

Restorative Justice for Victims from the Constitutional Perspective in Indonesia

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Abstract

Restorative justice in Indonesia emphasizes the active participation of victims, offenders, and the community in resolving criminal cases, with the primary aim of restoring losses and ensuring the offender's accountability. Various efforts have been made to integrate this approach into the legal system through a number of regulations, such as the Juvenile Criminal Justice System Law (UU SPPA) and other related provisions. However, in practice, the role of the victim is often overlooked, as the legal approach tends to focus more on the offender. This situation reflects that, despite a paradigm shift from a retributive model of law enforcement to a restorative approach, its implementation in practice still does not fully address the needs and rights of victims. This research aims to explore the essence of restorative justice in protecting victims of crime. In addition, it evaluates the implementation of criminal case resolution based on restorative justice from a constitutional perspective. The research method used in this dissertation is normative legal research, which is generally conducted through literature studies and the analysis of secondary data. The findings of this study show that restorative justice places the victim as the primary harmed party and provides space for their active participation in case resolution. This approach seeks to restore the victim's losses by holding the offender accountable and aims to return the victim to an equal position with the offender within the legal process. Furthermore, the implementation of restorative justice in Indonesian legislation already has a clear legal foundation. However, there are still several shortcomings. Therefore, it is important to revise the Indonesian Code of Criminal Procedure (KUHAP) to better integrate the resolution of criminal cases based on restorative justice.

Keywords: Restorative justice, Indonesian criminal law, victim

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1. Introduction

As a result of various weaknesses within the criminal justice system and widespread dissatisfaction with its operations, stakeholders have been prompted to seek alternatives outside the formal system. One such alternative is the mechanism of Alternative Dispute Resolution (ADR).¹ A specific form of ADR is penal mediation between the offender and the victim, which, in practice, is often chosen to avoid the rigidity of the existing criminal justice system or to circumvent the negative consequences of imprisonment, particularly by seeking alternatives to incarceration or custody.²

Initially, the development of national law was not particularly responsive to the needs and interests of crime victims. However, over time, through the convening of several international congresses focusing on victim-related issues, attention toward crime victims began to grow.³ At least three major international congresses addressed similar themes: the Geneva Congress, which examined "new forms and dimensions of crime"; the Caracas Congress (1980), which addressed "crime and the abuse of power, offenses and offenders beyond the reach of law"; and the Milan Congress (1985), which focused on victims of crime, linking them to the new dimensions of criminality and crime prevention in the context of development, both conventional and non-

¹ Gregorius Widiartana & P. Prasetyo Sidi P., *Mediasi Penal: Rekonstruksi Peran Korban Dalam Penyelesaian Kejahatan Ringan Dengan Pendekatan Keadilan Restoratif*, Prosiding Seminar Nasional Viktimologi Asosiasi Pengajar Viktimologi Indonesia – Universitas Pancasakti Tegal Tegal, 22-24 November 2019, p. 88

² *Ibid*

³ Yeti Kurniati, *Keadilan Restoratif Dalam Perspektif Viktimologi*, Prosiding Seminar Nasional Viktimologi Asosiasi Pengajar Viktimologi Indonesia – Universitas Pancasakti Tegal, 22-24 November 2019, p. 288

conventional crimes, and the illegal abuse of economic and public power.¹

Currently, there is a paradigm shift in criminal law and punishment theory, moving from a retributive justice model toward restorative justice. This shift demands more humane treatment of offenders and increased protection of the rights of victims, their families, and the broader community.² In recent years, support for the implementation of restorative justice has gained momentum. While some regard restorative justice as a modern concept in criminal law, others argue that it is actually a return to traditional or ancient models of resolving criminal cases,³ including the view expressed by Braithwaite.⁴

The restorative justice concept emphasizes the involvement of all parties, valuing their participation at a higher level. It restores control to the victim and places responsibility on the offender to make amends, thereby contributing to the rebuilding of social values.⁵ Another essential aspect is the active involvement of the community in rebuilding and strengthening itself, promoting mutual care and respect, which in substance can reduce the dominance of the state in the judicial process.⁶

Law enforcement based on restorative justice involves all relevant parties in a crime—offenders, victims, their respective families, and the community—with the goal of achieving a more just and effective resolution through their active participation.⁷ Nonetheless, according to Muladi, any legal framework that seeks to protect victims must fundamentally consider the nature of the harm suffered, both material or physical and psychological.⁸ Psychological harm may manifest as trauma, resulting in a loss of trust in the social environment and public order. Such trauma may appear in the form of depression, anxiety, cynicism, suspicion, loneliness, and other forms of social withdrawal.⁹

Within Indonesia's legislative system, the state has actively provided protection for victims through the enactment of a specific law: Law No. 13 of 2006 on the Protection of Witnesses and Victims, as amended by Law No. 31 of 2014. This legal provision was followed by Government Regulation No. 44 of 2008 on the Provision of Compensation, Restitution, and Assistance to Witnesses and Victims. For victims specifically, the law defines a victim as "a person who suffers physical, mental, and/or economic harm as a result of a criminal offense."¹⁰

A closer look at the legislation reveals that criminal case resolution through mediation is not yet normatively regulated in Indonesia, except in cases involving juveniles.¹¹ In practice, however, despite the lack of formal regulation, law enforcement officials often use their discretion to resolve criminal cases outside the formal judicial system.¹² Over time, law enforcement institutions—such as the police, the prosecutor's office, and the judiciary—have begun adopting restorative justice practices by interpreting the scope of legal subjects in criminal law enforcement more broadly. Examining restorative justice-based law enforcement policies, criminal law in this context is understood as public law with private dimensions. These dimensions involve two main aspects: first, the recognition of customary justice as part of national cultural heritage; second, the possibility of resolving criminal cases outside the formal judiciary, thereby enabling penal mediation that brings offenders and

¹ *Ibid*

² Dede Kania, Pidana Penjara Dalam Pembaharuan Hukum Pidana Indonesia, dalam jurnal Yustisia Vol. 3 No.2 Mei - Agustus 2014, p. 25

³ Sukardi, Penanganan Konflik Sosial Dengan Pendekatan Keadilan Restoratif, Jurnal Hukum & Pembangunan 46 No. 1 (2016): 70-89, p.73

⁴ ...Restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world's peoples ... lihat John Braithwaite, *Restorative Justice & Responsive Regulation*, Oxford University Press, 2002, p.5

⁵ Tommy Leonard, Pembaharuan Sanksi Pidana Berdasarkan Falsafah Pancasila Dalam Sistem Hukum Pidana Di Indonesia, dalam jurnal Yustisia. Vol. 5 No. 2 Mei - Agustus 2016, p. 478

⁶ *Ibid*

⁷ Dede Kania, Op.cit. p. 26

⁸ Fauzy Marasabessy, Restitusi Bagi Korban Tindak Pidana: Sebuah Tawaran Mekanisme Baru, Jurnal Hukum dan Pembangunan Tahun ke-45 No.1 Januari-Maret 2015, p. 54

⁹ *Ibid*

¹⁰ Article 1 paragraph (2) of the Republic of Indonesia Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning Protection of Witnesses and Victims

¹¹ Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak

¹² Gregorius Widiartana & P. Prasetyo Sidi P., Mediasi Penal: Rekonstruksi Peran Korban Dalam Penyelesaian Kejahatan Ringan Dengan Pendekatan Keadilan Restoratif, Prosiding Seminar Nasional Viktimologi Asosiasi Pengajar Viktimologi Indonesia – Universitas Pancasakti Tegal Tegal, 22-24 November 2019, p. 91

victims together.¹

As previously outlined, the juvenile justice system has introduced restorative justice mechanisms, particularly through the diversion process. Over time, the Juvenile Criminal Justice System Law has been supported by several technical regulations to ensure the implementation of restorative justice. In 2014, the Supreme Court issued Regulation No. 4 of 2014 on Guidelines for Diversion Implementation in the Juvenile Criminal Justice System, which was a follow-up to Law No. 11 of 2012 on the Juvenile Criminal Justice System. Additionally, other law enforcement institutions, such as the prosecutor's office, issued Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The police also established Regulation No. 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice. Most recently, the Supreme Court issued Regulation No. 1 of 2024 on Guidelines for Adjudicating Criminal Cases Based on Restorative Justice.

Given this development, it is both relevant and important to further explore the essence of restorative justice in protecting victims of crime. Additionally, it is necessary to examine the ideal construction of restorative justice, oriented toward victim protection, from a constitutional perspective within Indonesia's criminal justice system.

2. Methods of Legal Research

This research will employ a normative legal research method. According to Peter Mahmud Marzuki, normative legal research is a process aimed at discovering legal norms, legal principles, or legal doctrines to answer specific legal issues.² This type of research is conducted to produce arguments, theories, or new concepts as prescriptions for resolving legal problems. In general, normative (doctrinal) legal research is carried out through a literature study that examines secondary data, such as legal provisions including legislation, court decisions that are legally binding (*Inkracht van Gewijsde*), legally significant agreements, other legal documents, as well as previous research, academic analyses, and other relevant references. This research model may also incorporate interviews, focus group discussions, and public hearings as supplementary methods in the event that the available data is incomplete.³ Normative legal research differs from empirical legal research and other social science research methods in terms of the types of legal materials used.⁴ The primary legal materials used in this research will consist of laws and regulations, including: the 1945 Constitution of the Republic of Indonesia, laws related to the criminal justice system, court decisions, and other judicial documents from relevant institutions related to criminal law enforcement. Additionally, secondary legal materials will serve as reference documents in this research. These materials provide explanations of the primary legal sources and may include draft laws (*Rancangan Undang-Undang/RUU*), textbooks, research findings published in journals and magazines, and expert opinions in the field of law.⁵

3. Discussion

3.1 The Essence of Restorative Justice in Protecting Victims of Crime

Although the concept of restorative justice has long been rooted in noble values that have existed for generations, the term "restorative justice" is believed to have been first introduced in the 1950s through the writings of Albert Eglash, and only began to gain wider usage around 1977.⁶ In his work, Eglash described restorative justice as a constructive and creative act, determined autonomously with guidance, and one that allows for group involvement.⁷ The earliest known practice of restorative justice can be traced back to 1974 in Kitchener, Ontario, where two offenders involved in vandalism were brought face-to-face with their victim, and both parties agreed on compensation for the crime. This practice was referred to as the Kitchener Experiment and received positive support from various stakeholders, leading to the establishment of the Victim-Offender Reconciliation Program (VORP).⁸ This program operated under the auspices of the Christian Mennonite

¹ Joko Sriwidodo, *Kajian Hukum Pidana Indonesia "Teori dan Praktek"*, (Yogyakarta: Penerbit Kepel Press, 2019), p. 23-24

² Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2010), p. 47

³ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2010), p. 35

⁴ Muhaimin, *Metode Penelitian Hukum*, (Mataram: Mataram University Press, cetakan Pertama, 2020), p.60

⁵ *Ibid*, p. 63

⁶ Maidina Rahmawati, et. al., *Peluang dan Tantangan Penerapan Restorative Justice dalam Sistem Peradilan Pidana di Indonesia* (Jakarta: Institute for Criminal Justice Reform, 2022), p. 49

⁷ *Ibid*

⁸ *Ibid*

Committee and inspired further innovations in North America and surrounding regions.¹ Over the following decades, the program evolved and contributed to the emergence of a new paradigm in thinking about crime, which came to be known as restorative justice.²

Dignan's observations,³ reveal that many practitioners and advocates of Restorative Justice (RJ) implicitly operate with the concept of the "ideal victim" as identified by Christie in 1986. In addition, Dignan noted that questions concerning the concept of the victim rarely arise in the RJ literature, perhaps with the exception of Young's observation,⁴ which suggests that RJ tends to adopt a highly undifferentiated view of victims. Therefore, exploring victim-related concepts within RJ remains a relatively underexplored area. It can be said that there are three distinct representations of victims in RJ practices in the United Kingdom: (1) the structurally neutral individual victim; (2) the socially inclusive community as victim; and (3) the offender as victim, a view that is reflected within the restorative justice movement itself.⁵

Restorative justice goes beyond restitution or reparation; it encompasses a dynamic dimension and an interactive process in the pursuit of justice and equity. In German, the word *Ausgleich* (literally translated as "balancing") refers to both the process of dispute resolution and problem-solving, as well as the resolution itself. With its emphasis on conflict resolution, the primary goal of restorative justice is to facilitate participation.⁶ In Europe, the initiation and facilitation of controlled forums for resolving and addressing conflict lie at the heart of the philosophy of Victim-Offender Mediation (VOM).

Pan-European documents, such as Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe and its Explanatory Memorandum, provide essential guidelines regarding the principles, legal foundations, and standards of practice and training in Victim-Offender Mediation (VOM) in Europe. Although not legally binding, these documents serve as important references for European countries in developing VOM practices.⁷ Active participation in Victim-Offender Mediation allows victims and offenders to address conflicts directly, with mediation offering a space to repair both the emotional and material harm caused by criminal acts. This form of mediation is more comprehensive than the solutions typically provided by the criminal justice system, as it enables both parties to represent their own interests and take an active role in resolving the conflict.⁸

Consensus in mediation cannot be achieved without the active participation of the parties involved. Empowerment is a crucial element that enables both victims and offenders to advocate for their own interests and express their perspectives. If one party is unable to participate fully, mediation should not proceed. However, in cases of imbalance, the mediator has a responsibility to assist the weaker party in understanding and articulating their interests and viewpoints.⁹ In Victim-Offender Mediation (VOM), power imbalances—such as dependency or threats of violence—can hinder free participation and valid consent. Nevertheless, mediators can address these imbalances by supporting the disadvantaged party, thus fostering a more equitable mediation process.¹⁰

The development of restorative justice (RJ) concepts occurred concurrently in both North America and Europe. One of the representatives of the Northern European abolitionist movement, Norwegian criminologist Nils Christie, criticized the criminal justice system in his influential article "Conflicts as Property." In this article, Christie argued that the concept of crime is an abstraction and should instead be understood as a conflict

¹ Dewi Setyowati, "Memahami Konsep Restorative Justice sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan," *Pandecta Research Law Journal* 15, no. 1 (27 Juni 2020): h. 126, <https://doi.org/10.15294/pandecta.v15i1.24689>.

² *Ibid*

³ J. Dignan, *Understanding Victims and Restorative Justice*, (Maidenhead: Open University Press, 2005)

⁴ R. Young, 'Testing the limits of restorative justice: the case of corporate victims,' in C. Hoyle and R. Young (eds) *New Visions of Crime Victims*, (Portland, OR: Hart Publishing, 2002).

⁵ Sandra Walklate, Changing boundaries of the 'victim' in restorative justice So who is the victim now?, in Dennis Sullivan and Larry Tift (ed.), *Handbook of restorative justice (A Global Perspective)*, (New York: First Published 2006 by Routledge), p. 279-280

⁶ Lutz Netzig & Thomas Trenczek, 'Restorative justice as participation: theory, law, experience and research,' in B. Galaway and J. Hudson (eds) *Restorative Justice: international perspectives*, (Monsey, NY: Criminal Justice Press, 1996)

⁷ Christa Pelikan and Thomas Trenczek, *Victim offender mediation and restorative justice (The European landscape)*, in Dennis Sullivan and Larry Tift (ed.), *Handbook of restorative justice (A Global Perspective)*, (New York: First Published 2006 by Routledge), p.63

⁸ *Ibid*, p.65

⁹ *Ibid*, p. 66

¹⁰ *Ibid*

between real individuals—individuals who possess ownership rights over their conflicts.¹ As restorative justice continues to evolve, it is important to consider the type of social interaction it proposes. Daly identified the core elements of RJ as follows:²

- (a) it focuses on the sentencing phase;
- (b) it involves face-to-face meetings between offenders who admit guilt and their victims;
- (c) it provides victims with an active role in decision-making;
- (d) it is an informal process involving lay participation;
- (e) it seeks to hold offenders accountable without stigmatizing them; and
- (f) it helps victims recover from the harm caused by the crime.

Christie argued that conventional criminal justice processes fail to meet the needs of victims, offenders, and the broader community. Instead, those who have a personal stake in a case should be empowered to reclaim ownership of their conflicts in order to better address their needs. This is because, within the criminal justice process, legal professionals have effectively taken over conflicts from the involved parties, thereby limiting the participation of both victims and offenders in resolving their own cases.³ Christie's abolitionist perspective—alongside the ideas of other scholars such as Louk Hulsman and Herman Bianchi—has significantly contributed to the development of restorative justice theory and has influenced its evolution, particularly in Northern and Central European countries such as Norway, Finland, and Austria.⁴

The application of the restorative justice concept has increasingly been initiated through various programs in numerous countries. In 1985, the Council of Europe issued Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure, which reflected the spirit of restorative justice in its formulation, notably by recommending an examination of the benefits of mediation and reconciliation.⁵ Subsequently, the Council of Europe issued Recommendation No. R (99) 19 on Mediation in Penal Matters, which defined mediation and outlined its principles, legal basis, and guidelines for implementation.⁶

In 1989, the integration of restorative justice into the legal system of New Zealand was marked by the introduction of the Children's and Young People's Wellbeing Act. This law aimed to restructure the juvenile justice system and address sentencing disparities between Maori and non-Maori children. It introduced a family group conference mechanism involving families, legal advisors, social workers, relevant parties, and—if willing—the victim.⁷ The implementation of restorative justice can also be found in the criminal justice system of the United Kingdom, through the Crime and Disorder Act of 1998 and the Youth Justice and Criminal Evidence Act of 1999. Both laws contain fundamental elements such as the importance of considering the victim's opinion before taking restorative action, the involvement of community groups, and the publication of reparative actions to victims and the wider public.⁸

The use of restorative justice within criminal justice systems subsequently received global support from various countries and international organizations during the Tenth United Nations Congress held in Vienna, Austria, in 2000, which specifically addressed the issue of restorative justice.⁹ The United Nations stated that within the criminal justice system, restorative justice holds a position as an alternative model, uniquely responsive to crime. It must be distinguished from both rehabilitative and retributive theories, advocating instead

¹ Dewi Setyowati, "Memahami Konsep Restorative Justice sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan," *Op.Cit.*, p. 126,

² Kathleen Daly, *The limits of restorative justice*, (Chapter 7), Dennis Sullivan and Larry Tifft (ed.), *Handbook of restorative justice (A Global Perspective)*, (New York: First Published 2006 by Routledge), p. 135

³ *Ibid.*

⁴ *Ibid.*

⁵ Maidina Rahmawati, et. al., *Peluang dan Tantangan Penerapan Restorative Justice dalam Sistem Peradilan Pidana di Indonesia*, *Op.Cit.*p. 50.

⁶ *Ibid.*, 51.

⁷ Suku Maori merupakan kelompok penduduk asli Selandia Baru. Lihat Betania Fransiska Sitanggang dan Irma Cahyaningtyas, "Penanganan Perkara Anak Dalam Perspektif Jaksa Penuntut Umum," *Jurnal Pembangunan Hukum Indonesia* 2, no. 1 (2020): 77; Lihat juga Madina Rahmawati et. al, *Peluang dan Tantangan Penerapan Restorative Justice dalam Sistem Peradilan Pidana di Indonesia*, (Jakarta : Institute for Criminal Justice Reform, 2022) h. 49.

⁸ Rahmawati et.al., *Loc. Cit.*

⁹ Donny Irawan, Herlyanty Bawole, dan Ronald Rorie, "Tinjauan Hukum atas Keadilan Restoratif sebagai Perlindungan Hukum bagi Korban Tindak Pidana di Indonesia," *Lex Administratum* 10, No. 5 (2022): p. 1.

for the collective involvement of all parties in resolving the crime and addressing its consequences and future implications.¹

The Tenth United Nations Congress also produced the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, which outlines a number of foundational principles and the use of restorative justice in handling criminal cases.² The Vienna Declaration on Crime and Justice, presented during the same Congress, stated, among other things, that mechanisms of mediation and restorative justice should be introduced to ensure protection for victims of crime. Subsequently, the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, which includes mediation as a key element, was formally adopted by the United Nations on July 24, 2002. This marked the UN's recognition of restorative justice as a legitimate approach that may be applied within national criminal justice systems.³ The UN resolution serves as a guiding framework for the implementation of restorative justice, though it is non-binding. Its primary objective is to assist member states in adopting and implementing restorative justice practices within their respective criminal justice systems.⁴

According to Gavrielides, the term restorative justice in the context of criminal justice refers to four main programs: victim-offender mediation, family group conferencing, healing and sentencing circles, and community restorative boards.⁵ This classification is derived from the existing literature and represents standard practices within restorative justice. However, the criteria for defining what is "restorative" remain ambiguous. For years, restorative justice and mediation were often regarded as synonymous, but more recent literature suggests that restorative justice may offer a distinct alternative to both rehabilitative and retributive approaches to crime.⁶

In brief, restorative justice is considered an alternative approach that may alleviate Post-Traumatic Stress Symptoms (PTSS) in victims of crime. While moderate evidence supports reductions in PTSD following the application of restorative justice (RJ) compared to conventional justice, outcomes vary in terms of mood changes, cognition, alertness, and reactivity. Methodological limitations may have influenced the inconsistency of these findings. Nevertheless, the RJ approach places greater emphasis on victims and actively involves them in the healing process after the crime.⁷ Despite ongoing debates, definitions of restorative justice typically highlight both the process and the intended outcomes—namely, the resolution of consequences and implications for the future. One source of disagreement is whether restorative justice should be understood as a process, an outcome, or both. While many definitions emphasize procedural aspects, others focus on forward-looking outcomes such as making amends through apologies, forgiveness, or other forms of reparation. A significant risk emerges when an overemphasis on outcomes leads to rigid models that may undermine the integrity of the practice—for example, by pressuring offenders to apologize or encouraging victims to forgive.⁸

Restorative justice can be applied at various stages within the criminal justice system. It is often used as an alternative, with cases referred directly by police officers or judges. In some instances, restorative justice is employed alongside conventional criminal justice procedures, even during imprisonment or reintegration from detention. Many restorative justice programs accept direct referrals from the community, offering an alternative that can bypass the conventional criminal justice system entirely.⁹ Restorative justice is an alternative or complementary approach to criminal adjudication that emphasizes the integration of the offender on one hand and the victim/community on the other, working together to find solutions and restore positive social relations.¹⁰ It is an approach within the criminal justice system that offers an alternative to conventional justice, aiming to

¹ Ibid

² Ibid, p. 2

³ Ibid

⁴ Norjihan Ab Aziz, "Keadilan Restoratif di bawah Resolusi Pertubuhan Bangsa-bangsa Bersatu: Hak Tertuduh dan Hak Mangsa Jenayah," *Kanun* 30, no. 1 (2018), p. 108.

⁵ Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy*, Helsinki: Criminal Justice Press, 2007, h. 29

⁶ Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy*, Helsinki: Criminal Justice Press, 2007, h. 29

⁷ Alex Lloyd & Jo Borrill, *Examining the Effectiveness of Restorative Justice in Reducing Victims' Post-Traumatic Stress, Psychological Injury and Law* (2020) 13:77–89, h. 87

⁸ Meredith Rossner, *Restorative justice and victims of crime: directions and developments*. In: Walklate, Sandra, (ed.) *Handbook of Victims and Victimology*, 2017. Routledge, Abingdon, UK, h. 3

⁹ Lindsey Pointer, *What is "Restorative Justice" and How Does it Impact Individuals Involved in Crime?*, <https://bjatta.bja.ojp.gov/media/blog/what-restorative-justice-and-how-does-it-impact-individuals-involved-crime>

¹⁰ Kuat Puji Prayitno, *Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum In Concreto)*, *Jurnal Dinamika Hukum* Vol. 12 No. 3 September 2012, h. 409

address the lack of a holistic and humane perspective in handling crime. It seeks to create inclusive strategies that respond to victims' needs and minimize the psychological harm they experience.¹

In 2001, Miers completed a second report on the effectiveness of seven restorative justice schemes in England, covering the period from July 1999 to November 2000, supported by a research group funded by the Home Office. Two of the schemes focused on adult offenders, while the others addressed youth offenders.² In its executive summary, the study identified challenges in understanding the diversity of restorative schemes, including variations in their focus on victims and offenders, as well as the implementation of interventions. The report explained that restorative justice aims to provide victims with the opportunity to communicate the impact of the crime to the offender, to encourage offender accountability, and to repair the damaged relationship between victim and offender. However, it also noted the ongoing difficulty in establishing a consistent and effective RJ approach, given the differing views on its theoretical foundations and definitions of success in practice.³

The Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly, emphasize the need for recognition and respectful treatment of crime victims' dignity. These principles advocate for access to fair judicial mechanisms, prompt resolution, adequate assistance, and other services including restitution and compensation from the state. The provision of information, victim participation, and alternative dispute resolution methods, including restorative justice, are also acknowledged. Victims' privacy and security are highlighted as critical aspects within these principles.⁴

Restorative principles are a fundamental basis in every restorative justice effort, and there is no definitive list of these principles. Practitioners and scholars emphasize different concepts according to their own approaches and practical understandings. Lyubansky and colleagues have identified ten principles based on their experience in teaching, research, and practice. These principles include:⁵

- a. Treating relationships as the foundation;
- b. Approaching conflict;
- c. Recognizing conflict as belonging to the community;
- d. Creating conditions for truth-telling, mutual understanding, and accountability;
- e. Prioritizing voluntariness;
- f. Committing to restorative justice as an anti-oppressive practice;
- g. Acknowledging that interpersonal violence is often connected to structural/systemic violence;
- h. Having the aim to repair harm and transform conflict;
- i. Using "power with" rather than "power over";
- j. Responding to the needs of all parties affected by harmful actions.

Based on this, it is important to respect the dignity of crime victims and emphasize the significance of access to fair justice, adequate assistance, as well as the privacy and security of victims. Furthermore, restorative principles in restorative justice emphasize the importance of treating relationships as foundational, approaching conflict with mutual understanding, and using shared power to respond to the needs of all parties affected by harmful actions.

Restorative justice (RJ) offers benefits to crime victims that are not available in the traditional justice system. Victims are given a central role in the RJ process, where they receive information about their victimization experience and obtain emotional recovery as well as an apology from the offender. Through victim-offender conferences, victims and offenders have the opportunity to communicate, discuss repair plans, and agree on terms. Reparations offered may include financial restitution, community service, or prevention programs. In RJ, the rights of victims are acknowledged, and repairing individual harm becomes the primary focus.⁶

¹ Ana M. Nascimento, Joana Andrade, and Andreia de Castro Rodrigues, *The Psychological Impact of Restorative Justice Practices on Victims of Crimes—a Systematic Review*, *Journal of Trauma, Violence, & Abuse* 2023, Vol. 24(3) 1929–1947, h. 1929

² Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy*, Helsinki: Criminal Justice Press, 2007, h. 52

³ Ibid

⁴ Tali Gal, *Child victims and restorative justice : a needs-rights model*, Oxford University Press, Inc. 2011, h. 33

⁵ Gabriel Velez & Theo Gavrielides (Editors), *Restorative Justice: Promoting Peace and Wellbeing*, (This Springer imprint is published by the registered company Springer Nature Switzerland AG, 2022), in Chapter 5 "Developing a More Restorative Pedagogy: Aligning Restorative Justice Teaching with Restorative Justice Principles" by Mikhail Lyubansky, Giovana Mete, Gillian Ho, Emily Shin, and Yamenah Ambreen h. 80-81

⁶ Alex Lloyd & Jo Borrill, *Examining the Effectiveness of Restorative Justice in Reducing Victims' Post-Traumatic Stress, Psychological Injury and Law* (2020) 13:77–89, h. 77

3.2 The Concept of Restorative Justice from a Constitutional Perspective

The principles of Restorative Justice (RJ) have been recognized within the criminal justice system in Indonesia, particularly reflected in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU SPPA), which specifically includes the term "Restorative Justice." This provision defines Restorative Justice as the resolution of criminal cases by involving the offender, victim, families of the offender/victim, and other related parties to collectively seek a fair settlement that emphasizes restoration to the original state rather than retaliation.¹

Before the enactment of UU SPPA, according to Kuat Aji Prayitno, there were five legal policy guidelines that provide the foundation for restorative justice.² First, Law No. 2 of 2002 concerning the Indonesian National Police affirms the primary duties of the Indonesian National Police, namely to provide protection, guidance, and service to the community. The police have the authority to perform additional duties relevant and permitted by law and are responsible for their actions in accordance with applicable law.³ Second, in carrying out their duties and authorities, prosecutors are obliged to act in accordance with the law, considering religious norms, decency, morality, and humanitarian values present in society, as well as maintaining the honor and dignity of their profession.⁴ Third, judicial power is the independent state authority responsible for administering the judiciary system to ensure the enforcement of law and justice in accordance with the values of Pancasila and the 1945 Constitution, as an important step toward realizing the Rule of Law in the Republic of Indonesia.⁵ Fourth, every court decision must include the reasons and legal basis underlying the decision, referring to specific articles of relevant legislation or unwritten legal sources used in the adjudication process.⁶ Fifth, judges are required to explore, follow, and understand the legal values and sense of justice that live within society.⁷

Cahya Wulandari concludes that restorative justice at the investigation and prosecution levels serves as an alternative effort to resolve criminal cases aimed at reducing case backlogs in courts.⁸ The process is faster than litigation and focuses more on the interests of the victim, with the goal of restoring the parties involved to their state prior to the crime. Police Regulation No. 6 of 2019 and Police Chief Regulation No. 5 of 2020 serve as initial guidelines for restorative justice-based resolution. However, more detailed legal frameworks within the Criminal Procedure Code (KUHAP) are needed in the future to comprehensively regulate ADR processes based on restorative justice.⁹ Nevertheless, restorative justice can be applied not only at the investigation and inquiry stages but also during prosecution, trial, and sentencing phases. One form of RJ program implemented in prosecution and trials in other countries is the Sentencing Circles. This program is a joint forum aimed at reaching consensus regarding charges or sentences based on the decisions of parties involved in the criminal act.¹⁰

Besides formal institutional authority as mentioned above, materially the Indonesian Criminal Code (KUHP) already regulates, albeit limitedly, criminal offenses classified as violations punishable only by fines, where case resolution outside the criminal justice process can be conducted through peaceful payment of fines.¹¹ Another regulation reflecting the state's attention to victims can be found in the existence of the Witness and Victim Protection Agency (Lembaga Perlindungan Saksi dan Korban, LPSK). LPSK is an institution tasked with providing protection and other rights to witnesses and/or victims, as stipulated in Law Number 13 of 2006 concerning the Protection of Witnesses and Victims. This provision states that victims have the right to file a restitution or compensation claim to the court through LPSK.¹²

Decisions regarding compensation and restitution are determined by the court in accordance with

¹ Lihat Pasal 1 angka 6 UU No. 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak (SPPA)

² Kuat Puji Prayitno, Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum In Concreto), dalam jurnal *Dinamika Hukum* Vol. 12 No. 3, 2012, h. 416

³ Pasal 13 huruf c, Pasal 15 ayat (2) huruf k, Pasal 16 ayat (1) huruf l Undang-Undang Nomor 2 Tahun 2002 tentang Kepolisian Republik Indonesia

⁴ Pasal 8 ayat (4) Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia

⁵ Pasal 1 angka (1) Undang-Undang Nomor 48 tahun 2009 tentang Kekuasaan Kehakiman

⁶ Ibid, Pasal 50 ayat (1)

⁷ Ibid, Pasal 5 ayat (1)

⁸ Cahya Wulandari, *Dinamika Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia*, dalam *Jurnal Jurisprudence* Vol. 10, No. 2, 2020

⁹ Ibid

¹⁰ Paul McCold, *The Recent History of Restorative Justice: Mediation, Circles and Conferencing*, dalam Dennis Sullivan dan Larry Tifft, *Handbook of Restorative Justice: A Global Perspective*, (New York: Routledge, 2006), h. 29.

¹¹ Lihat ketentuan Pasal 82 ayat (1) Kitab Undang-Undang Hukum Pidana

¹² Lihat Pasal 7 Undang-Undang Nomor 13 Tahun 2006 Tentang Perlindungan Saksi dan Korban

applicable laws. Derivatively, the regulation on restitution is elaborated in Government Regulation, which defines restitution as a form of compensation given to the victim or their family by the offender or a third party, which may include returning property, payment of damages for loss or suffering, or reimbursement for certain costs.¹ However, according to Prayitno, the process of restitution or compensation regulated in Law No. 13 of 2006 and Government Regulation No. 44 of 2008 still operates within a retributive justice framework rather than a restorative justice philosophy.

In the context of Human Rights, Law Number 39 of 1999 concerning Human Rights states that the National Commission on Human Rights (Komnas HAM) has functions including study, research, outreach, monitoring, and mediation related to human rights.² These functions are further detailed in its duties and authorities, which include mediating peace between disputing parties, resolving cases through various methods such as consultation, negotiation, mediation, conciliation, and expert assessment, advising parties to resolve disputes through courts, and submitting recommendations on human rights violations to the Government and the House of Representatives.³ If human rights violation cases are resolved through mediation, the resolution is conducted by Komnas HAM members appointed as mediators. The written agreement reached through mediation becomes a legally binding mediation decision and serves as valid evidence.⁴ Nevertheless, this does not imply the elimination of prosecution or sentencing, but rather that the mediation decision is valid evidence.

Regarding Indonesian regulations, restorative justice discourse rarely addresses horizontal conflicts, for example, those involving criminal acts on a broader scale. However, in fact, restorative justice discourse can also touch upon this area. Observing Law Number 7 of 2012 concerning the Handling of Social Conflicts, philosophically, it is rich in restorative justice elements. This law mandates that the Government and Regional Governments have the obligation to undertake post-conflict recovery efforts that are planned, integrated, sustainable, and measurable. These recovery efforts include reconciliation, rehabilitation, and reconstruction.⁵

According to Daly, restorative justice is a justice mechanism that can be defined as a contemporary approach to addressing crime, disputes, and conflicts within limited communities.⁶ This mechanism involves meetings between affected individuals, facilitated by impartial persons. These meetings can take place at various stages in the criminal process, including before arrest, diversion from court, pre-sentencing, post-sentencing, as well as for offenses or conflicts not reported to the police. Specific practices of restorative justice may vary depending on the context but are always guided by rules and procedures appropriate to the conditions of the crime, dispute, or conflict involved.⁷

For example, Wesley Cragg proposes that conflict resolution through reducing the use of violence is a basic function of the legal system. This approach aligns with law enforcement practices and limiting sanctions to those who can avoid violating the law.⁸ Cragg highlights that punishment and correction can also be understood as conflict resolution, a concept different from the traditional view of the purpose of punishment. Nevertheless, this approach is more in line with modern practices and opens space for significant sentencing reforms. The next challenge is clarifying the compatibility of this approach with traditional views on the necessity of punishment.⁹ Restorative justice serves as an important alternative in the debate between rehabilitation and retribution, a discourse present in several countries over recent decades. According to him, proponents of restorative justice advocate the use of restorative practices to address various levels of conflict, ranging from personal conflicts to larger social conflicts. Although initially associated with crime, restorative justice is also considered useful in handling various other types of conflicts. Its goal is to empower those involved in conflicts to participate in an inclusive process that enables them to reach agreements on how to repair the harm caused by the conflict.¹⁰

¹ Lihat Pasal 1 angka 5 Peraturan Pemerintah No. 44 tahun 2008 tentang Pemberian Kompensasi, Restitusi, dan Bantuan Kepada Saksi dan Korban

² Lihat Pasal 76 ayat (1) Undang-Undang Republik Indonesia Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia

³ *Ibid*, Pasal 89 ayat (4)

⁴ *Ibid*, lihat Pasal 96

⁵ Lihat Pasal 36 ayat (1) dan (2) Undang-Undang Republik Indonesia Nomor 7 Tahun 2012 Tentang Penanganan Konflik Sosial

⁶ Kathleen Daly, What is Restorative Justice? Fresh Answers to a Vexed Question, Victims & Offenders (Routledge)-Vol. 11, Iss: 1, pp 9-29

⁷ *Ibid*

⁸ Wesley Cragg, The Practice Of Punishment (Towards a theory of restorative justice), First published 1992 by Routledge, h. 165

⁹ *Ibid*

¹⁰ Amy Levad, Restorative Justice Theories and Practices of Moral Imagination, LFB Scholarly Publishing LLC El Paso 2012, h. 7-9

4. Conclusion and Recommendations

4.1 Conclusion

This study concludes, firstly, that the implementation of restorative justice in Indonesian legislation already has a clear legal basis, but there are several shortcomings that warrant attention in this paper. The focus of restorative justice discussed here is the regulation at the law level, which is specific to cases involving children in conflict with the law. On the other hand, the general regulation of restorative justice is governed at the level of implementing regulations without clear attribution in the laws themselves. The substance of restorative justice regulations, referring to the Child Justice System Law (SPPA), is still oriented toward the offender. From a constitutional perspective, the implementation of restorative justice offers a concept of resolving criminal cases by paying attention to and giving a greater role to the victim, granting the initiative right to submit a request for restorative justice resolution within the criminal procedural law. Besides the victim, the initiative to request case resolution through restorative justice can also be made by the victim's family, the offender, and offered by law enforcement officials with the victim's consent.

Secondly, the implementation of restorative justice in Indonesian legislation has a clear legal basis but still has several shortcomings that require attention in this paper. The restorative justice regulation discussed here is specifically for cases involving children in conflict with the law at the law level. Meanwhile, the general restorative justice regulation is managed at the implementing regulation level without clear attribution in the laws. The substance of restorative justice regulation, referring to the SPPA law, remains offender-oriented.

4.2 Recommendations

This study recommends the following: First, the concept of restorative justice must be centered on the victim, meaning that the philosophical foundation of the approach to resolving criminal acts should be based on restorative justice oriented toward the interests of the victim. Considering that the resolution of criminal acts through restorative justice is essentially aimed at restoring the situation to its original state, this inherently relates to the interests of the victim. Second, the concept of restorative justice is important to be regulated within the criminal procedural law at the legislative level. In other words, amending the Criminal Procedure Code (KUHP) is essential to integrate the resolution of criminal acts based on restorative justice.

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