

# Criminal Law Enforcement Based on Restorative Justice in Indonesia

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## Abstract

This study aims to analyze law enforcement in the criminal justice system based on the value of restorative justice. The problem is the approach used in criminal law enforcement is mostly still giving a deterrent effect and conventionally imposing the law itself. The ideal law enforcement has to be supported by awareness of the role of punishment as a social sub-system, community's influence is quite significant in efforts to enforce the law. The efforts to develop law enforcement with the concept of restorative justice are the ones that are directed at reforming criminal law in Indonesia. This research was conducted to identify how restorative justice is regulated in law enforcement that is centered on recovering the crime victims from the losses and suffering they undergo. This is interesting to study through the concept of restorative justice-based law enforcement. The research method is normative jurisdiction with the approach of the rule of law and the concept approach. The results of the research show that restorative justice has not been maximally used as a basis for consideration and a center for law enforcement because it focuses more on retaliation for criminals over the crimes they have committed. The value of restorative justice is specifically limited to the punishment of children, which is regulated in Act Number 11 of 2012 concerning the Criminal Justice System for Children. In other words, the law enforcement has not been satisfying because one of its objectives is recovery of victims.

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## 1. Introduction

This study aims to analyze law enforcement in the criminal justice system based on the value of restorative justice. The problem is the approach used in criminal law enforcement is mostly still giving a deterrent effect and conventionally imposing the law itself. The ideal law enforcement has to be supported by awareness of the role of punishment as a social sub-system, community's influence is quite significant in efforts to enforce the law. The efforts to develop law enforcement with the concept of restorative justice are the ones that are directed at reforming criminal law in Indonesia. This research was conducted to identify how restorative justice is regulated in law enforcement that is centered on recovering the crime victims from the losses and suffering they undergo. This is interesting to study through the concept of restorative justice-based law enforcement. The research method is normative jurisdiction with the approach of the rule of law and the concept approach. The results of the research show that restorative justice has not been maximally used as a basis for consideration and a center for law enforcement because it focuses more on retaliation for criminals over the crimes they have committed. The value of restorative justice is specifically limited to the punishment of children, which is regulated in Act Number 11 of 2012 concerning the Criminal Justice System for Children. In other words, the law enforcement has not been satisfying because one of its objectives is recovery of victims.

Law enforcement is currently dominated by positivistic dogmatic paradigm that can be seen from the purpose of giving punishment in the law enforcement in Indonesia. The law enforcement in this country is still, in terms of punishment, focused on retributive justice in which the emphasis is more on the punishment given to a criminal as retaliation for the crime he or she has committed. Article 10, Article 11, and Article 12 of the Criminal Code emphasize on retaliation. Retributive view of justice legitimizes punishment as a means of retaliation for the crimes that have been committed.

Crime is an immoral act in society and therefore, a perpetrator is given a sentence as a reprisal by *Van Bammelen (1997: 25)*. Retaliation is the one and only purpose of punishment. Philosophically, the goal of punishment in law enforcement in Indonesia is in accordance with the Criminal Code, which is still oriented towards retributive justice. Although in other regulations it has moved towards rehabilitative justice but all of them only see the interests of perpetrators instead of victims. Retributive justice emphasizes on retaliation for a person who committed a crime, while rehabilitative justice emphasizes on recovery of a perpetrator. Based on these facts, it can be said that the law enforcement in Indonesia has not yet realized concrete justice values.

As a response to more varied crime acts that have occurred in community, the purpose of giving punishment had shifted to rehabilitative justice. Retributive justice concerns only the perpetrators, and so does rehabilitative justice. The emergence of rehabilitative justice aimed to reform the perpetrators and turn them into law-abiding and productive members of society. Rehabilitative model advocates that sanctions are used to change what causes a perpetrator to commit a crime. These changes are the results of planned interventions (such

as, participation in rehabilitation programs for drug addicts) whose process includes individual changes (such as changing attitudes and behavior).

According to *Rommelink (1993: 600)* retributive justice with absolute theory cannot have the same thoughts about the criminal system. The conditions for justifying a court decision are included in the crime itself. This notion emerges from an absolute view of crime. Based on this context, punishment is *res absolutaabffectufuturo* (an inevitability that is independent of its impact in the future). A crime act results in a conviction.

From the perspective of absolute theory, punishment is retaliation for a mistake that has been done, it is oriented to the act and lies in the crime itself. Punishment is given because the perpetrators must accept the sanctions for mistakes they did. According to this theory, the basis for punishment must be sought from the crime itself because the crime has caused suffering for others and, in return, the perpetrators must be given suffering. (*Leden Marpaung, 2009: 105*).

The criminal justice process that is completed in a court requires a lengthy process that consequently requires time, money, and energy. This causes a buildup of cases in the court. The efforts to compensate are also inefficient because of the procedures of the court. (*Umi Rozah, 2012: 310-311*).

These facts show that law enforcement is still focused on retributive justice and rehabilitative justice. This means another focus is necessary, that is the focus on the interests of victims and community through adequate restorative justice, so that the conditions of a whole criminal law reform can be fulfilled. The existing system has so far emphasized the reprisal to a perpetrator, but it has not yet paid attention to the victims. Consequently, the community has not felt justice and legal certainty; the conviction has not benefited grassroots.

The research problems are answered with normative approach method. Law is described and understood not only as written rules but also as values and principles that can be a guide for formulation of norms in the written rules. *Peter Mahmud Marzuki (2005: 35)* states that legal research is a process to find the rule of law, law principles, and doctrines to answer the legal issues.

## 2. Literature Review

### *The Concept of the State of Law*

Indonesia as a state of law is mandated in the 1945 Constitution of the Republic of Indonesia in Article 1 paragraph (3) which states "Indonesia is a State of Law". Consequently, all aspects of life in Indonesia, which is based on Pancasila and 1945 Constitution of the Republic of Indonesia, including governance must be regulated by law.

All are the doers, supporters and implementers. Policy executers and policy makers must have a good spirit that is in accordance with the spirit of Pancasila and 1945 Constitution (*PadmoWahyono, 1986: 21*). The concept of the state of law is used to discuss the issues that exist in the first problem, and this concept is expected to provide clarity and an in-depth analysis on the importance of a basis in law enforcement in Indonesia.

*George F Cole (Years TT, 113)* explains Joseph Goldstein's idea that classifies criminal law enforcement into three, namely criminal law enforcement in total *enforcement* based on complaints, *Full enforcement*, in this law enforcement, law enforcement is expected to be maximally executed, *Actual enforcement*, according to Joseph Goldstein produces concrete law enforcement. The concept of law enforcement shows that criminal law enforcement in Indonesia is based on the *substantive law of crime* formulation, but in reality this is fully implemented, due to limitations in procedural law, thereby limiting the space for law enforcement, besides there is an influence from the law enforcement factor itself, thus there will be spaces where law enforcement cannot be done or which is a space where law enforcement has not been able to run properly. Discretion is also used at this Full Enforcement by law enforcement to decide, continue or not to proceed with a case.

### *Restorative Justice*

The value of justice becomes an important thing that must be protected by the rules themselves. Law must have three aspects, namely justice, benefits, and certainty. It is said that when there is a conflict between rules of law in the three aspects, in which justice becomes dominant and it is felt unfair, then for the sake of justice, that rule of law is released, (*Bernard L Tanya, et.al. 2010: 128-131*).

Restorative justice (*restorative justice*) is an effort or a new model approach in Indonesia that is very close to the principle of deliberation which is the soul of the nation (*volkgeist*) of Indonesia itself. Restorative justice will conflict with the principles of legality and legal certainty. This is because restorative justice does not focus on imprisonment, but rather on how to improve or restore the victim's condition after a crime has taken place. Perpetrators of crime can be required to pay compensation, carry out social work, or other reasonable actions ordered by the court.

From the perspective of the victim, restorative justice gives the power to give the perpetrators the opportunity to express their remorse to the victim and it is better if they are facilitated in a professional meeting. This perspective of restorative justice is as a result of a shift in law from *lex talionis* or *retributive justice* by

emphasizing *restorative* efforts. Efforts to recover victims when using a more retributive and legalistic approach is difficult to treat victims' wounds, then the restorative justice seeks to emphasize the perpetrators' responsibility for their behavior that causes harm to others (*H. Siswanto Sunarso, 2014: 157*)

*Nur Agus Susanto (2014: 217)* outlines aspects of *Gustav Radbruch's* views in relation to the purpose of the justice value in law enforcement. The law enforcement process generally means that legal certainty does not always have to be given priority in fulfilling every positive legal system, as if legal certainty must exist first, then justice and expediency appear afterward. *Gustav Radbruch* then corrected his theory that the three objectives of law were equal.

### 3. Result and Discussion

The hope towards justice cannot be detached from people's laws and socio-cultural values because a good law is a law which reflects the values that are believed by the people, do not create different interpretation and do not consist of subjective truth in its implementation especially in the process of trial, so that the people do not become the victims. This phenomenon is studied and the solution has to be found in order to keep the people's trust. This is based on The 1945 Constitution of The Republic of Indonesia (UUD NKRI 1945) specifically Article 24 Paragraph 1. It states that trial must always be held to enforce law and uphold justice, so that responsive justice, which is the people's hope, is realized. The renewal of Criminal Code is still in process or it can be said that the system of Indonesian criminal law is still a vision (*Ius Constituendum*).

From formal law enforcement that is done in courts, it is seen that the officers only focus on giving sanctions to the suspects and do orders stated stiff and rigid law. They even apply this to the cases, which do not cause significant losses or problems and can be solved outside the courtrooms. On the other hand, restorative trial is a concept which gives justice both to the suspect and to the victim if we see it in from sociological point of view because a punishment of imprisonment or detention is closer to retributive criminalization, whose purpose is to give retaliation to a person who violates the law. These problems show us that giving physical punishment is not effective to keep a society in good order. The paradigm of the people that think that every person who violates the law must be sent to jail must be changed. One of the concepts that can be applied is to encourage the implementation of restorative trial.

According to *Barda Nawawi Arief (2014: 19)*, the people want substantial quality of law enforcement more than just formal quality. The law enforcement in Indonesia nowadays is being mended to reach the justice which is expected by the society. It can be seen from the efforts to enforce the law that are being done for the people and also for the law itself. This shows that the government wants to amend some rules in order to ensure justice and security for the people.

Normatively, the restorative justice was formulated in the 2012 Regulations number 11 about the children penal law system (UU SPPA). Article 1 number 6 of UU SPPA formulates that restorative justice is a penal law case solution by involving the suspect, victim, the family of suspect/victim, and other related parties to find a fair solution by focusing on restoring the situation to normal, and not retaliation. It can also be found in Memorandum of Understanding with the Chair of the Supreme Court of the Republic of Indonesia, Minister of Justice and Human Rights of the Republic of Indonesia, Attorney General of the Republic of Indonesia, and Chief of Police of the Republic of Indonesia number: 131/KA/SKB/X/2012; Number: M. HH -07. HM.03. 02 Year 2012; Number: KEP – 06/E/ EJP/10/2012; Number: B/39/X/2012, October 17th, 2012 about Implementation of Drafting the Limitations of Minor Offences and Fine Amount, Quick Investigation, and implementation of Restorative Justice. The juridical basis of restorative justice is the Fourth principal of Pancasila in which a consensus to solve problems is stated.

The decisive and clear regulations in restorative justice arrangements are only stated in article 1 number 6 UU SPPA which focuses on children trials only. This means there are no restorative justice arrangements which are general and clear, and consequently, there is norm emptiness (*recht vaccum*). New regulations for restorative justice are, then, needed. The arrangements which are only limited to SPPA will not accommodate comprehensively the renewal of the penal law.

Restorative justice has been applied in many Asian countries such as Japan, Thailand, Singapore, and European countries such as Netherland, Germany, and England. These countries have adopted this international law instrument. The restorative justice in these countries affects the policies of criminal law enforcement. Indonesia needs to learn the implementation of restorative justice in these countries in its efforts to renew its Criminal Code based on its pluralistic society, which consists of many tribes and cultures, by harmonizing customary laws and religious laws with the national law that is being implemented in criminal law enforcement (*Muladi, 2002:69*).

Law enforcement and criminal law settlement based on restorative justice are done together based on conflict or damage which appeared as a result of criminality. Social relationship restoration between community members must be done by all parties through a consensus, so that the justice inside every person could be found. Equal opportunities are given to all parties to contribute maximally and proportionately in the process of finding

a solution (Justisi Devli Wagiu, 2015:60)

The main basis for solving a criminal act through restorative justice is a solution which does not only serve as a tool to mediate both parties to find an agreement but also restorative aims to bring them and other related parties to understand the meaning and purpose of recovering, and the sanctions given are preventive ones. On the other hand, the amendment of Indonesian Criminal Code lies on basic values and concepts of justice making it able to support just law enforcement.

Law enforcement will not only uphold the formal mechanism of a law, but also strive for its substantive values. Nowadays, the court seems the best place to solve a conflict and to seek justice. Every indication of a criminal act, without considering its minor offense, will always be brought to court and consequently, it is only a jurisdiction of law enforcement.

#### 4. Conclusion

Realizing justice in law enforcement can be done by giving opportunities to the court to give justice based on the truth whose purpose is to renew the criminal law system in the future. Restorative justice is the basis of law enforcement that gives justice. Theoretically, the law enforcement to solve criminal cases that occur in society is still emphasizing more the suspect (daad dader). Restorative justice changes this paradigm, it focuses not only on the law breaker but also on the victim.

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