

EMBRACING RESTORATIVE JUSTICE: A PATH TOWARDS EQUITABLE MEDIATION IN CRIMINAL CASES

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Abstract

Mediation is a viable option in criminal cases, as it adheres to the principle of achieving a fair and equitable form of justice. Restorative justice is a process that aims to resolve criminal cases by incorporating the perpetrator, victim, perpetrator's family, and other relevant parties. The goal is to collectively seek a fair conclusion that focuses on restoring the original condition rather than seeking revenge. This essay elucidates the imperative nature of utilizing media in criminal cases to achieve restorative justice. Restorative justice has been adopted somewhat in general criminal cases by law enforcement. Execution of Restorative Justice. Furthermore, it aligns with the core principles of our nation, Pancasila, which emphasises the importance of equilibrium, unity, peaceful coexistence, equality, fraternity, and collective decision-making. If Restorative Justice is implemented appropriately, it aims to give the community a perception of justice and advantageous outcomes.

Keywords: *Criminal Law; Restorative Justice; Law Enforcement.*

Abstrak

Guna mencapai keadilan yang seimbang, asas mediasi diperlukan. Keadilan restoratif adalah metode penyelesaian perkara pidana di mana pelaku, korban, keluarga mereka, dan pihak terkait lainnya bekerja sama untuk mencapai penyelesaian yang adil dengan prioritas pemulihan daripada pembayaran. Dalam artikel ini, pentingnya penggunaan media dalam perkara pidana untuk mencapai keadilan restoratif dijelaskan. Keadilan restoratif hanya berlaku untuk beberapa kasus pidana. Ini juga dianggap sesuai dengan semangat orang Indonesia, yang berasal dari dasar negara kita, Pancasila, yang mengutamakan nilai-nilai keseimbangan, kerukunan, kerukunan, perdamaian, ketentraman, kesetaraan, persaudaraan, dan kekeluargaan. Rasa keadilan akan tercipta dan keuntungan masyarakat akan dilindungi jika restorative justice dilakukan dengan cara yang benar.

Kata Kunci: *Hukum Pidana; Keadilan Restoratif; Penegakan Hukum.*

A. Introduction

Within the framework of the rule of law, the acknowledgement of law's paramountcy is contingent upon the principle of legality, a multitude of legislative provisions and the preeminence of law. This is the primary cornerstone in implementing law enforcement inside the Indonesian legal system. Hence, it is incumbent upon the state to establish a robust framework for attaining a just and lawful society, primarily through establishing legal governance. If the

state fails to cultivate public trust in establishing legal power, the severity of law violators' symptoms will increase.¹

The most effective approach to establishing legal power in a country that follows the rule of law is to enforce the law fairly for all individuals. Imposing stringent penalties by legal regulations on offenders of crimes is the most effective approach to establishing legal legitimacy. The objective of developing a legal norm is to provide penalties for individuals who breach it. Therefore, the concept of rule of law is equivalent to implementing penalties or consequences. The issue at hand is how the state implements existing sanctions to fulfil its obligations and perform its roles within society. The state must recognize the importance of effectively and impartially enforcing the law. Hence, the law is the foundation for governmental actions to attain certainty, fairness, and legal advantages.

As the primary breadwinners, law enforcement personnel are responsible for strengthening the foundations that support the welfare of the community in a variety of elements of life. This, in turn, strengthens the foundations that support the welfare of society in other parts of life.² As stated by Soerjono Soekanto,³ the harmonious application of values and regulations, which are subsequently manifested in conduct, is the essence of the law enforcement process, which is considered high quality. The “pattern-setting group,” which can be regarded as the law enforcement group in the restricted sense, is also included in this pattern of behaviour. This pattern of behaviour is not confined to members of the general public.

When it comes to the enforcement of the law, three aspects need to be taken into consideration: legal certainty (also known as *Rechtssicherheit*), expediency (also known as *Zweckmassigkeit*), and justice (also known as *Rechtigkeit*).⁴ About these three components, Gustav Radbruch⁵ expressed his support for the legal ideal, often known as the concept des Rechts. This legal goal will guide the human race throughout their legal lives. The equilibrium between these three fundamental values is essential. On the other hand, these three fundamental principles do not necessarily have a harmonious connection; instead, they are in a state of confrontation, conflict, and tension (*spannungsverhältnis*) with one another. When it comes to

¹ Oksidelfa Yanto, 2020, *Negara Hukum Kepastian, Keadilan dan Kemanfaatan Hukum Dalam Sistem Peradilan Pidana* Indonesia, Bandung: Pustaka Reka Cipta, Hal 7

² Soejono D. 1978, *Penegakan dalam Sistem Pertahanan Sipil*, Bandung: PT Karya Nusantara Cabang, Hal 18

³ Soerjono Soekanto, dan Mustafa Abdullah, *Sosiologi Hukum dalam Masyarakat*, Jakarta: CV. Rajawali, hal. 40

⁴ Sudikno Mertokusumo, Mr. A. Pitlo, 1993, *Bob-Bob Tentang Penemuan Hukum*, Bandung: PT Citra Aditya Bhakti, hal.3

⁵ Gustav Radbruch, in Satjipto Rahardjo, 2006, *Hukum Dalam Jagad Ketertiban*, Jakarta: UKI Press, Hal 135

conflicts of this nature, justice issues should be given first attention. Therefore, this is because the law, in essence, is for the benefit of humans rather than humans for the law.

In the context of the rule of law, criminal prosecution holds significant significance in maintaining public order. In law enforcement, it is the responsibility of relevant agencies to adhere to established standards. After that, the values that are embodied in the norms that have been accepted by society are enforced.

As stated in Article 28D of the Constitution of 1945, one of the obligations and responsibilities of the state towards its people is to ensure that every individual has the right to recognition, guarantees, protection, and fair legal certainty, in addition to the right to be treated equally before the law. Despite this, the following events led to the conclusion that the resolution of matters brought before the legal system, specifically the court, did not satisfy the concept of justice outlined in the essay.

Through the publishing of the National Police Chief's Letter No. Pol: B/3022/XII/2009/SDOPS dated 14 December 2009 concerning Handling Cases through Alternative Dispute Resolution (ADR), the notion of restorative justice has begun to be embraced in legislation since 2009. The publication of the letter signified this. Furthermore, the practice of diversion, which is the settlement of children's criminal cases outside of court, manifests restorative justice in cases involving children. This practice is controlled by Law No. 11 of 2012 about the Juvenile Criminal Justice System.

Regarding the field of copyright, Article 95 paragraph (4) of Law no. 28 of 2014 concerning Copyright and Article 154 of Law no. 13 of 2016 concerning Patents, which regulates the mediation process before carrying out criminal prosecution, adopts the penal mediation model to deal with crime problems. Both of these laws were passed in 2014. As an out-of-court settlement mechanism founded on the ideals of justice, the practice of restorative justice law enforcement has also been reflected in several court decisions.

Using Supreme Court Regulation (Perma) Number 1 of 2016, revisions to Perma No. 1 of 2008 Governing Mediation Procedures in Court, as a breakthrough in addressing justice issues frequently asked by justice seekers themselves, the Supreme Court has made a comprehensive effort to address these difficulties. Prison mediation is an alternate method of conflict resolution that takes place outside of the court system.

Considering the premise of implementing mediation, which leads to balanced justice, the implementation of mediation in criminal cases is highly possible and should be considered. On

the other hand, the opposite is true in cases of criminal prosecution that are brought before a judge. It paves the way for the possibility of practising unequal justice. The criminal justice system implemented is offender-centered, which places excessive focus on the rights of suspects or defendants. This is one of the reasons why this scenario has occurred.

The study of victimology explains the necessity of resolving cases outside of the legal system (non-litigation) in the restorative justice framework. This rationale is derived from the procedural system. An approach to resolving criminal disputes that emphasizes the conditions necessary to establish justice and a balance between those who have been victimized and those who have committed criminal activities. Restorative justice has the potential to function as a significant solution for the parties in order to achieve justice. Because of this, there is a possibility that a criminal case will not result in the imposition of punishment and jail.⁶ This paper will address the research topic: “What is the ideal implementation of criminal law enforcement through restorative justice to realize legal certainty, justice, and benefits?” This question is based on the study background.

B. Discussion

1. Principal of Restorative Justice

The term “restorative” was initially used by Bernatt (1977) as a means of resolving cases. It originated in America and involved mediation between the victim and the culprit in criminal cases.⁷ The definition of restorative justice in Indonesia is outlined in Law Number 11 of 2012, specifically in Article 1. According to this law, restorative justice refers to the process of resolving criminal cases by involving the perpetrator, victim, family members of both parties, and other relevant individuals. The primary objective of restorative justice is to collaboratively pursue a fair resolution that focuses on restoring the affected parties to their original state, rather than seeking revenge.

Marian Liebman⁸ defines restorative justice as a legal framework that seeks to “reestablish the welfare of victims, offenders, and communities affected by crime, while also preventing further criminal activity.” Restorative justice is a progressive kind of criminal justice that focuses on a collaborative approach between the offender and the victim/community to discover answers

⁶ Afthonul Afif, 2015, *Pemaafan, Rekonsiliasi dan Restoraive Justice*, Yogyakarta: Pustaka Pelajar, hal 341-350.

⁷ Tony F, Marshall, 1999, *Restorative Justice An Overview: A report by the Home Office Research Development and Statistics Directorate*, London: Information & Publications Group, Research Development and Statistics Directorate, hal 7

⁸ Marina Liebmann. 2007. *Restorative justice : How It Works*. London: Jessica

and repair social relationships. The central concept of restorative justice is ‘empowerment’. Empowerment is the core of restorative ideology, and the effectiveness of implementing restorative justice depends on it.⁹

The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (2000) also supports the application of restorative concepts. It promotes the development of restorative practices that are not limited to civil cases. Nevertheless, the inclusion of restorative measures in this statement prioritizes the pursuit of justice for the individuals involved in a criminal case. The individuals directly involved in the situation, both the wrongdoer and the person harmed, as well as the those indirectly impacted, including the general public.¹⁰

If grouped together, the five principles of restorative justice, also known as the five principles of Restorative Justice, are as follows: firstly, the focus is on the harms and resulting needs, highlighting the dangers and consequences caused by criminal acts to victims, society, and the offender; secondly, it addresses the obligations that arise from these harms, emphasizing the protection of the affected environment, such as the offender's family and the surrounding community; thirdly, it emphasizes inclusive and collaborative processes; fourthly, it involves specific parties with a legitimate stake in the situation, including perpetrators, victims, families, and communities who have the legal capacity to be involved; and finally, it seeks to correct mistakes and rectify the wrongs committed.¹¹

The five concepts encompassed in these essential values are the equitable distribution of justice and the absence of one party’s supremacy over the other, as well as the absence of bias in the criminal justice system. Alternatively, the primary benefit of this restorative tool is attained through a cooperative procedure that includes all relevant parties (stakeholders). This value is identical to the mediation concept outlined in regulation no. 1 of 2016, which applies to civil disputes.

⁹ C. Barton, *Empowerment and Retribution in Criminal Justice*. In: H. Strang, J. Braitwaite (eds), “*Restorative Justice: Philosophy to Practice*”. Journal TEMIDA Mart 2011. Aldershot: Ashgate/Dartmouth, 55-76.

¹⁰ The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twentyfirst Century, 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/CONF. 184/4/Rev. 3, para. 29.

¹¹ Howard Zehr dan Ali Gohar, 2003, *The Little Book of Restorative Justice*, USA: Good Books Intercourse, hal 33, pdf. Diunduh melalui situ www.goodbooks.com. pada hari Rabu tanggal 19 Mei 2021 jam 09.23 WIB

2. The Implementation of Ideal Restorative Justice Criminal Law Enforcement as an Effort to Realize Legal Certainty, Justice and Benefits

According to Sudikno Mertokusumo,¹² to guarantee fairness for all parties in a trial, three essential factors must always be taken into account while implementing the law: juridical (legal certainty), sociological (benefit), and philosophical (justice) ideals. Sudikno Mertokusumo's explanation is as follows:

- a. Philosophical concept of justice: Pancasila serves as the fundamental principle for legislation, acting as the ultimate authority for all legal sources in Indonesia. The five moral principles are divinity, humanity, unity, democracy, and social justice. With its rich variety of customs and civilizations, Indonesia can settle disagreements without litigation.
- b. Legal certainty (juridical): Legal certainty refers to the assurance that the requirements of the law or regulation implement a statutory regulation. It is the collective desire of individuals that a law can be implemented in response to an actual occurrence. This is the appropriate manner in which the law ought to be implemented. Principles are unavoidable, and the law must still be enforced even during times of decline. Legal certainty is necessary for this. Legal certainty serves as a legal safeguard against arbitrary actions. This implies that individuals can attain their desired objectives under specific circumstances. The general public anticipates a clear and definite understanding of the law. Legal certainty enhances societal order. The purpose of the law is to establish legal certainty, as its objective is to maintain public order. Radbruch presents a fundamental position on the concept of legal certainty. There are four aspects of the significance of legal certainty. Firstly, the law is affirmative; secondly, that law is grounded on specific facts or principles, namely knowledge. Furthermore, reality must be conveyed lucidly, without semantic inaccuracies, and easily executable. Furthermore, favourable legislation must not be subject to frequent or effortless alterations.
- c. The philosophical foundation for legislation in Indonesia is Pancasila, which serves as the ultimate source of all laws. The five moral principles are divinity, humanity, unity, democracy, and social justice. With its decadent array of customs and civilizations, Indonesia can settle disagreements without litigation.

¹² Sulardi, Yohana Puspitasari Wardoyo, *Kepastian Hukum, Kemanfaatan, Dan Keadilan Terhadap Perkara Pidana Anak Kajian Putusan Nomor 201/Pid.Sus/2014/PN.Blt*, Jurnal Yudisial Vol. 8 No. 3 Desember 2015: 251 – 268, hal 258

- d. **Sociological Value (Expediency)** The community anticipates advantages from implementing or enforcing the law. The purpose of the law is to govern human behaviour and ensure societal order. Therefore, the execution of laws or law enforcement must offer advantages or utility to society. Legislation aims to prevent social discontent by ensuring its implementation and enforcement.

The community fully executes and attains the restorative justice process. The procedure must be genuinely attuned to the community's needs and focused on preventing re-offending. This emphasizes the importance of considering several factors while addressing crime and preventing the labelling and discrimination of individuals. Therefore, it is widely acknowledged that it is necessary to establish a monitoring system in society to oversee the implementation of the outcomes of settling criminal conduct, offering assistance, and creating extensive chances for essential stakeholders.¹³

While alternative dispute resolution methods are typically limited to civil cases, it is worth noting that criminal cases can also be resolved amicably through the discretionary powers of law enforcement officials or through societal mechanisms such as consultation, peace initiatives, and forgiveness institutions. These may involve family reunions, village meetings, traditional gatherings, and deliberations. Presently, there is no established legal foundation for dealing with criminal cases in a manner that deviates from the law. Consequently, there are instances where disputes are settled in a friendly and non-adversarial manner yet are nonetheless processed by the legal system in compliance with relevant legislation. Not all regulations with criminal provisions allow for peaceful resolution.

The investigator's discretionary acts are specified in Article 16, paragraph (2) of Law Number 2 of 2002, which pertains to the State Police of the Republic of Indonesia. It is necessary to ensure that the action does not violate any legal regulations, aligns with legal obligations, is suitable and reasonable within the position's responsibilities, considers compelling circumstances, and upholds human rights. The investigators' authority enables perpetrators and victims to engage in the ongoing criminal reconciliation or mediation process. Suppose it is determined during criminal mediation that the situation is peaceful. In that case, investigators can use this agreement as grounds to halt the investigation, mainly if it is conducted

¹³ Tim Pengkajian Hukum tentang Sistem Pembinaan Narapidana Berdasarkan Prinsip Restorative justice . 2012, *Laporan Tim Pengkajian Hukum Tentang Sistem Pembinaan Narapidana Berdasarkan Prinsip Restorative Justice*, Jakarta: Kementerian Hukum Dan Hak Asasi Manusia Republik Indonesia, hal 17

by a customary law society where the state acknowledges the agreement as a valid legal matter in Indonesia.

Penal mediation is deemed suitable as an alternative in settlement due to the inherent nature of mediation, which grants full autonomy to the parties involved to shape the course of the process and choose the intended outcome of the agreement. The decision is not influenced by a third party acting as a mediator but instead reflects the complete volition and agreement of the persons concerned.¹⁴

Restorative justice is typically implemented through mediation when the defendant and the victim get together to achieve an agreement in order to resolve the case collaboratively. On certain occasions, the wrongdoer was required to provide monetary compensation to the victim, and in return, the victim expressed remorse to avoid legal proceedings. An optimal resolution reconciled the interests of the victim and the suspect. Numerous other solutions can be employed to execute this concept. When implementing the idea of restorative justice, researchers from POLRI exercise discretionary authority governed by legislation. An advantageous consequence of the Restorative Justice idea is the presence of diversion orders in cases concerning delinquent youngsters. Restorative Justice is the foundation for incorporating diversion into resolving cases involving children. Diversion prioritizes the focus on the needs and well-being of children and child victims.

An example that demonstrates the efficacy of the legal system in implementing this notion is the case of aggravated theft perpetrated by a juvenile named Oktavian Nur Sakti in a boarding house under the authority of the Sragen Police. The juvenile pilfered a mobile device and currency from the quarters of a slumbering occupant in a boarding establishment. The youngster was not arrested, and the prison initiated an inquiry that suggested mediation for the minor. Mediation entails the participation of correctional officers and investigators acting as mediators, victims and suspects, community leaders and caretakers.

Following the outcome of the mediation, it was determined that the child would not face legal prosecution. Instead, the boy would be reunited with his parents and placed under the care and oversight of Corrections and community authorities. This decision was made after the youngster acknowledged his wrongdoing and refrained from repeating such behaviour. Perform this action in order to iterate further. Resolute in his pursuit to further his education.

¹⁴ Sahuri Lasmadi, Umar Hasan, Elly Sudarti, *Tindakan Diskresi Oleh Penyidik Dalam Penyelesaian Tindak Pidana Kekerasan Dalam Rumah Tangga di Polres Tanjung Jabung Barat*, Jurnal Sains Sosio Huaniora, Volume 3 Nomor 2 Desember 2019

Meanwhile, the victim urgently demands the prompt return of his child's stolen belongings for immediate usage. Youngsters desire to enhance their skills and pursue school without being stigmatized as criminals. At the same time, victims should be free to continue their daily activities and meet their requirements. This demonstrates that instances where the magnitude of loss is relatively low, will be far more effective when addressed under a restorative justice framework.

C. Conclusion

Restorative Justice has been applied in juvenile and general criminal cases, albeit with limited scope. This is evident from the presence of Law Number 11 of 2012 about the Juvenile Criminal Justice System, which upholds the principles of Restorative Justice. The National Police Chief's Circular Letter Number SE/8/VII/2018, which focuses on the diversion procedure, has been issued to implement restorative justice. Restorative Justice can be practised inside internal police settings. The Prosecutor's Office Regulation Number 15 of 2020, which grants discretionary authority, was published to establish requirements for implementing Restorative Justice. Individuals can be prosecuted for specific, less serious offences, such as petty crimes, by adhering to the criteria and conditions outlined in these Prosecutor's Regulations. Execution of Restorative Justice. It is also seen as embodying the essence of our nation, specifically derived from the core principles of our country, Pancasila, which emphasizes the importance of equilibrium, unity, reconciliation, peace, serenity, equality, fraternity, kinship, discussion, and agreement. Suppose Restorative Justice is effectively developed and executed. In that case, it will serve the purpose of the law by delivering a sense of justice that will be advantageous to the community.

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