



# Formulating Restorative Justice Regulation in the Criminal Justice System in Indonesia

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**Abstract.** The concept of restorative justice focuses on the conditions for creating justice and balance for the perpetrators of criminal acts and the victims themselves. Restorative justice focuses on turning punishment into a process of dialogue and mediation to agree on a more just and balanced settlement of criminal cases for the victims and perpetrators. The problem of this research is related to the formulation of restorative justice arrangements in the criminal justice system in the future. The research method uses empirical juridical, namely examining the law with a statutory, conceptual, and case approach supported by primary and secondary data. The results show that the concept of restorative justice has not run optimally because the carrying capacity of regulations and implementers is not balanced. The imbalance arises because people in general still use the court conceptually and still use the criminal justice system. Restorative justice in handling criminal acts is not only seen from the perspective of criminal law. Still, it is also associated with moral, social, economic, religious, local customs, and other considerations. The concept of restorative justice in Indonesia is similar to that of Belgium, carried out through therapy/rehabilitation or social work as a form of responsibility. Qualifications of criminal acts that can use penal/restorative justice mediation in their settlements are punishable by imprisonment of less than 5 (five) years for adults and 10 (ten) years for children.

**Keywords:** Criminal Justice System · Formulation · Restorative Justice

## 1 Introduction

The proclamation of Indonesian independence on 17 August 1945, in addition to reflecting the will of the Indonesian people to determine the future of their nation for themselves, also contains a determination to reform and improve in all areas of life that were previously neglected, to realize the ideals and goals of the Indonesian people by achieving the said independence.

The Indonesian nation to realize a criminal law reform which can be interpreted as an effort to reorient and reform criminal law following central socio-political values, socio-philosophy, and socio-cultural that underlies and gives sides to the normative content and substance of the aspired criminal law. Reforms in the field of criminal law are fundamental because the current criminal law, especially the material criminal law

left by the colonial colonizers, is no longer appropriate and cannot meet the demands of the legal needs of the Indonesian people.

According to Barda Nawawi Arief [1], the efforts to reform law in Indonesia, which started with the birth of the 1945 Constitution of the Republic of Indonesia (UDNRI 1945), cannot be separated from the foundation. At the same time, the objectives to be achieved, as also formulated in the Preamble to the 1945 Constitution of the Republic of Indonesia, are: "to protect the entire Indonesian nation and to promote the general welfare based on Pancasila."

Since Indonesia's independence until now, law enforcement has always been the main problem that people have complained about. The number of legal cases that are not resolved or finished with an unsatisfactory ending makes the law even more distrustful. According to Ahmad Mujahidin [2], the legal downturn in Indonesia is caused by 2 (two) factors, namely the corrupt behavior of law enforcers (professional jurists) and the mindset of law enforcers who are still trapped in positivistic legalistic thoughts.

The concept of a restorative justice approach is an approach that focuses on the conditions for creating justice and balance for the perpetrators of criminal acts and the victims themselves. Criminal justice that focuses on punishment has been transformed into a process of dialogue and mediation to create an agreement on a more just and balanced settlement of criminal cases for the victims and perpetrators. Restorative justice means restoring justice, while restoration here has a broader meaning than what is known as the conventional criminal justice process for restitution or compensation for victims.

The restorative approach emphasizes that punishment is an effective means to secure interests that are claimed as justification for criminal sanctions. Not only as an explanation for the adherents of rehabilitation, but things that can reduce the number of crimes can be achieved more effectively through social and economic policies, and improvements in the rights (power and benefits) of victims can be protected more effectively through compensation or reparations [3].

According to Braithwaite and Pettit, as well as Cavadino and Dignan [4], with the same view on a general perspective, urge that in dealing with cases of the first choice used in responding to crimes, there must be an opportunity to provide restitution by the perpetrator to the victim voluntarily. If this is not possible (the perpetrator does not have money to replace the property), the victim must receive compensation from the State and get repairs by the perpetrator [5].

The issue of reorientation and evaluation of the concept of restorative justice in the current criminal justice system. Policy formulation on restorative justice in the future criminal justice system. Based on the description above, it is interesting to conduct research titled "Formulating Restorative Justice Regulation in The Criminal Justice System in Indonesia."

## 2 Research Method

The empirical juridical research method is used to examine using a statutory, conceptual, case, and comparative study approach supported by primary and secondary data. Secondary data in the form of Circular Letter of the Chief of Police (KAPOLRI) Number SE/8/VII/2018 concerning the Application of Restorative Justice in settlement of

Criminal Cases; Regulation of the National Chief of Police Number 6 of 2019 concerning Criminal Investigations; Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution.

### 3 Findings and Discussion

#### 3.1 Restorative Justice Arrangements in the Criminal Justice System

The criminal justice system in Indonesia is strictly regulated in Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHP). Criminal law enforcement is a system of power or powers granted to the state in enforcing criminal law, namely the police, prosecutors, judges, and correctional institutions. The criminal justice system is also known as the law enforcement system because it contains an understanding that these institutions make a substantial effort to enforce abstract legal rules [6].

Restorative justice can be formulated as a thought that responds to the criminal justice system's development by focusing on the need for community involvement and victims who feel excluded from the mechanisms that work in the current criminal justice system. In addition, restorative justice can be used as a frame of mind that can be used in responding to a crime by law enforcement.

Basically, restorative justice is also known as the settlement of cases through mediation (penal mediation). Penal mediation in criminal law has a noble purpose in resolving criminal cases that occur in society. Conceptually, Stefanie Trankle said in Barda Nawawi Arief [7], the penal mediation developed was based on ideas and working principles.

In handling cases of children, a known form of restorative justice is a reparative board/youth panel, which is a settlement of criminal cases committed by children by involving perpetrators, victims, communities, mediators, and law enforcement officers who are authorized to jointly formulate appropriate sanctions for perpetrators and compensation for victims or the community [8].

The restorative justice arrangement is the KAPOLRI Regulation Number 6 of 2019 concerning Criminal Investigations. Restorative justice is a program launched by the KAPOLRI, which is a step to follow the dynamics of the development of the legal world, which has begun to shift from positivism to progressive to fulfill the community's sense of justice.

Article 1 number 27 of the KAPOLRI Regulation Number 6 of 2019 concerning Criminal Investigations states that restorative justice must involve the perpetrators, victims, and/or their families as well as related parties. This aims to achieve justice for all parties. In its implementation, the criminal justice system in Indonesia has not been optimal. Regarding several conditions in resolving cases with a restorative justice approach, it is based on Article 12 letters A and B in the KAPOLRI Regulation Number 6 of 2019 concerning Criminal Investigations, as follows:

1. The criminal act that has been resolved is a minor crime or a criminal offense which is a complaint offense whether it is absolute/relative;
2. There is a desire from the litigants (perpetrators and victims) to make peace, and the consequences of these problems do not have a broad/negative impact on people's lives;

3. Reconciliatory activities must be carried out by bringing together the litigants and involving social institutions such as local community leaders;
4. In resolving cases, it is necessary to pay attention to the factors of intention, age, socio-economic conditions, the level of losses incurred; and
5. Does not include repeated acts (recidivism) [9].

The principle of restorative justice is one of the principles of law enforcement in case settlement that can be used as an instrument of recovery and has been implemented by the Supreme Court in the form of policy enforcement (Supreme Court Regulations and Supreme Court Circular Letters). However, its implementation in the Indonesian criminal justice system is still not optimal. The Supreme Court Regulations and Supreme Court Circulars are [10]:

1. Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2012 concerning Adjustment of Limits for Minor Crimes and the Amount of Fines in the Criminal Code;
2. Regulation of the Supreme Court of the Republic of Indonesia Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System;
3. Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning Guidelines for Prosecuting Women in Facing the Law;
4. Circular Letter of the Supreme Court of the Republic of Indonesia Number 4 of 2010 concerning Placement of Abuse, Victims of Abuse and Narcotics Addicts into Medical Rehabilitation and Social Rehabilitation Institutions; and
5. Circular Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 3 of 2011 concerning Placement of Victims of Narcotics Abuse in Medical Rehabilitation and Social Rehabilitation Institutions.

After the Memorandum of Understanding was agreed upon, the Supreme Court, the Attorney General's Office, and the Indonesian National Police made further regulations for each institution as a guideline for resolving criminal cases with the principles of restorative justice, among others:

- 1) Circular Letter of the Head of the Indonesian National Police Number SE/8/VII/2018 of 2018 concerning the Application of Restorative Justice in settlement of Criminal Cases (SE Kapolri 8/2018);
- 2) Regulation of the Head of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Criminal Investigations (Perkapolri 6/2019);
- 3) Regulation of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Perkejaksaan 15/2020); and Decision of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice (Kepdirjenbadilum 1691/2020).

The Republic of Indonesia Attorney's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice clearly states that restorative justice seeks to involve perpetrators, victims, and the community in resolving these criminal cases. In the implementation of the restorative justice approach based on the RI Prosecutor's Regulation Number 15 of 2020, it can be seen that the regulation focuses on a peace agreement between the perpetrator and the victim and how the procedural law recognizes the existence of the peace agreement as an agreement that has legal force. As a substantial investment in a paradigm of punishment not for retaliation but as a remedy, the Prosecutor's Office took a strategic step by issuing the Indonesian Prosecutor's Office Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice which was promulgated on Bhakti Adhyaksa Day (HBA) 22 July 2020.

An example of a case of applying restorative justice in the judiciary was once when Judge Marzuki sat in silence listening to the demands of the Public Works Prosecutor against a grandmother accused of stealing cassava. The grandmother argued that her life was poor, her son was sick, and her granddaughter was hungry. In its decision, the Panel of Judges chaired by Marzuki, "I cannot make legal exceptions, so you must be punished. I give you a fine of IDR 1,000,000; if you can't pay, you must go to prison for 2.5 years." Meanwhile, judge Marzuki took off his hat and opened his wallet, then took and put the amount of IDR 1,000,000 in the hat and said to the audience, "I, on behalf of the Court, also impose a fine on everyone present in this courtroom of IDR 50,000 because as a person who lives in this city has left a man starving to the point of stealing to feed his grandchildren."

The case above shows that the application of restorative justice in the territory of the Supreme Court should be carried out. Still, the legal umbrella related to restorative justice in the territory of the Supreme Court is not strong enough, because it is only in the form of a decree in the hierarchy of laws and regulations. The decree under a law/government regulation in lieu of law is less than optimal in handling restorative justice in the territory of the Supreme Court. The Supreme Court should issue a more substantial legal umbrella than the Decree so that restorative justice in the territory of the Supreme Court is more optimal.

### **3.2 Formulation of Restorative Justice Arrangements in the Indonesian Criminal Justice System**

According to Barda Nawawi Arief [11], The criminal law system is a unified system that aims (purposive system) and criminal which is only a tool/means to achieve goals. The criminal objective is an integral part (sub-system) of the entire criminal system (criminal law system) in addition to other sub-systems, namely the "criminal act," "criminal responsibility (error)," and "criminal" sub-systems.

The principle of rehabilitation teaches that treating the perpetrator of a sexual violence crime as an individual with special needs, and the problems related to his crime must be known as much as possible to achieve effective rehabilitation. Criminals must look forward (forward-looking). The severity/seriousness of the crime committed is only a clue to determining the severity and duration of the action required to rehabilitate the

perpetrator. Still, rehabilitation is more about fulfilling the requirements to treat the perpetrator.

In the Vienna declaration, the 10/2000 UN Congress (document A/CONF.187/4/Rev.3) stated that in order to provide protection to victims of crime, a mediation mechanism from restorative justice should be introduced. This penal mediation is often identified or associated with its emergence with the view of “restorative justice.” This view departs from a new paradigm (a new paradigm) or from a “changing lens” about the nature of crime and the reaction to the crime itself.

In looking for other alternatives to imprisonment (alternative to imprisonment/alternative to custody), the background of pragmatism, among others, is to reduce stagnation or accumulation of cases (“the problems of court case overload”) to simplify the judicial process [12] (Table 1).

The concept of restorative justice is a manifestation of customary law that has long developed in Indonesian society so that it is recognized that customary law/law that lives in a society in the Criminal Code Bill aims to fulfill a sense of justice, certainty, and legal benefits. Restorative justice in handling criminal acts is not only seen from the perspective of criminal law. Still, it is also associated with moral, social, economic, religious, local customs, and other considerations [14].

Restorative Justice in Belgium can be said morally and as compensation to victims of criminal acts. This mediation actor is carried out by rehabilitation or social work as a form of responsibility [15]. The Law on Penal Mediation is accompanied by its guidelines (The Guide-line on Penal Mediation). In the Netherlands, the defendant who a single judge pardoned did not need to undergo a lengthy trial. *Rechtelijk Pardon* (Judge’s pardon) can be a general criminal dispute resolution based on specific indicators. Applying a formalistic legalistic criminal justice system can certainly raise doubts for people who question where absolute justice is and what the community expects.

**Table 1.** The Differences between Conventional Criminal Justice and Restorative Justice

No.	Conventional Criminal Justice	Restorative Justice
1.	Victims vs. offenders	Victims (V) and offenders (O) mediate for the benefit of (helping) both of them
2.	Avoid direct communication	Victim and Offender have direct communication
3.	Expected to be passive	Victim and Offender participate in decision making
4.	All critical decisions are made by professionals (particularly the police, prosecutors, judges, and advocates)	Victim shares how the crimes of the Offender have impacted him

Source: Declaration of Vienna, 10<sup>th</sup> United Nations Congress, 2000 [13].

## 4 Conclusion

Restorative justice arrangements in the criminal justice system currently prioritize “right relationships” rather than “right rules.” The vital task of justice here is to restore the balance of relationships damaged by crime/criminal acts (victim-offender; victim-offender-community, offender-community; offender-family) rather than ensuring that the rule of law has been followed, interpreted, and enforced correctly. Restorative Justice, in principle, is a philosophy (basic guideline) in the peace process outside the judiciary by using mediation or deliberation to achieve justice expected by the parties involved in the criminal law, namely the perpetrator of a crime (his family) and the victim of a crime (his family) to find the best solution that is agreed upon and agreed by the parties. The principle of restorative justice is one of the principles of law enforcement in resolving cases that can be used as an instrument of recovery. However, its implementation in the criminal justice system in Indonesia is still not optimal in overcoming the problem of criminal acts in Indonesia. Based on the explanation above, the concept of restorative justice is not yet optimal because the carrying capacity between regulations and implementers is not balanced. The imbalance arises because people in general still use the court conceptually and still use the criminal justice system. There is still a lack of understanding of the community and law enforcement against the restorative justice concept.

The formulation of restorative justice arrangements in the criminal justice system in Indonesia in the future is a manifestation of customary law that has long developed in Indonesian society. Customary law that lives in the community in the Draft Criminal Code aims to fulfill a sense of justice, certainty, and legal benefits. Restorative justice in handling criminal acts is not only seen from the perspective of criminal law. Still, it is also associated with moral, social, economic, religious, local customs, and other considerations. Restorative justice in Indonesia is similar to that in Belgium. The concept is carried out by rehabilitation or doing social work as a form of responsibility in article 4a into the StGB of the Belgian Criminal Code, which stipulates that if the perpetrator provides compensation to the victim in whole or in part or has seriously tried hard to provide compensation so that the sentence can be reduced or even released from punishment if the offense is punishable by a maximum of 1 year in prison.

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