

Policy Restorative Justice as Alternative Criminal Justice System in Indonesia

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ABSTRACT: The Purpose of this study is to analyze the nature of *restorative justice* as a form of approach to solving criminal cases. This research begins with a theoretical study of the concept of *restorative justice* in which there is a struggle to declare as a theory or philosophy of punishment. Then this study continues with a search for the practice of using the *restorative approach Justice* by law enforcement officials. This study uses qualitative research methods, a research method that is "*multimethod in focus, involving an interpretive and naturalistic approach to the subject matter.*" Sources of data obtained through field research, as well as document studies. The results of the study found that as a philosophy of criminalization, *restorative justice* can frame various policies, program ideas, and strategies for handling criminal cases so that it is expected that the results of the process can create justice felt by perpetrators, victims, and the community and answer various problems faced by the criminal justice system when this.

Keywords: Policy, Restorative Justice, Criminal Justice System

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I. INTRODUCTION

In many countries, dissatisfaction and frustration with the formal justice system will regenerate the interest in preserving and strengthening customary law and traditional justice practices have led to calls for alternative responses to crime and social disturbance. Even this alternative gives the parties involved, and often also the surrounding community, the opportunity to participate in resolving conflicts and overcoming their consequences.

The restorative justice program is based on the belief that the parties to the conflict must be actively involved in resolving and reducing negative consequences. They are also based in some cases, the desire to return to the decision-making building and the local community. These approaches are also seen as a means to encourage the peaceful expression of conflict, to promote tolerance and inclusiveness, build respect for diversity, and promote responsible community practice.¹

A new and well-established form of restorative community justice offers several ways to welcome and resolve conflicts. They involve individuals who are not free from the incident, but are directly involved or affected by it. Community participation in the process is no longer abstract, but rather very direct and concrete. This process is highly adapted to situations where parties participate voluntarily, and each has the capacity to engage fully and safely in the process of dialogue and negotiation.

John Braithwaite explained that the *Restorative discourse Justice* focuses on restitution justice programs in criminal matters, but it should be noted that the restorative process used to resolve and resolve conflicts in various contexts and other settings including the workplace.²

Restorative justice or known as "*reparative justice*" is an approach to justice that focuses on the needs of victims, perpetrators of crime, and also involves the participation of the community, and does not merely fulfill legal provisions or criminal conviction.

In this case, victims are also involved in the process, while perpetrators of crime are also encouraged to take responsibility for their actions, namely by correcting the mistakes they have made by apologizing, returning the stolen money or doing community service.

Tony F. Marshall British criminologist in his article "*Restorative Justice an overview*" said:³

¹ UNODC, Handbook on Restorative Justice Programs. Criminal Justice Handbook Series, (Vienna: UN New York, 2006). p.5.

² Ibid

³ "Restoration Justice", Source: <http://www.negarahukum.com/hukum/keadilan-restoration.html>, accessed on February 14, 2019

" *Restorative Justice is a process whereby all parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future*" means: Restorative Justice is a process, in which the parties have an interest in certain violations meet together to solve the problem together how to resolve the consequences of the violation for the sake of the future.

According to *UNODC (United Nations Office on Drugs and Crime)*, what is meant by *restorative justice* is an approach to solving problems in various forms involving victims, perpetrators, their social networks, judicial bodies, and the public. Restorative justice programs are based on the basic principle that criminal behavior not only violates the law, but also injures victims and the community. Every effort to overcome the consequences and criminal behavior must and if possible involve the perpetrators and the injured parties in addition to providing what is needed for victims and perpetrators in the form of assistance and support.⁴

Meanwhile, according to *Clifford Dorn, the* leader of the *restorative movement Justice* in the philosophical approach emphasizes the importance and linkages of perpetrators, victims, the community and the Government in cases of crime and juvenile delinquency.⁵

According to the *Center for Justice & Reconciliation (CJR)* that *restorative Justice* is a theory of justice that emphasizes repairing losses caused by criminal behavior. This is important when the parties consciously meet together to decide how to do it. This can make the transformation of relations between communities.⁶

So that in the current law enforcement, it seems that there is an imbalance in its implementation because there is still a state hegemony that is carried out by law enforcement officials.

.This fact shows that the public has not yet gained full trust in the criminal justice system that has been working so far, which does not seem to pay enough attention to victims of crime. The Government should make a criminal law enforcement policy that also takes into account the interests of victims of crime through both criminal and non-criminal channels. Because ideally, not all types of crime can be resolved peacefully by stopping the prosecution.

Based on the phenomena mentioned above, the issue of this research is that there is a tendency for the weak regulation of legal substance regarding the protection of victims of crime in terms of compensation and restitution/compensation so that justice guarantees for crime victims, in general, can not be felt as a whole and the settlement of a particular criminal case can be resolved peacefully through *restorative justice*. Existing legal institutions do not provide maximum guarantees for victims to get compensation. Therefore, it is necessary to further study the legal substance regulation on compensation and restitution/compensation in legislation so that it reflects the principles of justice and protection for victims of crime and settlement of criminal cases without going through a long formal route.

II. RESEARCH METHODS

This research is a normative or doctrinal legal research completed with empirical research, which will examine and analyze the application of restorative justice at the level of investigation, prosecution, and court trials. The problem is discussed using normative legal research through a philosophical approach by studying and analyzing the philosophical values of the resolution of criminal cases in *restorative justice* by upholding the value of justice to all victims of crime as a manifestation of respect for the rights of victims of crime.

III. DISCUSSION

Nature of *Restorative Justice* as a Form of Approach to the Settlement of a Criminal Act in the Criminal Justice System

1. *Restorative Justice* in Indonesian Judiciary The

Existence of the process of *restorative justice* as an alternative settlement of criminal cases is primarily determined by the awareness and knowledge of the community itself, including law enforcement officials. Judicial understanding which only prioritizes the application of the rules, proves the wrongdoers and then punishes them will not be able to accept this concept. For him, the judiciary is the right of the state to impose sanctions on its citizens who have broken the rules. Deterrence and rehabilitation become a very populist factor in it. Justice attention is dominated by the interests of actors, society, and the state.

Restorative justice is more about solving problems between the parties in social relations than confronting perpetrators and government officials. The philosophy of *just peace principle* is integrated with the *process of meeting, discussing, and actively participating in the resolution of the criminal matter*. Integration of

⁴ UNODC, Op.cit. p.6.

⁵ Susan C. Hall, *Restorative Justice in the Islamic Penal Law. A Creation to the Global System*, *Duquesne University School of Law Research Paper*, No. 2012-11. p.4.

⁶ Dvannes, *Restorative Justice Briefing Paper-2*, *Center for Justice & Reconciliation*, November 2008. p.

actors on the one hand and victims, the community, on the other side as a whole, to find solutions and return to the pattern of good relations within the community.

This change in the paradigm of thinking needs to be supported by national legislation policies and understanding of scientific developments in the world of justice. In Brazil settlement model, *restorative* this is built through social education (*social pedagogical*).⁷ This means that the 'model is *restorative circles*' built on *social pedagogical points of view* or through social education views that the causes and consequences of crime are social problems.

The 11th UN Congress Report in Bangkok Thailand (*Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice Bangkok, 18-25 April 2005*), formulates that, *there was a general agreement on the need for innovative approaches in the administration of Justice, including the use of alternatives to imprisonment for minor offenses, especially by first time offenders, juvenile offenders and drug abusers, the use of restorative Justice, including mediation and conciliation, and the need to take into consideration the rights of victims, in particular those of women and children.*

The 12th UN Congress in Brazil, *Report of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice Salvador, Brazil, 12-19 April 2010*, also recommends member states to evaluate and update criminal justice policies by developing comprehensive strategies, reducing the use of prison sanctions, and increasing the use of alternatives to prisons including programs *restorative justice*.

The international community has provided *guidelines on criminal Justice* regarding innovative, comprehensive, and integral approaches to the strategy by increasing the use of restorative justice programs. An evaluation to redesign more effective judicial proceedings needs to be done in Indonesia, and the UN Congress is sufficient to be one of the aspirations to build or update/reform justice policies towards the model *Restorative Justice*. In national policy, there is Pancasila which is the *core philosophy of the nation*. As the *core philosophy of Pancasila* is thus a source of value for the existence of a legal system in Indonesia.⁸

In the 4th precepts of the Pancasila: "Democracy Led by Wisdom in Consultation / Representative" contained the philosophy of deliberation or deliberation, the meaning contained is: prioritizing deliberation in making decisions for the common interest, and respecting any deliberative decisions/decisions "morally accountable to God Almighty, upholding the dignity and human dignity, the values of truth and Justice give priority to unity and unity for the common good.

The 4th Precepts of Pancasila teaches us to make a choice through deliberation. Prioritize deliberation in making decisions for the common good. Deliberation to reach consensus is filled with the spirit of kinship, so that when it is *broken down the philosophy of "deliberation"* contains 5 (five) principles as follows. First, *conferencing* (meet to hear each other and express desires); second, *search solutions* (looking for solutions or meeting points for the problem being faced); third, *reconciliation* (reconciling with their respective responsibilities); fourth, *repair* (repairing all the consequences); and fifth, *circles* (supporting each other).

These principles are exactly what is needed and become a key word in *restorative Justice*, so that the constitutionality of *restorative Justice* finds its foundation in the philosophy of the 4th principle of Pancasila.⁹ The basis of that if implemented in the pattern of settlement of criminal cases contains a principle called the *VOC (Victim Offender Conferencing)*. The target in the meeting *VOC (Victim Offender Conferencing)* is mediation or *VOM (Victim-Offender Mediation)*, which is an opportunity to make peace and agree on mutual improvement. The aim is to deal with crime as a conflict that must be resolved between people directly affected not as a conflict between the state and the defendant.

Umbreit and Coates stated that the purpose of the settlement of the case with *VOM* was to "*humanize*" the justice system.¹⁰ The approach is said to be more humane because it tries to eliminate some of the problems.

⁷ Hacyl research Bolívar, D., Brancher, L., Navarro, I., Vega, M. (2010) *Restorative Justice in Latin America: Reflections from three countries. Paper presented at Expert Seminar 'Conferencing: A Way Forward for Respective Justice in Europe'*. Leuven: European Forum for Restorative Justice.

⁸ Prayitno, Strong Praise, 2007, Pancasila As the Leading Star (Leitstern) in the Development of Legal Institutions and Institutions in Indonesia, *Journal of Legal Media, Accreditation: No. 26 / DIKTI / Kep / 2005 Vo. 14 No. 3, Yogyakarta*, p. 152

⁹ Silakerakyatan yang bermakna prinsip demokrasi ini kala diimplementasikan dalam penyelesaian perkara dengan restorative justice bisa disamakan dengan istilah Pinto sebagai "*Participative democracy in Restorative Justice*" di mana korban, pelaku, dan masyarakat berperan penting dalam proses pengambilan keputusan.. Lihat Pinto, 2005, "*Is Restorative Justice Possible in Brazil?*" Dalam Daniel Achutti, 2011, "*The Strangers in Criminal Procedure: Restorative Justice as a Possibility to Overcome the Simplicity of the Modern Paradigm of Criminal Justice*," *Journal: Oñati Socio-Legal Series*, Vol. 1, No. 2, Brazil, hlm. 12

¹⁰ Umbreit, Mark and Robert Coates in Mara F. Schiff, 1998, *Restorative Justice Interventions for Juvenile Offenders: A Research Agenda for the Next Decade*, Online Journal, Available: <http://wcr.sonoma.edu/v1n1/schiff.html>.

First, they no longer alienate relations with victims after the judicial process to a secondary place so that the consequences of the crime they experience seem to go unnoticed. On the other hand, the inclusion of the parties in solving problems is a *significant part* and is a characteristic of the restorative model. Second, it is effectively responsible to victims for the recovery of material and moral losses and provides various opportunities for dialogue, negotiation, and resolution of problems. Third, give respect to human dignity (*the respect for human dignity*), because restorative Justice is not separate from the model of human rights protection, even they both seek the common good (*they both seek a common good*).

There is a fundamental paradigm shift or redefinition that needs to be done, namely the way we view crime as essentially a humanitarian problem so that it does not approach (*excessive formality excessive formality*) and only look for someone's mistakes, but think to solve situations / problems, and must touch to the point In this context, the crime response should look for solutions to the problems of human relations (*care for real people and relationships*). This paradigm shifts the presumption from crime as a problem of the state to crime as an individual problem. Therefore Justice for the struggle is able to answer what is actually needed by victims, perpetrators and the community (*experienced within a context*). Such Justice is said to be "*experiencing justice*".

The rules of deliberation (the 4th principle of Pancasila) with the principle of deliberation to reach a consensus which is encompassed in a family spirit contains the essence of *experiencing Justice*. This is in line with the thoughts expressed by **Jarem Sawatsky**, a reviewer *restorative Justice* who works at *the Institute for Justice and Peacebuilding at Eastern Mennonite University in Virginia*, as follows:

*"Needs of victims, offenders and communities are central for Restorative Justice. Justice is about participation. This has a huge implication for Justice. If needs are central, then Justice is always ad hoc. Justice must respond and be experienced within a context. That means Justice will look different and be arrived at differently depending on the needs, the culture, the history, the future, and the people involved."*¹¹

According to **Jaccould redefinition of crime** in relation to restorative Justice is not seen as something general / general or standard but how the impact of the crime and the dialogue that ensues (*Crime is no longer conceived as a violation against the state or as a transgression against a legal standard, but as an event that causes harm and consequences — focusing on the possible solution of the problem through a dialogue bet-ween the parties*).¹²

Redefinition of crime to *restorative Justice* become important in the Codes orientation of crimes defined as forbidden actions stipulated in the Act and punishable for those who violate the ban (Article 1 paragraph (1) of the Criminal Code). The investigation process is formulated as a series of investigative actions in terms of and in the manner stipulated in the law to search for and collect evidence which with clear evidence of the crime that occurred and to find the suspect (Article 1 number (2) of the Criminal Procedure Code). The court's decision as a judge's statement pronounced in a court hearing can be in the form of conviction, free or free from all lawsuits (Article 1 number (11) of the Criminal Procedure Code).

Morris stated that the response to such crimes is considered as a justice with a conventional system that sees justice primarily exclusively as a violation of *state law*, and the response to such violations is formulated by professionals representing the state.¹³

Table 1. The fundamental difference between *restorative Justice* and the judiciary according to the KUHAP procedural law, among others: Judgment

| Criminal Procedure Code Criminal | Justice Restorative |
|---|--|
| 1. Based on Crimes committed; | 1. Pointing to Errors (<i>errors</i>) caused by violations; |
| 2. Placing victims in a central position; | 2. Placing the victim in a secondary position; |
| 3. The goal is centered on the idea of how to punish the guilty fairly; | 3. The basic purpose is to give satisfaction to the parties involved in the violation; |
| 4. <i>Retributive Justice</i> ; | 4. <i>Restorative Justice</i> ; |
| 5. <i>Result in prison for the accused</i> ; | 5. <i>Dialogue, negotiation, and resolution</i> ; |
| 6. Determined by legal professionals | 6. Determined by the parties in the <i>Conferencing</i> . |

¹¹ Jarem Sawatsky, "Restorative value: Where Means And Ends Converge", *Restorative Justice Online Journal*, Vol. IX, 2010, <http://www.restorativejustice.org/arti-clesdb/articles/3681>, Manitoba, Canada, hlm. 12

¹² Daniel Achutti, op.cit, hlm. 12

¹³ *Ibid*

In the XI UN Congress in Bangkok, 18-25 April 2005 on *Crime Prevention and Criminal Justice* took the main theme of efforts "*responsive and synergistic*" with a combinative strategy in ways to prevent crime and criminal Justice (*the main theme of the Eleventh Congress would be "Synergies and responses: strategic alliances in crime prevention and criminal justice"*).¹⁴ In line with that, it is also necessary for Indonesian criminal justice policy to take responsive, synergistic and combinative steps, that is, in addition to judicial methods based on the Criminal Procedure Code, also pursued *restorative Justice* is.

The provisions in the national legal policy guidelines that can be used as restorative justice rests are as follows. First, Law No. 2 of 2002 concerning the Indonesian Police formulates that the main tasks of the Republic of Indonesia National Police include providing protection, protection, and services to the public (Article 13 letter c). In the context of carrying out their duties, the police have the authority to carry out other authorities that fall within the scope of their duties (Article 15 paragraph (2) letter k) — authorized to carry out other actions according to responsible law (Article 16 paragraph (1) letter l). Second, in carrying out its duties and authority, prosecutors always act according to the law by respecting religious norms, politeness, decency, and are obliged to explore and uphold the human values that live in society, and always maintain the honor and dignity of their profession (Article 8 paragraph (4) Law No.16 of 2004).

Third, the Judicial Power is the power of an independent state to administer Justice in order to enforce law and Justice based on the Pancasila and the 1945 Constitution, for the implementation of the Republic of Indonesia State Law (Article 1 number (1) of Law 48 of 2009). Fourth, Article 50 paragraph (1) of Law 48/2009: all court decisions must include the reasons and grounds for the decision, also contain certain articles of the relevant legislation or unwritten legal sources which are used as a basis for hearing. Fifth, Article 5 paragraph (1) of Law 48 of 2009, Judges are required to explore, follow, and understand the legal values and sense of Justice that lives in the community.

In Indonesia there is a LPSK (Witness and Victim Protection Agency). LPSK is an institution that has the duty and authority to provide protection and other rights to Witnesses and victims as stipulated in Law No. 13 of 2006 concerning Protection of Witnesses and Victims. Provisions in Article 7 of Law No. 13 of 2006 states that victims through LPSK are entitled to submit to the court in the form of the right to restitution or compensation which is the responsibility of the perpetrators of crime. Decisions regarding compensation and restitution are given by the court.

Restitution is compensation given to the victim or his family by the perpetrator or a third party, can be in the form of return of property, payment of compensation for loss or suffering, or compensation for certain actions (Article 1 number 5 PP No. 44 of 2008 concerning Provision of Compensation, Restitution and Assistance to Witnesses and Victims), but the process of restitution or compensation as referred to in Law No. 13 of 2006 and PP No. 44 of 2008 is still in the context of courts *retributive* not in the philosophy of *restorative Justice*.

Based on the provisions in the existing national legislation policy, *restorative Justice* in enforcing criminal law *in concreto* can be done based on the following thoughts. First, through the authority of LPSK institutions, or prosecutors and judges in court based on the provisions of Law No. 13 of 2006 and PP No. 44 of 2008, but from the beginning the approach used was the process of *restorative Justice*; secondly, using secondary rules that give authority to the legal apparatus (police, prosecutors and judges) to *create, extinction, and alteration of primary rules*. *Creation, extinction, or alteration* with the process of *restorative Justice*.

According to **HLA Hart**, criminal law subsections are classified as "*primary rules of obligation*" and "*secondary rules of obligation*". *Primary rules as rules of conduct and secondary rules as rules about rules or as official machinery*.¹⁵ *Primary rules are rules of conduct; they tell you what you are legally obligated to do (or refrain from) and what the consequences are attached to obedience or disobedience. The rules of criminal law seem to define standards of conduct; they are about what you can and cannot do, or more precisely, rules that forbid certain conduct and then attach punishments for disobedience. Secondary rules are legal rules that allow for the creation, extinction, and alteration of primary rules; Secondary rules are "rules about rules"; they regulate how other rules are made, changed, applied and enforced; They established official machinery for the recognition and enforcement of primary rules.*

National legislation policies within certain limits provide opportunities for law enforcement for *creation, extinction, or alteration* in enforcing criminal law. Just look like Ps. 16 paragraph (1) letter l of Law 2 of 2002 (under investigation), Article 1 (1) and Article 5 paragraph (1) of Law 48 of 2009 (under investigation). He said it was a discretionary authority in the *secondary rules of obligation*. The signs of (*national legal framework*) seem to have anticipated the development of society, science, and world civilization with its

¹⁴ Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice *Bangkok, 18-25 April 2005: The main theme of the Eleventh Congress would be "Synergies and responses: strategic alliances in crime prevention and criminal justice"*.

¹⁵ HLA Hart, 1997, *The Concept of Law*, New York: Oxford University Press.

responsive provisions in the enforcement of criminal law. Furthermore, it depends on the ability and courage of the apparatus themselves in using it. Hart reminded when enforcement of criminal law without developing principle *secondary rules* as a primitive. *Hart illustrates the need for secondary regulations in a complex legal system by imagining a society run only with primary regulations. He calls these 'primitive legal systems' and thinks they constitute a borderline legal system.*

As a comparison in Hungary since early 2007 judicial material with a *restorative approach*, Justice has been active. *Restorative Justice* with mediation is available to both adult and juvenile offenders if the crime is a crime against a person, a traffic violation or a crime against property whose threat does not exceed five years in prison. Other requirements are there are requests from the parties; the crime has a victim; the perpetrator pleaded guilty; non-perpetrators who usually commit the same crime a second time or are recidivists; no criminal proceedings are pending against the perpetrators at the time the crime is committed; not a criminal offense that results in death.¹⁶

If this situation is found, the prosecutor and the judge have the discretion (*discretion*) to determine the case to be resolved by mediation/restoration. If they want to use discretion, they need to consider the following factors. First, the perpetrator confessed during the investigation; second, the offender has agreed and can compensate the victim for damage resulting from the crime or provide other forms of restitution; third, perpetrators and victims agree to participate in mediation process; fourth, given the nature of the crime, the way the act was committed and the personal condition of the offender so that the court process is not needed, or there is a substantial reason that is believed that the court will consider the perpetrator's remorse as a mitigating condition.

In Indonesia, with authority, as stated in Article 5, paragraph (1) of Law no. 48 of 2009 puts the law enforcer as a "*judex mediator*" meaning he must be able to be a liaison between parties to the conflict. Furthermore, he must also be able to become a bridge between these parties with the community, and can weigh various interests, norms, and values that exist in that community.¹⁷

IV. CONCLUSION

Restorative Justice, also known as "*reparative justice*" is an approach to Justice that focuses on the needs of victims, perpetrators of crime, and also involves the participation of the community, and does not merely fulfill legal requirements or solely criminal prosecution. In this case, victims are also involved in the process, while perpetrators of crimes are also encouraged to take responsibility for their actions, namely by correcting the mistakes they have made by apologizing, returning the proceeds of crime, or by doing community service. This is an effort to restore the function of criminal law to the actual corridor as *anultimumremedium* as the ultimate weapon if other legal remedies can no longer be used in completing a criminal act that occurs in the community.

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¹⁶ Borbála Fellegi, "*Building And Toning: An Analysis Of The Institutionalisation Of Mediation In Penal Matters In Hungary*," Journal TEMIDA, Mart 2011, hlm. 22

¹⁷ Kuat Puji Prayitno, 2011, *Rekonstruksipemikiran Hukum Pidana yang Integral (Studi tentang Penegakan Hukum Pidana in concreto Oleh Hakim Dalam Konteks Sistem Hukum Nasional)*, Disertasi, Undip, Semarang, hlm. 395

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