

Child Development in the Context of Law Through Indigenous Approaches and Local Wisdom (Strengthening Restorative Justice Within the Criminal Justice System)

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ABSTRACT

The provisions related to children in conflict with the law are regulated in Law Number 11 of 2012 concerning the Child Criminal Justice System, which encompasses all forms of best interests, especially for children through the Restorative Justice approach. The problem in this study is how the regulation of the Criminal Justice System for children in conflict with the law in Indonesia and the urgency of customary law in realizing Restorative Justice in the settlement of cases of children in conflict with the law in Indonesia. The method used is Normative legal research with a statute approach and case approach. The results showed that the way to resolve children's criminal cases was through litigation and non-litigation. The urgency of customary law in realizing Restorative Justice in the settlement of cases of children dealing with the law in Indonesia needs to be reviewed because the settlement of children's cases through customary law will be very helpful and guarantee the best interests of the child. Meanwhile, the regulation on customary criminal sanctions in Law No. 11/2012 has not fully placed customary law as a *Primum Remedium* (primary remedy). Because in Article 71 paragraph (2) of Law No. 11/2012, customary sanctions are only a form of supplemental penalties. If the primary penalty is not enforced, the supplementary penalty cannot be implemented automatically.

Keywords: children; local wisdom; restorative justice.

INTRODUCTION

Children, when facing their problems, sometimes engage in deviant behavior or even illegal acts. Their limitations in understanding and protecting themselves from various systemic influences are contributing factors to these deviations or violations. Consequently, when a child becomes an offender, the state must provide protection for them.¹ The International Convention on the Rights of the Child emphasizes that the arrest, detention, or imprisonment of a child must comply with the law and be considered only as a last resort and for the shortest appropriate duration.

Regulations concerning children in conflict with the law are explicitly outlined in Law No. 11 of 2012 on the Juvenile Criminal Justice System. Article 1, paragraph 2 of this law defines a child in conflict with the law as a child who conflicts with the law, a child who is a victim of a crime, and a child who is a witness to a crime. Within the framework of the juvenile criminal justice system in Indonesia, the objectives of penal measures for children in conflict with the law are primarily focused on rehabilitation and the restoration of victims (restorative justice), which differs significantly from the objectives of penal measures for adults, which tend to emphasize retribution and punishment.²

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¹ Marlina. 2012. *Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, Medan: PT Refika Aditama., p. 15.

² M. Nasir Djamil. 2013. *Anak Bukan Untuk Dihukum*. Jakarta Timur: Sinar Grafika, p. 58.

For this reason, the perspective of Restorative Justice is crucial in addressing the issues of juvenile crime. The argument is that Restorative Justice can be proposed as a primary approach and solution, deemed capable of fulfilling penal demands that focus on benefits for all parties involved. The Restorative Justice approach serves as a paradigm that can be utilized as a framework for strategies in handling criminal cases, aiming to address the dissatisfaction with the functioning of the current criminal justice system.³ According to Muladi, Restorative Justice is a theory that emphasizes restoring the harm caused by criminal acts. This restoration of harm can be achieved through cooperative processes that involve all stakeholders.⁴

Restorative Justice emphasizes the significance of meetings among stakeholders involved in a crime and the period that follows. As stated by Achmad Ali, Restorative Justice is a process that involves all parties affected by a specific offense, collectively identifying the harm caused and addressing obligations and needs, while facilitating changes that should be recognized as rights.⁵

In the context of Restorative Justice, Adrianus Meliala posits that efforts to resolve conflicts and simultaneously heal the relationship between the offender and the victim can be achieved by bringing the offender into a forum with the victim or their family to foster empathy on both sides. Thus, in conflict resolution, the focus is not on emphasizing the offender's guilt and imposing criminal sanctions, but rather on the active participation of the conflicting parties through mediation or compensation for material and immaterial losses in the form of restitution or compensation, and the restoration of harmonious human relationships among the parties involved (humanization).⁶

The fundamental principle of penal measures for children through the application of Restorative Justice is that children must be regarded as victims, both by the offenders and the surrounding social environment, including parents, the community, and the state. Punishing children in conflict with the law is not an appropriate or conducive method for reforming their behavior; instead, it may serve as a setting for children to learn about crime.

Law No. 11 of 2012 on the Juvenile Criminal Justice System stipulates that issues concerning children in conflict with the law may be resolved through a diversion system while prioritizing the principles of Restorative Justice, as articulated in Article 1, paragraph 5 of Law No. 11 of 2012. Diversion is defined as the transfer of the resolution of a child's case from the criminal justice process to a process outside of the criminal justice system. The objectives of diversion are to:

- a. Achieve reconciliation between the victim and the child;
- b. Resolve the child's case outside of the judicial process;

³ Ulang Mangun Sosiawan, "Perspektif Restorative Justice Sebagai Wujud Perlindungan Anak yang Berhadapan dengan Hukum", *Jurnal Penelitian Hukum De Jure*, Volume 16, No. 4, 2016, p. 426

⁴ Yutirsa Yunus, "Analisis Konsep Restorative Justice Melalui Sistem Diversi dalam Sistem Peradilan Pidana Anak di Indonesia", *Jurnal Rechtsvinding*, Volume 2, No. 2, August 2013, p. 233

⁵ Septa Chandra, "Politik Hukum Pengadopsian Restorative Justice dalam Pembaharuan Hukum Pidana", *Fiat Justicia Jurnal Ilmu Hukum*, Volume 8, No. 2, 2014, p. 269.

⁶ Septa Candra, Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana di Indonesia, *Jurnal Rechtsvinding*, Volume 2, No. 2, August 2013, p. 269.

- c. Prevent the child from deprivation of liberty;
- d. Encourage community participation; and e. Instill a sense of responsibility in the child.⁷

Based on the provisions of Diversion in Law No. 11 of 2012 on the Juvenile Criminal Justice System, not all types of offenses committed by children can be resolved through the Diversion system. Only certain offenses may be addressed in this manner, specifically those that meet specific criteria, including:

- a. Offenses that carry a maximum prison sentence of less than 7 (seven) years; and
- b. Offenses that do not constitute a repeat of previous offenses.⁸

The objectives of diversion, as stipulated in Article 6 of this law, are as follows: a) To achieve reconciliation between the victim and the child; b) To resolve the child's case outside the judicial process; c) To prevent the child from deprivation of liberty; d) To encourage community participation; and e) To instill a sense of responsibility in the child. However, diversion is subject to certain limitations as outlined in Article 7 of the law, specifically: diversion can only be applied to offenses that carry a maximum prison sentence of less than 7 years and to offenses committed by the child that do not constitute a repeat offense.

The rising involvement of children in criminal activities is a consequence of their inadequate attention and supervision from parents, particularly given children's freedom to access information in the current digital age. This aligns with the explanation in Law No. 11 of 2012 on the Juvenile Criminal Justice System, which states that "Children need protection from the negative impacts of rapid development, the globalization of communication and information, advancements in science and technology, as well as changes in lifestyle and behavior among some parents that have brought about fundamental social changes in society, significantly influencing the values and behaviors of children. Deviant behavior or unlawful acts committed by children are, among other things, caused by factors external to the child." In this regard, children in conflict with the law, particularly those involved as offenders, should be viewed from the perspective of victims. Therefore, the resolution of criminal acts involving children should be examined more comprehensively

In light of the aforementioned considerations, this research will focus on strengthening the application of Restorative Justice within the criminal justice system through the rehabilitation of children in conflict with the law, as mandated by Law No. 11 of 2012 on the Juvenile Criminal Justice System, utilizing indigenous approaches and local wisdom. Rehabilitation of children in conflict with the law through the diversion pathway is deemed highly appropriate when employing customary law and local wisdom. Integrating the principles of Restorative Justice with customary legal practices in the context of rehabilitating children in conflict with the law can provide a comprehensive and effective approach to assist children in understanding the consequences of their actions, repairing damaged relationships, and improving their circumstances within society.

This is deemed necessary because both Restorative Justice and customary law emphasize the repair of damaged relationships and the restoration of losses caused by unlawful actions. Both

⁷ Article 6 of Law No. 11 of 2012 on the Juvenile Justice System.

⁸ Article 7, paragraph (2) of Law No. 11 of 2012 on the Juvenile Justice System.

approaches involve the community in the conflict resolution and rehabilitation processes. Customary law often highlights the role of the community in enforcing rules and resolving conflicts, while Restorative Justice encourages community participation in the restoration process. Additionally, both approaches foster empathy and a sense of responsibility among offenders, victims, and the community by focusing on acknowledgment of wrongdoing, genuine remorse, and a commitment to avoiding similar actions in the future. Furthermore, from the perspective of alignment with local values and norms, both Restorative Justice and customary law often resonate with local cultural and social values. They take into account the cultural and social context in resolving conflicts and building effective rehabilitation processes.

METHODS

This type of research is normative legal research employing a conceptual approach, historical approach, statutory approach, and case approach. The legal materials used consist of primary legal sources, secondary legal sources, and tertiary legal sources. Once all legal materials have been collected, an analysis of these materials will be conducted using descriptive analytical techniques, specifically analyzing and explaining the rehabilitation of children in conflict with the law through the lens of customary law and local wisdom as a means of strengthening Restorative Justice within the existing Criminal Justice System and Juvenile Criminal Justice System in Indonesia.

DISCUSSION

Regulation of the Juvenile Criminal Justice System in Indonesia

Restorative Justice, known in positive law as "*keadilan restoratif*", which has been developed by UNICEF, is based on international legal instruments for children facing legal issues, one of which is The Beijing Rules. This concept emphasizes justice that can restore the situation for children as offenders, children as victims of crime, and the disturbed community. Restorative Justice focuses on crime as harm/damage and justice as an effort to repair that damage, with a vision to elevate the roles of crime victims, offenders, and the community as three crucial dimensions in the criminal justice system for the welfare and safety of society.⁹

The Restorative Justice approach focuses on the needs of both victims and offenders. Furthermore, Restorative Justice helps offenders avoid committing further crimes in the future. This is based on a theory of justice that views crime and violations primarily as breaches against individuals or society rather than against the state. Restorative Justice fosters dialogue between victims and offenders, which can result in the highest levels of victim satisfaction and offender accountability. The concept is fundamentally simple: the measure of justice is no longer based on retributive punishment from the victim to the offender (whether physical, psychological, or punitive). Instead,

⁹ Dewi Setyowati, "Memahami Konsep Restorative Justice sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan", *Pandecta*, Volume 15, No. 1, 2020, p. 122.

the harm caused is healed by providing support to the victim and holding the offender accountable, with the assistance of family and community if necessary.¹⁰

Based on the juvenile criminal justice system, children in conflict with the law consist of those who are in conflict with the law, those who are victims, and those who are witnesses in criminal acts. **A child in conflict with the law** is defined as a child aged 12 years but under 18 years who is suspected of committing a criminal offense. **A child who is a victim** is defined as a child under 18 years who suffers physical, mental, or economic harm caused by a criminal act. **A child who is a witness** is defined as a child under 18 years who can provide testimony for legal proceedings, from the investigation stage to prosecution and court hearings regarding a criminal case that they have seen, heard, or experienced.

The handling of criminal cases involving children is distinctly different from the handling of cases involving adults, as the approach to children is specialized and regulated by specific laws. Understanding the processes involved in handling juvenile cases may still be lacking among certain segments of society, leading to various judgments that suggest children, particularly those in conflict with the law, receive preferential treatment or that children should not be punished at all. However, this is not entirely accurate; rather, the handling process is specifically regulated.¹¹

The juvenile criminal justice system is designed with particular goals in mind for the benefit of the child's future and society, incorporating the principles of Restorative Justice. The definition of Restorative Justice itself is not uniform, as many variations of models and forms have developed in its application. Consequently, various terminologies are used to describe the concept of Restorative Justice, including communitarian justice, positive justice, relational justice, reparative justice, and community justice.¹²

The category of children as offenders in criminal acts has specific age provisions. They are defined as children who are aged 12 (twelve) years but under 18 (eighteen) years who are suspected of committing a criminal offense. Therefore, children under the age of 12, even if they commit a criminal act, are not classified as children in conflict with the law and are outside this provision. Similarly, individuals over 18 years of age are no longer classified as children but are considered adults, subject to the general provisions of criminal law. In contrast, the category of children who are victims of criminal acts includes those under the age of 18. The age limit for both child victims and child witnesses is the same, namely 18 years. There is no stipulation regarding whether children under the age of 12 can be classified as victims or witnesses. Based on the contents of this provision, it must be understood that children under the age of 12 can indeed be both victims and witnesses.¹³

¹⁰ Hanafi Arief, Ningrum Ambarsari, "Penerapan Prinsip Restorative Justice dalam Sistem Peradilan Pidana di Indonesia", *Jurnal Al'Adl*, Volume 5, No. 2, 2018, p. 178.

¹¹ Mahir Sikki Z.A (Hakim Pengadilan Negeri Palopo Kelas I B), *Sekilas tentang Sistem Peradilan Pidana Anak*, <https://www.pn-palopo.go.id/berita/artikel>, accessed on 2 August 2022, at 13:17 WITA.

¹² Yusi Amdani, "Konsep Restorative Justice dalam Penyelesaian Perkara Tindak Pidana Pencurian oleh Anak Berbasis Hukum Islam dan Adat Aceh", *Jurnal Al-'Adalah*, Volume 13, No. 1, 2016, p. 62.

¹³ Analiansyah & Syarifah Rahmatillah, "Perlindungan Terhadap Anak yang Berhadapan dengan Hukum (Studi Terhadap Undang-Undang Peradilan Anak Indonesia dan Peradilan Adat Aceh)", *Gender Equality: Internasional Journal of Child and Gender Studies*, Volume 1, No. 1, March 2015, p. 55.

In relation to the legal protection of children in conflict with the law, Law No. 11 of 2012 states that there are various forms of protection for children in this context, which are classified into four categories: forms of protection during the legal process/trial (litigation), and forms of protection outside the legal process/trial (non-litigation).

1. Litigation

Referring to Law No. 11 of 2012, there are several specific provisions for children in conflict with the law, which include:

- a. Special courtrooms for children.
- b. The identity of the child is kept confidential in media reports, both print and electronic.
- c. Offenders under 12 years of age are returned to their parents or guardians.
- d. Officials do not wear official uniforms.
- e. Legal assistance is mandatory, and the child must be accompanied by a community advisor.
- f. The child must be accompanied by a parent and/or a trusted person, or a social worker.
- g. Consideration or advice must be obtained from a community advisor after the criminal act is reported, and, if necessary, from education experts, psychologists, psychiatrists, religious figures, professional social workers, or other expert personnel.
- h. Children who are arrested are placed in special service rooms for children.
- i. Children are not detained if a guarantee is provided by their parents.
- j. The examination of a child's case is conducted in a session that is closed to the public, except for the reading of the verdict.¹⁴

2. Non-Litigation through Diversion

According to Article 5 paragraph (3) of Law No. 11 of 2012, the Juvenile Criminal Justice System mandates the pursuit of Diversion, which refers to the transfer of the resolution of a child's case from the criminal justice process to an out-of-court process. The primary objectives of Diversion are to achieve reconciliation between the victim and the child, resolve the child's case outside of the judicial process, prevent the deprivation of the child's liberty, encourage community participation, and instill a sense of responsibility in the child.

At the stages of investigation, prosecution, and examination of the child's case in the district court, Diversion must be pursued in cases where the offense carries a prison sentence of under 7 years and does not involve repeated offenses.

Investigators, Public Prosecutors, and Judges, when implementing Diversion, must consider the category of the offense, the age of the child, the results of the community study from the Child and Family Services (Bapas), and the support from the family and community environment. Meanwhile, the agreement for Diversion must receive approval from the victim and/or the family of the child victim, as well as the consent of the child and their family, except

¹⁴ *Ibid*, p. 57.

for offenses that are categorized as minor violations, petty offenses, offenses without victims, or where the value of the victim's loss does not exceed the local minimum wage. The outcomes of the Diversion agreement may take various forms, including:

- a. Reconciliation with or without compensation;
- b. Return to parents/guardians;
- c. Participation in education or training at an educational institution or a Social Welfare Institution (LPKS) for a maximum of 3 (three) months; or
- d. Community service.

The Urgency of Customary Law in Realizing Restorative Justice in the Resolution of Cases Involving Children in Conflict with the Law in Indonesia

Custom is a reflection of identity and embodies the spirit of a nation from century to century. Every nation in the world has its own customs, which differ based on time and place. This diversity is a crucial element of a nation's identity. Levels of civilization and modern ways of life have not been able to eliminate the customs that thrive within indigenous communities. At the very least, it is evident that as society progresses, customs adapt to the advancements of the community.¹⁵

Customary law is a system of law that originates and develops within Indonesian society. In the Constitution of the Republic of Indonesia, namely the 1945 Constitution, the recognition of customary law and the existence of customary law communities is articulated in Article 18B paragraph (2) and Article 28I paragraph (3). Article 18B paragraph (2) stipulates that "The state recognizes and respects the unity of customary law communities and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, as regulated by law." Meanwhile, Article 28I paragraph (3) states, "Cultural identity and the rights of traditional communities are respected in accordance with the development of time and civilization."

The implementation of customary law does not involve law enforcement agencies such as the police, prosecutors, courts, or prisons. The judicial process is conducted by customary institutions through deliberations at village halls or sub-district offices, with decisions made based on consensus. In this regard, customary institutions have a clear understanding of the conditions and circumstances of their residents and communities. Concerning children in conflict with the law, resolving issues through customary law is of utmost urgency. This approach not only involves the perpetrator and the victim but also affects the balance of the entire customary community.

Resolving disputes amicably (non-litigation) is considered essential not only for fostering harmony among community members but also for eliminating feelings of revenge between parties. The process of resolving cases through customary justice can be characterized by principles of speed, simplicity, and low cost, similar to the principles of criminal procedural law in positive law. This method is easier for parties to understand, as it follows a quick and straightforward process, avoiding

¹⁵ Wahyu Jontah & Wencislaus Sirjon Nansi, "Penguatan Restoratif Justice Melalui Pendekatan Adat dan Kearifan Lokal Sebagai Alternatif Penyelesaian Perkara Pidana Anak", *Jurnal Ilmu Hukum*, Volume 7, No. 2, August 2018, p. 295.

the lengthy procedures typical of formal judicial systems, and allows both sides to engage in deliberation that truly represents their interests.

The relevance of resolving cases involving children through customary channels is fundamentally addressed in Law No. 11 of 2012 concerning the Juvenile Criminal Justice System through the approach of *Diversi*, which involves consensus deliberation among the perpetrator, victim, families of both, Community Guidance Officers, and Professional Social Workers while prioritizing the principles of Restorative Justice. The *Diversi* process must consider the interests of the victim, the welfare and responsibilities of the child, avoidance of negative stigma, prevention of retaliation, community harmony, propriety, morality, and public order.

The approach of customary law and local wisdom can serve as a highly effective tool in fostering rehabilitation for children in conflict with the law when pursued through the following steps:

1. **Appreciation of Local Traditions and Culture:** Introducing children to their local values, traditions, and culture can help them understand their place in society while enhancing their sense of identity and self-esteem.
2. **Mentoring and Guidance:** Involving community leaders or elders in providing mentorship to children can foster a better understanding of the values and norms respected in their communities.
3. **Restoration and Peace:** The approach of customary law often emphasizes peace and restoration in conflict resolution. Children dealing with legal issues can be introduced to processes such as mediation or deliberation to resolve their conflicts without engaging in formal judicial processes.
4. **Practical Education:** Integrating the principles of customary law into children's education can help them understand the consequences of their actions within the context of their community, as well as foster a more responsible attitude.
5. **Legal Awareness:** Assisting children in understanding the law and their rights within the framework of customary and local law can help them avoid unlawful behavior and provide them with the knowledge necessary to protect themselves.
6. **Community Empowerment:** Involving the community in the rehabilitation process of children in conflict with the law can offer strong social and moral support, while also strengthening intergenerational relationships.

It is important to note that these approaches should be tailored to meet the needs and contexts of each local community. Additionally, they must be implemented carefully and in accordance with applicable laws.

In alignment with this perspective, the application of customary sanctions for juvenile offenders must also adhere to the provisions of positive law, although it is acknowledged that the cultural and customary legal contexts in various regions may differ. However, in many cases, modern legal systems have sought to integrate aspects of customary law into a more formal judicial

framework. Various forms of customary sanctions that may be compatible with positive law include: **mediation or reconciliation**—this process involves mediation or reconciliation between the offender and the victim or the victim's family to achieve an adequate resolution without resorting to formal judicial proceedings; **restitution**—juvenile offenders may be required to undertake restorative actions, such as repairing the damage caused by their actions or performing community service as a form of compensation; community oversight—juvenile offenders may be placed under the supervision or **guidance of community leaders or customary institutions** as an alternative to incarceration; training and education—juvenile offenders may be directed to participate in training or educational programs aimed at altering their behavior and preventing the recurrence of criminal acts; **material restitution**—juvenile offenders may be required to provide restitution to the victim as compensation for the losses incurred.

It is important to note that in implementing customary sanctions, it is essential to ensure that the rights of the child, as guaranteed by positive law, and principles of justice are respected and considered. Customary sanctions must also be grounded in principles that are fair, proportional, and prioritize rehabilitation over incarceration.

CLOSING

The Law No. 11 of 2012 concerning the Juvenile Justice System regulates the mechanisms for addressing issues faced by children in conflict with the law, stipulating two pathways for resolving juvenile criminal cases: through litigation (via trial processes) and non-litigation (through diversion with a restorative justice approach). The urgency of customary law in realizing restorative justice in resolving cases involving children in conflict with the law in Indonesia warrants a reevaluation. This is due to the fact that resolving cases involving children through customary law or local wisdom can significantly aid and ensure the best interests of the child. However, the provisions concerning customary criminal sanctions in Law No. 11 of 2012 do not fully position customary law as a *Primum Remedium* (primary remedy) in the resolution of cases involving children in conflict with the law. As stipulated in Article 71, paragraph (2) of Law No. 11 of 2012, customary sanctions are merely an additional form of punishment. The principle of additional punishment is contingent upon the primary punishment; thus, if the primary punishment is not enforced, the additional punishment cannot be implemented automatically.

In this regard, the role of law enforcement agencies and the government is crucial to optimizing the mechanisms for enforcing applicable customary law that thrives within the community, based on local wisdom, which can foster a sense of justice in society at large and specifically within customary law communities. Furthermore, it is necessary to consider the utilization of local customary punishments so that they can be articulated within the existing penal framework in Indonesia, particularly concerning children in conflict with the law.

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