
Restorative Justice in The Perspective of Customary Law: A Solution to The Settlement of Narcotics Crimes Committed by Children

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Abstract

Restorative Justice is a thought that responds to the development of the criminal justice system by focusing on the needs of the community, where the settlement uses customary law which is something that is very urgent at this time by considering various things besides so that the settlement does not take a long time, but also the parties do not incur large costs and the most important thing is that family relations will remain harmoniously intertwined so as not to leave the problem of "revenge" for their descendants, especially for children who are involved in narcotics crimes, considering that children can become victims of adult behavior. The re-establishment of harmony in social ties of course will maintain public security and order. The method in this research is field research or often called Empirical Law research, namely research that looks directly at the reality in the field, this type of research has the nature and character of showing the gap between the applicable law and the existing reality. One solution that is carried out on the concept of restorative justice is to divert or place the perpetrators of child crimes out of the criminal justice system, meaning that not all cases of juvenile delinquents must be resolved through formal justice, and provide an alternative for settlement with a justice approach in the best interest of for children.

1. Introduction

Law No. 11 of 2012 concerning the Juvenile Criminal Justice System has undergone many changes, including in terms of the definition of children being broader and leading to the criminal justice system. And from an institutional perspective, there are institutions that can guarantee children's rights in undergoing the justice system. And also, from a principal standpoint it is also clear that children's rights are upheld in the law. Likewise, in terms of criminal sanctions against children, it has expanded, which previously tended to follow the Criminal Code, now it is more towards the expansion of the criminal sanctions themselves. So, in the implementation of the law on the juvenile justice system it is not only carried out by way of punishment but can be resolved by way of Restorative Justice.¹

John Braithwaite, Howard Zehr and Mark Umbreit as figures of restorative justice make restorative justice an effort to abolish punishment for wrongdoing by giving responsibility to the perpetrator and involving the participation of the litigants (perpetrators, victims and the community). Restorative justice gives the concept of apology, restitution and recognition of mistakes that have been made and efforts to heal and reintegrate the perpetrator back into society with or without additional punishment which gives the perpetrator an opportunity to improve himself.²

Handling criminal cases with a restorative justice approach offers different views and approaches in understanding and dealing with a crime. In the view of restorative justice, the meaning of a crime is basically the same as the view of criminal law in general, namely attacks on individuals and society as well as relationships. However, in the restorative justice approach, the main victim of a crime is not the state, as in the existing criminal justice system. Therefore, crime creates an obligation to repair damaged relationships due to the occurrence of a crime.³

¹ Meyrina, S. A. (2017). Restorative Justice dalam Peradilan Anak Berdasarkan Undang-Undang No.11 Tahun 2012. *Jurnal Penelitian Hukum De Jure*, 17(1), 92-107. <https://doi.org/10.30641/dejure.2017.V17.92-107>

² Wulandari, C. (2021). Dinamika Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia. *Jurnal Jurisprudence*, 10(2), 233-49. <https://doi.org/10.23917/jurisprudence.v10i2.12233>

³ *Ibid.*, 94

While justice is interpreted as a process of finding solutions to problems that occur in a criminal case where the involvement of victims, communities and perpetrators is important in efforts to repair, reconcile and guarantee the continuity of these repair efforts. As the most recent approach in criminal law, the restorative justice approach is a paradigm that can be used as a frame for a strategy for handling criminal cases that aims to address dissatisfaction with the functioning of the existing criminal justice system. This can be seen from the general characteristics of Indonesian customary law, views on customary violations/customary offences as well as the model and method of settlement it offers.⁴

The problem of applying customary law and the functionalization of customary justice institutions is in fact often clashed with formal law. This fact departs from historical realities where decades of colonialism caused European law to dominate the form of legal systems in many countries in the world. The sociological regime that underlies work in the criminal justice system allows all developments and all thoughts in society to be absorbed in the process of a criminal case.⁵

Even though in the normative framework there are many questions, in reality there is also the practice of settling criminal cases outside the criminal justice system, mainly by customary court institutions. Within the framework of a restorative justice approach, it is stated that the roots of values promoted by restorative justice are rooted in traditional values in traditional societies such as values of balance, harmonization and peace in society. Therefore, in several countries it is recorded that customary justice institutions are maintained as a means for the community to resolve disputes or problems they experience, including criminal cases. This fact raises the challenge of empowering customary justice institutions by placing them in the mechanism of the applicable system. It is a fact that the influence of the European legal system in various countries in the world as a result of colonialism in the past has caused this system to dominate the existing and current legal system. Problems have occurred since the implementation of "western" law in various countries and the

⁴ *Ibid.*

⁵ Zulfa, E. A. (2010). Keadilan Restoratif dan Revitalisasi Lembaga Adat di Indonesia. *Jurnal Kriminologi Indonesia*, 6(2), 182-203.

removal of traditional institutions that were previously in effect. There was a conflict where the two legal systems could not go hand in hand.⁶

Children involved in narcotics abuse are certainly not born suddenly, but through a process of consideration from criminal organizations or narcotics trafficking syndicates, where these crimes do promise quite lucrative benefits. Narcotics dealers use minors to become couriers for these illegal drugs with the aim of tricking the authorities.

Lack of knowledge about narcotics, and the inability to refuse and fight make minors a target for narcotics dealers to distribute narcotics widely and covertly. This problem is of course a very serious problem, because it can plunge minors into the illicit narcotics business. A child who becomes a narcotics courier is one thing that is so concerning where the child has faced the law and is classified as having committed a narcotic crime. Juridically, children who abuse narcotics are qualified as perpetrators of crimes, but conceptually because of narcotics abuse they qualify as Crime Without Victim, which means that the victims of the crime are the perpetrators themselves. then in the event of narcotics abuse the victim (crime) is the perpetrator. Thus, conceptually a child who abuses narcotics, in addition to his qualifications as a perpetrator, he is also a victim.⁷

The application of criminal sanctions for perpetrators specifically for children can provide prevention to perpetrators and the community from committing crimes again. This goal sometimes fails, because the perpetrators of crimes become recidivists and society acts by imitating crimes. This is because criminal sanctions cannot see the root of the problem that is the cause of criminal acts. Therefore, it takes a thought to take a social approach in addition to the application of criminal sanctions.

The use of criminal law as a means of overcoming crime, including overcoming narcotics abuse, is currently under intense scrutiny as well as being a topic of long

⁶ *Ibid.*, 184.

⁷ Supriyanto, E. (2018). Tinjauan Yuridis Terhadap Anak yang Menjadi Kurir Narkotika Ditinjau dari Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak. *Prosiding Seminar Nasional Cendekiawan*, 987-91. <https://doi.org/10.25105/semnas.v0i0.3424>

conceptual debate. Although this conceptual debate still gives rise to pros and cons of the use of criminal law as a means of overcoming crime.⁸

There is a view that the use of criminal law as a means of overcoming crime cannot be related to the understanding that its use must still be subsidiary in nature. That is, as long as the use of means outside the criminal justice system is seen as more effective, the use of criminal justice is avoided as much as possible. In addition, if criminal (law) is to be used as a means to reach the complete Indonesian human being, then a humanistic approach must also be considered. This is important not only because crime is essentially a humanitarian problem, but also because in essence the criminal law itself contains an element of suffering which can attack the most valuable interests or values for human life.⁹

Indigenous peoples use a family settlement. Mediation outside the court is a peaceful dispute resolution process that is commonly used by the community on a daily basis mediated by a third party, namely traditional elders, religious leaders, or other community leaders.¹⁰ Therefore, customary law is an aspect of the life and culture of the Indonesian people which is also the essence of the necessities of life, way of life, and outlook on life of the Indonesian people which is different from the western mindset which gave birth to a legal system based on the above mindset.

In general, the settlement of cases of child perpetrators of criminal acts that were resolved by the Village Head in Pohuwato Regency was only minor crimes, but researchers saw that children were dealers and drug users in traditional villages in Pohuwato Regency from 2018 at least 1 person, in 2019 at least 1 person and at least 2 people in 2020, in solving crimes against children as narcotics dealers and users it should be resolved with Restorative Justice considering that we know that cases of children who become narcotics couriers are perpetrators, but to involve victims in cases of children who become narcotics couriers and the user is still a question that who are the victims who will be involved in this case. So according to researchers that children who become drug couriers.

⁸ Prasetyo, A. et al. (2017). Diversi Tindak Pidana Narkotika terhadap Anak (Studi Kasus di Kabupaten Sambas). *Jurnal Nestor Magister Hukum*, 4(4), 83.

⁹ *Ibid.*, 83.

¹⁰ Syukur, F. A. (2012). *Mediasi Yudisial di Indonesia*. Mandar Maju.

The traditional village of Pohuwato Regency should prioritize customary law in resolving cases of children as dealers and users of narcotics. Bearing in mind that in the case of children who commit criminal acts of drug dealers and users of narcotics, they can be said to be victims. And the perpetrators who committed the crime should not be immediately transferred to court, but resolved by customary law itself, by way of mediation. The process was carried out by involving the Village Head as the Mediator, perpetrators, victims, as well as the family and the local community. These people were involved with a purpose, because they were also affected and affected in various forms as a result of a crime committed by the perpetrator.

2. Problem Statement

The application of customary law is an effort to restore the disturbed balance in the order of indigenous peoples. Based on the background above, the authors limit the problems that will be discussed in this study, namely: How is the concept of restorative justice in the perspective of customary law for the settlement of narcotics crimes committed by children?

3. Methods

The method in this research is field research or often called Empirical Legal research, namely research that looks directly at the reality in the field, this type of research has characteristics and characteristics that reveal a gap between the applicable law and the reality that exists in Pohuwato Regency by looking at criminal acts that occur especially in children. The approach used in this study is a juridical approach, namely analyzing problems regarding the implementation of the principles of restorative justice in the eyes of customary law against narcotics crimes committed by children. The technique used in collecting legal materials is by document study, namely conducting an assessment of the literature data (secondary data) that is relevant to the object of research which includes primary, secondary and tertiary legal materials both on laws and regulations, reference books and dictionaries. law, interview techniques, observation or observation techniques. Then analyzed by descriptive qualitative.

4. Discussion

In criminal law, narcotics crime is one of the special acts against the law. This

arrangement for narcotics crimes is outlined in Law Number 35 of 2009 concerning Narcotics (Narcotics Law). The criminal sanctions used in the Narcotics Law are:¹¹

- 1) Principal criminal sanctions in the form of death penalty, life imprisonment, imprisonment with a certain time limit, imprisonment, fines and other additional punishments;
- 2) Action sanctions in the form of medical and social rehabilitation. Aggravation of criminal acts based on the amount or narcotics, the consequences, carried out in an organized manner, carried out by corporations, carried out using children who are not old enough, and if there is a repetition (recidivist) within a period of 3 (three) years.

Crimes in the field of narcotics are not entirely committed by adults, but there are times when these crimes are also committed together with children. Children who are immature tend to be easily influenced to commit acts related to narcotics, because their souls are not yet stable due to physical and psychological development. The act of using a minor to carry out narcotic activities is a crime regulated in Article 133 of the narcotics law.¹²

The positive law that is used to try children is clearly contrary to human rights, contrary to the basic constitution, and very dangerous for the future of children, so there is no other choice, we have to overhaul the justice system for children in Indonesia. It is not enough to just revise the Law on Juvenile Justice, it is not enough to change the rules for implementing law enforcement officials in the field, but also the paradigm of juvenile justice must be changed. The juvenile justice paradigm must be based on a child protection perspective. In child protection there are 4 basic principles, namely: non-discrimination; the best interests of the child; survival, growth and development; respect for the opinion of the child. Thus, in the perspective of child protection, there is no punishment for children and no prison for children. Whatever the reason, whatever the actions taken by the child. The process of

¹¹ Yudha, N. K., & Utari, A. A. S. (2020). Perlindungan Hukum Terhadap Anak Sebagai Pelaku Tindak Pidana Narkotika. *Kertha Wicara: Journal Ilmu Hukum*, 9(2), 1-15.

¹² *Ibid.*, 6.

sentencing, let alone imprisonment, is only for adults.¹³

In dealing with children as perpetrators of juvenile crimes, the police always pay attention to the condition of children, which are different from adults. As individuals who are still unstable, the future of children as state assets, and the position of children in society who still need protection can be used as a basis for finding the best alternative solutions, how to prevent children from entering the formal criminal justice system, placing children and stigmatizing the position of children as prisoners.¹⁴

One solution is to divert or place juvenile offenders out of the criminal justice system, meaning that not all cases of naughty children must be resolved through formal justice channels, and provide alternatives for settlement with a justice approach in the best interests of the child and taking into account justice for victims which is called a restorative justice approach. Handling with this approach is also carried out with the reason to provide an opportunity for lawbreakers to become good people again through non-formal channels by involving community resources, also trying to provide justice to cases of children who have already committed crimes to law enforcement officials.¹⁵

Discourse on customary justice as an important part of the development of the philosophy of restorative justice criminal justice was born from the belief that restorative justice basically comes from the values of indigenous peoples that have existed so far. When looking at the definition of restorative justice, his point of view in seeing crimes and criminals that are different from what is currently developing and the goals carried out by this philosophy for the settlement of criminal cases, then such thinking seems to be natural. This view is also based on an assumption about the source of the values contained in restorative justice which basically originates from

¹³ Amdani, Y. (2016). Konsep Restorative Justice dalam Penyelesaian Perkara Tindak Pidana Pencurian oleh Anak Berbasis Hukum Islam dan Adat Aceh. *Al-'Adalah*, 13(1), 81-76. <https://doi.org/10.24042/adalah.v13i1.1130>

¹⁴ Yudaningsih, L. P. (2014). Penanganan Perkara Anak Melalui Restorative Justice. *Jurnal Ilmu Hukum Jambi*, 5(2), 67-79.

¹⁵ *Ibid.*, 68-69.

values in customary law.¹⁶

Violation of customary law is interpreted as a violation of the orderly line of the cosmos. For everyone who is considered to follow customary law, this line of cosmic order must be followed immediately. If this line is not carried even by an individual, then both society and that person will suffer for being outside the line. This action is referred to as a violation of *adat*.

Likewise, the settlement, in the view of *adat*, there are no provisions which come into effect accompanied by conditions that guarantee compliance by means of force. Customary sanctions do not have the same meaning as punishment as described in classical sentencing theories because their goals are different. An application of customary sanctions is an attempt to restore steps that are outside the cosmic line in order not to disturb the cosmic order. So customary sanctions are an attempt to restore the disturbed balance. Therefore, in the past, judicial activities including the criminal justice system could not be separated from religious, cultural and governmental activities, the economy and other life.¹⁷

Customary law communities are part of Indonesian society. It should be remembered that before the formation of the archipelago (Indonesia), as a Unitary State of the Republic of Indonesia. Customary law is an unwritten and uncodified rule, but it is still obeyed in society because it has certain sanctions if it is not obeyed. From the understanding of Customary Law that was disclosed above, most forms of Customary Law are unwritten. In fact, in a rule of law, a principle applies, namely the principle of legality. The principle of legality states that there is no law other than what is written in the law. This is to ensure legal certainty. But on the one hand, if a judge cannot find his law in written law, a judge must be able to find his law in the rules that live in society.¹⁸

The case of drug abuse committed by children in Pohuwato District, Friday, January

¹⁶ Zulfa, E. A. (2010). Keadilan Restoratif dan Revitalisasi Lembaga Adat di Indonesia. *Jurnal Kriminologi Indonesia*, 6(2), 182–203.

¹⁷ *Ibid.*, 189.

¹⁸ Badu, L. W. et al. (2021). Perlindungan Hak-Hak Konstitusional Masyarakat Adat di Kabupaten Boalemo dalam Penerapan Sanksi Adat. *Jurnal Konstitusi*, 18(1), 219–39. <https://doi.org/10.31078/jk18110>

31, 2020, around 23.30 WITA, a member of the Pohuwato Police Narcotics Investigation unit. Based on the case examples above, it is necessary to supervise children because there is a tendency for narcotics dealers and dealers to use children as the main target for the development of the narcotics business, one of which is using children as couriers in distributing narcotics, we can see in the following table:

Table 1. *Number of Narcotics Trafficking Cases in Pohuwato District Committed by Minors*

No.	Year	Case Report
1	2018	1
2	2019	1
3	2020	2

Source: Pohuwato Police Station 03 March 2021

The development of criminal acts of narcotics dealers committed by minors in the Pohuwato Regency area based on research data in the last 3 years there were 4 cases. In 2018 there was 1 case, in 2019 there was 1 case, and in 2020 there were 2 cases of underage narcotics dealers.

The court can impose penalties from the minimum penalty to the maximum penalty according to the penalty for the article/articles of the criminal law regulations that have been violated. In terms of the severity of the punishment, the punishment is proportional to the level of guilt of the Defendant (measured by the level of public disapproval of the ethical violations that apply in society and their impact), so that from a minimum penalty to a maximum threat, it is divided into 4 categories or ranges as follows:¹⁹

- 1) Reproach with a light level of guilt, the Defendant can be punished between a minimum sentence of up to $\frac{1}{4}$ (one quarter) of the maximum penalty;
- 2) Reproach with a moderate level of guilt, the Defendant can be sentenced to between $\frac{1}{4}$ (one quarter) of the maximum penalty up to $\frac{1}{2}$ (half) of the maximum sentence;
- 3) Reproach with a serious error rate, the Defendant can be sentenced to between $\frac{1}{2}$ (half) of the maximum criminal threat to $\frac{3}{4}$ (three-fourths) of the

¹⁹ Santoso, P. I. (2021, July). *Pembedaan Penjatuhan Hukuman Mati di Pengadilan Negeri Gorontalo*. Focus Group Discussion Fakultas Hukum Universitas Negeri Gorontalo dan Pengadilan Negeri Gorontalo.

maximum criminal threat;

- 4) Reproach with a very serious level of guilt, the Defendant can be sentenced to between $\frac{3}{4}$ (three quarters) of the maximum penalty to the maximum penalty;

Efforts to divert the process from a judicial process to a non-judicial process in overcoming narcotics abuse by children, are basically efforts to resolve narcotics abuse by children outside the criminal justice system. That is, the transfer of processes from judicial processes to non-judicial processes in overcoming narcotics abuse by children is basically an attempt to prevent children from applying criminal law and punishment.

Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, the term restorative justice is known as Restorative Justice, which means a settlement process involving perpetrators, victims, their families and other parties involved in a crime, jointly seeking a solution to the crime and the implication by emphasizing recovery rather than retaliation.

The main problem for imposing or implementing a restorative justice approach or concept in a legal system in general and in a criminal justice system in particular lies in the settlement mechanism offered by the approach or concept of restorative justice which is different from the settlement mechanism offered by the existing criminal justice system so that it is still difficult to accept. This is because the mechanism offered by the approach or concept of restorative justice emphasizes the concept of peace, the concept of "mediation" and the concept of reconciliation in which perpetrators, victims.²⁰

Settlement of criminal cases using a restorative justice approach is an option offered, it does not mean that with the presence of a new approach, namely restorative justice, the conventional criminal justice system will disappear. The presence of the criminal justice system is still deemed necessary, when the restorative justice approach cannot achieve the desired results. Nonetheless, the choice of resolving criminal cases using a restorative approach can also become a framework for the

²⁰ Arief, H., & Ambarsari, N. (2018). Penerapan Prinsip Restorative Justice dalam Sistem Peradilan Pidana di Indonesia. *Al-Adl : Jurnal Hukum*, 10(2), 173–90. <https://doi.org/10.31602/al-adl.v10i2.1362>

operation of the conventional criminal justice system. Because the process of resolving criminal cases using a restorative justice approach, especially in customary law, is a process in order to find the best form of a settlement of disputes that occur in society.²¹

Humans, according to traditional teachings, are obliged to place shame as a value base in every social relationship. It is this shameless moral teaching that in the perspective of customary law becomes a kind of defense mechanism or self-restraint, so that humans do not do anything that is contrary to decency, harmony and harmony in social life. Shameless teachings that are instilled in individuals basically provide a fundamental foundation for those involved in every social relationship. This shameless teaching functions as a value base in every social relationship, with the aim that those who carry out their social relations can place themselves properly. Maintaining the norms of decency and decency in society together creates solidarity in the form of efforts to prevent offenses from occurring. If an offense has actually been committed by an individual and has fulfilled the element of causality, then the reaction which is a correction is an automatic action which is a necessity for the balance of society.

Justice is not a sacred verification of the general intent of implicative sentences formulated in the articles of the Law. Justice is not a routine task of knocking the hammer on the courthouse. Justice also does not need lazy judges and blunt humanity. What is needed is that justice is the courage to interpret the law to elevate the dignity of Indonesian people. So that justice is only assumed to be the routine of police, prosecutors and judges as a livelihood in a building. Because, for officials, being a civil servant or a police officer aims to work. Because of this, the law is only part of the pile of files on the desk of law enforcement that must be completed. 18 Therefore, the progressive legal theory emerged by Satjipto Rahardjo, Progressive law enforcement is implementing the law, not just the black and white words of the regulations (according to the letter), but according to the spirit and deeper meaning

²¹ Kaluku, J. A. (2014). Penggunaan Hukum Adat Bajo Sebagai Alternatif Penyelesaian Perkara Anak Pelaku Tindak Pidana Kesusilaan (Studi Pada Masyarakat Adat Bajo, di Desa Jaya Bhaktikecamatan Pagimana, Kabupaten Luwuk Banggai, Sulawesi Tengah). *Arena Hukum*, 7(1), 89-116. <https://doi.org/10.21776/ub.arenahukum.2014.00701.6>

(to very meaning) of the law or law. Law enforcement is not only intellectual intelligence, but with spiritual intelligence. In other words, law enforcement is carried out with full determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to find other ways than what is usually done. 19 So progressive law prioritizes social justice. So that when the law is upheld, the sense of justice will really be felt by the community.²²

The concept of settling cases outside the system, the role of institutions in the justice system still plays a role either as a mediator or not. The residents' choice to bring this case into the criminal justice system was still an option even though the report was eventually withdrawn. From these problems the active role in making peace initiatives always comes from the perpetrators of criminal acts, where the initiative is responded to by law enforcement officials as long as the matter is approved by the victim by putting it in the form of a peace agreement.²³

5. Conclusion

The main goal of restorative justice is the creation of a fair trial. In addition, it is hoped that the parties, both perpetrators, victims, and the community, will play a major role in it. Considering that children who commit narcotics crimes are victims, in handling child cases, the known form of restorative justice is a reparative board/youth panel, namely a settlement of cases of crimes committed by children involving perpetrators, victims, communities, mediators, law enforcement officials who authorities jointly formulate appropriate sanctions for perpetrators and compensation for victims or the community. Even indigenous groups in their life order always use mediation efforts by consulting in resolving all problems with mediators namely customary heads, tribal heads, traditional leaders and elders in the group. So, the application of restorative justice is not a new thing that is carried out in the process of resolving disputes/problems, but has become the custom and culture of the Indonesian people from generation to generation until now.

²² Kurniawan, T. L. et al. (2021). Restorative Justice (Keadilan Restoratif) Penerapannya Dalam Hukum Pidana Dan Hukum Adat. *Unizar Law Review (ULR)*, 4(1), Article 1. <https://www.e-journal.unizar.ac.id/index.php/ulr/article/view/358>

²³ Hambali, A. R. (2020). Penegakan Hukum Melalui Pendekatan Restorative Justice Penyelesaian Perkara Tindak Pidana. *Kalabbirang Law Journal*, 2(1), 69-77. <https://doi.org/10.35877/454RI.kalabbirang36>

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