a source of occurrence of turbulence in Indonesian society during the post-reform. In *1st UPI International Conference on Sociology Education*, pp. 63–66.
[11] Saleh NA 2015 Makna Simbolik Kalosara Dalam Kehidupan Sosial Orang Tolaki. *Walasuji*. 6 (1) 99–112.
[12] Agustina T 2012 Pelaksanaan Penjatuhan Sanksi Adat Peohala Terhadap Pelanggaran Hukum Adat Kesusilaan Tolaki di Kota Kendari. Jakarta: Fakultas Hukum Program Pasca Sarjana Sistem Peradilan Pidana.
[13] Irianto S 2009 Metode Peneltian Hukum: Konstelasi dan Refleksi. Jakarta, Yayasan Pustaka Obor Indonesia.
[14] Neuman LW 2002 Social research methods: Qualitative and quantitative approaches. Allyn & Bacon Publishing.