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## **Legal Reconstruction in Indonesia Based on Human Rights**

**Imam As Syafei Building**

**Faculty of Law, Sultan Agung Islamic University**

**Jalan Raya Kaligawe, KM.4 Semarang, Indonesia**

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# The 5<sup>th</sup> PROCEEDING

## *“Legal Reconstruction in Indonesia Based on Human Right”*

**IMAM AS SYAFEI BUILDING**

Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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## PREFACE

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegnau, Ph.D from Sorbone University, Prof. Topo Santoso From Indonesian University, and Dr. Sri Endah Wahyuningsih, S.H., M.H from Sultan Agung Islamic University.

This was our fourth International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner in the concerned field to be discussed as guidelines to exchange and talk about views on the most important recent on Legal Construction and Development focusing on The Role of Indigenous and Global Community in Constructing National Law happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

## PROCEEDINGS

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# Restorative Justice and Penal Mediation in Resolving Cases of Children Confronting the Law in Indonesia

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## Abstract

*In Indonesia, the concept of restorative justice is more specifically penal mediation. Penal mediation is the settlement of a criminal case through deliberation with the help of a neutral mediator, attended by victims and perpetrators along with parents and community representatives, with the aim of restoring victims, perpetrators and the community. The judge can act as a mediator or with a mediator outside the court who has met the requirements and is certified. Mediation brings together the perpetrator and the victim, on this occasion a reconciliation is held between the victim and the perpetrator, and compensation for damages suffered by the victim is made. Penal mediation is carried out based on the secret principle, so that all events that occur and all statements that appear in the mediation process must be kept confidential by the parties including the mediator.*

*Keywords: Restorative Justice, Penal Mediation, Children Facing the Law.*

## A. INTRODUCTION

In the criminal justice process, there are several stages that must be passed for justice seekers at the level of investigation, investigation, examination in court to the stage of imposing a criminal decision and even legal remedies if used by the parties which of course require a lot of time, effort and cost. for justice seekers.

This is of course very contrary to the principles of justice stated in Law Number 48 of 2009 concerning Judicial Power Article 2 paragraph (4) which states that the trial is carried out simply, quickly and at low cost. This principle calls for a simple or not too formal legalistic trial, a convoluted and prolonged process and prioritizes justice over legal certainty. The time needed in a simple process is fast and the costs required in the process are affordable for anyone, including the poor.

One of the ways to make the principle of justice simple, fast and low cost effective in criminal justice is by applying the concept of restorative justice in both the first level court and the last court such as the Supreme Court of the Republic of Indonesia.

Restorative justice concept or the concept of restorative justice is a concept of justice that aims to empower victims, perpetrators, families and communities to correct an act against the law, using awareness and conviction as a foundation for improving social life. That the concept of restorative justice is basically simple.

The measure of justice is no longer based on equal retribution from the victim to the perpetrator (whether physical, psychological, or punitive). However, this painful act was healed by providing support to the victim and holding the perpetrator to account, with the help of family and community if needed. Indonesia has implemented the concept of restorative justice in the juvenile justice process. This further guarantees the fulfillment of a sense of justice between victims and perpetrators.

Restorative justice to produce restorative justice, which is a process in which all parties involved in a certain criminal act jointly solve the problem of how to handle the consequences in the future. It is very possible for restorative justice to be attempted in solving juvenile criminal cases.



Many Indonesian children are brought to trial each year for minor crimes. They do not get support from lawyers or social services. Children who are found guilty of committing or breaking the law will be sent to prison or detention center.

A criminal act committed by a child is a violation against humans and human relations. Criminal acts create an obligation to make things better by involving victims, perpetrators and society in finding solutions to make amends, reconcile and reassure hearts.<sup>1</sup>

This condition is of course very concerning, because many children have to face the judicial process. The existence of children in places of detention and imprisonment along with older adults places children in a vulnerable situation to become victims of various acts of violence. Children in this condition are called children in conflict with the law.

Children who violate the law or commit criminal acts are strongly influenced by several other factors outside of the child, such as relationships, education, playmates, and so on. To protect children from the influence of the formal process of the criminal justice system, human or legal experts and humanity think to make formal rules for removing a child who has violated the law or committed a criminal act from the criminal justice process by providing an alternative others who are considered better for the child.

Restorative justice in the settlement of cases of juvenile offenses outside the court that emphasizes the improvement of the consequences caused by criminal acts by empowering the recovery process and the interests of all involved, both perpetrators and victims, and the community.

The model of settlement of cases outside the court trial process is not new to the Indonesian legal system. In civil law,

<sup>1</sup> Angkasa, dkk., *Model Peradilan Restoratif Dalam Sistem Peradilan Anak (Kajian tentang Praktik Mediasi Pelaku dan Korban dalam Proses Peradilan Anak di Wilayah Hukum Balai Pemasarakatan Purwo-kerto)*, Jurnal Dinamika Hukum, Vol. 9, No. 9, Jakarta, September 2009 p. 188.

alternative dispute resolutions have long been known. Supreme Court Regulation No.1 of 2008 requires judges to conduct mediation first. Peace is something that must be sought at all levels of the court.

In the criminal law field, solving cases through peaceful means is still difficult to carry out. Whereas customary law in several regions recognizes peaceful institutions in criminal cases, whose principles are in line with the concept of restorative justice. Whatever model is chosen, restorative justice is directed at restoring the victim, perpetrator and society at the same time. Therefore, judges need to understand the concept or philosophy.<sup>2</sup>

Juvenile Justice System is all elements of the criminal justice system that are involved in the handling of juvenile delinquency cases:<sup>3</sup>

1. Police as a formal institution when naughty children first come into contact with the justice system, which will also determine whether the child will be released or further processed;
2. Prosecutors and parole agencies who will also determine whether the child will be released or processed in juvenile court;
3. Juvenile court, the stage in which the child will be placed in options, from being released to inclusion in the institution of punishment. The last is institution of punishment.

So it is hoped that the settlement of cases of children who are faced with the law can be resolved through non-litigation efforts, so that children do not experience trauma and avoid the bad stigma as perpetrators of crimes.

From the description above, the authors formulate a problem regarding: How is the implementation of restorative justice

<sup>2</sup> Muhammad Yasin, dkk., *Hakim dan Penerapan Keadilan Restoratif*, Buletin Komisi Yudisial, Vol. VI, No. 4, Januari- Februari 2012. p. 14.

<sup>3</sup> Purnianti, Mamik Sri Supatmi, dan Ni Made Martini Tinduk, *Analisa Situasi Sistem Peradilan Pidana Anak (Juvenile Justice System) di Indo-nesia*, UNICEF, Indonesia, 2003., p. i.

and penal mediation in solving children who are faced with the law in the juvenile criminal justice system in Indonesia?

## **B. DISCUSSION**

Bagir Manan is of the opinion that children in the criminal law field are treated as "little adults", so that the whole process of cases except in prisons is carried out the same as in adult cases.<sup>4</sup> There are 2 (two) categories of children's behavior that make them confront the law, namely:

1. *Offender status* is delinquency behavior of a child which, if committed by an adult, is not considered a crime, such as disobeying, skipping school or running away from home;
2. *Juvenile delinquency* is delinquency behavior of a child which if it is done by an adult is considered a crime or violation of the law.

Although children must undergo a criminal justice process, children's rights must still be given. Article 3 of the Convention on the Rights of the Child provides for the fulfillment and protection of children's rights in conflict with the law as follows:

1. In all actions concerning children, carried out by state or private social welfare agencies, courts of law, administrative authorities or legislative bodies, the best interests of the child must be the primary consideration;
2. States parties undertake to ensure the protection and care of children as necessary for their welfare, taking into account the rights and obligations of their parents, legal guardians or other persons lawfully over them, and for this purpose take all appropriate legislative and administrative action;
3. States parties should ensure that the various institutions, services and facilities responsible for the care and protection of children conform to the standards set by the competent authorities, in particular in

the areas of safety, health, in quantity and suitability. staff, theirs and also supervisory authorities.

One form of handling children in conflict with the law (ABH) is regulated in Article 16 paragraph 3 of Law Number 23 of 2002 concerning Child Protection which states that arrest, detention, or child imprisonment is only carried out if it is in accordance with the applicable law. and can only be done as a last resort. This regulation is in accordance with the Convention of the Right of the Child which has been ratified by the Indonesian government with Presidential Decree Number 36 of 1990 by stating that the legal process is carried out as the last step and for the shortest and most appropriate period.

Some regulations related to the detention of children in conflict with the law have actually attempted to implement restorative justice, although not comprehensively. However, in reality, many children who have faced the law who committed minor crimes were then jailed, just like the excitement of the world of child law in Indonesia in 2006, which was raised to the surface of the Raju case.

In practice, criminal cases are often resolved out of court through various discretions by law enforcement officials or through deliberation or peace mechanisms or forgiveness institutions in the community (family deliberations, village meetings, customary deliberations and so on). The practice of settling criminal cases out of court so far has no formal legal basis, so there are often cases where there has been an informal settlement (although through customary law mechanisms), but are still processed in court according to the applicable law.

In order to restore and provide protection for children who are in conflict with the law, it is necessary to cooperate with all parties. The concept of restorative justice through alternative dispute resolution is that the choice of settlement is left up to the perpetrator and the victim. In determining the sanction, the perpetrator can offer compensation negotiated /

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<sup>4</sup> Gatot Suparmono, *Hukum Acara Pengadilan Anak*, Djambatan, Jakarta, 2000, p. 40.

agreed upon with the victim. This system formulates justice into the formulation of the parties, namely victims and perpetrators, not based on calculations by prosecutors and judges' decisions. The weakness that is concerned about the application of restorative justice is that it can be a source of abuse of authority (discretion) by law enforcers.<sup>5</sup>

The definition of restorative justice according to Tony F. Marshall is a process in which the parties have an interest in breaking together how to reach an agreement after a criminal act occurs, including its implications at a later date.<sup>6</sup>

The concept of restorative justice through alternative dispute resolution is that the choice of settlement is left up to the perpetrator and the victim. In determining sanctions, the perpetrator can offer compensation negotiated / agreed upon with the victim. This system formulates justice into the formulation of the parties, namely victims and perpetrators, not based on calculations by prosecutors and judges' decisions. The weakness that is concerned about the application of restorative justice is that it can be a source of abuse of authority (discretion) by law enforcers.<sup>7</sup>

According to Article 1 point 5 of the Joint Decree of the Chairman of the Supreme Court of the Republic of Indonesia, Attorney General of the Republic of Indonesia, the Chief of the Indonesian National Police, the Minister of Law and Human Rights of the Republic of Indonesia, the Minister of Social Affairs of the Republic of Indonesia, and the State Minister for Women's Empowerment and Child Protection of the Republic that what is meant by justice Restorative is a fair settlement that involves the perpetrator, the

victim, their family and other parties involved in a criminal act, jointly seeking a solution to the crime and its implications, by emphasizing restoration to its original state.

*Restorative justice systems* At the very least, it aims to restore / restore (to restore) criminal acts committed by children with actions that are beneficial to the child, the victim, and the environment. According to Muladi, the characteristics of the restorative justice model are as follows:<sup>8</sup>

1. Crime is defined as one offense against another and recognized as conflict;
2. Points of attention to solving problems of future responsibilities and obligations;
3. The normative character is built on the basis of dialogue and negotiation;
4. Restitution as a means of party improvement, reconciliation and restoration as the main goal;
5. Justice is defined as relations of rights, judged on the basis of results;
6. The target of attention is to repair social losses;
7. The community is a facilitator in the restorative process;
8. The roles of victims and perpetrators of criminal acts are recognized, both in matters of and in resolving the rights and needs of victims. Perpetrators of criminal acts are encouraged to be responsible;
9. The responsibility of the perpetrator is defined as the impact of understanding the act and to help decide what is best;
10. Criminal action is understood in a comprehensive, moral, social and economic context; and
11. Stigma can be removed through restorative action.

The characteristic of restorative justice is that it makes the offender responsible for repairing the losses caused by his / her mistakes; provide opportunities for offenders

<sup>5</sup> Gayus Lumbuun, *Keadilan Rstoratif & Pemidanaan*, Makalah Kuliah, Pascasarjana Universitas Indonesia, Kajian Ilmu Kepolisian, Depok, 2012, p. 6.

<sup>6</sup> *Ibid.*, p. 2.

<sup>7</sup> *Ibid.*, p. 6.

<sup>8</sup> Ainal Mardiah, dkk., *Mediasi Penal Sebagai Alternatif Model Keadilan Restoratif Dalam Pengadilan Anak*, Jurnal Ilmu Hukum Pascasarjana Unsyiah Kuala, Vol. I Tahun I, No.1, Agustus 2012, p. 5

to prove their capacity and quantity in addition to dealing constructively with guilt; involving victims, parents, extended family, school and close friends; create a forum to work together in resolving these problems; establish a direct and real relationship between mistakes and social reactions. In the best interest of children, it is appropriate for law enforcement officers to apply a restorative justice approach.

Indicators in restorative juvenile justice can be seen from the roles of perpetrators, victims, the community, and juvenile justice professionals. Each role is as follows:<sup>9</sup>

1. Perpetrators, active actors to restore losses to victims and society. He must face the victim / victim's representative;
2. Victims are actively involved in all stages of the process and play an active role in mediation and determine sanctions for the perpetrators;
3. The community, is involved as a mediator in developing community services and providing job opportunities for perpetrators as a form of reparative obligation, helping victims and supporting fulfillment of the perpetrators' obligations;
4. Professionals, facilitate mediation, guarantee restorative implementation, develop creative / restorative community service options, involve community members in the process, educate the community.

In its application, not all cases of children can be subject to restorative justice and the criteria are as follows, not a case of child delinquency that sacrifices the interests of many people, the delinquency of the child which does not result in loss of human life, serious injury or life-long disability and the delinquency is not a crime against -on decency that is serious about honor and is not a traffic offense.

*Restorative justice* is an attempt to seek a peaceful conflict resolution outside the court. Especially for children with legal

conflicts, restorative justice is important to apply because child psychological factors must be considered.

There are four criteria for cases of children dealing with the law that can be resolved using a restorative justice model, namely:<sup>10</sup>

1. This case does not sacrifice the public interest and is not a traffic violation;
2. This is the first time the child is doing delinquency and isn't a recidivist;
3. It was not a case that resulted in the loss of human life, serious injury, or life disability;
4. This case does not constitute a serious honor crime.

In restorative justice the terms penal mediation and diversion are also known. In Indonesia, the concept of restorative justice, more specifically penal mediation, has been applied by a number of forward-thinking judges. In practice, the concept of restorative justice cannot be applied in all kinds of criminal acts. In general, the application of the concept of restorative justice in Indonesia, many juvenile justice judges have implemented the concept of restorative justice through penal mediation.

Mediation is a process of negotiating problem solving, in which the parties who are not impartial work together with the disputing parties to seek mutual agreement. The outside party is called a mediator, who is not authorized to decide disputes, but only helps the parties to resolve issues that are delegated to them.<sup>11</sup>

In the Big Indonesian Dictionary, the word mediation means the process of involving a third party in resolving a dispute as an advisor. This definition contains three important elements, namely:<sup>12</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> Khotibul Umam, *Penyelesaian Sengketa Di Luar Pengadilan*, Pustaka Yustisia, Yogyakarta, 2010, p. 10.

<sup>12</sup> Syahrizal Abbas, *Mediasi Dalam Perspektif Hukum Syariah, Hukum Adat, & Hukum Nasional*, Kencana Prenada Media, Jakarta, 2009, p. 3.

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<sup>9</sup> Angkasa, et al., *Op.cit.*, P. 191.



1. Mediation is the process of resolving disputes or disputes that occur between two or more parties;
2. Parties involved in dispute resolution are parties outside the disputing parties;
3. The parties involved in the dispute resolution act as advisors and do not have any authority in making decisions.

Mediation is a form of dispute resolution option, which is commonly known in civil law. Penal mediation is one of the alternatives to solve the problem. Penal mediation is no longer for minor criminal cases, but also for serious crimes such as rape and murder. Penal mediation is a way to prevent children who are faced with the law from the criminal justice process.

Penal mediation is the settlement of a criminal case through deliberation with the help of a neutral mediator, attended by victims and perpetrators along with parents and community representatives, with the aim of restoring the victim, perpetrator and the community.<sup>13</sup>

Penal mediation has advantages such as flexibility, speed of settlement, low cost, and the power that the parties have to determine the agreement to be reached.

In this penal mediation, reconciliation and compensation are paid for the victims. If this mediation reaches an agreement, the results can be used as an excuse to abolish carrying out crimes for the perpetrators of criminal acts. Mediators at this stage can be carried out by judges or mediators from outside the court who have received certification and training.

This mediation is a combination of the Victim-Offender Mediation and Reparation Negotiation Programs models. The judge after studying the case and the criminal acts committed by the defendant, offered a mediation penalty as an alternative to the settlement of the case with the peace of the parties. If the parties agree, then an agreement

is held voluntarily to participate in the settlement of the case by means of mediation by both the perpetrator and the victim.

The judge can act as a mediator or with a mediator outside the court who has met the requirements and is certified. Mediation brings together the perpetrator and the victim, on this occasion a reconciliation is held between the victim and the perpetrator, and compensation for damages suffered by the victim is made. Penal mediation is carried out based on the secret principle, so that all events that occur and all statements that appear in the mediation process must be kept confidential by the parties including the mediator.

For certain criminal acts, the perpetrator can offer the victim to mediate penalties in order to reduce the sentence. If the victim agrees to a request for mediation from the perpetrator of the crime, then a mediation agreement is submitted.

Basically it does not eliminate the criminal element for the perpetrator, but for certain crimes, for example those involving children, the peace should cause the perpetrator who is still a child not to be charged with the law or not dealing with the court, which will cause the child to be labeled as a criminal offender.

This can support a reduction in the number of children who are arrested, detained, and sentenced to prison, eliminate stigma and return children to normal human beings so that they are expected to be of use in the future. Mediators in deliberation on cases can be drawn from trusted community leaders and if this happens at school, it can be done by the school principal or teacher. The main requirement for settlement through deliberation is recognition from the perpetrator and the consent of the perpetrator and his family and victims to settle the case through deliberation for recovery, the judicial process is just running.

### **C. CLOSING**

In order to restore and provide protection for children who are in conflict

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<sup>13</sup>DS. Dewi dan Fatahillah A. Syukur, *Mediasi Penal : Penerapan Restorative Justice di Pengadilan Anak Indonesia*, Indie-Publishing, Depok, 2011., p. 86.



with the law, it is necessary to cooperate with all parties. The concept of restorative justice through alternative dispute resolution is that the choice of settlement is left to the perpetrator and the victim. In determining sanctions, the perpetrator can offer compensation negotiated / agreed upon with the victim. In Indonesia, the concept of restorative justice is more specifically penal mediation. Penal mediation is the settlement of a criminal case through deliberation with the help of a neutral mediator, attended by victims and perpetrators along with parents and community representatives, with the aim

of restoring the victim, perpetrator and the community.

The judge can act as a mediator or with a mediator outside the court who has met the requirements and is certified. Mediation brings together the perpetrator and the victim, on this occasion a reconciliation is held between the victim and the perpetrator, and compensation for damages suffered by the victim is made. Penal mediation is carried out based on the secret principle, so that all events that occur and all statements that appear in the mediation process must be kept confidential by the parties including the mediator.

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