

# Restorative Justice As An Alternative To Resolving Criminal Cases Committed By Children In Conflict With The Law

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## Abstract.

*Child protection in the criminal justice system for children, in conflict with the law in accordance with Law Number 11 of 2012 concerning the Criminal Justice System for children Crimes committed by children, is legal protection for children at the investigation, prosecution, and trial stages. The Restorative Justice approach prioritizes improving the relationship between the victim and the perpetrator of the crime. Law No. 11 of 2012 Article 9 paragraphs (1) and (2) regulate the pursuit of diversion in paragraph (1), investigators, prosecutors, and judges must consider; the category of a criminal offence, the age of the child, the results of community research from tapas; and the support of the family environment and society. Paragraph (2) Diversion agreements must obtain the consent of the victim and/or the victim's family and the willingness of the child and his/her family, except for criminal offences in the form of violations, minor criminal offences, victimless criminal offences or the value of the victim's loss is not more than the value of the minimum wage of the local provision. The forms of Diversion agreements, among others, Peace with or without compensation; handover back to parents/guardians participation in education or training in educational institutions or LPKS for a maximum of 3 (three) months; or community service.*

**Keywords:** Restorative Justice and Children in conflict with the law.

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## I. INTRODUCTION

The development of progress or modernization means that every country adjusts to modernization. Of course, in that case, it positively and negatively impacts every current progress. One of the negative impacts that can be caused by progress is the increasing moral crisis in society which has the potential for law violations in various forms. The direction of legal policy aims to make the law a rule that protects every citizen's rights. Along with developments, new thinking is needed regarding the future legal policy direction. According to Mardjono Reksodiputro, the criminal justice system is a system in society to tackle the problem of crime, aimed at controlling crime so that it is within the limits of tolerance and resolving most reports or complaints from people who are victims of crime by submitting criminals to a court session to be found guilty and receive punishment.

It also prevents victims of crime and prevents perpetrators from repeating their crimes. Children are a gift and mandate from God Almighty that must be taken care of properly in their growth and development into adult humans, children also have dignity as whole human beings who need special protection and attention so that children can grow and develop properly and have quality as the next generation of the nation. Protecting children's rights has received little attention from various parties, including concrete steps to protect children's rights. Likewise, the state, adults or even their parents violate efforts to protect children's rights. Children in such conditions are called children in conflict with the law, which in legal practice in Indonesia is used the term Children in Conflict with the Law, as for children in conflict with the law are those who are related to the judicial process, with the classification:

1. Children as witnesses;
2. Children as victims; and
3. The child as a perpetrator.

## II. METHODS

The method used in this journal is a qualitative descriptive method. This method is used to describe the conditions or situations that occur. The data used in this journal are the results of interviews and observations. Interviews were conducted with students and lecturers who participated in the socialization of

legal aid institutions at Abdurachman Saleh University Situbondo. Observations were made of the socialization process of legal aid institutions at Universitas Abdurachman Saleh Situbondo.

### III. RESULT AND DISCUSSION

The concept of restorative justice is resolving violations of the law by bringing victims and perpetrators (suspects) together to sit in a meeting to talk together.<sup>5</sup> Albert Eglash introduced the general term of the therapeutic approach by mentioning the term Restorative Justice. In his extensive writing on Reparation, he said that restorative justice is an alternative restitutive approach to retributive justice and rehabilitative justice approaches. The development of the restorative approach concept was also influenced by the German system of public representative bodies that spread throughout Europe after the fall of the Romans and the judicial system used by Indians who lived in the Hindus river valley in ancient times, such as the Vedic civilization, The Vedic civilization, which is a system of problem-solving through sanctioning the wrongdoer to atone for his sins or compensate for losses or pay debts so that the offender can be forgiven, includes the influence of Buddhist, Taoist, and Confucian traditions that have blended with western cultural influences now found in parts of North Asia. <sup>6</sup> Mark M. Lanier and Stuart Henry explain that the concept of restorative approaches has different sources, such as those from Anglo-Saxon restitution practices in the first century, Native American and Aboriginal justice, Mennonite activism, victims' movements, abolitionist and peace-making criminology, and ideas about reintegrative shaming.<sup>7</sup>

Definition of Restorative Justice according to experts:

1. Tony Marshall,

*"Restorative justice is a process where all parties with a stake in a particular offense come together to resolve collectively how to deal with aftermath of the offense and its implications for the future"*

2. Umbreit,

"Restorative Justice is a victim-centred response to crime that allows the victims, the offender, their families, and representatives of the community to address the harm caused by the crime".<sup>9</sup>

3. Sarre,

*"Restorative Justice is concerned with rebuilding relationship after an offence, rather driving a wedge between offenders and their communities, which is the hallmark of modern criminal justice systems"*

4. Undang-Undang,

Law No. 11/2012 article 1, paragraph 6 explains that Restorative Justice is the resolution of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to the original state and not retaliation.

Some universally applicable principles inherent in the concept of a restorative approach in resolving criminal offences include:<sup>11</sup>

1. Principle of Due Process

In every country's criminal justice system, the suspect is always given the right to know in advance about procedural matters.

Of certain procedural safeguards when faced with prosecution or punishment.

2. Equal protection

The process of resolving criminal offences through a restorative approach. Justice must arise from a process of mutual understanding of the meaning and purpose of justice, regardless of ethnicity, gender, religion, national origin and other social positions.

3. Victims' Rights

In solving a problem through a restorative approach, victims' rights need attention because victims are interested parties who should have a (legal) position in the settlement process.

4. Proportionality

The idea of fairness in the restorative system is based on consensus agreements that provide alternatives to solving problems. At the same time, the notion of proportionality is related to the scope of similarity of suffering sanctions that must be caused to offenders who commit violations. In criminal justice,

in general, proportionality is considered fulfilled when it meets a sense of retributive justice (reciprocal balance between punishment and reward).

#### 5. Presumption of Innocence

In criminal justice, in general, the state has the burden of proof to prove the suspect's guilt. Since and until this burden of proof is carried out, the suspect must be presumed innocent. This is not the case in the restorative process, which requires an admission of guilt as a condition for continuing the circle of resolution.<sup>12</sup>

#### 6. Right to Consultation or Legal Counsel

In restorative processes, advocates or legal advisors have a very strategic role to play in building the ability of offenders to protect their rights vis a vis the assistance of legal counsel. In all stages of the informal restorative process, the suspect can be informed through the assistance of legal counsel of their rights and obligations, which can be considered in making decisions.

### 3. CONCEPT OF CRIMINAL OFFENSE

The term criminal offence comes from the Dutch language, namely *strafbaar feit*. *strafbaar feit* comes from 2 forms of words, namely *strafbaar* and *feit*. *Straaf* means punishable, and *feit* in Dutch means part of reality so literally, the word *strafbaar feit* means part of reality that can be punished.

#### 1. Simons

Simons argues that *strafbaarfeit* is an unlawful act committed intentionally or unintentionally by someone who can be held responsible and, by law, has been declared a punishable act.<sup>13</sup> According to Evi Hartanti, the reason Simons formulated *strafbaarfeit* as above is because:<sup>14</sup>

- 1) For the existence of a *strafbaarfeit*, it is required that there is an act that is prohibited or required by law where the violation of such a prohibition or obligation has been declared a punishable act.
- 2) For such an act to be punishable, it must fulfil all the elements of the offence as formulated by law;
- 3) Every *strafbaarfeit* as a violation of a statutory prohibition or obligation is, in essence, an unlawful act or an *onrechtmatige handling*.

#### 2. Pompe

Pompe said that *strafbaarfeith* can theoretically be formulated as a violation of norms or disruption of legal order that has been intentionally or unintentionally committed by an offender, where the imposition of punishment on the offender is important for the maintenance of legal order and the guarantee of public interests.<sup>15</sup>

#### 3. E. Utrecht

Utrecht translates *strafbaarfeit* with the term criminal event, which he often calls offence because the event is a *Handelen* or does-positive or *nalaten*-negative negligence and its consequences (the situation caused by the act or negligence). A criminal event is a legal event (*rechtsfeit*), namely a social event that has consequences regulated by law.<sup>16</sup>

#### 4. Moeljatno

According to Moeljatno, criminal acts are "acts prohibited by a rule of law which prohibitions are accompanied by threats (sanctions) in the form of certain punishments, for those who violate the prohibition. The term criminal act is more appropriate for the following reasons:<sup>17</sup>

- 1) The prohibited act is the action (human action, i.e. an event or situation caused by a person's behaviour), meaning that the prohibition is aimed at the action. Meanwhile, the threat of punishment is aimed at the person.
- 2) There is a close relationship between the prohibition (aimed at the act) and the punishment (aimed at the person). Therefore, the act (a situation or event caused by the person violating the prohibition) and the person who caused the act are also closely related. To express this close relationship, it is more appropriate to use the term criminal act, an abstract notion that refers to two concrete conditions, namely first, the existence of a certain event (action); and second, the existence of a person who acts or who causes the event.

#### 3) Van Hamel

Van Hamel formulates it as follows: *strafbaar feit* is a person's behaviour (*menselijke gedraging*) formulated in the *wet*, which is against the law, which should be punished (*strafwaardig*) and done with fault.<sup>18</sup>

## Elements of a Crime

### 1. Subjective Elements

#### 1) Willfulness or negligence (dolus or Culpa)

Willfulness in criminal law is part of guilt. The willfulness of the perpetrator has a closer psychological relationship to an act (which is prohibited) than negligence (culpa). Therefore, the punishment for an offence is much more severe if there is intentionality than with negligence. Even certain acts, if committed with negligence, do not constitute criminal acts, which if they are committed intentionally, they constitute a crime such as embezzlement (Article 372 of the Criminal Code). Damaging goods (Article 406 of the Criminal Code) and so on.

2) Intent or Voornemen in an attempt or pogging as referred to in Article 53 paragraph 1 of the Criminal Code.

3) Various intentions or oogmerk as found, for example, in crimes of theft, fraud, extortion, forgery and others.

4) Planning or voorbedachte raad as found in the crime of murder under Article 340 of the Criminal Code.

5) Feeling of fear, among others, is found in the formulation of criminal offences according to Article 308 of the Criminal Code.

### 2. Objective Elements

#### 1) Unlawful nature

2) The quality of the perpetrator, for example, a civil servant commits a crime regulated in Article 415 of the Criminal Code

3) Causality, i.e. the relationship between an act as a cause and a fact as an effect.<sup>19</sup>  
cause with reality as an effect.<sup>19</sup>

## 4. CONCEPT OF THE CHILD

Article 1 of the Convention On The Rights of The Child, a child is defined as any person under the age of 18 years, unless under the law applicable to the child, maturity has been previously acquired. What is meant by children are those who are not yet adults and who become adults due to certain regulations, mentally, and physically still immature. The Basic Law on Decay (Law No. 12 of 1948) defines children as male and female persons aged 14 years and under. According to Article 45 of the Criminal Code, children are defined as minors if they are not yet 16 (sixteen) years old. Therefore, if he is involved in a criminal case, the judge may order that the guilty sibling be returned to his parents, guardian or custodian with no punishment or order him to be handed over to the government. According to civil law article 330 of the Civil Code, immature children are those who have not reached the age of even 21 (twenty-one) years and have not previously been married.<sup>20</sup> Law Number 23 of 2002 concerning Child Protection, what is meant by a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb.<sup>21</sup> Children's rights are part of human rights that must be guaranteed, protected and fulfilled by parents, families, communities, governments and states.

## IV. CONCLUSION

Child protection in the criminal justice system for children in conflict with the law in accordance with Law Number 11 of 2012 concerning the Criminal Justice System for children Crimes committed by children is legal protection for children at the investigation, prosecution, and trial stages. The Restorative Justice approach prioritizes improving the relationship between the victim and the perpetrator of the crime. Law No. 11 of 2012 Article 9 paragraphs (1) and (2) regulate the pursuit of diversion in paragraph (1), investigators, prosecutors, and judges must consider; the category of a criminal offence, the age of the child, the results of community research from tapas; and the support of the family environment and society. Paragraph (2) Diversion agreements must obtain the consent of the victim and/or the victim's family and the willingness of the child and their family, except for criminal offences in the form of violations, minor criminal offences, victimless criminal offences or the value of the victim's loss is not more than the value of the minimum wage of the local provision. The forms of Diversion agreements, among others; Peace with or

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