

# THE APPLICATION OF RESTORATIVE JUSTICE SYSTEM THROUGH THE DIVERSION OF CHILDREN IN CONFLICT WITH LAWS IN CENTRAL JAVA POLDA (REGIONAL POLICE OF THE REPUBLIC OF INDONESIA)

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# THE APPLICATION OF RESTORATIVE JUSTICE SYSTEM THROUGH THE DIVERSION OF CHILDREN IN CONFLICT WITH LAWS IN CENTRAL JAVA POLDA (REGIONAL POLICE OF THE REPUBLIC OF INDONESIA)

By

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***Abstract**---The birth of Law Number 11 of 2012 concerning Juvenile Justice System provides A new hope in the protection of children, namely the existence of strict arrangements regarding Restorative Justice and Diversion to avoid and keep children away from a judicial process. Restorative Justice through the Diversion process, seeks to place all parties involved in a particular criminal act together to overcome the problem and create an obligation to make things better by involving victims, children and the community in finding solutions to improve, reconcile and reassure a heart not basing on retaliation and returns the child back to the family environment properly. The main purpose of Diversion is to free children from the trauma of judiciary but still found obstacles in the implementation, either regulatory, institutional and infrastructure. The results of the research on the application of diversion at the police level still experienced many failures thus children end up having to deal with the Criminal Justice System and become prisoners that can damage the future of children.*

**Keywords**--- *Restorative Justice, Diversion, ABH.*

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## Introduction

Tony F. Marshall, as quoted by Paulus Hadi Suprpto explained that "Restorative Justice is a process where by parties with a stake in a specific offense collectively resolves how to deal with the aftermath of the offence and its implications for the future." Restorative is a process in which all parties involved in a particular crime jointly solve the problem of how to deal with the consequences in the future. British criminologist Tony F. Marshall in his writings suggests that the definition of restorative justice is:

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<sup>3</sup> *restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the after math of the offence and its implications for the future" (restorative justice adalah sebuah proses dimana semua pihak yang berkepentingan dalam pelanggaran tertentu bertemu bersama untuk menyelesaikan secara bersama-sama bagaimana menyelesaikan akibat dari pelanggaran tersebut demi kepentingan masa depan).*

In the history of modern law the application of restorative justice begins with the implementation of a settlement program outside traditional justice carried out by the public called victim offender mediation, which began in the 1970s in Canada. This program was initially implemented as an alternative measure in punishing child criminals, where before the sentence was carried out the perpetrator and the victim were allowed to meet to prepare a sentence proposal which became one of the considerations of many judges' considerations. The program assumes that the offender will benefit of this stage and victims will also receive special attention and benefits so as to reduce the number of recidivists among child offenders and increase the number of children responsible for giving compensation to the victims. The implementation of the program results in a higher level of satisfaction for victims and perpetrators than when they went through the traditional justice process.

<sup>7</sup> Restorative justice is the resolution of a criminal offense by involving the perpetrators, victims, the families of the perpetrators / victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation. Whereas diversion (which is part of the principle of restorative justice) <sup>14</sup> is the transfer of the settlement of a child case from the criminal justice process to a process outside of criminal justice.

Commitments to implement restorative justice, especially in the case of perpetrators are children, must be based on respect for children as entrusted with honor. Moreover, Indonesia <sup>15</sup> is a state party to the Convention on the Rights of the Child (Convention on the Rights of the Child). <sup>21</sup> As a state party, Indonesia has an obligation to provide special protection for children in conflict with the law.

<sup>6</sup> The implementation of restorative justice, especially diversion, agreement between the perpetrator and the victim becomes the most important part of the process of settlement of the case of the Child. Because with the agreement, it has become the main capital of diversion. If the victim's family does not forgive the perpetrator and still wants the perpetrator to be prosecuted, the desire for diversion will be lost. However, on the other hand the offender must also honestly admit his mistakes and be willing to pay damages to the victim. "If an agreement does not occur, restorative justice fails".

The desire to always punish criminals with imprisonment not only makes prisons full but also impedes the implementation of Restorative Justice, especially for cases of bad children. Even in the event that the perpetrators of the crime are children, the punitive culture that thrives in the community will hinder the application of diversion (which is part of the principles of Restorative Justice). <sup>28</sup> The culture of some Indonesian people who tend to always want to punish it does not yet support the implementation of restorative justice, including diversion. In fact, punishing the perpetrators of minors let alone sending them to prison for a long time will not completely solve the problem at hand. Community culture according to the writer does not support the implementation of restorative justice, because some people still think retributive or punishment. Whereas law enforcement officers will find it easier to understand and carry out restorative justice because it is regulated in legislation, but the culture of law

enforcement officials is usually normative so it is difficult to apply the principles of Restorative Justice, especially diversier cases of bad children. Even in the event that the perpetrators of the crime are children, the punitive culture that thrives in the community will hinder the application of diversion (which is part of the principles of Restorative Justice).

## Research Method

### Type of Research

According to Peter Mahmud legal research is conducted to find solutions to legal issues that arise (know how) in law. The results achieved are to provide a prescription of what should be on the issue raised. According to Bernard Arief Sidharta normative legal research is a type of research that is commonly carried out in legal science development activities which in the West is also known as Legal Dogmatics, a science whose scientific activities include inventorying, describing, interpreting and systematizing and also evaluating the whole positive law (authoritative text) prevailing in a particular society or country—by concurring concepts (notions), categories=categories, theories, classifications, and methods specially formed and developed to carry out all these activities—all of which are directed to prepare efforts to find juridical solutions to legal problems (micro or macro) that may occur in society. Arief went on to say that the core problem in Legal Studies is determining what would become the law for certain situations, which means determining what are the specific rights and obligations of the parties based on positive law in force. Johnny Ibrahim mentioned normative legal research a scientific research procedure to find the truth based on legal scientific logic from the normative side. This research uses several approaches, namely the sociological juridical approach and the statute approach which is carried out by examining the laws and regulations relating to the legal issues under study namely concerning the Criminal Justice System for Children, also using the Conceptual Approach which is the legal concept of Restorative Justice and the comparative approach to law in various countries.

### Research Data Type

Research data sources consist of primary data and secondary data. For secondary data consists of:

- a. Primary legal sources (Primary Sources or authorities), which are binding legal materials consisting of: Laws, Government Regulations, Ministerial Decrees; Jurisprudence; Other Legal Materials such as the Criminal Code, Criminal Procedure Code.
- b. Secondary legal materials (Secondary Sources or authorities), which provide an explanation of primary legal materials such as the draft legislation, scientific work from the legal community, research results and court decisions.

### Data Collection Technique

Data collection was carried out with documentation and interview studies. The documentation study was carried out by searching through the reseach library, of primary and secondary data sources. Interviews are used based on consideration that there are several questions that must be answered by respondents carefully and considerably based

on references and appropriateness both from references sourced from the literature (laws or other legal sources) and based on conscience and honesty considerations.

Other data collection methods used are observations made on a non-participation basis for “*watching and listening to other persons behaviour over time without manipulating or controlling it and recording finding in ways that permit some degree of analytical interpretation*”, in order to capture the natural social context of real human behavior; important symptoms or events, which affect social relations between people whose behavior is observed; reality from the point of view of life or the philosophy of life of the parties observed and identification of the regularity of behavior or patterns.

### Data Analysis

Data obtained through interviews, observations and documentation studies are then analyzed qualitatively by describing descriptively-analysis based on a juridical-systematic analysis supplemented with empirical analysis and comparative analysis.

### Results and Discussion

#### Implementation of the Restorative Justice System through Diversion of children in conflict with the law at the police level

The criminal justice system always discusses the responsibility of the offender in the sense of ensuring the offender gets the punishment they deserve. In the process of ensuring perpetrators to understand the consequences of their actions or empathize victims. Instead requires the offender to take care of themselves. Actors are prevented from acknowledging their responsibilities and given the opportunity to act on these responsibilities concretely. The stereotypical "neutralization strategy" and rationalization that violators often use to distance themselves from people they hurt is never opposed. Unfortunately, then, the feeling of alienation from the community felt by many perpetrators only increased during the legal process and ended with imprisonment (criminal). So for various reasons the legal process tends to prevent responsibility and empathy on the part of the perpetrators. Against children the criminal process is seen as a tragedy, because since the criminal justice process is moving, children experience considerable psychological pressure related to verbal violence, no legal protection is also the position of children who are considered equal to adults.

The birth of Law Number 11 of 2012 concerning the Child Criminal Justice System provides new hope in the protection of children, namely the existence of strict arrangements regarding Restorative and Diversion Justice to avoid and keep children away from the judicial process.

*This restorative lens or philosophy might be described as having five key elements or principles: Restorative justice...*

- 1. Focuses on harms and consequent needs.(victims', but also communities' and offenders')*
- 2. Addresses obligations resulting from those harms. (offenders' but also families', communities' and society's)*
- 3. Uses inclusive, collaborative processes.*
- 4. Involves those with a legitimate stake in the situation. (victims, offenders, families, community members, society)*



5. Seeks to put right the wrongs.

Treatment of Children in conflict with the law in accordance with the provisions set forth in Article 6 UUSPPA, which regulates the goal of diversion is to: a. achieving peace between victims and children; b. settle the Children case outside the judicial process; c. prevent children from deprivation of independence; d. encourage the community to participate; and e. instill a sense of responsibility to the child.

Based on the model of handling children dealing with law as regulated in Law Number 11 of 2012 concerning the Juvenile Justice System, it can be seen that the handling of children in conflict with the law begins with a report from the community which is then followed up by the police by conducting an initial review of the community report with a case title. Furthermore, the case will continue with the legal process if the report or complaint from the public constitutes a criminal act by issuing an investigation warrant by the police. With the issuance of the investigation warrant, the case title begins and after sufficient evidence is found, it continues with the investigation process.

If during the investigation process the suspect is an adult, then Phase I file transfer will be done, namely sending the case file to the prosecutor, then the suspect can be detained or not detained. Meanwhile, if the suspect is still a child, then the investigator will contact BAPAS to conduct research on the acts that have been carried out by the ABH perpetrators whether or not diversion can be carried out, then BAPAS with the investigator will bring together the ABH perpetrators with the victims and the victim's family to be attempted for diversion through a deal. If an agreement is reached either with compensation or without compensation, the investigator will stop the process of examining the case through diversion, but if there is no agreement with the victim or the victim's family either with compensation or without compensation, then there will be no diversion, so the investigator will continue the case process by delegating the case file to the Public Prosecutor.

The parties involved in the model of handling Children in Conflict with the Law through Diversion in accordance with Law Number 11 of 2012 concerning the Child Criminal Justice System are Investigators, ABH perpetrators and the families of ABH perpetrators, victims, families of victims and BAPAS. The role of child investigators in the process of childrendiversion in conflict with the law is very important so that diversion can be achieved, while BAPAS also greatly contributes in terms of conducting research and studies on criminal acts that have been carried out by perpetrators of ABH so that diversion efforts can be made, then BAPAS will mediate by bringing together ABH Actors/ABH perpetrators 'families with victims / victims' families so as to create mutual understanding and mutual acceptance. BAPAS is also expected to be very instrumental in determining the technical issues of providing compensation and or the amount of compensation so as not to burden ABH perpetrators and victims as well as prioritizing the future of children.

The model of handling children in conflict with the law as stipulated in Law Number 11 of 2012 concerning the Child Criminal Justice System aims to achieve peace between victims and ABH perpetrators by resolving cases of children who are in conflict with the law outside the judicial process and avoiding children from deprivation, independence, and encourage the community to participate and instill a sense of responsibility to children. Based on the results of research on the cases of Children Who Are Confronting the Law in the Central Java Regional Police in

2016, there were 251 cases of children, then of the 228 cases of Children Conflict with the Law, 42 cases of children were resolved through Diversion or by 16.73%, thus the another 167 cases of children in conflict with the law still continue the legal process in the form of investigations and files have been declared complete (P.21).

Next, the researcher found the fact that the failure of Diversion towards Children Who Are Confronting the Law was caused by several factors, namely :

- a. The agreement between the victim or the victim's family and the ABH perpetrators or the families of ABH perpetrators was not reached because the Diversion efforts carried out by the Investigator were not responded positively by the victims or the families of the victims because they wanted a legal process to be carried out.
- b. Lack of support from the community, because they do not understand the substance regulated in the juvenile justice system that has explicitly regulated and prioritized diversion.
- c. The unavailability of adequate and representative facilities and infrastructure in the police to facilitate those who carry out diversion efforts
- d. There is no uniformity in the version of the implementation of diversion by child investigators who are in conflict with the law because there is no S.O.P (standard operational procedure) established by the police in accordance with the criminal justice system of juvenile justice.
- e. Investigators are still passive and formalistic and there is no initiative in carrying out Diversion efforts towards ABH actors.

**Reconstruction of the Restorative Justice System approach to children in conflict with the law, is associated with the value of justice**

The concept of Restorative Justice is expected to be able to touch several aspects for children who are in conflict with the law, namely prevention, treatment, rehabilitation and reintegration. However, it turns out that not all parties can carry out these four aspects with the consideration that more and more involved in dealing directly with children who are in conflict with the law can provide technical impacts and obstacles. The public and law enforcers need to get a fresh perspective on the issue of ABH in order to be able to engage in efforts to reduce the number of children dealing with the law into channels and constructive steps in the physical and psychological development of children, with:

1. Prevent children in the state of legal system and give priority to an informal approach.
2. Expect a wiser solution to the concept of Diversion and Restorative Justice.
3. Requires separation of registration of children's case files at the Police and Prosecutors' Office.
4. The need for the provision of a special detention room for children and a courtroom for children and prosecutors who are certified to specifically deal with child problems.

It should be noted that in fact restorative justice is not only a principle but a philosophy namely a philosophy in the judicial process and also a philosophy of justice. Restorative justice is said to be a philosophy of justice because it is the basis in the preparation of judicial institutions. So it can be interpreted that restorative justice is a series of judicial processes that basically aims to restore (recover) the losses suffered by victims of crime. Restorative Justice

in criminal law must aim to restore the situation as before the crime. When someone violates the law, the situation will change. Thus that is where the role of law is to protect the rights of every victim of crime.

In this framework, the end of restorative justice is to protect and pay attention to justice for victims. The solution also characterizes the kinship of togetherness, peace, compassion by involving all stakeholders both victims, perpetrators, victims' families and perpetrators, elements of society for the creation of peace and welfare of the community, things are clearly not much different even exactly with customary law that is still alive and developing in the majority Indonesian people who prioritize the balance / recovery of the original situation as before the occurrence of crime. Thus, this is different from the old paradigm in the criminal justice system which is already quite satisfied by pursuing retributive justice/retaliation which in fact does not solve the problem and neglects justice for victims which must take precedence.

Law on the Criminal Justice System for Children (UUSPPA) Number 11 of 2012 provides a definition of restorative justice in Article 1 paragraph 6 reads: Restorative Justice is the settlement of criminal cases involving the perpetrators, victims, families of the perpetrators/victims, and other parties related to jointly seek a just solution by emphasizing restoration to its original state, and not retaliation.

Bagir Manan, in his writings describes the substance of "restorative justice" which contains the principles, among others: "Building joint participation between perpetrators, victims, and community groups completing an event or criminal act. Placing the perpetrators, victims, and the community as "stakeholders" who work together and directly try to find a solution considered to be fair for all parties (win-win solutions)". The principle of restorative justice which is basically an attempt to divert from the criminal justice process to the settlement by deliberation, cannot be applied to all types or levels of crime. However, in certain criminal acts, the application of this principle may be said to be far more effective than conventional criminal justice processes.

The principle of restorative justice in Indonesia has begun to be applied to the juvenile justice system. Through restorative justice, a crime is considered as an illness that needs to be cured, not just an unlawful act. Retributive justice theory is able to accommodate the understanding that criminal acts are only a violation of the law. Meanwhile, if it is considered a disease that must be cured, then the treatment must be holistic, comprehensive, involving all elements touched by the crime. In this case, restorative justice is an approach that can be used.

In line with that is the theory of justice from John Rawls and also the justice adopted by Pancasila. Rawls sees that the main interests of justice are (1) guaranteeing the stability of human life, and (2) the balance between personal life and shared life. John Rawl's thoughts on justice are social justice ideas that can be applied in the process of law enforcement. In the process of law enforcement for an act of crime, certainly the root cause of the crime itself must be seen whether it is influenced by an unjust social structure. In such a case certainly the new law enforcement action can be said to be fair if it considers social conditions and structure.

With regard to the application of Restorative Justice through mediation, the writer conveys the following ideas to carry out reconstruction:

Take a closer look in UUSPPA, Article 7 paragraph (1) which reads, "At the level of investigation, prosecution and examination of cases of children in district courts must put first Diversion." This article provides a limitation that the diversion obligation is only limited to the obligation to seek it, but it is not a requirement that must be carried out



optimally. Article 7 Paragraph (2) reads, Diversion as referred to in paragraph (1) is carried out in the case of a criminal offense committed: a. threatened with imprisonment of under 7 (seven) years; and b. is not a repeat of a criminal offense.

This article provides a limitation that the obligation of diversion is only for criminal cases that have a criminal threat of less than 7 (seven) years, meaning that criminal cases that are threatened with 7 (seven) years in prison or more, and / or constitute a repeat of a criminal act, are not required to be offered versioned attempt.

A child who commits a crime with the threat of imprisonment of 7 (seven) years or more, or repeats a crime, means that the child actually needs more comprehensive treatment. In this case the version is precisely appropriate for use by the child concerned. Based on the above argument, the limitation on diversion based on the threat of 7 (seven) years imprisonment becomes irrelevant.

Article 9 paragraph (2) reads: The diversion agreement must obtain the consent of the victim and / or the victim's family and the willingness of the child and his family, except for: a. Criminal acts in the form of violations, b. Minor criminal acts, c. Criminal acts without victims, and d. The value of the loss of the victim is not more than the local provincial minimum wage.

Article 9 paragraph (2) severely injures the concept of restorative justice, because in restorative justice the diversion method is explained about the involvement between the perpetrator, the victim, and the victim's family and the perpetrator's family. However, what is mentioned in Article 9 paragraph (2) of the UUSPPA would be to eliminate the existence of the victim in the event of a crime in the form of a violation, a minor crime, a crime without a victim and / or a crime that the victim's loss is not more than the minimum rupiah value of the local province. Because without involving the participation or inclusion of victims in the types of criminal acts as determined in Article 9 paragraph (2) of the UUSPPA, the position of the victim who should be protected based on restorative justice is harmed..

## Conclusion

The principle of restorative justice which is basically an attempt to divert from the criminal justice process to the settlement by deliberation, cannot be applied to all types or levels of crime. However, in certain criminal acts, the application of this principle may be said to be far more effective than conventional criminal justice processes. The principle of restorative justice in Indonesia has begun to be applied to the juvenile justice system. Through restorative justice, a crime is considered as an illness that needs to be cured, not just an unlawful act. Retributive justice theory is able to accommodate the understanding that criminal acts are only a violation of the law. Meanwhile, if it is considered a disease that must be cured, then the treatment must be holistic, comprehensive, involving all elements touched by the crime. In this case, restorative justice is an approach that can be used.

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