

Critical Analyse of the Exceptions in Resorting to Restorative Justice When Children Come into Conflict with the Law

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ABSTRACT

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As the child justice system continues to evolve and the development of Children's rights, there is a growing recognition of the need to address child offenders differently from adult offenders. Restorative justice has emerged as a promising approach to address the unique needs and circumstances of juvenile offenders, aiming to rehabilitate rather than solely punish. However, this research delves into the limitations and exceptions that may hinder the application of restorative justice in cases involving child offenders. The primary objective is to analyse the factors that influence the decision to deviate from restorative justice principles in children cases, which includes the severity of the offense; the age, maturity and attitude for guilty of the child; the times of committing offences of the child; the victim's perspective, and legal frameworks. By exploring these exceptions, the study aims to provide insights into the challenges and complexities that arise when applying restorative justice in child justice systems. Furthermore, the research employs a qualitative approach, involving a thorough review of legal provisions, case studies, and relevant literature to critically analyse the nuances of exceptions in restorative justice for children in conflict with the law. The findings contribute to the ongoing discourse surrounding the appropriate and effective use of restorative justice in juvenile cases, shedding light on when and why exceptions may be necessary. Ultimately, this paper serves as a valuable resource for policymakers, law enforcement officers, and researchers in the field of juvenile justice, offering a deeper understanding of the complexities inherent in implementing restorative justice in the child justice system.

Contribution/Originality: This research examines four circumstances on the exceptions of implementing restorative justice in children cases: The nature of the crime and the degree of social harm caused by the child is severe; The child who infringes the law and remain impenitent; Victims of crime are reluctant to participate in restorative justice, and Young recidivism. The finding is that those four circumstances may not suitable for implementing restorative justice when children conflict with the law.

1. Introduction

1.1. The concept of restorative justice

Before any actions can be taken to implement restorative justice, it is vital to see the concept of restorative justice itself, as without a proper understanding of it, the practical side of implementing and enforcing restorative justice will be a difficult task to do either to the victims, offenders or the legal bodies themselves.

One of the earliest and accepted definitions of restorative justice is a process whereby stakeholders in a particular offense come together to resolve collectively on how to deal with the aftermath of the offense and its implications for the future (Marshall, 1996 p21-43). The stakeholders do not just include the victim and the offender, but also the supporters of the victim as well as the offenders' which mainly include their family members and the community or the public (Zehr, 2015). However, this definition has been criticized on the ground as it did not emphasize the primary goal of repairing the harm to the victim but it focuses on the process which only included the face-to-face meeting between the parties involved (Daly, 2017).

Restorative justice has also been defined as actions that are primarily oriented towards doing justice by repairing the harm that has been caused by crime where the focus lies on the child and youth justice cases only (Bazemore & Mara, 2001). In general terms, restorative justice can be identified as a way of responding to criminal behavior in balancing the needs of the victims, offender and the community (Dandurand & Griffiths, 2006). Despite the problematic definitions, the common elements of restorative justice include the significance of victim's role and experience in criminal justice process, involvement of all relevant parties not limited to offender and the victim, but also their supporters and even the community, the reparation of harm done and the decision making by all parties involved (Daly, 2002).

For the issue of analyzing the concept of restorative justice, the author conducted a semi-structured interview, and all of the five interviewees are from Malaysia: Respondent A lecturer in law; Respondent B: deputy public prosecutor; Respondent C: Police inspector; Respondent D: criminal lawyer and respondent E: judge assistant.

Through the interview, the author found the principles and corresponding interpretations in the Table 1.

Table 1: principles and explanations of restorative justice

Principles	Explanations
Victim-Offender-Centered Approach	Prioritizes addressing the needs, rights, and well-being of victims, allowing them to actively participate in the justice process.
Offender Accountability and Responsibility	Holds offenders responsible for their actions, encouraging them to acknowledge the harm caused and take steps towards making amends.
Harm Repair and Restoration	Focuses on repairing the harm inflicted on victims, communities, and relationships, aiming to restore balance and promote healing.

Inclusive Dialogue	Facilitates open and respectful communication between victims, offenders, and stakeholders, enabling them to discuss the impact of the offense and potential solutions.
All parties Participation	Ensures that all parties involved choose to participate willingly, fostering a sense of ownership and commitment to the restorative process.
Community Involvement	Recognizes the role of the community in supporting victims, offenders, and the overall healing process, promoting a sense of collective responsibility.
Agreements and Restitution	Develops agreements outlining specific actions for offenders to take, such as restitution or community service, to repair harm and contribute positively.
Rehabilitation and Transformation	Aims to transform offenders through interventions that address underlying causes of their actions, fostering personal growth and reducing the likelihood of reoffending.
Balancing Justice and Healing	Strives to achieve a balance between addressing the needs of victims and the pursuit of justice, recognizing that healing and accountability can coexist.
Empathy and Understanding	Promotes empathy and understanding between victims and offenders, fostering a deeper connection that can lead to greater insight and positive change.
Prevention and Education	Addresses the root causes of harm, focusing on education and prevention strategies to reduce the occurrence of future offenses and promote awareness.
Flexibility and Adaptation	Adapts restorative justice processes to fit the unique circumstances of each case, ensuring that the approach is tailored to the needs and preferences of participants.
Restoration of Relationships	Recognizes the potential for repairing damaged relationships between victims, offenders, and communities, contributing to a sense of closure and harmony.
Procedural Fairness	Ensures that the restorative justice process is conducted fairly, transparently, and respects the rights of all participants, promoting trust and credibility.

These principles in the concept form the foundation upon which restorative justice is built, providing a framework for addressing various types of offenses and conflicts in a manner that prioritizes healing, reconciliation, and the restoration of relationships.

Thus, it can be seen that restorative justice is a theory of justice that focuses on the needs of the victims and the offenders, as well as the community affected by the crime. Compared with the traditional retribution justice system, it emphasizes more on repairing the harm caused by the crime and restoring relationships between the parties involved. Rather than simply punishing offenders, restorative justice seeks to involve all stakeholders in a process of dialogue and understanding. The approach aims to achieve accountability, repair harm, respect human rights and promote healing and reconciliation. It often involves a facilitated dialogue between the victim and the offender, in which the offender takes responsibility for the harm caused and works to make amends.

1.2. Background of implementing restorative justice in the child justice system

The implementation of restorative justice in the child justice system has gained increasing attention in recent years as a response to the limitations of traditional punitive approaches. Restorative justice principles emphasize accountability, repairing harm, and involving all stakeholders in the resolution process. This approach recognizes that children in conflict with the law often have unique needs, vulnerabilities, and potential for rehabilitation.

Traditionally, the child justice system has predominantly focused on punitive measures, often failing to address the underlying causes of offending behavior and neglecting the rights and needs of the child offenders and their victims (Bazemore, 1998). This has led to concerns about the negative impacts of incarceration on young offenders, including increased recidivism and further entrenchment in the criminal justice system.

With the development of the criminal justice system, restorative justice was launched and offers an alternative paradigm that aligns with international standards such as the United Nations Convention on the Rights of the Child, which underscores the importance of the child's best interests, rehabilitation, and reintegration into society. Combing and analyzing the former research, it can be seen that implementing restorative justice in the child justice system aims to address the following key aspects:

- i. **Accountability with Rehabilitation:** Restorative justice encourages child offenders to take responsibility for their actions and make amends to victims, while also offering them the opportunity to understand the consequences of their behavior and make positive changes.
- ii. **Victim Empowerment:** Restorative justice gives victims a voice in the process, allowing them to express their feelings, ask questions, and participate in finding solutions. This can lead to a sense of closure and satisfaction that punitive measures often fail to provide.
- iii. **Community Involvement:** Restorative justice involves the community in the reintegration process, promoting a sense of ownership and support for young offenders' successful reintegration.
- iv. **Reducing Recidivism:** By addressing the root causes of offending behavior and providing rehabilitation, restorative justice aims to reduce the likelihood of young offenders reoffending.
- v. **Individualized Responses:** Restorative justice recognizes that each case is unique and requires tailored responses that consider the child's background, needs, and circumstances.

However, implementing restorative justice in the child justice system is not without challenges. It requires significant changes to legal frameworks, policy, and institutional practices. Ensuring that the process is truly voluntary and respectful of the child's rights is paramount. Furthermore, adequate training and support for professionals involved, including judges, lawyers, social workers, and facilitators, are crucial to ensure the effectiveness and integrity of the approach.

As time passes by, restorative justice has become an increasingly popular approach to addressing child offenses in recent years. Some pioneer countries, such as New Zealand, Australia, and the UK (England and Wales) already have a shaped restorative justice system to manage the cases that child conflict with the law. This approach emphasizes

the need to address the harm caused by the offense and to work towards restoring relationships between the child offender, the victim, and the community.

In the context of child offenses, restorative justice may involve a facilitated dialogue between the child offender, the victim, and possibly other stakeholders such as parents, teachers, or community members. The goal of this dialogue is to allow the parties involved to share their experiences and perspectives and to work towards repairing the harm caused by children who are under 18 (Kilkelly & Liefwaard. 2022).

Restorative justice approaches to child offenses may also involve opportunities for the child offender to make amends for their actions, such as by performing community service or engaging in other acts of repair. There is no doubt that this can help the child develop a sense of responsibility and empathy, and may also help them to avoid future offending behavior and can ultimately contribute to the development of a safer and more just society.

Meanwhile, blindly applying restorative justice in every child's offenses may also have a negative effect, such as wasting of judicial resources, etc. Moreover, in certain specific types of children cases, the implementation of restorative justice may not necessarily achieve its goal of rehabilitating the offenders: this could not only potentially waste a significant amount of judicial resources and case processing time but also result in a limited impact on maintaining social stability. Thus, it is of great importance to analyse under what circumstances, restorative justice cannot be used for dealing with young offenders.

2. Circumstances on The Exceptions in Resorting to Restorative Justice when Children Come into Conflict with the Law

2.1. The nature of the crime and the degree of social harm is severe

It is well acknowledged that when determining the appropriate punishment for a crime, the nature of the offense and the degree of social harm caused by it should be taken into consideration. According to the sentencing principle of “punish fits the crime” in criminal law, more serious crimes are typically punished more severely than less serious offenses. Additionally, some crimes may be considered more harmful to society than others, even if they are not as serious in terms of physical harm or financial loss. Thus, restorative justice may not be applicable to certain serious, violent, and egregious crimes, such as rape and homicide. Where such crimes are extremely egregious, it is difficult to apply restorative justice in punishing the child who infringed criminal law and protecting social security.

In fact, currently in the Malaysian child justice system, for serious child offenses, the punishment for them is not only suitable by the Penal Code but also applicable by the [Child Act 2001](#), and the latter legal document, acts as a special law, usually have priority for implemented firstly. Thus, the learned judge has to consider both legislation and the child's best interest, and then find the most reasonable sentencing method for them.

For instance, in the case of [PP v. Hidayatul Akmal Azman](#) ([2020] 1 CLJ 562), the respondent was 17 years and 11 months at the material time of committing rape, while the victim, his girlfriend, was 14 years and 11 months old. It was not disputed that the respondent had pleaded guilty to the charge and that the Magistrate, in imposing the

sentence, had taken into account the respondent's guilty plea, the fact that he was a child at the relevant time, and the recommendations put forth by the Probation Officer that the respondent should only be fined under s. 91(1) of the [Child Act 2001](#) (section 91). Meanwhile, on the other hand, the Public Prosecutor argued that the sentence imposed was excessively inadequate considering the seriousness of the offense and the maximum sentence of 20 years' imprisonment and whipping prescribed by s. 376(1) of the Penal Code, and in the event, urged the High Court to disturb the same and substitute it with a stiffer sentence.

However, the learned judge holds the opinion that the first-offender child who has committed an offense under s. 376(1) of the Penal Code (statutory rape) should not as far as possible be made to suffer an imprisonment sentence as that may eventually turn him into a hardened criminal. Thus, in his opinion, adopting restorative justice on the young offender and making a fine sentence only may be adequate and may indeed meet the public interest principle of inducing him to turn away from his criminal demeanor.

Overall, in the author's opinion, despite the fact that all youngsters under 18 can be protected by the [Child Act 2001](#), there are actually some circumstances for the exception.

"Malice supplies the age" is a legal principle that applies in cases where a defendant's age is relevant to determining their guilt or punishment for a crime.

This rule was first proposed by the famous British lawyer Braxton in his book *"Interpretation of English Law"* ([McWilliams, 2010](#)). He believes that *"it is too mechanical to divide the attribution of criminal responsibility completely according to age"* ([Cipriani, 2016](#)). Because capacity for criminal responsibility is largely at the mercy of the child's understanding and judgment ([Petoft & Abbasi, 2022](#)). The principle states that if a defendant acted with malice or criminal intent, their age is not a defense against a criminal charge ([Chesney, 1938](#)). In other words, even if the defendant is young, their actions were still intentional and with criminal intent, so they can still be held responsible for the crime.

Thus, it is often invoked in cases where a minor commits a serious crime, such as murder or rape. While age can be a mitigating factor in determining the appropriate punishment, it does not excuse or justify criminal behavior. The principle recognizes that the intent or malice behind a criminal act is the most important factor in determining criminal liability, regardless of the age of the defendant ([Ward, 2022](#)). As a person under the age of 18 but over the age of 12, although the person is still a child in the legal sense and protected by the [Child Act 2001](#), the penalties under the Penal Code still apply, because in Malaysia and according to the penal code s82, only children whose age is under 10 years old are absolute the non-criminal age (Penal Code s82). Although in the Malaysian child justice system, restorative justice has not been officially acknowledged ([Ab Aziz, 2022](#)), to some extent, the legislation in this act has expressed the core opinion of restorative justice. In cases where two laws compete, the special law should generally apply, so the Child Act is clearly the special law that should be applied compared to the penal code. However, under the application of the normal Penal Code, the offence can be punishable by up to 20 years in prison, and after the application of the Child Act, a fine of only 1000RM was imposed. The only difference between the application of the two is the age of the accused. However, under the rule of "malice

supplies the age”, the [Child Act 2001](#) will no longer be applicable if successfully applied. But the discretion of it is still under the charge of the judges.

From this perspective, if the principle of “malice supplies the age” can be imposed in the case, the trial in the court and final sentencing will have an extremely huge difference, because the [Child Act 2001](#) may not be suitable for this case anymore. And the age is only a mitigating factor when sentencing the young offender.

Take another severe young offender’s crime as an example: [Nguyen Doan Nhan v. PP \(2018 1 LNS 1583\)](#). After the trial, the accused was found guilty and was convicted of the offense of murder under s. 302 of the Penal Code. The learned High Court Judge, however, made a finding that the accused was below the age of 18 years at the time of the offence and therefore made an order pursuant to section 97 of the [Child Act 2001](#) that the accused be detained in a prison during the pleasure of the Sultan of Johor Darul Takzim.

On the author’s view, this sentence result is quite reasonable because restorative justice cannot be applied in the case of serious violent crimes, but at the same time, since the accused person is still a child under the definition of the [Child Act 2001](#), it cannot be contrary to the CRC and the [Child Act 2001](#) s97. Therefore, the defendant is sentenced to long-term imprisonment instead of the death penalty.

Last but not least, although some countries already fully imposed restorative justice in the whole child justice system, such as the United Kingdom and New Zealand. Some of the research in their countries also suggests that restorative justice is unlikely to be effective or safe in sexual misconduct cases ([Cossins. 2008](#)). Because if the nature of such crimes is extremely egregious, it is difficult to apply restorative justice in punishing the crimes and protecting social security. Furthermore, the purpose of restorative justice may not be achieved in the violent and severe offenses.

2.2. The child who infringes the law and remains impenitent

In the above section discussing the concept of restorative justice, it can be seen that one most important precondition for the use of restorative justice in the child justice system is that both the victim and the offender must be willing to participate in the process of justice ([Lodi. 2022](#)). If either party is not willing to participate, restorative justice may not be a viable option. Therefore, it is important to assess the willingness of both parties before initiating the process. Furthermore, the offender must take responsibility for their actions and show a willingness to make amends for the harm caused. This requires the offender to be willing to engage in a process of introspection and self-reflection, and to be willing to listen to the victim and the community’s perspective on the harm they had caused.

Thus, in the process of restorative justice for child offenders, the first and foremost factor is to consider whether both the offender and victim would like to take part in the restorative justice system. Because normally, the victim would like to join since restorative justice represents him an opportunity to voice his damage ([Robalo & Abdul Rahim, 2023](#)). Nevertheless, under some circumstances the victim may not want to face the offender because of fear ([Mohammad, 2021](#)). Furthermore, the most common circumstance is that the young offender may not be willing to participate in the process because they didn’t feel regret for their behavior. And if their attitude is impenitent, they

fail to satisfy the precondition for the use of restorative justice, which is the offender must take responsibility for their actions and show a willingness to make amends for the harm caused (Suzuki & Jenkins, 2022). This requires the offender to be willing to engage in a process of introspection and self-reflection, and to be willing to listen to the victim and the community's perspective on the harm caused.

However, sometimes there will be such a situation: when a child commits a crime, in order to obtain the minimum punishment, he pretends to admit his mistake, but actually he has no repentance in his heart, and even has a clear tendency to re-offend. Then under this circumstance, if using restorative justice for that case, it may also be unsuitable because the subjective of that child is still harmful.

All in all, we may see clearly that without both the victims' and offenders' willingness to participate in the process of restorative justice, restorative justice cannot be used because it doesn't satisfy the precondition of the court's progress and cannot express the value of restorative justice in the child justice system as well.

2.3. Victims of crime are reluctant to participate in restorative justice

The role of the victim in the restorative justice system is fundamental and multi-faceted in the restorative justice system. It is important to protect the rights of victims in order to ensure the basic of human rights and prevent them from being secondary victimization. However, the comprehensive implementation of restorative justice in Malaysia's criminal justice system has not yet been realized, leading to insufficient protection of victims' rights. In other words, the rights of victims remain unclear. Therefore, when analyzing exceptional cases of applying restorative justice, it is paramount and essential to examine the fundamental rights of the victims.

i. Voice and Empowerment:

One of the central tenets of restorative justice is giving the victim a voice and the opportunity to express the impact of the offense on their life. Victims often feel powerless in traditional criminal justice systems, where decisions are made by legal professionals. In restorative justice, victims should have the right to get a platform to share their feelings, concerns, and needs, empowering them to play an active role in the resolution process.

ii. Emotional Healing and Closure:

The restorative justice process provides victims with a chance to confront the young offender and seek answers to their questions. This direct communication can lead to emotional healing and closure, as victims have the opportunity to understand the motivations behind the offense and receive genuine apologies. This can be particularly beneficial in cases where victims are struggling to cope with trauma.

iii. Restitution and Amends:

Victims often face financial, emotional, and psychological consequences as a result of the offense. Restorative justice allows for restitution and amends to be made directly to the victim, addressing their tangible losses and providing a sense of justice. This restitution can take various forms, such as compensation, community service, or repairing property.

v. Reintegration and Community Healing:

Restorative justice involves the broader community as well. When victims participate in the process, they become part of the community's response to the offense. This contributes to community healing, as community members witness the offender taking responsibility for their actions and working towards repair.

vi. Holding Offenders Accountable:

The victim's participation humanizes the offense for the offender and fosters a sense of accountability. When offenders see the direct impact of their actions on the victim, they may be more motivated to take responsibility and make amends. The victim's presence during the process can encourage genuine remorse and a commitment to change.

Despite the fact that there is no official legal document to ensure the above rights in Malaysian criminal justice, other jurisdictions like England and Wales already launched the Code of Practice for Victims of Crime in 2005 to protect the rights of victims. Those rights include: getting information, support, protection, compensation and most importantly, participating in restorative justice progress.

Thus, the victims' participation not only brings healing and closure to their own experience but also plays a critical role in fostering offender accountability, community healing, and the overall success of the restorative justice process. Moreover, what is worth mentioning is participating in the process of criminal justice is the "right" for the victim, instead of the "obligation". From this perspective, if the victim chooses to waive their right to participate in restorative justice, no one can prevent it. What is even more crucial is that the victim plays a pivotal role in restorative justice; if they are unwilling to engage in the process, the value of restorative justice diminishes. Therefore, in the aforementioned scenario, once the victim is unwilling to participate, the applicability of restorative justice becomes infeasible.

2.4. Young recidivism

Recidivism, also named as "repeated offender". Normally, this word refers to the offender whose age is above 18 as an adult. Meanwhile, children offenders can be considered as recidivists if they re-offend after being punished or rehabilitated for a previous offense ([Bradshaw & Roseborough, 2005](#)), because recidivism is not limited to adult offenders and can occur in children as well ([Ryan & Courtney, 2013](#)). In fact, preventing recidivism in children is particularly important, as early intervention can help to prevent them from becoming entrenched in a pattern of criminal behavior.

Thus, young recidivism refers to the phenomenon where a young person who has previously been involved in criminal activity or convicted of a crime, continues to engage in such activities and reoffends ([Acland & Cavanagh, 2022](#)). Recidivism is measured by the rate at which individuals who have been involved in the criminal justice system, re-offend or return to prison within a certain time frame. In this article, the meaning of "young recidivism" only refers to the offender whose age is below 18 years old.

Thus, if someone may be referred to as "young recidivism", he had to commit an offence when he was young, and re-offend again when he was below 18 years old. For instance, when David who was a first-time offender at 16 years old and committed a theft, there is no doubt that he is suitable for using the restorative justice process. After that, when he

was 17 years old and committed theft or other offenses again, then he will be considered as young recidivism. Then for this second offence, the restorative justice system is no more suitable for him because the first restorative justice process didn't play an important and effective role in their rehabilitation process.

Furthermore, the Johor chief police officer Datuk Kamarul Zaman Mamat disclosed that Johor students were involved in 1,388 crimes and 38 drug cases in 2018, while 1,230 crimes and 33 drug cases were involved in 2019, and some of these students are suspected of recidivism.

As we all know the aim of restorative justice is to repair the harm caused by a crime and to promote healing and reconciliation between the young victim, offender, and the community (Wood & Hayes, 2022). Restorative justice seeks to address the underlying causes of crime, such as social inequality, exclusion, and lack of opportunity, rather than simply punishing the offender. The approach is based on the principle of respect for the dignity of all parties involved and emphasizes accountability, responsibility, and active participation.

Thus, the ultimate goal of restorative justice is to restore relationships, promote healing, and prevent future harm (DePalmer & Livick, 2022). By involving all parties in the process of repairing the harm caused by the crime, restorative justice aims to create a sense of closure for the victim, foster empathy and understanding between the victim and offender, and promote positive change in the offender's behavior. The approach also seeks to strengthen the community by addressing the root causes of crime and creating a sense of accountability and responsibility among all members.

Meanwhile, if the offender commits offense again, which means the root cause of the crime still exists, so restorative justice does not express the effectiveness of its role. Thus, for the second or third or more-times offender, although they are still young and below 18 years old, it is unsuitable to use restorative justice again.

3. Conclusion

There is no doubt that restorative justice provides a more humane way to deal with juvenile delinquency, compared with the traditional retributive justice system. Meanwhile, as a developing justice system, some processes of restorative justice still have some imperfections, which requires us to continue to explore in the legal practice, and find out the implementation plan suitable for the actual situation in the Malaysian child justice system.

At least from what the author had discussed above, it may safely draw the conclusion that although restorative justice will play an important and necessary role in the future of the Malaysian child justice system, the jurisdictions still cannot fully address every juvenile delinquency case into it, because there have to exist some exception of restorative justice application to certain offences under the child law. And in this article, the author studied and discussed four potential circumstances for the exception, which include: the nature of the crime and the degree of social harm is very severe; the child who infringes the law and remains impenitent; victims of crime are reluctant to participate; and the young recidivism who re-offend crime again.

If the nature of such crimes is extremely egregious, and restorative justice is difficult to achieve the purpose of punishing crimes and protecting social security, and restorative justice may also not be applicable if the perpetrator does not recognize his mistakes and does not repent and reflect on the crime. Restorative justice aims to make perpetrators aware of their mistakes and to make reparations and changes, and if perpetrators are unwilling to change, it is unlikely to achieve good results and solve the crime in its root. Lastly, Restorative justice may also not be applicable if the offender has a history of multiple repeat offenses. In such cases, the perpetrator has developed bad habits, restorative justice may be less effective than traditional punishment.

While restorative justice has been effective in addressing many types of crimes and conflicts, it is important to carefully consider these exceptions when law enforcement officers deal with children who have come into conflict with the law. Ultimately, the goal should be to promote the best interests and well-being of all involved, while ensuring accountability and justice are achieved in each country's child justice system. As countries strive to refine their juvenile justice systems, it is essential to embrace a nuanced and context-specific approach that recognizes the limitations and potential benefits of restorative justice, ultimately striving for a balanced and equitable system that best serves the interests of justice, rehabilitation, and social harmony.

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