



## **Implementation of Restorative Justice in Surakarta District Court**

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**Abstract:** The postponement of the Decree of the Director General of Badilum Number 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Court Environment by Letter Number 1209/DJU/PS.00/11/2021 until the Supreme Court regulations regarding guidelines for justice come into force Restorative raises problems, namely what the Surakarta District Court's policy is regarding the implementation of justice. This field research type uses interview and documentation data collection methods and data analysis techniques using the interactive model from Miles and Huberman. The research results show that in their authority to examine and adjudicate cases, judges must pay attention to contextual matters in resolving cases using a restorative justice approach, which resolves criminal cases by involving perpetrators, victims, and other parties who work together to find a satisfactory solution. fair by emphasizing restoration to the original state, not retaliation. Resolving cases using restorative justice, lack of support and cooperation between institutions, and the justice system not regulating much about victims' rights.

**Keywords:** Restorative Justice, District Court, Surakarta

**Abstrak:** Ditanggungkannya SK Dirjen Badilum Nomor 1691/DJU/SK/PS.00/12/2020 tentang Pedoman Penerapan Restorative Justice di Lingkungan Peradilan Umum oleh Surat Nomor 1209/DJU/PS.00/11/2021 sampai dengan diberlakukannya peraturan Mahkamah Agung tentang pedoman keadilan restoratif menimbulkan persoalan, yaitu bagaimana kebijakan Pengadilan Negeri Surakarta terkait pelaksanaan keadilan. Penelitian ini berjenis penelitian lapangan dengan metode pengumpulan data wawancara dan dokumentasi serta teknik analisa data menggunakan model interaktif dari Miles dan Huberman. Hasil penelitian menunjukkan bahwa hakim dalam kewenangannya memeriksa dan mengadili perkara, hakim haruslah memperhatikan hal-hal yang bersifat kontekstual di dalam menyelesaikan perkara dengan pendekatan restoratif justice, yang menyelesaikan perkara tindak pidana dengan melibatkan pelaku, korban maupun pihak lainnya yang bersama-sama mencari penyelesaian yang adil dengan menekankan pemulihan kembali pada keadaan semula bukan pembalasan. Penyelesaian perkara dengan restorative justice, kurangnya dukungan dan kerjasama antar lembaga, sistem peradilan belum banyak mengatur tentang hak-hak dari korban.

**Kata Kunci:** Restorative Justice, Pengadilan Negeri, Surakarta

## A. Introduction

The concept of restorative justice has become a trend in legal settlements among law enforcers. One of the law enforcers who can be vital in resolving legal problems is a judge. As a mascot of the law, judges are always considered to know the law and cannot reject a case even when there is no current law. Judges are obliged to explore the values that exist in society to serve as a guideline in judging; Law Number 48 of 2009 concerning Judicial Power Article 5 paragraph (1) mentioned that "judges and constitutional justices are obliged to explore, follow and understand legal values and a sense of justice that lives in society."

Restorative justice is not something new in Indonesian society. Before Indonesia was colonized, the law applied by Indonesians was customary law. Restorative justice, commensurate with musyawarah and consensus, is part of customary law implemented by local communities at that time. However, almost all aspects of life in Indonesian society were paralyzed when Indonesia was colonized, including the original laws, which were not popular at that time.

In Indonesia's criminal law development, there is a paradigm shift from retributive justice to restorative justice. Restorative justice is a process where all parties involved in a particular crime join together to solve the problem of dealing with future consequences. Restorative justice is also defined as the restoration of relationships and redemption of mistakes that the perpetrator of a criminal act and/or his family wishes to carry out against the victim of a criminal act and/or his family outside of court so that legal

problems arising as a result of the criminal act can be resolved properly by reaching an agreement between both parties.<sup>1</sup>

The paradigm shift from retributive justice to restorative justice in Indonesia is demonstrated by adopting the concept of restorative justice into criminal law provisions in Indonesia. The Birth of Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System. The concept of restorative justice is realized by the existence of diversion institutions. The definition of diversion based on the provisions of Article 1 number 7 of the Law of the Republic of Indonesia Number 11 of 2012 is: "Diversion is the transfer of the resolution of children's cases from the criminal justice process to a process outside of criminal justice."

Diversion manifests a paradigm shift from retributive justice to restorative justice. However, the provisions regarding diversion are not the only dominant institution in the concept of restorative justice. Article 14a of the Criminal Code through conditional sentences can also be used to realize restorative justice. Still, in practice, there are differences in perceptions from the judges who apply it.<sup>2</sup>

Due to these developments, the prosecutor's office, as part of the criminal justice system which carries out functions in the field of prosecution, has adopted the concept of restorative justice in line with the publication of Prosecutor's Regulation Number 15 of 2020 concerning Guidelines for Terminating Prosecution Based on Restorative Justice. Then, the Indonesian National Police also issued Indonesian National Police Regulation Number 8 of 2021 concerning Handling Criminal Acts Based on Restorative Justice.

The Supreme Court of the Republic of Indonesia, as the holder of the judicial branch of power through the Directorate General of the General Courts, has also issued a Decree of the Director General of the General Courts Number 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts. However, it was later suspended by Letter Number 1209/DJU/PS.00/11/2021 until the Supreme Court regulations regarding restorative justice guidelines were implemented.<sup>3</sup>

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<sup>1</sup>Keith Cherry, "Introduction: Pluralism, Contestation, and the Rule of Law," *Constitutional Forum / Forum Constitutionnel* 30, no. 4 (2021); Anis Widyawati, "Criminal Policy Of Adultery In Indonesia," *Journal Of Indonesian Legal Studies* 5, No. 1 (2020); Swati Kaushal, "Punishment for Crimes: An Instrument of Social Change," *Proceedings of International Young Scholars Workshop* 9 (2020); Danial, "Criminalization In Islamic Penal Code: A Study Of Principles, Criminalization Methods, And Declining Variations," *Jurnal Ilmiah Peuradeun* 11, no. 3 (2023).

<sup>2</sup>B. Arief Sidharta, "Etika Dan Kode Etik Profesi Hukum," *Veritas et Justitia* 1, no. 1 (2015); Serlika Aprita, *Etika Profesi Hukum* (Bandung: Refika Aditama, 2019); Muh Risnain, "Kriminalisasi Hakim Dan Eksistensi Prinsip Judicial Independence Dalam Bingkai Negara Hukum," *Jurnal Hukum Dan Peradilan* 2, no. 3 (2018).

<sup>3</sup>Bambang Sutiyoso and Sri Hastuti Puspitasari, *Aspek-Aspek Perkembangan Kekuasaan Kehakiman Di Indonesia* (Yogyakarta: UII Press, 2005); Dachran Busthami, "Kekuasaan Kehakiman Dalam Perspektif Negara Hukum Di Indonesia," *Masalah-Masalah Hukum* 46, no. 4 (2017): 336-342; Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer* (Jakarta: Kencana Prenadamedia, 2010). Edi Setiadi and Kristian, *Sistem Peradilan Pidana Terpadu Dan Sistem Penegakan Hukum Di Indonesia* (Jakarta: Kencana Prenada Media Group, 2018).

This article attempts to answer several problems: (1) The policy of the Surakarta District Court related to implementing restorative justice. (2) The role of Surakarta District Court judges in realizing justice. (3) The obstacles experienced by the Surakarta District Court in realizing restorative justice.

This article uses descriptive field research. The data in this article was taken at the Surakarta Class 1A District Court. This article's data sources are primary and secondary data sources. Primary data sources were obtained using the interview method with Class 1A Surakarta District Court Judges. Secondary data sources in this article are primary, secondary, and tertiary legal materials. The data collection technique in this article uses interview and documentation methods. The data analysis technique in this article uses the interactive model from Miles and Huberman.

## **B. Surakarta District Court Policy Regarding the Implementation of Restorative Justice**

The application of restorative justice at the general court level is based on:

- 1) Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2012 concerning Adjustments to the Limits of Light Crimes and the Number of Fines in the Criminal Code
- 2) Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System.
- 3) Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases in Conflict with the Law.
- 4) Supreme Court Circular Number 4 of 2010 concerning Placement of Abuse, Abuse Victims, and Narcotics Addicts into Medical Rehabilitation and Social Rehabilitation Institutions.
- 5) Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2011 concerning Placement of Narcotics Abuse Victims in Medical Rehabilitation and Social Rehabilitation Institutions.
- 6) Joint Decree of the Chairman of the Supreme Court of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Chief of Indonesian National Police, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, and Minister for Women Empowerment and Child Protection of the Republic of Indonesia Number 166A/KMA/SKB/XII/2009, 148A/A/JA/12/2009, B/45/XII/2009/M.HH-08 HM.03.02 of 2009, 10/PRS-s/KPTS/2009,02/Men.PP and PA/XII/ 2009 concerning Handling Children in Conflict with the Law.
- 7) Memorandum of Understanding with the Chief Justice of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Attorney General of

the Republic of Indonesia, Head of the Indonesian National Police Number 131/KMA/SKB/X/2012, Number M.HH-07.HM.03.02 of 2012, Number KEP-06/E/EJP/10/2012, Number B/39/X/2012 dated 17 October 2012 concerning the Implementation of Adjustments to the Limits of Light Crimes and the Number of Fines, Quick Examination Procedures and the Implementation of Restorative Justice

- 8) Joint Regulation of the Chairman of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Head of the Indonesian National Police, Head of the Narcotics Agency of the Republic of Indonesia Number 01/PB/MA/III/2014, Number 03 of 2014, Number 11 of 2014, Number 03 of 2014, Number Per-005/A/JA/03/2014 Number 1 of 2014, Number Perber/01/III/2014/BNN concerning handling of Narcotics Addicts and Victims of Narcotics Abuse in Rehabilitation Institutions
- 9) Decree of the Director General of the General Justice Agency Number 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for Implementing Restorative Justice in the General Court

In its development, judging decisions with a restorative justice paradigm will minimize dissatisfaction with the decision and minimize the feeling of winning or losing as felt in settlements through conventional justice because restorative justice provides space to obtain a win-win solution and avoid hostility or revenge that often arises from the results of court decisions.

There are many decisions made by judges and several court decisions that do not reflect restorative justice. Still, we can find several judges' jurisprudence that adheres to the restorative justice paradigm in deciding criminal cases if we look closely. Restorative court decisions can be seen in several jurisprudence/court decisions below:

1. North Jakarta District Court Decision Number: 46/Pid/UT/781/WAN dated 17 June 1978 concerning the case of Mrs. Elda released the defendant from all legal charges because of peace.
2. Decision of the Supreme Court of the Republic of Indonesia Number 1644K/Pid/1988 dated 15 May 1991 concerning the existence of customary courts which eliminate criminal charges.
3. Supreme Court Decision Number 984K/Pid/1996, dated January 30, 1996, concerning cases subject to customary sanctions, the prosecutor's demands cannot be accepted.
4. Supreme Court Decision Number 107/PK/Pid/2006 dated 21 November 2007 concerning peacemaking that reduces sentences.

The results of the interview with the Surakarta District Court Judge, Judge Ninik, showed that the decision proved the role of district court judges in realizing restoration. Since the beginning of becoming a judge, several systems of justice have been taught. So, restorative justice is not something new for judges.<sup>4</sup> Apart from that, in several areas that strongly adhere to their traditions, restorative justice has existed for a long time. In determining the restorative justice decision, apart from being based on several provisions listed above, the judge's decision is also based on exploring several cases per case in the field.

What Judge Ninik explained was in line with what was conveyed by Judge Sitoroes, who explained that the duty and authority of judges in deciding incoming cases is required to provide fair decisions through several legal considerations based on the law or other legal sources.<sup>5</sup> Judges must pay attention to contextual matters in their authority to examine and try cases. It is also hoped that this contextual interpretation of law will help people understand the sense of justice in society because society is where the law was born.

Some examples of decisions that the author can extract from one source of judge informants in the April-May period there are several decisions using a restorative justice approach, including:

1. Decision No. 49/Pid. B/2023/PN.Skt related to the crime of morality violating Article 281 paragraph 1, subsidiary paragraph 2. In his complaint, the prosecutor demanded two months in prison. Still, in his decision, the judge decided on a prison sentence of two months, determining that this sentence should not be served unless there is a decision at a later date. what determines otherwise is because the convict committed a criminal act before the 12-month probation period ended.

Based on the results of the decision, it can be concluded that from the start of the case being processed by the police, restorative justice has been implemented at the litigant level. Namely, between the victim/witness and the defendant, the defendant went to the witness/victim's residence to apologize, and the victim forgave him. Still, because the legal process was ongoing, both parties agreed to resolve the issue through penal measures from the police level to the court. Based on the judge's decision, who has attempted and implemented restorative justice efforts with the judge's authority for the defendant:

- 1) Not imprisoned, provided the defendant has apologized and admitted his mistake and the victim/witness has forgiven the defendant.
- 2) The maximum penalty for the perpetrator is 1 (one) year, and the defendant was sentenced to 2 (two) months in prison

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<sup>4</sup>Interview with YM. Ninik Hendras Susilowati, S.H., M.H., on August, 21, 2023.

<sup>5</sup>Interview with YM. Richmond Parluhutan Bharbarossa Sitoroes, S.H., M.H., August 27, 2023.

The results of the judge's decision, apart from having attempted to achieve restorative justice at the court level, were also able to apply progressive legal theory by making decisions wisely so that the defendant was not imprisoned, taking into account that there was peace at the level of both parties and the family and the defendant was regretting his actions and also promised not to repeat it which is proven by a statement letter agreement. The judge's decision has created restorative justice where both parties can make peace based on sincerity and wisdom without any pressure from either party.

2. Decision No. 54/Pid.B/2023/PN.Skt related to the crime of using violence against other people carried out jointly in violation of Article 170 paragraph 1 of the Criminal Code, the prosecutor demanded that defendants 1, 2, and 3 each be sentenced to prison for four months. The judge decided that defendants 1, 2, and 3 were each sentenced to three months.

In this decision, restorative justice was achieved at the level of both parties and the family outside of court because the reported party/defendant apologized, and the witness/victim was forgiven and given compensation to the victim of Rp. 30,000,000.00 (thirty million). Based on restorative justice, which focuses more on creating justice and balanced conditions for the perpetrators of criminal acts and their victims, the criminal justice mechanism specifically for punishment is transformed into a more just and balanced resolution of criminal cases for the victims and perpetrators. Even though the defendant is still in detention for three months based on the judge's decision, peace has been reached between the two parties and their families so that both parties have obtained justice as expected by both parties and view the imprisonment process as an effort to resolve the criminal case which is more fair and balanced for victims and perpetrators.

3. Decision No. 86/Pid.B/2023/PN.Skt related to the crime of abuse in violation of Article 335 paragraph 1 of the Criminal Code, the prosecutor's demand for three months, and the judge's decision to prison for three months.

The judge's decision in this case has realized restorative justice, where the legal process sought is resolution through peace between the two parties. The defendant has admitted his mistake, and the victim has forgiven him. In this situation, due to the defendant's actions in taking the victim's cell phone, the victim suffered a loss of around Rp—3,800,000.00 (three million eight hundred thousand rupiah). However, because peace efforts were made and the victim's cellphone was returned, the damage to the victim did not occur. This means that the legal process using the restorative justice model has been achieved and losses no longer occur, so it is appropriate that the sentence imposed on the perpetrator is 3 (three) months minus the prison term already served. The defendant is only serving the remaining term of detention, which has been reduced

by the detention already carried out. Apart from peace between the two parties, the defendant also regretted his actions and promised not to make a mistake that would result in him being punished. This is one of the restorative principles, namely that apart from creating peace, it also restores and makes the defendant a better human being through the opportunities given.

4. Decision No. 100/Pid.B/2023/PN.Skt related to the crime of theft violating Article 362 of the Criminal Code, prosecuted by a judge with a prison sentence of 5 months and sentenced by a judge to 3 months.

In deciding this case, the judge considered restorative justice aspects by seeking peace for both parties. The defendant apologized to the victim, and the victim forgave the perpetrator. Based on this peace, the Surakarta District Court judge reduced the defendant's prison sentence to 3 months based on various considerations:

- 1) peace between the perpetrator and the victim
- 2) the defendant is the backbone of the family
- 3) This is the first time a criminal has been committed
- 4) The defendant regretted it and promised not to repeat his actions.

In conclusion, restorative justice efforts should be carried out at every level, including at the community, police, prosecutor's office, and court levels. By paying attention to restorative justice, punishment is not always an effort to retaliate. Still, beyond that, it is about trying to do the best for both parties and their families so that the guilty party can become a much better person. Apart from that, the long and complicated legal process for the perpetrator can be a lesson and provide a deterrent effect so that the defendant does not make a mistake that could result in him being sentenced again.

### **C. The Role of Surakarta District Court Judges in Realizing Restorative Justice**

Free and impartial judges have become a universal provision and one of the characteristics of the law State. The judge's decision is an important and necessary aspect to resolve criminal cases. When examined through the judge's vision in adjudicating cases. The judge's decision is the "crown" and peak of reflection and values of justice and ultimate truth, human rights, competent and factual mastery of the law or facts, and visualization of the ethics, mentality, and morality of the judge concerned. According to Article 1 point 11 of the Criminal Procedure Code, what is meant by "a court decision is a judge's statement made in an open court session, which can be in the form of punishment or release from all legal charges in the matter and according to the method regulated in this law." The court's decision depends on the results of the judge's deliberation based on the assessment they obtained from the indictment in conjunction with everything that was proven in the examination at the court hearing.



Judges must always think and work according to the legal framework in their duties and positions and not go outside the law. The judge's decision does not just fulfill legal formalities. In deciding cases, a judge is subject to free and impartial justice because free and impartial justice is the principle that must be obeyed by judges.

Article 24 of the 1945 Constitution explains that "judicial power is independent power to administer justice to uphold law and justice." In carrying out their judicial office, judges are free from any influence, do not take sides with anyone, and must not be affected by the interests of their position or economic interests; no intervention is permitted in the judge's decision-making process, including intervention from the legislative, executive powers of society or the mass media.

To guarantee the objectivity of judges in their decisions, judges have absolute freedom. However, the freedom of judges does not mean that there is some kind of special privilege for judges to act as freely as they can regarding a case they are examining because judges are bound by the law. Law Number 48 of 2009 concerning Judicial Power has explicitly regulated several articles to guarantee the objectivity of judges, including Article 2 paragraph 1, which explains, "Judicial proceedings are carried out for the sake of justice based on belief in the Almighty God" then in Article 4 paragraph 1 that "The court adjudicates according to the law without discriminating against people," Article 13 paragraphs 1 and 2 explains, "court hearings are open to the public unless the law provides otherwise and all court decisions are only valid and have legal force if they are pronounced in a hearing that is open to public.

To determine the severity of the sentence, the judge can move within the limits of the maximum sentence or choose the type of punishment. Within these limits, criminal judges can determine the appropriate punishment imposed on the defendant. This freedom does not mean unlimited freedom. A judge must pay attention to the nature and seriousness of the offense committed and the circumstances surrounding the acts before him. The judge must look at the personality of the person's behavior, age, level of education, male or female, environment, character, or other things.<sup>6</sup>

When deciding a case, a judge must have confidence that the decision is correct based on juridical and non-juridical evidence. A defendant cannot simply be declared guilty and sentenced but must be supported by at least two valid pieces of evidence. These two valid pieces of evidence must convince the judge of the defendant's guilt and the criminal act he committed (Articles 183 and 184 of the Criminal Procedure Code).

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<sup>6</sup>Yousra Hasona, "Child Soldiers and Restorative Justice in the Arab World Countries," *Internet Journal of Restorative Justice* 9 (2021).; Natalya A. Artebyakina and Tatyana Makarova, "Problems of Protecting the Rights of a Private Prosecutor in Defamation Cases," *Russian Journal of Criminology* 13, no. 4 (2019). Edhei Sulistyono, Pujiyono, and Nur Rochaeli, "Restorative Justice as a Resolution for the Crime of Rape with Child Perpetrators," *International Journal of Criminology and Sociology* 10 (2021); Yutirsa Yunus, "Analisis Konsep Restorative Justice Melalui Sistem Diversi Dalam Sistem Peradilan Pidana Anak Di Indonesia," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 2, no. 2 (2013).

Apart from that, the judge must also pay attention to mitigating and aggravating factors. Mitigating factors include the defendant being young, acting politely, and admitting his actions. Aggravating factors include giving complicated information, not admitting their actions, disturbing the community, causing harm to the state, and so on. In Article 8, paragraph 2 of Law Number 48 of 2009 concerning judicial power, it is stated that the judge must pay attention to the evil and good qualities of the defendant in considering the crime to be imposed.

The several explanations above show that the judge should consider many aspects in deciding whether a case is guilty. Even more in resolving cases using a restorative justice approach, which resolves criminal cases by involving perpetrators, victims, and other parties to work together to seek a fair solution by emphasizing restoration back to its original state and not for retaliation.

Several other universally applicable principles inherent in the concept of a restorative approach to resolving criminal acts include the following:

a) Principles of Fair Settlement (Due Process)

In every criminal justice system throughout the country, suspects are always given the right to know in advance about certain protective procedural procedures when faced with prosecution or punishment. The judicial process (due process) must be considered a form of protection to balance the state's power to detain, prosecute, and carry out punishment from a sentence.

In its implementation, the restorative approach process mechanism requires the desire to continue to protect suspects related to the due process. However, because the restoration process requires an admission of guilt first, this raises the question of to what extent informed consent and voluntary waiver of rights can be used to start a fair settlement.<sup>7</sup> According to researchers, the basic concept of resolution through a restorative approach, which requires an admission of guilt for the perpetrator, is a condition for finding a way out to continue the recovery process and, at the same time as a signal that the perpetrator must take responsibility for his actions because an admission of guilt is another form of responsibility.

b) Equal Protection

In resolving criminal acts through a restorative approach, justice must arise from a process of mutual understanding of the meaning and objectives of justice, regardless of

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<sup>7</sup>Rebecca Banwell-Moore, "Just an 'Optional Extra' in the 'Victim Toolkit'?: The Culture, Mechanisms and Approaches of Criminal Justice Organisations Delivering Restorative Justice in England and Wales," *International Review of Victimology* 29, no. 2 (2023); Paula Miranda Sánchez et al., "Restorative Juvenile Penal Mediation in the Framework of the New National Youth Social Reintegration Service in Chile: Principles and Foundations of a Technical Standard," *Politica Criminal* 17, no. 33 (2022); Ulang Mangun Sosiawan, "Perspektif Restorative Justice Sebagai Wujud Perlindungan Anak Yang Berhadapan Dengan Hukum (Perspective Of Restorative Justice as A Children Protection Against The Law)," *Jurnal Penelitian Hukum De Jure* 16, no. 4 (2017).

ethnicity, gender, religion, national origin, and other social positions.<sup>8</sup> There are doubts about the ability of a restorative approach system to resolve a problem and provide a "sense of justice" between different participants because one party may have superior economic, intellectual, political, or even physical strength. So, there is an inequality between the parties participating in a restorative process.

#### c) Victims' Rights

In resolving problems through a restorative approach, victims' rights need to receive attention because victims are interested parties who should have a legal position in the resolution process. In the criminal justice system in general, it is suspected that victims do not receive equal protection from authorities in the criminal justice system so the true interests of victims are often neglected, and even if they exist, it is only to fulfill the administrative system or criminal justice management.

According to the researcher, the acknowledgment of providing an opportunity to provide an explanation or account relating to the incident experienced by the victim during the trial process does not reflect the existence of an equal position under the law. For the legal position of victims to be equal in the settlement process, victims must also be given the right to obtain adequate compensation for the suffering they have experienced

#### d) Proportionality

The idea of fairness in a restorative system is based on consensus agreement, which provides alternative options for resolving problems. At the same time, the notion of proportionality is related to the scope of equality of suffering sanctions that must be imposed on violators who commit violations. In criminal justice, proportionality is generally fulfilled if a sense of retributive justice has been met (reciprocal balance between punishment and reward). In contrast, in a restorative approach, disproportionate sanctions can be imposed on violators who commit the same offense.

#### e) Presumption of innocence

In criminal justice, the state has the burden of proof to prove the suspect's guilt. From and until the burden of proof is met, the suspect must be presumed innocent. This is different in the restorative process, which requires an admission of guilt as a condition for continuing the resolution cycle. In restorative processes, the suspect's rights regarding the presumption of innocence can be compromised in a way that the suspect has the right

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<sup>8</sup>Ian D. Marder, "Mapping Restorative Justice and Restorative Practices in Criminal Justice in the Republic of Ireland," *International Journal of Law, Crime and Justice* 70 (2022); Dedy Sumardi, Mansari Mansari, and Maulana Fickry Albaba, "Restoratif Justice, Diversi Dan Peradilan Anak Pasca Putusan Mahkamah Konstitusi Nomor 110/Puu-X/2012," *Legitimasi: Jurnal Hukum Pidana Dan Politik Hukum* 11, no. 2 (2022): 248-65, <https://jurnal.ar-raniry.ac.id/index.php/legitimasi/article/view/16010>.

to terminate the restoration process and refuse the process of admitting that he is guilty and then chooses the option of a formal process where guilt must be proven, or the suspect can obtain the right to appeal to the court and all agreements agreed in the restorative process are declared to have no binding force.

f) Right to Consultation Assistance or Legal Advisor

In the restorative process, advocates or legal advisors have a very strategic role in building the offender's ability to protect their rights through the assistance of legal advisors. In all restorative informal stages, suspects can be given information regarding their rights and obligations through the assistance of legal advisors, which can be used to make decisions. However, once a suspect chooses to participate in a restorative process, he or she should act and speak on his or her behalf. Their positions of allowing attorneys to represent participants at all points during the restorative process would destroy many of the expected benefits of "encounters", such as direct communication, expression of feelings, and proactive collective decision-making. Lawyers can also be very helpful in advising their clients about the most likely outcomes they should expect.

Restorative justice as an important development in human thought is based on the traditions of justice from ancient Arab, Greek, Roman, and other civilizations that accepted a restorative approach even in murder cases, a restorative approach from the general assemblies (moots) of Germanic societies that swept across Europe after the fall of Rome, Hindu India as ancient as the Vedic Civilization for whom "he who redeems is forgiven", and the ancient Buddhist, Taoist, and Confucian traditions that blended with today's Western influences in North Asia.<sup>9</sup>

According to the restorative justice perspective, a criminal act violates humans and the relations between them. Restorative justice can be implemented through mediation between victims and offenders, family group deliberations, and restorative community services for both victims and perpetrators. Applying the principles of restorative justice depends on what legal system a country adheres to. If the legal system does not want it, then it cannot be forced to implement restorative justice. So, it can be concluded that the principle of restorative justice is an option in designing a country's legal system. Even if a country does not adhere to it, it does not rule out the possibility of applying the principles of restorative justice to provide justice, legal certainty, and benefits.

Restorative justice has begun in the juvenile justice system in Indonesia; one of the systems is known as diversion. Juvenile justice system law can be used as the basis for

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<sup>9</sup>Christian B.N. Gade, "Is Restorative Justice Punishment?," *Conflict Resolution Quarterly* 38, no. 3 (2021); John Braithwaite, *Restorative Justice & Responsive Regulation* (England: Oxford University Press, 2002); Josep Tamarit and Eulalia Luque, "Can Restorative Justice Satisfy Victims' Needs? Evaluation of the Catalan Victim-Offender Mediation Programme," *Restorative Justice* 4, no. 1 (2016): 68-85; Ning Ye, "Institutional Interaction in Traffic Law Enforcement in China: Resistance and Obedience," *Semiotica* 2017, no. 216 (2017); Rico Nur Cahyo and Irma Cahyaningtyas, "Kebijakan Hukum Pidana Tentang Diversi Terhadap Anak Pelaku Recidive Guna Mencapai Restorative Justice," *Jurnal Pembangunan Hukum Indonesia* 3, no. 2 (2021).

applying restorative justice in criminal law. As explained by Judge Sitoroes, real restorative justice in Indonesia is the justice implemented in the juvenile justice system, so diversion can be used to realize real restorative justice.

#### **D. Obstacles Experienced by the Surakarta District Court in Realizing Restorative Justice**

The judge's paradigm is an important thing in a judge's decision. The judge's paradigm will determine the content of the decision handed down. M. Natsir Asnawi stated that the judge's decision was not only seen from one dimension. The judge's decision is seen and understood from various dimensions surrounding it. The judge's decision in this case is not merely a normative and juridical issue but also about legal compliance, legal effectiveness, values, and culture in society, as well as the judge's paradigm in deciding cases. Paradigm issues are important, so it is necessary to instill a suitable paradigm for a judge in Indonesia to produce ideal court decisions.<sup>10</sup>

M. Natsir Asnawi further explained that judicial independence is the fundamental and most important factor for the court in upholding truth and justice. Judging results from thought, taste, creativity, and conscience as a neutral control and controller of various interests and intimidation; even judges are often required to make legal breakthroughs for justice.

Restorative justice has colored the law and has become a breakthrough in creating justice for all parties. Ideally, a judge's decision must reflect the values of justice, legal certainty, and expediency. However, it is very difficult to accommodate these three values in a court decision. This is because the judge must consider many aspects. Even more in resolving cases using a restorative justice approach, which resolves criminal cases by involving the perpetrator, victim, and other parties who seek a fair solution together by emphasizing restoration back to the original condition rather than retaliation. Justice should be the judge's priority if these three principles cannot be fulfilled simultaneously.<sup>11</sup>

The use of restorative justice to resolve criminal cases has been recognized internationally, and restorative justice is based on the laws that exist in society. However, in practice, there are several obstacles, including that our criminal justice system still does not regulate much about victims and their rights and often tends to be ignored and forgotten because our system is more focused on punishing perpetrators. The losses and

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<sup>10</sup>Banwell-Moore, "Just an 'Optional Extra' in the 'Victim Toolkit'?: The Culture, Mechanisms and Approaches of Criminal Justice Organisations Delivering Restorative Justice in England and Wales."; Diah Ratna Sari Hariyanto and Dewa Gede Pradnya Yustiawan, "Paradigma Keadilan Restoratif Dalam Putusan Hakim," *Kertha Patrika* 42, no. 2 (2020): 180; Satria Unggul Wicaksana Prakasa, "Garuda Indonesia-Rolls Royce Corruption, Transnational Crime, and Eradication Measures," *Lentera Hukum* 6, no. 3 (2019).

<sup>11</sup>Nur Rochaeti and Nurul Muthia, "Socio-Legal Study of Community Participation in Restorative Justice of Children in Conflict with the Law in Indonesia," *International Journal of Criminology and Sociology* 10 (2021); Nur Rochaeti, "A Restorative Justice System in Indonesia: A Close View from the Indigenous Peoples' Practices," *Sriwijaya Law Review* 7, no. 1 (2023): 89; Sheetal Ranjan, "Domestic Violence Legislation in Greece: Analysis of Penal Mediation," *Women and Criminal Justice* 30, no. 1 (2020).

suffering experienced by victims and their families are not considered. As explained by Judge Ninik, there is a need for understanding and synergy between the police, the prosecutor's office, and the courts so that the rights of victims can change and provide compensation. At the beginning of the trial, it must be raised so that the judge can confirm it; often, this matter does not get enough attention from everyone even though, according to the rules, compensation is permitted.<sup>12</sup>

Apart from that, the next obstacle is that if restorative justice is to be implemented optimally, cooperation between law enforcement agencies must be increased. In the regulatory provisions, there are, for example, a Memorandum of Agreement with the Chief Justice of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, the Head of the Indonesian National Police Number 131/KMA/SKB/X/2012, Number M.HH- 07.HM.03.02 of 2012, Number KEP-06/E/EJP/10/2012, Number B/39/X/2012 dated 17 October 2012 concerning the Implementation of Adjustments to Limits for Light Crimes and the Number of Fines, Quick Examination Procedures and Implementation Restorative Justice means that in practice all stakeholders must participate optimally.

Apart from the cooperation of all parties, the understanding of all stakeholders regarding handling restorative justice must be improved through several activities and seminars so that a synergy is found between all law enforcers regarding restorative justice and its scope. Lack of support and cooperation between institutions is an obstacle that still occurs in upholding justice, including handling children in conflict with the law. Many groups still consider mediation to be a second-class method of seeking justice with the view that mediation is not successful in achieving justice at all because it is nothing more than a compromise between the parties involved, even though currently the judge is one of the parties who can mediate cases involving children in conflict with the law, unlike civil mediation which allows non-judges to be mediators in court.

In many cases of criminal acts involving children as victims, the families of the victims insist on demanding that the child perpetrators be prosecuted according to the law. The majority of people, especially the families of victims, believe that children who conflict with the law should be punished according to the same standards as adults. This happens because the victim's family does not accept it when their family is injured due to acts of violence or abuse carried out by the perpetrator.

Infrastructure that supports the implementation of restorative justice must be improved so that every law enforcement agency, especially the courts, can implement it optimally. For example, if a child conflicts with the law, court conditions that are friendly to children in conflict with the law must be provided so that it doesn't seem scary.

Restorative justice and diversion have begun to be recognized as an alternative for handling children in conflict with the law from criminal justice. It is starting to receive support from many parties. There are still many obstacles faced by the juvenile criminal

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<sup>12</sup>Interview with YM. Ninik Hendras Susilowati, S.H., M.H., on August, 21, 2023.

justice system, namely differences regarding the perception of the meaning of justice by the perpetrators of diversion, whether from the victim, his family, the perpetrator and/or his family, law enforcement officers, and the community regarding the implementation of diversion. The culture that thrives in society that children must be punished the same as adults will hinder the implementation of diversion. The public's understanding of children who conflict with the law, especially parents of children who conflict with the law, means that society tends to be reluctant to accept or forgive a child who has committed a criminal act. This, of course, results in the diversion process at the investigation level sometimes being unsuccessful, especially again because the culture of forgiveness in society towards children who conflict with the law tends to be lacking.

## **E. Conclusion**

The judge's duty and authority in deciding incoming cases is to provide a fair decision through several legal considerations based on the law or other legal sources. Judges must pay attention to contextual matters in their authority to examine and try cases. It is also hoped that this contextual interpretation of the law will help us understand the sense of justice in society because society is where the law is born. In realizing justice in each decision, the judge considers many aspects. Moreover, resolving cases using a restorative justice approach resolves criminal cases by involving perpetrators, victims, and other parties who work together to seek a fair solution by emphasizing restoration back to its original state and not retaliation.

Judges should consider many aspects, especially when resolving cases using a restorative justice approach, which resolves criminal cases involving the perpetrator, victim, or other parties. The support of all parties is necessary, and cooperation between law enforcement agencies must be improved. Lack of support and cooperation between institutions is an obstacle that still often occurs in upholding justice. Our criminal justice system still has not regulated much about victims and their rights and often tends to be ignored and forgotten because our system is more focused on punishing perpetrators. The losses and suffering experienced by victims and their families are not considered. In the case of children, there is no awareness from the victim's family. In many cases of criminal acts involving children as victims, the families of the victims insist on demanding that the child perpetrators be prosecuted according to the law. The majority of people, especially the families of victims, believe that children who conflict with the law should be punished according to the same standards as adults.

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