



The Concept of Implementing Restorative Justice in Relation to the Principle of *Ultimum Remedium*

Ryan Fadli Siregar ¹, Yasmirah Mandasari Saragih ²,

Muhammad Azhali Siregar ³

^{1 2 3} Program Studi Magister Ilmu Hukum Fakultas Pascasarjana

Universitas Pembangunan Panca Budi Medan, Indonesia

Email ; ryanfadli_siregar@yahoo.com yasmirahmandasari@gmail.com

azhalisiregar@dosen.pancabudi.ac.id

Abstract Children are the future generation of the nation that must be protected, especially when dealing with the law. The difficult navigation route passed by children who are suspects of criminal acts has depicted sadness in children that can disturb the child's mental state, in order to avoid this possibility, another method has emerged in child criminal acts, namely restorative justice (diversion) which is in accordance with the principle of *ultimum remedium* in criminal law. This study aims to understand the concept of implementing restorative justice which is associated with the principle of *ultimum remedium*, where this study works using qualitative methods and is sorted in descriptive, so that concrete solutions can be found regarding the matter being studied. The results of this study found a match between the concept of restorative justice and the principle in criminal law, namely *ultimum remedium* where criminal witnesses are the last step in handling child criminal acts. However, in its application, several obstacles were found, one of which was due to the different meanings of justice between the parties.

Keywords: Restorative Justice, *Ultimum Remedium*, Child Criminal Acts.

1. INTRODUCTION

The Indonesian state is a state of law (*rechtsstaat*), this can be seen in Article 1 paragraph (3) of the 1945 Law of the Republic of Indonesia. This means that all subsystems of the administration of the Indonesian state and its constitutional system, social system must be regulated by law, and also all elements of state power tools and citizens must obey the laws created for the rule of law. (Septa Chandra, 2014) So the State has an obligation to carry out reforms in the legal aspect in order to provide certainty, justice and benefits for its citizens, one of which is reforming the criminal law for children who are in conflict with the law.

Children who are in conflict with the law or children who commit criminal acts are not only acts that disturb public order, but are also a danger that can threaten the future of a nation or state. On that basis, children must be protected from harmful actions, so that children as inheritors of the nation's ideals are maintained for the future of the nation and state. (Syaiful Asmi Hasibuan, Yasmirah Mandasari Saragih, et al, 2019,)

This is what prompted criminal experts to initiate the concept of restorative justice as a means of improvement. In accordance with the principle of *ultimum remedium* where punishment or criminal sanctions for child perpetrators is an alternative or last resort in law enforcement,

Restorative justice in principle is a philosophy (basic guidelines) in the peace process outside of justice by using mediation or deliberation to achieve justice expected by the parties

involved in the criminal law, namely the perpetrator of the crime (his family) and the victim of the crime (his family) to find the best solution that is agreed upon and agreed upon by the parties. Restorative justice is said to be a philosophy (basic guideline) in achieving justice carried out by parties outside of justice because it is the basis for the peace process between the perpetrator of a criminal act (his family) and the victim (his family) as a result of victims/losses resulting from the criminal act. Thus, it can be said that restorative justice contains basic principles including: (Nopiana Mozin, Yasmirah Mandasari Saragih)

1. Striving for peace outside of court by the perpetrator of the crime (his family) towards the victim of the crime (his family)
2. Providing opportunities for perpetrators of criminal acts (their families) to take responsibility for making amends for their mistakes by compensating for losses resulting from the criminal acts they have committed
3. Resolving criminal law problems that occur between perpetrators of criminal acts and victims of criminal acts if agreement and agreement is reached between the parties.

The concept of Restorative Justice is in accordance with the principle of *ultimum remedium* which considers the use of other sanctions first before harsh and sharp criminal sanctions are imposed, if other legal functions are lacking then criminal law is used. Van Bemmelen said that the application of this *ultimum remedium* should be interpreted as "effort" (*middel*), not as a tool to restore injustice or to recover losses, but rather an effort to restore an uneasy situation in society. (Nur Ainiyah Rahmawati, 2013)

Based on the description above, it is interesting for the author to study the application of restorative justice in relation to the principle of *ultimum remedium* .

Formulation of the problem :

1. How is the concept of implementing restorative justice related to the principle of ultimum remedy?
2. What are the obstacles in implementing the concept of Restorative Justice?

2. RESEARCH METHODS

This research uses a type of normative legal research using a conceptual approach *which* departs from the views and doctrines that develop in legal science with a scientific procedure to find the truth based on scientific logic from the normative side by analyzing problems and research through an approach to legal principles and referring to legal norms contained in statutory regulations .(Amirudin and H. Zainal Asikin, 2016) In this research, the

data used is secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials which are analyzed using qualitative normative analysis methods.

3. DISCUSSION

The concept of implementing restorative justice in relation to the principle of *ultimum remedium*

Based on preliminary data on child cases registered at the Medan District Court from the beginning of 2023 to July 2024, there were 155 cases with details of 60 cases of theft, 43 cases of crime involving sharp weapons or sharp objects, 10 cases of abuse, 30 cases of child protection, 11 Narcotics cases and 1 Murder case, but only 1 child criminal case was successfully resolved with Restorative Justice (diversion) with registration number 79/Pid.Sus-Anak/2023/PN Mdn. According to the case data above, it shows that the implementation of restorative justice and the principle of *ultimum remedium* in resolving juvenile criminal cases has not been implemented optimally. In its implementation, criminal sanctions for children in certain cases shift in position. No longer as *an ultimum remedium* but as *a primum remedium* (Nur Ainiyah Rahmawati) The concept of restorative justice itself is " *Settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to the original condition, and not retaliation* . (M. Ghufuran H. Kordi K,2015) " From this understanding we can understand that the concept of restorative justice seeks to protect children's independence, both children as perpetrators and children as victims and encourages the community to participate.

Settlement with the concept of restorative justice applied in Indonesia in accordance with the Convention *on the Rights of the Child* in 1990 agreed upon by countries in the world, which are equipped with International Instruments, including: *Beijing Rules* , dated 29 November 1985, *The Tokyo Rules* , dated 14 December 1990, *Riyadh Guidelines* , dated 14 December 1990, and *Havana Rules* , dated 14 December 1990, (Anita Zulfiani, 2023) Where the implementation of handling juvenile criminal cases through restorative justice in Indonesia is regulated in the Juvenile Criminal Justice System Law, including the following:

1. The head of the court is obliged to appoint a judge or panel of judges to handle children's cases no later than 3 (three) days after receiving the case files from the public prosecutor.
2. The judge is obliged to seek diversion no later than 7 (seven) days after being appointed by the District Court as a judge.
3. Diversion as intended in paragraph (2) is carried out no later than 30 (thirty) days.
4. The diversion process can be carried out in the mediation room of the District Court.

5. In the event that the Diversion process is successful in reaching an agreement, the Judge shall submit the Diversion minutes along with the Diversion agreement to the Chairman of the District Court for a determination to be made.
6. If diversion is not successful, the case will proceed to the trial stage.

Apart from that in point 5 above, in the event of a Diversion agreement, the agreement must obtain the consent of the victim and/or the victim's child's family as well as the willingness of the child and their family. This indicates that there must be activeness from the victim and his family in the diversion process, so that the recovery process can be achieved in accordance with restorative justice. Implementation must be carried out at the level of investigation, prosecution and examination of children's cases in the district court, carried out in the event that the criminal offense committed: (a) is punishable by imprisonment for less than 7 (seven) years; and (b) is not a repeat criminal".

This provision explains that a child who commits a crime whose threat is more than 7 (seven) years and is a repeater does not have to seek diversion, this is important considering that if the threat is more than 7 (seven) years it is classified as a serious crime, and is a repetition, meaning that the child has committed similar or dissimilar criminal acts, including criminal acts resolved through diversion. Repetition of criminal acts by children is proof that the goal of Diversion has not been achieved, namely instilling a sense of responsibility in children not to repeat acts in the form of criminal acts. Diversion efforts against it may not be mandatory. (Mohammad Taufik Makarao, Wenry Bukamo, Syaiful Azri, 2013) In the event of a diversion agreement, there are several forms of results of the diversion agreement, including:

- a. Peace with or without compensation;
- b. Handing back to parents/guardians;
- c. Participation in education or training at an educational institution or LPKS for a maximum of 3 months; or
- d. Society service.

The implementation of this diversion is in line with the *Ultimum Remedium principle* which according to Van de Bunt has three meanings , namely:

- a. The application of criminal law only to people who violate the law is ethically very severe;
- b. Criminal law is *the ultimum remedium* because criminal law sanctions are heavier and tougher than sanctions in other fields of law, and often have side effects, so they should be applied if sanctions in other fields of law are unable to resolve the problem of law violations (final remedy);

- c. Criminal law is *the ultimum remedium* because administrative officials are the first to know that a violation has occurred. So they are the ones who are given priority to take steps and actions rather than criminal law enforcers. (Mas Putra Zenno Januarsyah, 2011)

Likewise, the concept of *Restorative Justice* emphasizes the definition of crime as an action against an individual or society, not as a form of violation against the State. The victim plays a major role and receives restitution from the perpetrator of the crime. (Yasmirah Mandasari Saragih, Muhammad Ridwan Lubis, 2013) Apart from the litigants (perpetrators and victims), the role of the community is also very determining in the realization of diversion. The community's role can be seen in Article 93 letters d and letter e which reads "The community can participate in protecting children from prevention to social reintegration of children. by : (Rial Pradila Srg, Yasmira Mandasari Saragih, 2023)

- a. Participate in resolving children's cases through diversion and a restorative justice approach;
- b. This means that people who are not perpetrators or victims are included in the process of resolving criminal cases committed by children:
- c. This community involvement is very helpful in creating a safer and more peaceful atmosphere in social interactions;
- d. Contribute to the rehabilitation and social reintegration of children, child victims and/or child witnesses through community organizations.

Based on what has been explained above, the concept of implementing restorative justice is closely related to the principle of *ultimum remedium* where criminal sanctions can be imposed when peace efforts by the parties do not fulfill the agreement or after other efforts cannot be taken or are unsuccessful.

Obstacles in Implementing Restorative Justice

Based on the above, the factors inhibiting the implementation of restorative justice are:

1. Legal substance that has not coordinated the complete implementation of restorative justice;
2. Law enforcers who have not optimally implemented existing regulations and are still rigid and have not yet maximized legal compliance/community participation;
3. There has been no regulation that coordinates all provisions for children through a restorative justice approach, outreach to all officials and law enforcement ;
4. There are differences in perceptions regarding the meaning of justice from the parties;

5. Lack of understanding and public doubt regarding the application of restorative justice cannot have a deterrent effect on criminal perpetrators;
6. It is difficult to present the litigants.

4. CONCLUSION

1. The concept of Restorative Justice in handling juvenile criminal cases is in accordance with the principle of *ultimum remedium*, where criminal sanctions are the final step taken after diversion efforts have first been carried out involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to work together to find a solution. which is fair by emphasizing restoration back to its original state, and not retaliation, this is done by balancing criminal acts committed by children not only talking about violations of the law but violations of social norms so that the community is obliged to play an active role in resolving child criminal cases with a protection orientation. the future of children, both victims and perpetrators.
2. Factors that become obstacles in reaching a diversion agreement in resolving children's cases are, *first*, Legal substance that has not yet coordinated the complete implementation of restorative justice. *Second*, Law enforcers who have not optimally implemented existing regulations and are still rigid and have not yet maximized legal compliance/community participation. *Third*, there has been no regulation that coordinates all provisions for children through a restorative justice approach, outreach to all law enforcement officers, *Fourth* ., There are different perceptions regarding the meaning of justice from the parties. *Fifth* , The lack of understanding and doubts by the public regarding the implementation of restorative justice cannot have a deterrent effect on criminal perpetrators. *Sixth* , it is difficult to present the litigants.

5. BIBLIOGRAPHY

- Amirudin, & Zainal Asikin, H. (2016). *Introduction to legal research methods* (Revised ed.). PT Raja Grafindo.
- Anita Zulfiani. (2023). Restorative justice and child criminal justice. *Journal of Research Domain*, 3(4).
- Arief, H. (2018). Application of restorative justice principles in the criminal justice system in Indonesia. *Al'Adl Journal*.

- Januarsyah, M. P. Z. (2011). Application of the principle of ultimum remedium in corruption crimes. *Journal of the Bandung College of Law*.
- Kordi, M. G. H. (2015). Disobedience to children: Reflections on children's rights and protection. *Pustaka Baru Press*.
- Makaraao, M. T., Bukamo, W., & Azri, S. (2013). Child protection law and the elimination of domestic violence. *Rineka Cipta*.
- Rahmawati, N. A. (2013). Indonesian criminal law: Ultimum remedium or primum remedium. *Recidive Journal*, 2(1), Faculty of Law, Sebelas Maret University.
- Mozin, N., & Saragih, Y. M. (2021). The role of the PPA unit in applying restorative justice theory to the crime of theft against child offenders in Gorontalo. *Journal of Social Economics and Humanities*.
- Pradila, S., & Saragih, Y. M. (2023). Juridical analysis of children as perpetrators of traffic violations that cause accidents and casualties. *Journal of Social Science Research*, 3(4).
- Chandra, S. (2014). Legal politics of adopting restorative justice in criminal law reform. *Faculty of Law, Muhammadiyah University*.
- Hasibuan, S. A., Saragih, Y. M., et al. (2019). Model of implementing restorative justice in child crime at the investigation level. *Seminar Journal of Social Sciences Engineering & Humanities*.
- Saragih, Y. M., & Lubis, M. R. (2013). Development of the concept of restorative justice in Indonesian criminal law. *CV. Dewa Publishing*.