Encouraging the Implementation of Restorative Justice for Juvenile in Japan (Lesson Learned from Indonesia)

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Abstract

Restorative Justice has been developing broadly in many countries as a new paradigm in criminal law field. Restorative Justice proposes a comprehensive and holistic way for settling criminal disputes. It involves offender, victim and community that affected by the crime to encounter and come up with the best solution for restoring the harm that caused by the crime. The basic idea of Restorative Justice has spread out to every field of criminal law including Juvenile Law. Following the necessity and global trend, Indonesia has made an effort to replace the Juvenile Court Act (JCA) with the new one, the so-called Juvenile Criminal Justice System Act (JCJSA), which utilizes diversion as restorative justice program for juvenile delinquent. In regard to Japan, restorative justice idea has been developed by academicians, practitioners and westerns scholars. However, up to present, there is no legal basis for implementing restorative justice in Japan nationally. It is in this sense that the practice of restorative justice in Indonesia may contribute and encourage the development of restorative justice for juvenile in Japan.

Keywords: juvenile restorative justice, Indonesia, Japan.

1. Introduction

Restorative justice is a relatively new method for dealing crimes. I emphasize "relatively" since there is contention among proponents of restorative justice as to whether this is a novel system or a revival of an older legal practice. The term "restorative justice" is now becoming familiar in criminology and the field of criminal law. Moreover, restorative justice is emerging as a global trend in handling crime.

In its current form, restorative justice first appeared in the mid-1970s in the Canadian city of Kitchener, Ontario at a presentence hearing of the trial of two teenagers for vandalism. On the other hand, this practice, or what later came to be known as restorative justice, is actually part of indigenous practice in many traditions across the world. There is evidence of this from the discovery of John Braithwaite, an Australian criminologist, following the launch of his book, *Crime, Shame and Reintegration* in 1989, that restorative justice conferences also occur in Africa, Melanesia, Asia, and America.[1]

In the context of Indonesia, I hypothesize that the values of restorative justice are common to Indonesian society. This is because the core idea of restorative justice is also found in Indonesian traditional legal system namely *adat* law and Islamic criminal law that predate the Dutch colonization of the archipelago and its subsequent renaming as Indonesia. The *adat* law is an indigenous law that the western scholars name it as customary law. While

the Islamic criminal law ever existed in Indonesia. Both the law contains restorative justice value. Therefore Indonesia has been practicing restorative justice before the Dutch colonized Indonesia. In the modern law context, the new law for juvenile in Indonesia employs restorative justice idea that called diversion for settling the juvenile cases within criminal matter. The utilization of restorative justice for juvenile in Indonesia was triggered from several cases that have changed our perspective for coping juvenile cases. It is in this sense that probably the experience of Indonesia in dealing juvenile cases may contribute to Japan juvenile justice system. However, in order to comprehensively understand restorative justice, I will discus first about restorative justice and its development.

2. Literature Review

2.1. Definition of Restorative Justice

In much of the literature, proponents of restorative justice have unanimously affirmed that the term "restorative justice" was first coined by Albert Eglash. Most of them also agree that it first appeared in his 1977 paper,[2] entitled *Beyond Restitution—Creative Restitution* which was presented at a conference on restitution in 1975.[3]

Howard Zehr, who is regarded as the "father" of restorative justice, admits that he cannot identify and recognize all of the current restorative justice programs and the hundreds of restorative justice practitioners and academicians involved in developing restorative justice program. This situation radically contrasts with the 1990s era when he was able to keep abreast of developments in restorative justice, including its practitioners and proponents.[4]

Since restorative justice has evidently evolved into many forms, it is helpful to briefly revisit its initial definition. Zehr originally conceptualized restorative justice as a process that involved, to the greatest extent possible, those who had a stake in a specific offense in collectively identifying harms, needs, and obligations, as well as their redress, to heal and make things as right as possible.[5] Certainly this definition raises some further questions, such as what does Zehr mean by those "who had a stake in a specific offense?" How are such individuals to be defined?

To respond to such questions and enrich the discussion, I propose another definition that is acknowledged as the most acceptable definition of restorative justice since it has also been adopted by the United Nations.[6] This definition was proposed by Tony Marshal who argued that "restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its

implications for the future."[7]

Marshal's definition, however, raises the same question as Zehr's definition, namely, who is "the parties with a stake in a particular offense?" Additionally, according to Marshal's definition, what should be restored? The latter question was reasonably resolved within Zehr's definition, that is, harm and needs resulting from a specific offense.

To respond to the above question, we may also refer to the Economic and Social Council (ECOSOC) Resolution of 2002/12 regarding the Basic Principle on the Use of Restorative Justice Programmes in Criminal Matters. In its annex, specifically subsection 4 of section I on the use of terms, it states that "Parties" means the victim, the offender, and any other individuals or community members affected by a crime who may be involved in a restorative process.[8] This is in line with John Braithwaite's response in his book regarding Marshal's definition that a "stake in a particular offense" primarily refers to the victim(s), offender(s), and affected communities (including the families of victims and offenders). Braithwaite also answered the question of what should be restored as follows: "whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime. Stakeholder deliberation determines what restoration means in a specific context."[9]

As we know from the definition above, victim is also involved in the settlement process. For most criminal law scholars, incorporating victims—and the affected community when appropriate—in the criminal justice process is a relatively new idea given that the role of the victim in this process has been represented and taken over by the investigator (police) and prosecutor. Restorative justice evidently has a different core concept from that of criminal justice.

Zehr's framework provides a clear understanding of victim-incorporation. Adopting the analogy of a photographic lens, Zehr explained that the choice of lens affected the outcome, because different lenses created different pictures. The same went for understanding a crime. Zehr noted that if we viewed crimes through a retributive lens, the "criminal justice" process failed to meet many of the needs of either the victim or the offender. The process neglected victims while failing to meet its expressed goals of holding offenders accountable and deterring crime.[10]

To clarify these differences, Zehr then differentiated between criminal justice and restorative justice as shown in the table below:[11]

Table 1: Two Different Views of Justice

Criminal Justice	Restorative Justice
• Crime is a violation of the law and the state • Violations create guilt • Justice requires the state to determine blame (guilt) and impose pain (punishment)	• Crime is a violation of people and relationships • Violations create obligation • Justice involves victims, offenders, and community members in an effort to put things right
• Central focus: Offenders getting what they deserve	• Central focus: Victims' needs and offenders' responsibility for repairing harm

According to Zehr, as cited by Mark Umbreit and Marilyn Peter Armour, the two approaches shown in the above table entail different ways of seeking justice.

There are many more definitions proposed by restorative justice proponents that have resulted from the ongoing development of restorative justice programs. But for sure we know now that restorative justice is a comprehensive way in dealing crime involving all the parties to make restoration or to heal the victim, offender, and the affected party.

2.2. Categorization of Restorative Justice

Restorative justice has been evolving and transforming widely and spontaneously. Some of the variations that have developed are not far from its original core, whereas others are considered to have developed well beyond the core of restorative justice. Debates about restorative justice occur not only between proponents and opponents of restorative justice, but also among its proponents. To better understand the concept and its variations, I will discuss four categories relating to restorative justice below:

2.2.1 Origins

There are two contrasting narratives of restorative justice: (1) as a novel and innovative system; and (2) as a modification of indigenous law. The first narrative views restorative justice as a subsequent development from its first experimental origins in Kitchener, as

described earlier in this paper. The second narrative views restorative justice as neither a novel nor an innovative system, but rather as an old practice that precedes any theory. According to this view, our realization that this old practice was actually restorative justice only came after its theorization.[12] According to Steve Mulligan, there is no dispute regarding the first narrative which is different from the second narrative.[13] Proponents of the first narrative argue that the second narrative provides a misleading view of restorative justice. Kathleen Dally has refuted what she regards as a misconception that conferencing is based on indigenous practices. According to Dally, efforts to write a history of restorative justice that romantically invoke a premodern past to justify current practices of justice are not only erroneous, but also unwittingly re-inscribe the ethnocentrism that they wish to avoid. Dally added that this misconception was ubiquitous among prominent advocates of restorative justice. In particular, she asserted that just because restorative justice was flexible and accommodating did not mean that conferencing (particularly in New Zealand) was an indigenous practice.[14] However, in my view, it is difficult to detach the practice of FGC (Family Group Conference) in New Zealand from the practices of the Maori people who have greatly contributed to FGC. Moreover, historically, as noted by Gerry Johnstone, in 1988, the New Zealand Department of Justice commissioned a report by Moana Jackson recommending that the Maori be allowed to deal with conflicts that affected them in a way that was culturally appropriate. This implied a return to the principles of restorative justice that were embedded in the precolonial method of dispute resolution. A year later in 1989, the practice of FGC, which was partly informed by Maori philosophy and practices of justice, was established for youth offenders.[15] Therefore, even though FGC cannot be said to be an indigenous practice, as Dally has pointed out, in the same way it also cannot be said to be an entirely new practice. Regarding this issue, I cite Zehr and Ali Gohar, who suggest that restorative justice in its modern form entails the "revival" of indigenous practices:[16]

> "….the movement owes a great debt to earlier movements and to a variety of cultural and religious traditions. It owes a special debt to the native people of North America and *New Zealand* (emphasis added). The precedents and roots of this movement are much wider and deeper than the Mennonite-led initiatives of the 1970s. Indeed, they are as old as human history"

2.2.2 Initial Forms

In much of the literature, three forms of the initial practice of restorative justice are described, namely, Mediation, Conferencing, and the Circle. These practices are reflected in

many programs. For instance, the Victim Offender Reconciliation Program (VORP), Victim Offender Mediation (VOM), and Community Mediation belong to the mediation category. Examples of the conferencing category are the Family Group Conference (FGC), the *Wagga Wagga* Conference, and Community Group Conferencing. Navajo Justice and the Sentencing Circle are examples of the last category. Paul McCold has differentiated these practices as discussed below.[17]

2.2.2.1 Mediation

VORP

As I have previously discussed in relation to the historical background of the restorative justice movement, the first emergence of VORP dates back to 1974 in Ontario, Canada. The primary purpose of VORP is reconciliation, involving the healing of injuries and restoring right relationships, which is conducted through direct mediation (face-to-face meetings between the victim and offender). This program can be viewed as complementary to the traditional criminal justice system rather than as a diversionary model designed to "avoid" the criminal justice system to obtain a better settlement compared with the criminal justice system. VORP is a faith-based program, that is, it adopts a religion-based approach, particularly Christian values, to reach reconciliation. Historically, VORP mediators were probation officers, but this does not have to be predetermined. Citing Zehr, Johnstone suggests it is preferable that the mediator is a community volunteer.[18] However, it is notable that the community affected by the crime is not involved in this program.

VOM

According to Mark Umbreit and Marilyn Peterson Armour, VOM is a further evolutionary step in VORP's journey. Historically, the VORP experiment in Ontario was adopted and implemented for the first time in Elkhart, Indiana, in the United States in 1978. With the passage of time, the initial experiments have gone through numerous iterations in the structure of the encounter, its focus, and even in its name.[19] Paul McCold has noted that VOM does not stress reconciliation as VORP does, but places more emphasis, instead, on victims' healing, offenders' accountability, and the restoration of losses. Like its precursor, VOM entails direct mediation. Nevertheless, differing from the first VORP experience, VOM occasionally requires premediation sessions for each party and non-directive "dialogue driven" processes.[20] VOM can also be used at various stages of the criminal justice process.[21]

Community Mediation

Paul McCold states that community mediation was the first generation of mediation in the United States that emerged in the early 1970s. It was subsequently followed by VORP in 1978, which further evolved into VOM.[22] Community mediation programs are operated by community dispute resolution centers, often as adjuncts to law schools or court services that receive cases from the police, prosecutor, and probation officers, and offer a range of dispute resolution services. [23] Community mediation is "settlement-driven," implying that the mediator cannot impose a decision, but may help to identify multiple paths toward an agreement.[24] Unlike VORP, community mediation is a theoretically secular model, but has not been secular in practice.[25]

In terms of their ongoing development, the boundaries between these three initial programs are becoming increasingly blurred. For example, more recently, it has also become possible to conduct indirect mediation for a victim who does not want to meet the offender, but still wants to express their feelings emanating from the crime.[26] In Europe, most forms of mediation such as VOM do not mandatorily require direct meetings between the victim and offender.[27] It should be noted that VOM, VORP, and Community Mediation are initial forms of mediation. Certainly, there is scope for developing other programs beside these three within this category. Take for instance VOD (Victim-Offender Dialogue) which is an outgrowth of VOM.[28] Unlike VOM, which is effective in handling juvenile offenders, VOD is designed as a non-diversionary program for handling severely violent crimes such as murder, vehicular homicide, or serious felony assaults.[29]

2.2.2.2. Conferencing

Family Group Conference (FGC) in New Zealand

Since 1989, New Zealand has incorporated FGC as a restorative justice program within its judicial process through the Children, Young Persons and Their Family Act. Compared with VORP and VOM, FGC has a larger number of participants. It is designed both as an alternative to court proceedings and as a means of providing guidance to sentencers. Youth justice family conferences are facilitated by a youth justice coordinator who is an employee of the Department of Child, Youth and Family Service.

Wagga Wagga Conference

Wagga Wagga is a small city in New South Wales, Australia. In 1991, influenced by FGC and John Braithwaite's theory of reintegrative shaming, Terry O'Connel, a police officer,

emulated FGC in using the conference method in Wagga Wagga.[30] Unlike a sentencing circle, which uses judicial discretionary power, or FGC, which relies on an Act as its legal basis, O'Connel used the Wagga Wagga conference within the ambit of police discretionary power.

Community Group Conferencing

Community group conferencing is conducted by particular communities within a wide range of circumstances and places such as a school, workplace, community, youth organization, or college campus. Community group conferencing is an incident-focused conference which means that it is merely limited to repairing the damage caused by a specific offense.[31]

2.2.2.3. Circle

Navajo Justice

Navajo justice refers to an old legal practice of the Navajo nation.[32] It is conducted if the *nalyeeh* (compensation) demanded by the victim from the offender is unsuccessful, and is facilitated by a *naat'aanii* (a respected peacemaker within the community). Its core practice is based on traditional spiritual beliefs. This practice has influenced modern forms of peacemaking circles such as the sentencing circle described below.

Sentencing circle

The sentencing circle first emerged in 1992, in Mayo Town, in Canada's Yukon Territory, and was based on the application of judicial discretionary power facilitated by a judge. At that time, a 26-year-old recidivist committed a "new" crime after his previous 46 criminal convictions. Realizing that the conventional criminal justice process had not been effective for this offender, the judge, probation officer, and Crown Counsel explored another way to engage other parties within the process of sentence determination. The judge then modified the courtroom setting. A circle of 30 chairs was arranged for the participants: the judge, lawyers, police, First Nation officials and members, probation officer, victim, and others. Using the circle process was advantageous for the judge compared with a traditional sentencing hearing.[33] In a sentencing circle, everyone is allowed to give their opinion regarding the crime and the offender. In the conventional criminal justice system, there is no opportunity for certain parties, for example, the police to appear at the trial. Therefore, a sentencing circle provides a comprehensive approach that helps a judge to reach a verdict.

The sentencing circle was thus adapted from the traditional circle ritual and has been incorporated within the criminal justice system

2.2.3. Timeline Operation

A timeline operation refers to the operational time frame of restorative justice. Susan L. Miller divides restorative justice programs into two types: diversionary and therapeutic. The diversionary type refers to any restorative program that is designed to operate in lieu of the criminal justice system process and to provide an alternative outcome. In Miller's view, this type is more offender-centered. On the other hand, the therapeutic type is more victim-centered since it operates after the offender has been convicted. The goal of this type of program is to empower, recover, and heal the victim.[34]

In relation to this category, Moriss and Maxwell have identified three possible processes of restorative justice referring to its flexibility: pretrial as a diversion; presentence to inform sentencers; and prerelease.[35]

2.2.4. Enforcement

The last category is composed of two types of enforcement: voluntary and coercive. In much of the literature, these two subcategories are also referred to as “the purist” and “the maximalist” models, respectively. The purist model relies on the initial definition of restorative justice. Take for instance Toni Marshal, who, for many, is a purist. He defined restorative justice in this way: “restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.” From Marshal’s definition, it is clear that the initial notion of restorative justice was to “resolve collectively” and not by just one party. This implies the necessity of obtaining the voluntary consent of each party.

On the other hand, maximalists take a different path, referring to Lode Walgrave and others who defined restorative justice as “all activities oriented to realize justice by restoring harm brought by a crime.”[36] In the maximalist view, the words “all activities” can be extended to include all measures for realizing justice as long the purpose is to restore the harm caused by the crime. This also includes coercive enforcement of restorative justice. This can be done, for example, through the judge’s verdict, regardless of whether the offender agrees or disagrees with the verdict.

In short, restorative justice should be understood from a wide set of angles to obtain a clear and comprehensive picture of what it entails. A nation can choose which of the categories that I have described in this chapter best fits its national characteristics so that it becomes feasible to implement restorative justice. Taking account of all of the above categories, there are twenty-four possible permutations of restorative justice programs. For instance, a nation can establish a new practice of restorative justice by using a conference form as a diversion, which is based on the voluntary consent of the parties in lieu of a criminal trial.

3. Restorative Justice For Juvenile In Indonesia

Children are a national asset that ensures the sustainability of a country. They carry the future of a nation on their shoulders. Therefore, it is necessary to devise a set of safeguards for children to protect them during the period of their physical and mental development. However, they may experience problems in their lives, for example, if they come into conflict with the law. Therefore, special methods of evaluation and treatment should be formulated

specifically for children who are in conflict with the law. In this context, restorative justice plays a very important role in safeguarding these children's future.

In the Indonesian context, the population within the age range of 0–17 years was 82.6 million in 2011. This means that 33.9%, or more than one third of Indonesia's population, is composed of children.[37] The age categories and the terms "child" or "children" used here refer to those described in the UN Convention on the Rights of the Child.[38] Within the field of criminal law, a specific term carries legal consequences. There are two categories for the term "child" in criminal law: (1) a child as someone considered too young to bear criminal responsibility, and (2) a child as someone perceived as being able to bear criminal responsibility. The first category is often simply called a "child," whereas terms for the second category vary according to each country. In New Zealand, for example, the term "child" is applied to the first category and the term "young person" is applied to the second.[39] For this paper, I employ the term "juvenile" when referring to the second category, and "child" for the first category.[40] Therefore, stipulating the age of criminal responsibility to distinguish between a child and a juvenile is a critical matter in the field of criminal law. In Indonesia, some changes have been made to the categorization of a child and juvenile as I describe below.

3.1 Age of Criminal Responsibility for Juvenile

The United Nations (UN) Resolution Number 40/33 of 1985 on UN Standard Minimum Rules for the Administration of Juvenile Justice (often called "The Beijing Rules") recognizes that juveniles need special treatment owing to their early stage of human development. This special treatment includes particular care and assistance relating to their physical, mental, and social development. Beside these, they also require legal protection in conditions of peace, freedom, dignity, and security. Therefore, formulating the age of criminal responsibility for juveniles is one measure for creating a safeguard that ensures special treatment for juveniles.

The Beijing Rules do not stipulate a fixed age of criminal responsibility for juveniles. In their Annex, they merely state that the age at which criminal responsibility commences should not be fixed at too low a level.[41] This is because the formulation of law depends on the history and culture of a nation. In Japan, for instance, the age range for criminal responsibility is set between 14 and 19 years,[42] whereas in New Zealand it is set between 14 and 17 years.[43] The formulation of the age limit thus differs among countries depending on their individual economic, social, political, and legal systems.[44]

In the context of Indonesia's current legislation, legal provisions for juveniles who

commit crimes are contained in the Juvenile Criminal Justice System Act, hereafter referred to as JCJSA (Act Number 11/2012), and in the Juvenile Court Act, hereafter called JCA (Act Number 3/1997). Prior to the enactment of the above two Acts, they were stipulated in the Indonesian Penal Code (Act number 1/1946), Article 45[45] of Chapter III pertaining to exclusion, mitigation, and enhancement of punishment.

The Indonesian Penal Code known as *Kitab Undang Hukum Pidana* (KUHP) sets the maximum age of criminal responsibility for the juvenile category below 16 years. This means that those who commit crimes at the age of 16 years or over are legally treated as adults. However, the Indonesian Penal Code does not set a minimum age of criminal responsibility for juveniles.

Article 67 of JCA provides the judge with three alternatives verdicts for minor offenders[46] (under the age of 16 years). These alternatives are:

(1) The person found guilty may be returned to his or her parents, guardian, or foster parents without any sanction;
(2) The person found guilty may be placed at the disposal of the government without any sanction. This may be applied if the person breaches a particular criminal[47] act within two years of having previously been convicted for one of the criminal acts mentioned above.
(3) The offender may be sentenced and punished.

In criminal law, there are two kinds of sentence: punishment and treatment. The first two alternatives described above refer to treatment, whereas the third refers to punishment. Although the above provision considers treatment as a sentence to protect the future of minors by stipulating their maximum age limit of criminal responsibility, it fails to fulfill another important aspect of legal protection. It does not stipulate a minimum age of criminal responsibility. This omission conflicts with the recommendations of the Beijing Rules. Moreover, the concept of responsibility becomes meaningless without the stipulation of a lower age limit. Therefore, an amendment is required regarding the age of criminal responsibility and other critical matters relating to juveniles.

In 1997, the Juvenile Court Act (Law No. 3/1997) was established to regulate and replace general legal provisions for juveniles under the KUHP, which was then repealed. Under this Act, juveniles between the ages of eight and eighteen years, who are also unmarried, fall within the jurisdiction of the juvenile court.

If a child below the age of eight years commits a delinquent act, the investigator will assess whether that child can continue to be educated by their parents or whether s/he should

be sent to the social department to be educated after hearing the opinion of the probation officer.[48]

However, the age of eight years was subsequently considered to be too low for a juvenile to be held criminally responsible. There have been several cases that have triggered this consideration regarding the amendment of the minimum age of juveniles. One of these cases was the "RJ" case, involving an eight-year-old boy who engaged in a fight with his schoolmate. This case became one of the landmark contexts for a petition filed at the Indonesian Constitutional Court to amend the minimum age of criminal responsibility within JCA. The petition was filed jointly by the Indonesian Commission on Child Protection (*Komisi Perlindungan Anak Indonesia*) and the Medan Foundation of Studies and Child Protection Center (*Yayasan Pusat Kajian dan Perlindungan Anak Medan*).

The Constitutional Court in its decision number 1/PUU-VII/2010 undertook a judicial review of the petition. It stated in its verdict that the phrase "8 years old" in Article 1 verse 1, Article 4 verse 1, and Article 5 verse 1 of JCA, including its explanation, conflicted with the Constitution of the Republic of Indonesia. The phrase was, therefore, conditionally unconstitutional and had no binding power unless it was reinterpreted as "12 years old." This minimum age for a juvenile was reaffirmed in JCJSA No. 11 of 2012, which will replace JCA on July 31, 2014, two years after its enactment.

A simplified representation of the long history of formulating the age of criminal responsibility for juveniles in Indonesia is provided in Table 3 below:

Table 2: The Age of Criminal Responsibility for Juveniles

Regulation	**Age of Criminal Responsibility for Juveniles**	
	Minimum Age (Years)	**Maximum Age (Years)**
Penal Code	-	under 16
JCA	8	under 18
Constitutional Court Decision	Amendment of minimum age in JCA from 8 to 12	
JCJSA	12	under 18

3.2 JCJSA: A New Chapter in Handling Juvenile Cases

The juvenile law in Indonesia was rigid and provides for no possibility of discretion or for a diversion program.[49] Even if a case has already been resolved through *musyawarah*[50] among the parties in conflict, as there is no legal basis for *musyawarah* in juvenile law, the state can exercise jurisdiction and "re-indict" the case. However, there are many cases that are not serious and that can be resolved through the application of *musyawarah* which has the same values and ideas as restorative justice.

The perception of JCA as being obsolete has led to the birth of JCJSA, a new act that was passed by the Indonesian Parliament and enacted on July 30, 2012. JCJSA is founded on the principle that a juvenile who is in conflict with the law should have the right to special protection, including from incarceration.

JCJSA includes three child categories: a juvenile as a delinquent, victim child, and witness child. Importantly, in contrast to JCA, it provides for a diversionary system in lieu of the criminal court. Here, a diversionary system should be understood not merely as a temporary criminal policy, but rather as a permanent system that is designed to settle and divert a case from the traditional criminal justice system process.

JCJSA contains 15 chapters composed of 108 articles. The provisions regarding diversion as a restorative program are contained in chapter two. Article 6 declares the following objectives of diversion:

a. To achieve reconciliation between the victim and juvenile;[51]
b. To settle a juvenile case outside of the court process;
c. To divert a juvenile from freedom deprivation;
d. To encourage the community to participate; and
e. To instill a sense of responsibility in the juvenile.

It is obligatory to apply diversion to criminal offenses that are subject to sentences of not more than seven years of imprisonment and that do not involve recidivism.[52] Outcomes of the diversion agreement, as provided by JCJSA, may be:[53]

a. Reconciliation with or without redress;
b. Return of juveniles to parents/guardians;
c. Participation of juveniles in education or training at an educational institution or at the Institution of Social Welfare Exertion (*LPKS/Lembaga Penyelenggaraan Kesejahteraan Sosial*) for no longer than three months; or
d. Community service.

Musyawarah will be applied within JCJSA as a mechanism for implementing diversion, as stated in Article 8 subsection 1:

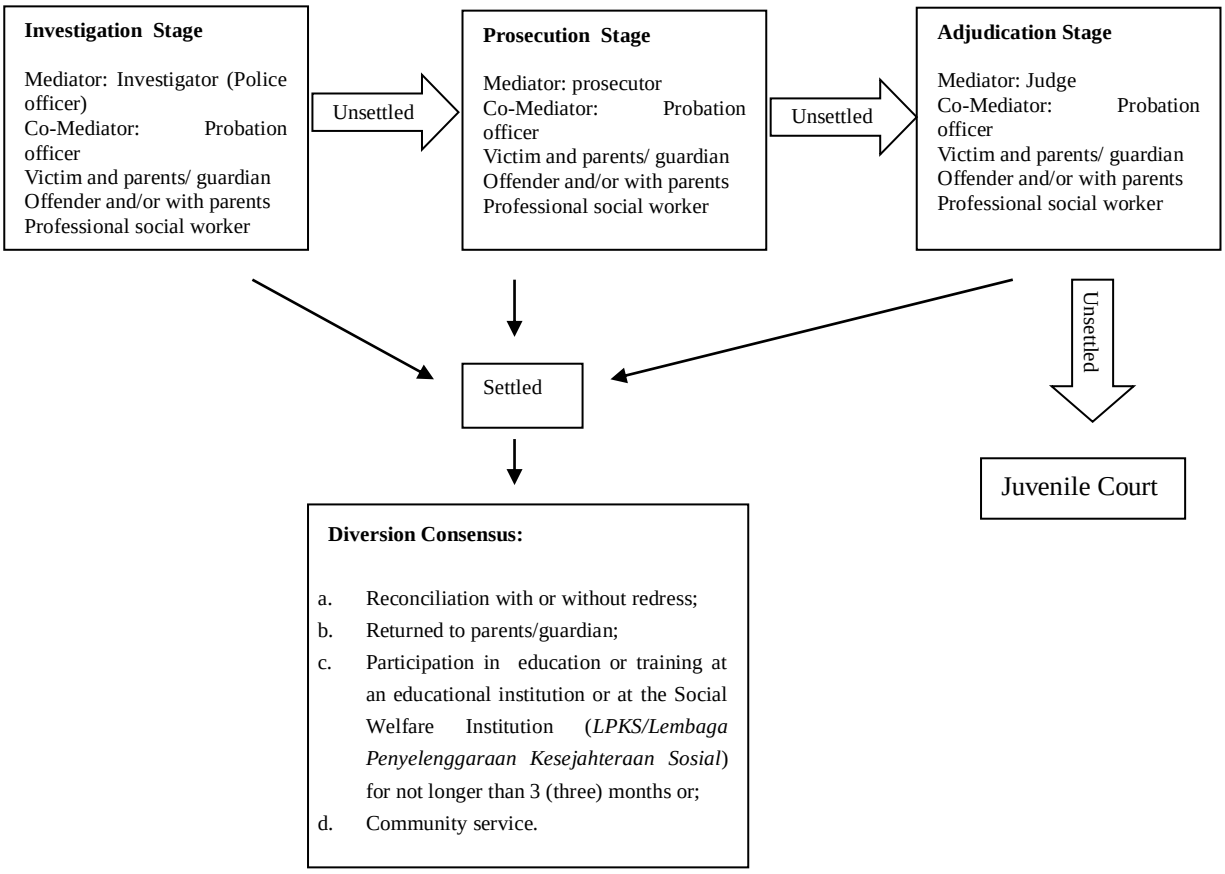
"The diversion process is conducted through *musyawarah* involving the juvenile and parents/guardian, victim and/or parents/guardian, probation officer, and professional social worker based on the restorative justice approach."[54]

The diversionary form of *musyawarah* that has now obtained a legal base in JCJSA can be seen to share the same approach as FGC.

What makes JCJSA unique is that it offers three opportunities for juveniles to obtain a restorative settlement through diversion: at the investigation stage, the prosecution stage, and the adjudication stage.[55] Thus, a conventional criminal trial becomes the *ultimum remedium*[56] or last resort for settling a case if the diversion process fails to reach consensus.

The three stages of the diversion process in JCJSA are shown below:

Figure: JCJSA Diversion Flow Chart[57]



It is evident that the last three options for the diversion consensus in the above figure

address the offender, whereas the first one is formulated to meet the victim's interest. Therefore, Eglash's observation that the victim is not the "meat and potato" of the diversion process also applies here. JCJSA is still more offender-oriented than victim-oriented. However, this does not mean that JCJSA ignores the victim's interest. Many of its articles clear state that the victim plays a key role in determining whether or not diversion occurs since this process requires voluntary consent of the victim party.

In short, JCJSA is 'a dream come true;' an act that can be predicted to protect the future of children and juveniles. Based on Indonesian legal history, it is unlikely that Indonesians would experience difficulty or resistance relating to the exercise of diversion, as stated in JCJSA. This is because *musyawarah* is a routine dispute resolution strategy in their daily lives. However, there are several points to be considered. To date, there have been no statistics available on the extent to which *musyawarah* has succeeded in resolving conflict in Indonesia. Restorative justice itself remains to be comprehensively evaluated. Whereas the data show some successful cases, others have met with failure. What is clear is that restorative justice is not a panacea. However, given the negative impacts of the current criminal justice system on juveniles, employing restorative justice for juveniles would be the best choice for handling juvenile cases. To minimize the failure of restorative justice, several preparations should be carried out in advance of its implementation. Among these, well-trained mediators, safe and neutral places for both victims and offenders, and impartiality would be some of the critical factors that would determine the success of restorative justice.

4. Restorative Justice in Japan.

4.1.Effort for Implementing Restorative Justice in Japan

In respect to Japan, restorative justice is described, mostly by Western scholars, as a new paradigm that will likely meet with no strong resistance when it is implemented. This perception usually involves reference to Japan's cultural foundation.[58] In addition, T. Kawashima and Y. Noda, as cited by Hiroshi Oda, have categorized Japanese society as a non-litigious society, which in my view will facilitate the implementation and acceptance of restorative justice.[59] Unfortunately, to date, Japan has not established a legal basis for implementing restorative justice, particularly as a diversionary system.[60] However, according to Kei Someda, Director of General Affairs and the Planning Division of the Chiba Probation Office, Ministry of Justice, the police and public prosecutor may discharge cases based on

their discretionary power.[61]示談 *Jidan* (out-of-court settlement) is possible within this system. Nevertheless, Someda adds that further research is required as to whether or not *jidan* can be categorized as restorative justice.[62]

The attempts for implementing restorative justice in Japan therefore have been made, encouraged and developed by many parties: academicians, practitioners and also non-Japanese scholars. In my view this is a sign that the implementation of restorative justice in Japan will prevail officially, in sense of acknowledged by the state, in the near future. One of the embryonic movements of restorative justice in Japan is pioneered by a group discussion.

Norio Takahashi, a law professor at Waseda University, along with his colleagues, also creates a group discussion that focused on restorative justice. The group discussion members consist of academicians and practitioners that meet once in two months. I am grateful that I was invited by professor Takahashi to participate in the group in March 2nd 2013 at Waseda University. In the group discussion there would be two or three speakers delivering a topic of restorative justice, sometimes they also discus the practice of restorative justice in one's group member institution.

In practical level, the efforts for practicing restorative justice idea in Japan have been made not only for juvenile delinquent but also for adult offender. The example of this is occurring in Shimane Prefecture. According to Hidetomo Shima, Rehabilitation Coordinator for Shimane Asahi Rehabilitation Program Center (SARPC), his institution (SARPC) has been developing therapeutic community that based on restorative justice idea. Hidetomo is also a member of the group discussion that previously mentioned.

Shimane Asahi Rehabilitation Program Center has 1.511 males inmate as of May 2014 (the maximum capacity is 1971 inmates). The restorative justice idea is run in the pre-release stage by creating dialogue between victim and the offender. The SARPC also develops indirect victim-offender mediation (VOM) by giving a chance to the offender to write a letter for his victim to apologizing and showing his remorse. The later program was actually, according to Yoko Hosoi, a professor of sociology at Toyo University, did not run well, the reason is because there are not many offenders who are willing to participate in it.

Another program that created at SARPC is therapeutic community (TC), an inmate community. The idea is to instill in the feeling of the victim, so the offender would know that what he has done was harming the victim. However this does not mean that they (offenders) meet their 'real' victim, it is conducted with a role play model. According to Hidetomo, TC unit consists of 58 inmates in maximum capacity. They spend their daily activity in this community for minimum 6 month and 18 month in maximum length.

In the role playing model, the TC employs family group conferencing (FGC) as one of restorative justice programs. They play a role of offender and victim of their offence. Naturally FGC is the most suitable form of restorative justice that involves big number of participants. Within FGC there will be offender and offender's family, victim and victim's family. Surely there will be a facilitator as well for conducting the FGC.

Unlike the previous program, the TC has made great changes in terms of recognition harm and need of family members. Most of inmates recognized that how their offences affect severely to their family members such as financial burden, human relationship, social exclusion from the community and so forth. On the other hand in the role playing, offender has a chance to understand victim perspective of the offence, how the offence has harmed the victim and affected their life. Moreover, the offender, assisted by all parties, is encouraged and supported to figure out on how he can restore such serious harm on the victim.

Even though the FGC above is fictitious, one of the goals of restorative justice has been reached i.e. to instill in the feeling of remorse of the offender.

4.2. Restorative Justice for Juvenile in Japan

The stipulation of criminal age responsibility of a country depends on the culture, social, and criminal policy of the country. As described previously, the provision for juvenile in Japan is stipulated with Japan Penal Code and Juvenile Act. According to article 41 of Japan Penal Code, the minimum age to bear criminal responsibility is set at 14 years old,[63] whilst the maximum age is set under 20 years old.[64] In Japan, juvenile delinquent is placed in a special correctional institution for juvenile. Up to present, Japan has 52 correctional institutions for juvenile.

I was grateful that I have had the opportunity to visit one of correctional institutions for juvenile in Japan on July 2014. I, several undergraduate students and three professors of Kanazawa University visited 湖南 学院 (*Konan Gakuin*) in Ishikawa prefecture. Konan gakuin is actually a Juvenile Training School (JTS) or in Japanese is called 少年院 (*Shounen'in*), a correctional institution for juvenile. As of 2010, Japan has 51 JTS that spread all over Japan.[65] According to Endo Hideaki, Head of Konan Gakuin JTS, since 2011 Japan build another JTS so it becomes 52 in total. The purpose for visiting the Gakuin JTS is to know the system of correctional institution in Japan particularly for juvenile. Another purpose is that I want to know whether restorative justice idea can be implemented in Japan, particularly within JTS.

4.2.1. Juvenile Training School

In respect to Japan, JTS was first-time formed in 1924 in Tokyo. JTS is designed for juvenile who committed delinquency to be educated in order to become a better person. Male and female in JTS is separated. There is no female inmate in Konan Gakuin. If there is female that committed a delinquency in Hokoriku area and decided to be sentenced then she will be sent to JTS in Osaka. Hideaki explained the JTS in general perspective and Konan Gakuin as particular example of JTS.

In my view, JTS in Japan is well-planned and well-designed in order to achieve the goal, to re-educate juvenile so they can live together within Japanese society. In the context of Konan Gakuin JTS, the training school is equipped with many facilities to measure that the juveniles get a good physical and mental education. For instance I see that Konan Gakuin has a swimming pool, multipurpose indoor-gymnasium, outdoor field for sport and planting crop, classroom, handicraft room, dining room, workshop, computer laboratory etc.

The inmate capacity in Konan Gakuin JTS is 50 inmates. Currently it has 25 inmates with three cases: maltreatment, theft and drug as the three high rank cases respectively. In case of drug, juvenile has been targeted by mafia to be a drug user or courier so the mafia can easily cut the link of crime chain that connect them when the juvenile get caught.

A new inmate will be placed in a quarantine-cell which can be locked from outside only. The quarantine-cell is very clean and has sufficient air circulation system and window that allows sunlight to shine the cell. It has a bed with *futon*, table and fan. Once the inmate is determined to be ready for socializing with others, he will be moved to a juvenile room. Interestingly, the room has no outside and inside lock. Konan Gakuin uses sliding door (a typical door in Japan) for the room, therefore I can not say that it is a cell since the juvenile can freely move inside and outside the room within particular block. For me it is just like a student dormitory which is good for juvenile mental development. Like the quarantine-cell, the juvenile room is also very neat, bright and not too narrow. It reminds me to the typical cell in Sweden as presented by Prof Jerzy Sarnecki, a criminologist from Stockholm University, at the 5th Annual Conference of Asian Criminological Society, in India. The lay out of the juvenile room in Japan is similar to prison in Sweden. It seems that most of developed country has the same standard as recommended by International conventions which seems still hard to be fulfilled by most of developing countries.

Regardless the facility, another important thing to be discussed in juvenile justice system is the relation between the victim and offender. Recently the conventional juvenile justice system has been criticized. The critic is concerning with the victim's need and the offender's responsibility to the victim. In criminal law field, this idea is a relatively new notion. Typically, in conventional juvenile justice system, the juvenile who commits delinquency has to responsible by serving his/her punishment in a correctional institution such JTS. Victim's voice has been ignored in this system. A new idea tries to fill this gap. The idea is called restorative justice (修復的司法).

4.2.2. The Potential Restorative Justice Program in Japan

The core idea of restorative justice is to restore the victim, the offender and (if appropriate) the community that affected by crime. As mentioned earlier, the term of restorative justice was used for the first time by Albert Eglash, a US psychologist who works in a prison, in his article in 1975. To date, restorative justice has been employed in many countries. In its development, restorative justice is evolving in many forms. Two of the forms are diversionary system and therapeutic system. Diversionary system means that the restorative justice program is used before a trial as an alternative means in lieu of trial. In relation to this,

Indonesia is going to employ diversionary system for juvenile in the end of July 2014. The other form, therapeutic system, means that the restorative justice program is operated after the trial when the offender is serving his/her punishment. In this part I want to focus on the latest, i.e., therapeutic.

In relation to Japan, Yukiko Yamada, a lawyer who studies restorative justice from Mark Umbreit in Minnesota, has been developing restorative justice in Japan particularly in Chiba prefecture. She formed a non-profit organization (NPO) and established a Victim Offender Dialogue Program for juvenile in 2001. Prior to her visitation to US, she represented a boy, who, after hearing testimony from a person he had injured, bowed deeply to his victim. According to Yamada, previously, the boy had been shifting blame for his conduct onto the victim.[66]

This program is actually similar to Victim Voice Heard (VVH) in Delaware and Victim Offender Conferencing in West Australia. Frankly, in practical level, there are not so many victims that want to meet the offender. In term of VVH for example, since the program began in 2002, there were only 10 victim-offender dialogues occurred which was noted in data collection until end of 2007 (the program is still on going) (Susan L. Miler, 2011: 214).

Interestingly, there are still many forms of restorative justice programs which lighter than VVH of VOC. The program is named indirect mediation. This program is developed in the way of thinking that not all victims want to meet their offenders but still want to get the benefit of restorative justice such apology or practical reparation. In this program the mediator become a representative of each party to deliver the both parties interest particularly the victim. According to Lyle Keanini, compared with direct mediation and conference, indirect mediation was less personal, did not allow victims' more emotional needs to be satisfied, was less effective in breaking down stereotypes and increasing understanding, and may be less influential in reforming offenders (12 Asian-Pac. L. & Pol'y J. 174). In my view, in the context of Japan, indirect mediation will be more suitable particularly if the victim is also a minor. In the case of minor as the victim, the victims may be accompanied by their parents to express and deliver their need to mediator and the same way goes for the juvenile, they can also be accompanied by their parents.

5. Conclusion

In sum the selection of restorative justice programs vary from country to country. Japan can adapt the model of diversionary like the model in Indonesia, or therapeutic model as implemented in many states of the US. It depends on many factors particularly the culture of a country. To note, Japan has practicing therapeutic model in Shimane and Chiba separately using discretionary power as its legal basis. Since we have found that most of victims hesitate and seem unfamiliar with restorative justice program that requires direct meeting with their offender, therefore, in my view, indirect mediation will be a good start to become an initiative project of restorative justice (in sense of therapeutic model) in order to achieve the satisfaction of parties especially the victim in Japan. Moreover, to manifest it nationally, it would be better if the practice of restorative justice for juvenile is based on an act as its legal basis.

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[1] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 24.
[2] The exceptions are Daniel W. Van Ness and Karen Heetderks Strong who, while initially concurring with this view, inserted a "clarification" footnote in the fourth edition of their book. They noted that Eglash developed his concept of creative restitution (discussed in his 1975 article) as a feature of restorative justice within his series of articles published in 1958 and 1959. Ann Skelton (2005), who has traced Eglash's sources, found that the term restorative justice emerged in 1956 in a book by Heinz-Horst Schrey, Hanz Hermann Walz, and W.A. Whitehouse. The book was, written in German and subsequently translated and adapted into English as *The Biblical Doctrine of Justice and Law.* For more details, see Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice, An Introduction to Restorative Justice* (4th ed., Anderson Publishing 2010) 22.
[3] In 1977, the paper was published in an anthology entitled *Restitution in Criminal Justice: A Critical Assessment of Sanctions.*
[4] Howard Zehr in the foreword of a book by Mark Umbreit and Marilyn Peterson Armour entitled, *Restorative Justice Dialogue, an Essential Guide for Research and Practice* (Springer Publishing Company 2011) vii.
[5] ibid 7.
[6] Paul McCold, 'The Recent History of Restorative Justice: Mediation, Circle, and Conferencing' in Dennis Sullivan and Larry Tifft (eds.), *Handbook of Restorative Justice* (Routledge 2008) 23.
[7] Braithwaite (n 1) 11.
[8] <www.un.org/en/ecosoc/docs/2002/resolution%202002-12.pdf> last accessed March 7, 2014.

[9] Braithwaite (n 1) 11.
[10] Howard Zehr, *Changing Lens: A New Focus for Crime and Justice* (Herald Press 2005) 178–179.
[11] Umbreit (n 8) 8.
[12] Sullivan (n 10) 24.
[13] Mulligan (n 4).
[14] Kathleen Dally, 'Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects' in Allison Morris and Gabrielle Maxwell (eds.), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing 2003) 65.
[15] Johnstone (n 31) 36.
[16] Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (2003) 10, downloaded from <www.unicef.org/tdad/littlebookrjpakaf.pdf> last accessed on March 10, 2014.
[17] Morris (n 49) 42–51. See also Daniel W Van Ness and Karen Heetderks Strong who consider three programs: Victim-Offender Mediation (Canada and US), Conferencing (New Zealand and Wagga Wagga, New South Wales) and Circles (Canada), to be key programs that have influenced the development of restorative justice, Van Ness (n 2) 26.
[18] Johnstone, (n 31) 2.
[19] Umbreit (n 8) 113.

[20] A dialogue-driven process involves assisting parties to enter into dialogue with each other, experience each other as human beings, and understand the harm that has been done, Umbreit (n 8) 242.
[21] Keanini (n 22).
[22] Sullivan (n 10) 24.
[23] Morris (n 49) 42.
[24] Umbreit (n 8) 242.
[25] Morris (n 49) 42.
[26] Keanini (n 22).
[27] Norio Takahashi, "Restorative Justice and Treatment of Offenders" in *Sonderdruck Aus Menschengerechtes Strafrecht* (2005) Festschrift Fur Albin Eser Zum 70. Geburtstag. Verlag C.H. Beck Muncen, 1434–1439; see also Morris (n 50) 7.
[28] According to Susan L Miller, as of October 2009, twenty-five states in the United States had VOD programs for victims/survivors of severe violence. For further details, see Susan L Miller, *After the Crime. The Power of Restorative Justice Dialogue between Victims and Violent Offenders* (New York University Press 2011) 17
[29] Umbreit (n 8) 212.
[30] Reintegrative shaming is a notion proposed by John Braithwaite that differs from the concept of "stigmatization shaming" within the traditional criminal justice system. For further details, see Braithwaite (n 1); see also Johnstone (n 31) 99.
[31] For further details, see Morris (n 49) 47.
[32] The Navajo nation, with a population of approximately 200,000, is spread across the states of Arizona, New Mexico, and Utah, Johnstone (n 31) 50.
[33] Van Ness (n 2) 29.
[34] Miller (n 63) 12.
[35] Crawford (n 18) 207; an example of a prerelease restorative justice program is VVH (Victim Voice Heard) which was formulated by Kim Book in Delaware in the United States, see Miller (n 63).
[36] Takahashi (n 62) 1434–35; Crawford (n 18) 273–77.
[37] Kementerian Pemberdayaan Perempuan dan Perlindungan Anak dan Badan Pusat Statistik. *Profil Anak Indonesia 2012 (Indonesian Child Profile 2012)* (Jakarta. 2012) 5.
[38] Article 1 of the Convention states that: "…a child means every human being below the age of eighteen years…" See UN Resolution 44/25 of 1989 on the Convention on the Rights of the Child.
[39] A child is defined as "a boy or girl under the age of 14 years," whereas a young person is defined as "a boy or girl over the age of 14 years but under 17 years, and does not include any person who is or has been married or in a civil union." See the New Zealand Children, Young Persons, and Their Family Act Number 24 of 1989. However, several exemptions have been made for prosecuting children in the Youth Court. For further details, see Section 272 (Jurisdiction of Youth Courts and children's liability to be prosecuted for criminal offenses).
[40] The Juvenile Court Act Number 3/1997 and Juvenile Justice System Act Number 11/2012 just use the term "*anak*," which literally means "child" for both categories. The combined use of the terms "child" and "juvenile" in this thesis is derived from the Convention on the Rights of the Child and The Beijing Rules.
41 The criterion of "too low" is actually difficult to measure since every country has its own law that reflects its values and culture. Even within the same continent, the minimum age of criminal responsibility varies from country to country. For example, within the European countries of Scotland, Ireland, France, Sweden, Spain, and Luxemburg, criminal responsibility begins at 8, 10, 13, 15, 16 and 18 years of age, respectively. See G. Van Bueren, *International rights of the child (Section C: Children and the justice system)* (University of London Press 2006) downloaded from:
<www.londoninternational.ac.uk/sites/default/files/international_rights_child.pdf> accessed on February 15, 2014.
42 See Penal Code of Japan Act No 45/1907, Art. 41 and Juvenile Act of Japan No 168/1948 Art. 2 (1) and 3 (1).
43 See the Children, Young Persons and Their Families Act of New Zealand, No. 24 of 1989, section 2, subsection 1.
44 See the commentary section of The Beijing Rules, section 2.2 of the Annex.
[45] Abrogated by Article 67 of JCA.
[46] Indonesia's Ministry of Justice has translated "*orang yang belum dewasa*" as "minor" instead of "juvenile."
[47] Articles 489, 490, 492, 496, 497 (misdemeanours concerning the general security of persons and property and the public health), 503–505, 514, 517–519 (misdemeanours relating to public order), 526 (misdemeanours against the public authority), 531 (misdemeanours relating to destitute persons), 532 (misdemeanours relating to morals) 536 and 540 (misdemeanours relating to morals), Penal Code of Indonesia, official translation of Ministry of Justice of Indonesia, www.refworld.org/docid/3ffc09ae2.html accessed on November 15, 2011.
[48] Article 5 of JCA.
[49] In terms of restorative justice, a diversion program shares the same meaning as in Black's Law Dictionary: a

program that refers certain criminal defendants before trial to community programs, on-the-job training, education and the like, which if successfully completed may lead to the dismissal of the charge. Bryan A Garner, 'Black's Law Dictionary' (New Pocket edn., 1998) 200

[50] *Musyawarah* is a method for settling a dispute peacefully that involves all stakeholders.

[51] Juvenile here refers to a child in conflict with the law (child as delinquent) according to Article 1 of JCJSA.

[52] Article 7, subsection 1 of JCJSA.

[53] Article 11 of JCJSA.

[54] Translated from Art. 8 (1) *proses diversi dilakukan melalui musyawarah dengan melibatkan anak dan orang tua/walinya, korban dan/atau orang tua/walinya, pembimbing kemasyarakatan, dan pekerja sosial professional berdasarkan pendekatan keadilan restorative.*

[55] Art. 7 (1), 29, 42, and 52 of JCJSA.

[56] *Ultimum remedium* is a basic principle in the criminal law field which means that the use of criminal law should be the last resort after all other means fail to settle the case.

[57] Based on Articles 7, 8, 9 and 13 of JCJSA.

[58] John O Haley stresses the cultural foundation to highlight apology and reciprocal pardon as dominant threads in the Japanese social fabric. This is reflected in standard practices in Japan whereby the offender seeks a formal letter of forgiveness from the victim that is addressed to the police, the prosecutor, or the judge. The victim, through the letter, may inform the law enforcement agencies that he or she has been compensated and has pardoned the offender. The letter may also include a request to the authorities not to report, prosecute, and punish the offender. This letter is then used by law enforcement officials when considering their decision. See John O Haley. *A Spiral of Success, Community Support is the Key to Restorative Justice in Japan.* 1994. Downloaded from www.context.org/iclib/ic38/haley/ accessed December 11, 2012.

[59] See Hiroshi Oda, *Japanese Law* (3rd ed., Oxford University Press 2009) 2.

[60] Diversionary system here means a system that provides an alternative dispute resolution in lieu of a criminal trial.

[61] According to Haley, despite the high conviction rate in Japan (about 99.5%), it is estimated that the police do not report up to 40% of all apprehended offenders and that prosecutors suspend prosecution of possible convicts in nearly a third of the reported cases. See Haley (n 40).

[62] Personal communication from Kei Someda at the Restorative Justice Regular Meeting at Waseda University, March 2, 2013.

[63] Article 41 of Act No.45/1907 (Penal Code of Japan). (Infancy) An act of a person less than 14 years of age is not punishable.

[64] Act No 168/1948 Juvenile Act of Japan, Article 2 (1) In this Act, the term "Juvenile" refers to a person under 20 years of age; the term "Adult" refers to a person of 20 years of age or older.

[65] UNAFEI, Criminal Justice System in Japan, 2011, pag.8

[66] http://www.accessmylibrary.com/article-1G1-74768195/restorative-justice-tackle-juvenile.html Accessed 11/12/2012

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