

# The Application of The Restorative Justice Concept in Child Criminal Acts Perspectives of Islamic Law and Progressive Law

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## Abstract

Restorative justice is an alternative concept for resolving criminal cases committed by minors or teenagers who cannot be said to meet the requirements to serve sentences equivalent to adults. By prioritizing the restoration of the victim's and perpetrator's conditions to reconcile both parties, while in Islamic law with the concept of *qisas-diyat* compensation, *as-sulhu* conciliation, and forgiveness between the perpetrator and the victim, this thesis will discuss the correlation and review of Islamic law and progressive law in the application of restorative justice in child criminal offenses. This research aims to answer the questions that formulate the problem how is the concept of restorative justice in the juvenile criminal justice system from the perspective of Islamic law and progressive law? This study uses a qualitative method with library or literature research: descriptive analysis. This study's results show that applying the restorative justice concept has several methods, including a reconciliation approach, a forgiveness approach, an apology approach, and a sincere remorse approach. Meanwhile, in Islamic law, this form of restorative justice can be in the form of compensation with the concept of *qisas-diyat*, conciliation in Islam with the concept of *as-sulhu* in the implementation of Islamic criminal law with the application of *ta'zir*, and *al-afwu* forgiveness. The application of Restorative justice in child criminal acts from a progressive legal perspective is manifested in the form of diversion.

**Keywords:** Islamic law, juvenile delinquency, progressive law, restorative justice.





## Introduction

Children are agents of development who will maintain and sustain the development of the nation.<sup>1</sup> Children have a strategic role and have special characteristics that claim the continuity of the nation and state in the future. So that every child can later bear this responsibility, they need to get the widest possible opportunity to grow and develop optimally, both physically, mentally, socially, and morally.<sup>2</sup> The handling of criminal cases against children is certainly different from the handling of adult cases. The handling of children is special; therefore it is regulated in separate regulations.<sup>3</sup> Legal regulations against children who commit crimes in Indonesia have actually been regulated in Law Number 11 of 2012 concerning the Juvenile Justice System. Therefore, if a child commits a crime, the child will be processed legally based on this law.<sup>4</sup>

In resolving children's cases, restorative justice is prioritized, which is a way of resolving criminal cases involving children by involving the perpetrator/victim, and other related parties to jointly seek a fair resolution by emphasizing restoration to the original state, and not seeking retribution.<sup>5</sup> According to Islamic law, a child who commits a crime is not subject to criminal liability, whether it is hudud, qishas/diyat, or ta'zir punishment. Punishment for guilty children in Islam is borne by their parents, because they are obliged to educate their children to be good people. If the child behaves badly (becomes a criminal), it means that the parents have not carried out their obligations properly, so it is the parents who bear the consequences, namely being sanctioned for their negligence.<sup>6</sup> Meanwhile, in progressive law, the Restorative Justice approach to juvenile delinquency emphasizes a deep understanding of the factors underlying the child's unlawful behavior. This focuses on the root of the problem which may be related to family environment, education, or other social factors that can influence a child's behavior. These principles highlight the need for a more responsive and adaptive legal system, as well as paying special attention to child rehabilitation to prevent recidivism in the future.<sup>7</sup>

The application of the restorative justice concept in Islamic law and progressive law can be a consideration in law reform in Indonesia. The sentencing system in Indonesia should have shown its form with the character of restorative justice. That the concept of

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<sup>1</sup> Arif Gosita, *Masalah Perlindungan Anak*, (Jakarta: Akademi Perssindo, 1989), 123.

<sup>2</sup> Nasution, K., "Perlindungan Terhadap Anak dalam Hukum Keluarga Islam Indonesia". *Al-'Adalah*, 13 (1), (2017): 1-10.

<sup>3</sup> Setyana, F. "Pelaksanaan Diversi Dalam Perkara Tindak Pidana Anak Pada Pengadilan Negeri Di Wilayah Hukum Pengadilan Tinggi Palangkaraya Berdasarkan Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak". *Al-Adl: Jurnal Hukum*, 15(2), (2023): 423-435.

<sup>4</sup> R. Wiyono, "Sistem Peradilan Pidana Anak di Indonesia." (Jakarta: Sinar Grafika, 2016), 76.

<sup>5</sup> Undang-undang Nomor 11 tahun 2012 Tentang *Sitem Peradilan Pidana Anak*. Lembaran Negara Republik Indonesia Tahun 2012 Nomor 153, Tambahan Lembaran Negara Republik Indonesia Nomor 5332. Pasal 1 Angka 6.

<sup>6</sup> Sandi, G. (2023). *Tindak Pidana Kekerasan Terhadap Anak Yang Dilakukan Oleh "Toxic Parents" Dalam Prespektif Hukum Positif Dan Hukum Islam* (Doctoral dissertation, UIN Kiai Haji Achmad Siddiq Jember).

<sup>7</sup> Korna, I. W. *Reorientasi Lembaga Rehabilitasi Dalam Penegakkan Hukum Terhadap Pelaku Penyalahguna Narkotika Dalam Perspektif Keadilan Restoratif*, (Doctoral dissertation, Universitas Islam Sultan Agung, 2023).

restorative justice is a way of resolving criminal acts outside the judicial process (out of criminal judicial procedure) or at least not fully following criminal justice procedures. This resolution is commonly used by children in conflict with the law to find a way to establish a fairer and more balanced sentencing system.

Based on this description, the author wants to discuss further the application of the concept of restorative justice in child criminal acts from the perspective of Islamic law and progressive law in more depth with two basic questions: How is the concept of Restorative Justice applied in child criminal acts? and how is the concept of Restorative Justice in the juvenile criminal justice system from the perspective of Islamic law and Progressive law?

## METHOD

This research is normative legal research that is descriptive-analytical in nature.<sup>8</sup> The approaches used in this research are the statute approach and the conceptual approach. The statute approach is carried out by examining the laws and regulations related to the Application of the Restorative Justice Concept in Child Criminal Acts from the Perspective of Islamic Law and Progressive Law. The conceptual approach is carried out by examining legal concepts and theories relevant to restorative justice, juvenile delinquency, Islamic law, and progressive law.

The data used in this research is secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials. Data collection techniques are carried out through literature studies by means of reading, recording, and quoting various literatures. The collected data were then analyzed qualitatively using the deductive method, which is a method of data analysis by drawing conclusions from general matters to specific matters.<sup>9</sup>

## RESULT AND DISCUSSION

### Implementing Restorative Justice in the Juvenile Justice System

In resolving cases with restorative justice, the focus is not on emphasizing the offender's guilt, but rather on relying on the role of the parties involved. There must be discussions between the victim and the perpetrator or using a system of material and immaterial restitution with the aim of restoring human relations.<sup>10</sup> The characteristics of restorative justice are the belief that crime is a personal matter that results in harm to the victim, family, and community. Its purpose is to reach a peaceful agreement between the victim and the perpetrator by paying compensation for the losses caused by the perpetrator's wrongdoing. The process in restorative justice emphasizes the participation of the victim, the perpetrator, and their families.<sup>11</sup>

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<sup>8</sup> Sedarmayanti & Syarifudin Hidayat, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 2003), 23.

<sup>9</sup> Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, Cetakan. III, (Bandung: Citra Aditya Bakti, 2004), 81.

<sup>10</sup> Rininta Gustiyani, *Penerapan Keadilan Restoratif Bagi Anak Yang Berhadapan Dengan Hukum Di Dunia Maya*, ed. Zaid (Cirebon: CV. Strata Persada Academia, 2023).

<sup>11</sup> Candra, Septa. "Restorative Justice: Suatu Tinjauan Terhadap Pembaharuan Hukum Pidana Di Indonesia." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 2.2 (2013), 200.

The Indonesian judicial system has regulated the implementation of restorative justice, namely Law Number 11 of 2012 concerning the Juvenile Justice System. The enactment of Law Number 11 of 2012 concerning the Juvenile Justice System was due to the increasing number of children in contact with the law and experiencing legal uncertainty. With the implementation of this law, there is a legal process that specializes the child justice process in Indonesia. Therefore, since 2012, judges can provide a penal mediation process or restorative justice based on existing grounds. Children in conflict with the law, who can be subject to Law Number 11 of 2012, are children up to the age of 17 who are suspected of committing a criminal offense as referred to in Article 1 number 3, and children who are victims of crime are children aged 18 and over who experience physical or mental violence, and children who become witnesses are children under the age of 18 who can be witnesses in juvenile court for the purposes of investigation and balancing carried out by judges and in principle using diversion settlement.<sup>12</sup>

The criteria for children whose cases should be handled using the diversion method are:

1. Criminal acts punishable by imprisonment for more than 1 year are focused on for diversion, but if the sentence is more than 1 year and up to 5 years, the judge must consider the use of diversion for the child, except for those that result in the loss of limbs or loss of life, they will not receive a diversion.
2. Considering the age of the child, the younger the child, the easier it is to use diversion.
3. If a child is involved in a criminal case, diversion must be carried out for the child.
4. Material losses caused by the child's wrongdoing must be subject to diversion.
5. Unrest caused by the child must be resolved with the agreement of the perpetrator's family and the community.
6. If a child commits a crime with an adult, the adult will be subject to ordinary trial.

In terms of child protection, perpetrators of criminal acts are as important as protecting children as victims. Acts of children that violate the law should be considered and take into account a sense of justice that is guided by human rights, especially for children. This is very important to provide an overview of juvenile criminal justice which must use a restorative justice approach and the principle of diversion.

The new Law concerning the Juvenile Justice System, Law No. 11 of 2012, states that in the case of criminal acts committed by children before the age of 18, they must be brought before a children's court. 11 Children can only be sentenced or subject to action based on the provisions of the law.<sup>13</sup> Children under the age of 14 can only be subject to action. The lightness of the act, the child's personal circumstances, and the circumstances at the time the act was committed or what happened afterward can be used as the basis for the judge's consideration not to impose a criminal sentence. Actions against child perpetrators must be based on considerations of justice

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<sup>12</sup> Sitompul, *Beberapa Tugas dan Peranan Polri* (Jakarta: CV Wanthi Jaya, 2000), 1.

<sup>13</sup> Bab 5 Pasal 69 ayat 1 dan 2 Undang-undang No 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak.

and humanity.<sup>14</sup> The Juvenile Criminal Justice System Law states that imprisonment for children is only used as a last resort.<sup>15</sup> The Juvenile Criminal Justice System must prioritize a restorative justice approach.

In the Juvenile Criminal Justice System, when handling cases of child victims and child witnesses, law enforcement officials such as correctional institutions, investigators, public prosecutors, judges, advocates, or other legal aid providers are obliged to pay attention to the best interests of the child and strive to maintain a family atmosphere. This is in line with Article 54 of the latest Criminal Code, which states that criminal sanctions aim to prevent criminal acts by upholding legal norms for the protection of society, fostering perpetrators of criminal acts, resolving conflicts, restoring balance in society, freeing convicts from guilt, and forgiving convicts. Criminal sanctions are not intended to preach or degrade human dignity. The latest Criminal Code also explains the sentencing guidelines.

In imposing a sentence, it is obligatory to consider the magnitude of the offense committed, the motive and purpose of committing the criminal act, the manner in which the criminal act was committed, the attitude and actions of the perpetrator after committing the criminal act, the life history and social conditions of the perpetrator, the impact of the sentence on the perpetrator's future, the impact of the criminal act on the victim, forgiveness from the victim/their family, and public perception of the criminal act committed. In handling children's cases, Article 5 paragraph 1 of Law No. 11 of 2012 stipulates that the Juvenile Criminal Justice System must prioritize a restorative justice approach. By using the phrase "Juvenile Criminal Justice System" in Article 5 paragraph 1 of Law No. 11 of 2012, the Juvenile Criminal Justice System is not only directed at judges, but also at investigators, public prosecutors, and correctional institutions as a system for resolving criminal cases involving children.<sup>16</sup>

Based on Articles (5) to 14, Article 29, Article 42, and Article 52 paragraphs (2) to (6) of Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, diversion must be attempted at the level of investigation, prosecution, and examination of children's cases in court by prioritizing a restorative justice approach. The phrase "must be attempted" implies that child law enforcement officials, from investigators to prosecutors and judges, are obligated to ensure that the diversion process can be carried out. The obligation to attempt diversion starting from the investigation, prosecution, and examination of children's cases in district courts is carried out in the case of criminal acts punishable by imprisonment for less than 7 (seven) years and is not a repeat offense.<sup>17</sup>

The diversion process is carried out through deliberation involving the child and their parents/guardians, the victim and/or their parents/guardians, social workers, and professional social workers based on a restorative justice approach. Furthermore, if necessary, the deliberation

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<sup>14</sup> Undang-Undang No 11 Tahun 2012 Bab 5 Pasal 70 Undang-undang tentang Sistem Peradilan Pidana Anak.

<sup>15</sup> Pasal 81 ayat 5 Undang-undang No 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak.

<sup>16</sup> Dewi. D.S and Syukur Fatahillah. A, "Mediasi Penal; Penerapan Restorative Justice Di Pengadilan Anak Indonesia," *Indi Publishing*, 2011.

<sup>17</sup> Kemenkumham, "*Badan Penelitian Dan Pengembangan HAM Kementerian Hukum Dan HAM, Buku Pedoman Penerapan Restorative Justice*" (Jakarta: Balai Pustaka, 2013).

can also involve social welfare personnel and/or the community.<sup>13</sup> Law No. 11 of 2012 concerning the Juvenile Justice System states the objectives of diversion:

1. To achieve reconciliation between the victim and the child,
2. To resolve children's cases outside of court proceedings,
3. To prevent children from being deprived of their liberty,
4. To encourage community participation, and
5. To instill a sense of responsibility in children.

These objectives of diversion are an implementation of restorative justice which seeks to restore a solution to a problem, not retribution as has been known in criminal law. In many countries, diversion is carried out as an effort to divert the handling of cases of children suspected of having committed a criminal act from formal proceedings with or without conditions. Diversion in this case aims to: prevent detention, avoid being labeled as a criminal, advance interventions needed by victims and perpetrators without going through formal processes, and prevent children from undergoing criminal justice processes to avoid the negative influences and implications of the process. In achieving the latter objective, this effort is more seriously carried out at the police level by the police using their discretionary powers. At the prosecutor's office, bypassing this procedure is done through an opportunity institution by way of dropping a case.<sup>18</sup>

### **Implementation of the Restorative Justice Concept in Juvenile Criminal Acts from the Perspective of Islamic Law**

In Islam, there are two paradigms in case resolution, namely, litigation cases (in court) and non-litigation cases (out of court). The litigation paradigm is a basic view and belief that the only proper institution for resolving cases is through the courts. Conversely, the non-litigation paradigm starts from the basic assumption that case resolution is not always through law and courts. Out-of-court methods are part of a model that is not abandoned and has proven effective in resolving cases without leaving lasting wounds and grudges. This latter method is now known as the restorative justice approach.

According to Andi Hamzah, in Islamic law, perpetrators of criminal acts can obtain release or legal relief from the court if they receive forgiveness from the victim by paying a fine or diyat (compensation). If a resolution through restorative justice is reached, the State, represented by the court, only makes a decision so that the agreement between the perpetrator and the victim

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<sup>18</sup> Israr Hirdayadi and Hera Susanti, "DIVERSI DALAM SISTEM PERADILAN PIDANA ANAK DI INDONESIA DAN TINJAUANNYA MENURUT HUKUM ISLAM," *LEGITIMASI: Jurnal Hukum Pidana dan Politik Hukum* 6, no. 2 (December 4, 2018).

can be implemented properly.<sup>19</sup> These principles of restorative justice are central to the teachings of many religions, including Islam.<sup>20</sup>

### 1. Compensation (Diyat)

Compensation or diyat is an alternative to the death penalty or other punishments for a crime committed by the perpetrator against the victim. The diyat punishment is that the murderer must pay compensation to the victim's family. Diyat as a punishment has a certain measure that has been determined by sharia, depending on the victim of the murder. This can be summarized as follows: The majority of scholars (Imam Hanafi, Imam Maliki, Imam Shafi'i, and Imam Ahmad) agree that the diyat for a free Muslim is one hundred camels, there is no difference in this case between intentional, quasi-intentional, and unintentional killing (error).

The theory of diyat is relevant to the handling of child law in cases of abuse because children in this case are not able to be held accountable for their actions. Children who commit an act that is contrary to sharia are only given action sanctions such as teaching or education, returned to their parents, and are still subject to civil sanctions, namely paying diyat by their parents as a consequence of their actions. The diyat given is in accordance with the actions taken by the child. If the child commits an act of persecution, the sanction given is diyat jarimah qisas (compensation for bodily harm).

### 2. Conciliation (As-sulhu)

Sayyid Sabiq argues that Aş-şulhu is a type of agreement to end resistance between two opposing parties.<sup>21</sup> From the definitions above, it can be concluded that Aş-şulhu is an effort to reconcile two parties who are in dispute, quarreling, harboring grudges, and hostile in defending their rights, with the hope that the dispute will end. In other words, as expressed by Wahbah Zuhaili, Aş-şulhu is an agreement to end all forms of conflict or dispute.<sup>22</sup>

The legal basis of Aş-şulhu is sanctioned by Allah SWT. As stated in the Qur'an:

"The believers are but brothers, so make settlement between your brothers. And fear Allah that you may receive mercy." (QS. Al-Hujurat: 10).

In deciding a case, the judge is asked to consider As-Sulhu, but the judge cannot force a settlement because conciliation is the right of the victim and not an obligation. The purpose of conciliation is to end conflict and friction. According to a number of legal experts, conciliation is not permitted in serious cases involving crimes such as terrorism, premeditated murder, and rape because they constitute violations against Allah, the State, society, and human rights. If the victim dies or becomes incompetent to decide on conciliation (such as a minor or an insane person), then

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<sup>19</sup> Chindy Pratisti Puspa Devi, *Restorative Justice Pada Hukum Pidana Anak Indonesia Dalam Perspektif Hukum Islam*, (Depok: Indie Publishing, 2014), 43.

<sup>20</sup> Ismallah, Hafizh Syadi. "PERLINDUNGAN TERHADAP KORBAN DALAM SITUASI PEMBUNUHAN DAN PENGANIAYAAN MENURUT HUKUM ISLAM SERTA KAITANNYA DENGAN KEADILAN RESTORATIF." *SAMLON: Samudra Law Journal* 1.1 (2024): 12-26.

<sup>21</sup> Sayid Sabiq, *Fiqh al- Sunnah*, (Dar al- Fiqir, 1987), 189.

<sup>22</sup> Wahbah Zuhaili, *Al- Fiqih* (Beirut: Dar Al- Fikr Al- Muashir, 2005), Jilid Iv, 4330.



conciliation can be decided by the family or their legal representative. Conciliation can occur if the family agrees to receive a sum of money in lieu of punishment. If the victim dies and has no relatives, then in this case conciliation is taken over by the government as the heir. In this case, conciliation turns into a fine for the perpetrator that must be paid to the state treasury to replace/avoid punishment, including the death penalty.

The concept of ta'zir is the punishment classification that is most receptive to the approach of victim-offender reconciliation, conflict resolution, anger management, and compensation. As a punishment, ta'zir also contains many elements of restorative justice, including respecting and maintaining the dignity of the perpetrator. One of the unique elements of restorative justice in Islamic law is the idea of reparation/restoration. This makes the ta'zir punishment very restorative.<sup>23</sup>

### 3. Forgiveness/Pardon (al-'afwu)

The concept of forgiveness or al-'afwu is similar to compensation and conciliation in that it avoids the original punishment. While diyat means forgiveness with full compensation (paying compensation according to the provisions of diyat) and conciliation is equivalent to forgiveness with partial compensation (compensation according to the agreement of both parties or as determined by the State), al-'afwu refers to forgiveness without any compensation, or what can be called "full forgiveness."

According to Abdul Qadir 'Audah, al-'afwu is the dropping of the obligation of punishment (such as *qisas*) without compensation, while as-sulhu is the dropping of the obligation of punishment (such as *qisas*) with compensation. Imam Malik and Imam Abu Hanifah liken forgiveness/pardon with compensation to as-sulhu and not al-'afwu. This is because the obligatory punishment for intentional murder is *qisas*, and diyat is not obligatory unless the victim is willing to forgo *qisas*, in which case the perpetrator is obligated to carry out diyat. According to Imam Shafi'i and Imam Ahmad, forgiveness/pardon with diyat is called 'afwu and not sulhu.<sup>24</sup>

## Implementation of the Restorative Justice Concept in Juvenile Criminal Acts from the Perspective of Progressive Law

The concept of progressive law places humanity above the law; the law is merely a means to guarantee and protect various human needs. Law is no longer seen as an absolute and autonomously existing document. Based on this thought, in the context of law enforcement, law enforcement officers should not be trapped in the cooptation of rules over the conscience that voices truth. Progressive law, which rests on rules and behavior, positions humans not to be absolutely bound by the reins of rules.<sup>25</sup>

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<sup>23</sup> Nawal H. Ammar, "Restorative Justice in Islam: Theory and Practice", *The Spiritual Roots of Restorative Justice* ed by Michael L. Hadley (Albany: State University of New York Press, 2001), 175.

<sup>24</sup> Abdul Qadir Audah, *at-Tashri' al-Jina'i al-Islami*, 168.

<sup>25</sup> Satjipto Rahardjo, *Sisi-sisi Lain dan Hukum di Indonesia*, (Jakarta: Kompas, 2003), 17.

Departing from the perspective of the progressive law approach as described above, its application within the framework of law enforcement in the juvenile criminal justice system rests on certain assumptions. The assumption in enforcing the juvenile criminal justice system is that the law enforcement of the juvenile criminal justice system emphasizes the best interests of the child, not solely the interests of the juvenile justice system itself. The laws and regulations of the juvenile criminal justice system are not absolute and final laws but are always in the process of becoming (law as a process, law in the making).

Assumptions in the Enforcement of the Juvenile Criminal Justice System: The Juvenile Criminal Justice System is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving a sentence, as stated in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, Article 1 point 1. The Juvenile Criminal Justice System Law (JCJSL) replaces Law Number 3 of 1997 concerning the Juvenile Court. The Law concerning the Juvenile Court was replaced because it did not pay attention to and guarantee the best interests of the child, be it the child perpetrator, child witness, or child victim. The Child Protection Law only protected children as victims, while children as perpetrators were sometimes positioned the same as adult perpetrators. The JCJSL emphasizes the diversion process, where this judicial process is very attentive to the best interests and well-being of the child. At every stage, namely, investigation at the police, prosecution at the prosecutor's office, and examination of the case in court, efforts must be made to pursue diversion based on Article 7 paragraph (1) of the JCJSL. Terms of the juvenile criminal justice system.

The implementation of diversion as part of the realization of progressive legal theory in handling criminal acts committed by children starts from the investigation level, prosecution, trial, to the implementation of handling criminal acts committed by children by correctional institutions.

## CONCLUSION

The conclusion of this research is that the restorative justice approach offers an alternative way to resolve legal problems arising from criminal acts through peace efforts outside of court. This approach emphasizes restoring the relationship between the perpetrator and the victim and the perpetrator's responsibility for the losses caused. From an Islamic legal perspective, the concept of restorative justice is reflected in the principles of qisas-diyat, as-sulhu, ta'zir, and forgiveness (al-afwu), which emphasize compensation and reconciliation. Although there are differences in the legal basis, the age of majority of children, and criminal sanctions between Islamic law and positive law, both prioritize restorative justice and the principle of legality.

In the context of juvenile delinquency, the application of restorative justice is realized through diversion policies, which aim to protect children's rights and provide legal protection. This diversion policy is applied at all levels of justice and functions as part of progressive legal theory in handling criminal acts by children, starting from the investigation stage to implementation in correctional facilities. This finding shows that restorative justice is not only effective in resolving legal conflicts peacefully but also has a strong foundation in various legal systems, including Islamic law and positive law.

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