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IMPLEMENTATION OF RESTORATIVE JUSTICE, THE INTENT OF PUNISHMENT, AND LEGAL CLARITY IN INDONESIA

FAUZIAH LUBIS

¹⁵ Faculty of Sharia and Law, Universitas Islam Negeri Sumatera Utara, Medan, Indonesia
fauziahlubis@uinsu.ac.id

Abstract—This study looks at the fairness of restorative justice, the goal of punishment, and the need of legal certainty. According to the study's findings, restorative justice is still only being applied theoretically. In this instance, it emphasizes that the formalistic, long-established ideas of justice that have arisen in society and are applied in Indonesian customary law assemblies serve as the foundation for the genuine aim of sentencing. In contrast, the notions of individual deterrence and general deterrence call for actions to be absolute in order to produce a deterrent impact. Afterward, the idea of reform or rehabilitation was further developed. The use of restorative justice emphasizes the recovery of victims' material losses as a result of the perpetrators' unlawful acts, both physically and psychologically. This is done through a consensus-building process involving the perpetrator, the victim, the perpetrator's family, and the victim's family, as well as, if necessary, the community and the appropriate authorities. With relation to legal norms and values, this research methodology is normative juridical along with theories, legal doctrine, jurisprudence, applicable rules and regulations, as well as publications pertinent to the research topic. According to the study's findings, restorative justice is a noble form of justice when instances of illegal behavior have happened. Therefore, repair or restoration is crucial if the victim is to be rehabilitated or healed from the suffering he has endured on a material, physical, or psychic level. To be clear, restorative justice does not apply to all crimes; rather, it only does so in circumstances involving crimes against children, minor offenses, women in conflict with the law, and drug-related offenses. In order to provide clarity, there should be a firmness if the offender does not want to make restitution even though it is deemed capable of doing so in terms of material capabilities. There also needs to be concrete sanctions so that restorative justice is not only limited to other options; the legal framework for it should be expanded to the Constitution.

Keywords: Legal Clarity, Sentencing Purpose, and Restorative Justice.

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INTRODUCTION

Indonesia's high rate of crime serves as an example of how law enforcement officers have failed to have a deterring effect on offenders (Adiesta, 2021). Likewise, at this period, neither the criminals nor the victims of crime consider the age of children or adults (Kim, E.M., 2020). There hasn't been a clear solution or good integration of stakeholders' efforts in crime prevention thus far (Allace, R., et.al., 2013). While the resolution of a lawsuit is a component of human rights, which calls for fairness and predictability in the law. Additionally, Indonesian criminal procedural and legal instruments have governed the formal steps that must be taken in order to resolve a criminal case. Unfortunately, people who are dressed in law enforcement uniforms frequently utilize this formal system in actuality as an oppressive tool (Amjad, 2019).

It is true that carrying out criminal law enforcement is a difficult task (Asadullah, 2012). Legal protection for victims is one instance of how problems of justice and human rights are neglected in criminal law enforcement (Braithwaite, 2021). Even though it is well recognized that a victim is someone who endures bodily and emotional harm as a result of another party acting in violation of their rights and with their own self-interest (Burns, J.C and Sinko, L., 2021). In many instances, it is

understandable that crime victims—who are essentially the people that suffer the most as a result of a crime—do not obtain the protection required by law (Edyono, 2021).

As the opinion expressed by Romli Atmasasmita noted in Law Number 8 of 1981 that the Criminal Procedure Code (KUHP), which emphasizes the rights of suspects, has as its primary role "protection of the dignity of the suspect or defendant."

Further explanation put forward is that only Chapter XIII of Articles 98-101 of the Criminal Procedure Code, which deals with the merging of compensation claims, addresses victim protection. However, it is believed that the arrangement has flaws in both its process and its substance. In actuality, merging compensation claim instances is also quite uncommon. Due to the victim's ignorance of their rights, the public prosecutor's failure to tell them of these rights, the legal advisor's unwillingness to be bothered, and the judge's failure to provide this process, this occurred. This makes the issue rather difficult.

In most cases, there are two parties involved in a crime: the criminal and the victim (Castillo, 2021). Although in actuality there are some crimes that happen without having a victim, such as gambling and drug misuse, the victims of these crimes are also the ones who commit them. Every criminal conduct must result in positive repercussions for the offender, specifically in the form of a court-issued sentence (Daye Gang et.al., 2021). The objective of the punishment is to, as much as is humanly feasible, return the victim to his pre-crime state or condition (Hodgson, J., 2022). As of now, the major punishment meted out to the offenders is incarceration. However, in essence, the neighborhood needs the situation to be as favorable as possible before a crime occurs (Ivo Aertsen, et.al, 2013). Even though the majority of allegations and complaints from the public about crime victims who are convicted and sentenced to prison are true, the criminal justice system can nevertheless be considered successful (Juhari, 2017).

In an administrative practice, statutory restrictions interact with social attitudes or conduct to produce the approach to the administration of criminal justice. The system incorporates the outputs of an interaction process that was planned logically and effectively to achieve certain objectives within the bounds of that process. For certain offenses that are not extraordinary crimes but disturb the peaceful functioning of society and the state, dissatisfaction with the formal judicial system that has been implemented thus far calls for the application of customary law or traditional justice (Karim, 2016). To promote the development of peace, tolerance for the diversity of viewpoints, paradigms, education, and social status is necessary. In fact, respecting the differences in every human being is a natural thing without having to create gaps in life in society and state, and it requires the active participation of the surrounding community (Karjoko, L. et. al., 2021). Law enforcement officials must therefore operate progressively, that is, by not applying normative law contextually but by circumventing the formal regulations of the Criminal Procedure Code and the substantive regulations of the Criminal Code as *lex generalis* and other norms as *lex specialist*. This serves as the context for the author's research.

Similar to the restorative justice system that is now in place in Indonesia (Lodi, 2022). By engaging in non-litigation peace efforts aimed at achieving a good resolution based on an agreement between the parties, restorative justice is a criminal law approach that contains noble/traditional values or it can be said to be a socio-cultural approach. As a result, punishment by providing deterrence and retribution, which can be detrimental to life in the future, can be minimized. The guiding principle of restorative justice is that victims who have suffered as a result of crime can be compensated, and there can be peace. Of course, this principle is not one-sided, impartial, or arbitrary, and it only sides with the truth in accordance with the relevant laws and regulations, while also taking equality of victims' rights to compensation and balance in all spheres of life into consideration. While the offender receives physical or psychological punishment in its application, the traumatic criminal act caused by the offender's activities is recovered through care for the victim.

1. Problem

Restorative justice is very important to be researched in the context of the application of justice in Indonesia. In order to achieve justice, it is necessary to pay attention to the objectives of sentencing and legal certainty for those who commit crime. Therefore, to overcome the problem of crime, a justice system is needed that is able to provide justice for the community, namely through restorative justice.

2. Research Method

This research methodology is normative juridical. The relationship between different forms of data is also explained, and the analysis is deductively inductively concluded in the form of a systematic narrative description. Secondary legal data is obtained from regulatory sources contained in the law.

As for empirical data, it is information obtained from primary legal materials, secondary legal materials, and tertiary legal materials in normative research as well as the results of interviews in the field. The focus of this research is to examine how legal concepts are put into practice, both through textual positive legal research and research on societal legal norms. The statutory approach and the case approach are the methods of approach that will be used. For getting primary data the interview with informants and professionals gets information to supplement the gaps in secondary data. Specifically, conducting interviews with informants and performing library research were the two methods used to acquire data for this study. Materials from secondary data are used as data collection tools in normative juridical research with the goal of gathering concepts, theories, and information as well as conceptual ideas from previous researchers in the form of legislation, scholarly works, journals, and other forms of secondary data.

3. Discussion

Fairness of Restorative Justice

Justice, expediency, and legal certainty are the three fundamental legal concepts. A good law is one that can integrate these three components for an individual's welfare as well as the welfare of the community, according to the legal foundation's perspective on the concept of justice. The benefits of the law's contents are in line with the goals it is intended to pursue, and legal certainty is described as a situation in which the law can serve as a rule that must be followed. This means that justice accords equal rights to everyone before the court (Lustick, 2021).

In essence, the application of restorative justice in a case is not aimed at punishing the perpetrators, but rather creating harmonization between community members and the components that make it up. First, when justice is established through the criminal mediation procedure, a talk between the offender and victim constitutes one of the key components of restorative justice (Maglione, G., 2021) and must also acknowledge guilt as a result of the crimes committed. Second, justice focuses on giving victims, offenders, families, and communities the tools they need to put an end to unlawful behavior by using awareness and conviction as the cornerstone of a better social environment (Miers, 2021). Law enforcement no longer conducts investigations, prosecutions, and trials in order to impose formalistic sentences (Murhula PBB and Tolla AD, 2020).

Third, justice that places a strong emphasis on recovering losses brought on by criminal acts; compensation includes giving the victim's property back or paying for the loss or damage sustained as well as giving back costs caused as a result of criminal, providing services, and protecting recovery rights (Marabessy, 2015). Fourth, restorative justice is an alternative technique of resolving criminal cases whose philosophical approach is intended to resolve conflicts by ameliorating the circumstances brought on by unlawful activities. Fifth, justice that is balanced with the development of the rapid, easy, and affordable justice principle. Sixth, relative justice, which is another name for restorative justice, is one of the ideas of punishment in the criminal judicial system that derives from societal principles of justice. The seventh type of justice is balanced justice, which takes into account the harmony of the rights and obligations of both the perpetrators and the victims. Eighth, justice that prioritizes victim justice according to individual preferences and interests rather than those set by the state.

In reality, retributive justice cannot be replaced by restorative justice or a humanist philosophy. Since the creation of the legislation, restorative justice has incorporated a humanist philosophy. It is a system as well as a judge's conscience when serving on a panel of judges. Third, by challenging the legitimacy of decisions and acting as a check on judges' consciences, the humanist approach is not a brand-new dimension of consideration that is introduced outside the criminal justice system. The law already states that the judge bases his or her choice on conscience. Considering human growth when it comes to criminal law has more advantages than using corporal punishment. Then, from a criminal standpoint, restorative justice can exist with humanist pressure. Because it involves all pertinent parties, considers victims' needs, acknowledges harm and violence, reintegrates pertinent parties into society, and motivates and encourages offenders to accept responsibility, restorative justice cannot be separated from the judicial process and must be integrated with retributive justice. A number of factors can be taken into account, including the fact that the completion of a good legal process is placed more on the quality aspect and does not give a quantity target at the operational level, but instead seeks solutions to the delay in completing the process, and places more emphasis on prevention than handling cases within the framework of the law enforcement function (Nikki D'Souza, 2021).

Besides Government Regulation Number 43 of 2017 and Regulation Number 7 of 2018 concerning Provision of Compensation, Restitution and Victims to Witnesses and Victims, it also contains special regulations governing the treatment of children. According to this law, victims are entitled to restitution in the form of compensation for lost property or income, losses attributable to suffering

that was directly caused by criminal acts, and/or payment for medical expenses or costs of psychiatric or medical care (Pristiwiyanto, 2020). In contrast to the idea of restorative justice, where the implementation of compensation can still be carried out without having to be based on a judge's decision that has legal force, there are weaknesses in restorative justice where it has not been determined. Restitution can only be implemented in the application of juvenile crime based on a judge's decision that has permanent legal force. Restitution has not turned into a mandatory criminal punishment and is still simply an option if the crime's perpetrator does not wish to pay the compensation.

The Use Of Legal Certainty In Restorative Justice

The principle of legal certainty, the law must be understandable to its subjects so that they can adapt their behavior to the laws in place and prevent the state from acting arbitrarily while wielding authority (Saefudin, and Nasirudin, 2022). Given that the goal of the law is to establish justice and order, efforts should be taken to effectively govern areas that are not already controlled. The key is to carefully consider the legal precepts associated with the proposed regulation. Additionally, it is vital to prioritize content rather than merely formality during implementation and to pay attention to the factor of efficiency (Suzuki, M and Jenkinz, T., 2022). Law that lacks certainty value will be meaningless and worthless. Legal certainty is necessary to carry out beneficial actions in society and to establish order.

Jan M. Otto claims that it demonstrates how legal certainty can be attained if the law that is enacted must be in accordance with the needs and problems of society. The rule of law that can produce legal certainty is one that is derived from and reflects the community's culture. Real legal certainty is what is referred to as such, and it calls for harmony between the state and the populace in terms of how they see and comprehend the legal system.

Legal clarity is important for handling criminal cases in connection to the application of restorative justice (Zulfa, A.E. (2020). This is a common practice when dealing with minor reasons in everyday crimes. As stated by Gustav Radbruch, with his combined theory, always "justice," priority "benefit," and finally "certainty," all types of serious, minor, serious, and non-serious crimes must still prioritize the law, taking into account the rights of a suspect, defendant, or convict by applying the principles of the "rule of law," and prioritizing the principle of "priority" (Muhaimin, 2019). The legislation appears to be so solid and perfect at first glance. However, this adage frequently makes it challenging to find justice within the letter of the law. Human values appear to be ignored by the law. Due to Indonesia's covert pursuit of legal certainty in law enforcement, justice in the law becomes constrained (Taylor, O.T and Bailey, M.K.T., 2021).

The Criminal Procedure Code in Indonesia regulates formal procedures to address the issue of material criminal law violations. However, formal legal procedure is frequently exploited as a purely oppressive tool, disregarding the values of justice, and even the nature of the law as a preventive measure often goes unconsidered. When the law may bring pleasure to crime victims, it incorporates assurance in restorative justice (Velez, M.G. (2021). For there to be a sense of justice and order, this concept of certainty must be present in every legal issue that is created. The legal framework of

restoration of justice is by looking at the extent of its application in the Supreme Court of the Republic Indonesia. The basis for its implementation is as follows:

1. Minor crime

Legal Basis:

- a. Article 310 of the Criminal Code (KUHP);
- b. Letter of the Directorate General of the General Judiciary Agency Number 301/DJU/HK01/3/2015 concerning Settlement of Minor Crimes;
- c. Decree of the Directorate General of General Judiciary Agency Number 1691/DJU/SK/PS.00/12/2020 dated 22 December 2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts;

It can, in theory, be used to impose penalties under Articles 364, 373, 379, 384, 407, and 482 of the Criminal Code with a maximum loss amount of Rp 2,500,000.00 (two million, five hundred thousand rupiahs), provided that the offense is not repeated.

2. Child case

Legal basis:

- a. Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare;
- b. Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System;
- c. Government Regulation Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children who are not yet 12 (Twelve) Years Old;
- d. Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System.

Basically, diversion is feasible within the parameters set forth by the law, and if the diversion is unsuccessful or fails to meet the standards for diversion, the judge seeks a ruling using a restorative justice method as governed by Articles 71 to 82 of the Law. Law No. 11 of 2012 of the Republic of Indonesia relating to the juvenile justice system.

3. Cases Involving Women in Legal Dispute (PBH)

Legal Basis:

- a. CEDAW Convention (Convention on The Elimination of All Forms of Discrimination Against Women) which has been ratified by Law of the Republic of Indonesia Number 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (Convention on the Elimination of All Forms of Discrimination Against Women);
- b. the ICCPR (International Covenant on Civil and Political Rights) convention which has been ratified by Law of the Republic of Indonesia Number 12 of 2005 concerning Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights);
- c. Law of the Republic of Indonesia Number 23 of 2004 concerning the Elimination of Domestic Violence (KDRT);
- d. Law of the Republic of Indonesia Number 21 of 2007 concerning Eradication of the Crime of Trafficking in Persons;
- e. Law of the Republic of Indonesia Number 31 of 2014 concerning Protection of Witnesses and Victims;
- f. RI Law Number 35 of 2014 concerning Child Protection;
- g. Government Regulation of the Republic of Indonesia Number 43 of 2017 concerning the Implementation of Restitution for Children Who Become Victims of Crimes;
- h. Government Regulation of the Republic of Indonesia Number 7 of 2018 concerning the Provision of Compensation, Restitution and Assistance to Witnesses and Victims;
- i. Regulation of the Supreme Court Number 3 of 2017 concerning Guidelines for Adjudicating Women's Cases Facing the Law,

As for its implementation, case examination is carried out, in essence the Judge is to consider gender equality and non-discrimination, by identifying the facts of the trial as follows:

- a) Inequality of social status between the litigants;
- b) Inequality of legal protection that affects access to justice;
- c) Discrimination;
- d) The psychological impact experienced by the victim;
- e) The victim's physical and psychological powerlessness;
- f) Power relations that make the victim/witness helpless;
- g) History of violence from the perpetrator against the victim/witness.

4. Narcotics case

Legal Basis:

- a. the Criminal Code;
- b. RI Law Number 35 of 2009 concerning Narcotics;
- c. Circular Letter 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;
- d. the Head of the National Narcotics Agency of the Republic of Indonesia Number 01/PB/MA/III/2014, Number 3 of 2014, Number 11 of 2014, Number Per005/A/JA/03/2014, Number 1 of 2014, Number Perber/01/III/2014/BNN concerning Handling Narcotics.

Restorative justice can essentially only be used in drug cases when the addict, abuser, victim, or narcotics dependent is treated, cared for, and recovered in a medical rehabilitation facility and/or a social rehabilitation facility (Walgrave et al (2019)). Legal certainty, as defined by Van Apeldoorn, might also indicate that it can be decided by the law in specific circumstances. Legal certainty ensures that the law is followed, that people who are entitled can exercise those rights in accordance with the law, and that decisions can be put into action. Likewise, legal certainty, in the words of Sudikno Mertokusumo, is a justifiable protection (seeking justice) against arbitrary actions, which implies that someone will be able to obtain what is expected under specific conditions.

To achieve legal certainty, the following elements must be supported the legal structure, the legal substance, and the legal culture (Lawrence M. Friedman, 2009). Where each of these elements must be interrelated and mutable (Willis, R. and Hoyle, C., 2019). The principle is the center of the

rule of law, but it is impossible to compare legal principles and legal norms since the former regulate and explain, while the latter serve as legal instructions. As a result, the former excludes affirmative law and serves only as a general guide. and, of course, it cannot be used to settle legal problems directly (Sulistiyawan, 2019).

Laws and regulations can only be overruled by judges if their application will result in violations of the fundamentals of justice that The legal system in Indonesia is positivist, where regulations rank first in the implementation and enforcement of laws, so they are not in line with social reality of the application of customary law and religious law in a particular area. Law is seen as an explicit byproduct of a specific legitimate source of political authority in the positivist stream of thought. The law takes the form of clear directives that positively ensure its certainty in light of the standards themselves. Legal positivism's existence demonstrates how human action creates and destroys law, making it independent of morality and the norm system as a whole. To put it another way, law exists independently of morality (Sulistiyawan, 2019).

According to Herbert Lionel Adolphus (1961), legal positivism has five traits, namely:

1. Law is a human-given commandment.
2. Neither the applicable law (law as it is) nor the idealized law have an unbreakable bond with morality (law as it ought to be).
3. It's critical to distinguish between and analyze the legal notion from:
 - a. Researching the origins of law or its causes historically.
 - b. Sociological research on how the law interacts with other social phenomena, legal inquiries based on morality, social objectives, legal purposes, and so forth..
4. The legal system is a closed logical system, meaning that it can derive the correct legal provisions from predetermined legal laws using logic (logical means), without taking social, political, or other aims into account. moral principles, etc.
5. Logic-based arguments and evidence cannot be used to support or refute considerations of decency because information in facts can be confirmed or disproven (non cognitivism in ethics).

Legal certainty is the ultimate goal of legal positivism, according to Austin (J.L., 1962), and in order to achieve it, law and morality must be separated in order to create a logical, unchanging, and closed system (Close logical system). the foundation for the legal certainty principle, which is embodied in positive law through legislation. On the basis of legal positivism, the following conclusion can be made regarding the existence of legal certainty:

1. The legal system of a nation is effective not because it is rooted in social life or the national soul, nor is it founded on natural law, but rather because it receives its positive form from the appropriate authorities.
2. Law must be detached from its material form in order to be understood merely in terms of its formal form.
3. Although legal substance is acknowledged to exist, it is not relevant to legal science since it could compromise the discipline's scientific integrity.

The purpose of providing clarity to positive law, where positivistic law requires regularity and certainty to promote the correct and efficient operation of the legal system, is the relationship between the principle of legal certainty and legal positivism thinking. This may definitely be accomplished in order to safeguard the general welfare, individual interests, serve as the primary force behind the establishment of law in society, maintain public confidence in the government, and maintain the legitimacy of the ruler in the eyes of the populace.

In accordance with Law No. 12 of 2011 Concerning the Formation of Legislation, which governs the process of creating laws and regulations, Indonesia is a member of the Continental European legal system. Regulations must be created based on the criteria listed below;

1. The philosophical foundation (*Filosofische grondslag*), which derives from Pancasila and the 1945 Constitution, is a factor that shows how the laws are created while taking into account the way of life, awareness, and legal ideals, as well as the national philosophy and inner atmosphere of Indonesia.
2. Sociological foundation, which talks about the laws created to satisfy human requirements.
3. The juridical basis (*yuridische grondslag*), regulations are developed to overcome legal issues, legal voids, taking into consideration the current norms, which will be altered or canceled in order to guarantee legal clarity and a sense of fairness. The third point deals with resolving legal issues and voids while taking into account current legal regulations or favorable legal regulations (current legislation), which will be amended. 22 December 2020: 1691/DJU/SK/PS.00.

The protection of criminal victims is a component of restorative justice as well because the victim's loss must be taken into account first. This loss may include not only financial loss or physical

suffering but also psychological trauma in the form of anxiety, cynicism, depression, and other symptoms (Zulfa, A.E. (2011)). Even though it is true that victims' losses are overlooked, court practice up to this point frequently ignores the interests of victims, including the loss and suffering they endured as a result of the criminal acts they witnessed.

CONCLUSION

Originally focused at law enforcement as a result of legal positivism. It is a new paradigm for the purpose of punishment that analyzes the sources of law from legal values obtained from local wisdom values in society. The goal is to bring victims, offenders, and members of the community together for discussion and consensus. This process is guided by law enforcement officials from the police, attorney, and court levels. Especially in certain situations, like instances involving minors, the case file no longer needs to be submitted to the prosecutor's office if the Restorative Justice agreement has been struck at the police level. Similar cases include those involving minor offenses (*Tipiring*) and ladies who have run afoul of the law (PBH). A sign of the resocialization of the offender's obligation as a citizen is the restoration in an effort to implement reparations for victims of crime in the context of the relationship between the victim and the perpetrator. In addition, it is also based on the admirable principles of justice that exist in society. Legal rules must be applied in the settlement of criminal cases by taking into account the rights of suspects, defendants or convicts. It is necessary for the implementation of restorative justice.

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