



MEASURING THE CONCEPT OF RESTORATION IN CRIMINAL JUSTICE SYSTEM

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ABSTRACT

Regarding the restoration concept such as restorative justice, alternative dispute resolution, circle sentencing, and *ishlah*, Indonesia's Criminal Justice System is not yet familiar with this concept. Generally, the concept of restoration is not known in Criminal Procedure Law (KUHP) which adheres to the principle of legality. Based on this situation, it is interesting to study the concept of restoration, especially the functionalization of restoration concepts and the readiness of the Indonesian Criminal Justice System to implement the restoration concept. This research used a qualitative research method that discusses the concept and implications of restoration associated with the applicable rules or principles. The results show that the restoration concept, such as alternative dispute resolution, circle sentencing, and *ishlah*, is a concept that prioritizes the interests of the parties involved, namely the principle of win-win solution and recovery. This concept has long been practiced by the community, especially indigenous peoples and in the Criminal Justice System. It has been functionalized to resolve criminal cases that meet the requirements of both the level of investigation and prosecution as a way of resolving criminal cases. The implications of these concepts on the Indonesian Criminal Justice System are deviations from the principle of legality in the KUHP. However, these implications are logically acceptable to the community in the framework of equitable and definite legal manifestations. It is recommended that the mechanism for implementing the restoration concept, such as alternative dispute resolution, circle sentencing, *ishlah*, can be included in the Draft Criminal Procedure Code (RKUHP). Thus, in the implementation, the restoration concept can be juridically and formally accepted as a principle of the Indonesian Criminal Justice System.

Keywords: concept; criminal; functionalization; implications; restoration

INTRODUCTION

Background

Basically, the Indonesian criminal law system adheres the principle of legality. Consequently, it requires the settlement of every criminal case through the formal Criminal Justice System to be formed based on the law. In this sense, the Indonesian Criminal Justice System does not recognize

the existence of *Afdoennig buiten process*.¹ Such concepts are known only in civil matters.

The concept of law enforcement that emphasizes legal certainty alone is no longer able to control crimes that occur and often injure the sense of justice. The facts show that trivial cases that are not qualified for trial

¹ *Afdoenig buiten process* adalah Penyelesaian perkara diluar pengadilan

being brought to court for trial. As in the case of Samirin's grandmother being convicted of collecting the remaining rubber tree sap in a plantation owned by PT Bridgestone, she was fined around Rp. 17,000 and sentenced to 2 months and 4 days by the Simalungun Court. There is a case of Grandma Saulina who was sentenced to 1 month and 14 days by a judge at the Balige District Court, for cutting down a durian tree with a diameter of 5 inches belonging to her relatives with the aim of, building a tomb for her ancestors. In addition, there is a case of Couple Anjol Hasim and Jamilu Nani. They took 6 bamboo sticks. The last case is from Grandma Minah who was accused of stealing 3 pieces of cocoa from PT RSA worth Rp 2.000.²

The cases above are described juridically. The judicial process itself is correct because it has carried out the orders of the law. However, in conscience, it hurts the sense of justice and the expediency of the law in society. It has indirectly depicted that law is sharpened only against weak and uninformed people. These cases have shown the death of the purpose of the law in the process of enforcing the law itself. It is because law enforcement only considers the legal side and does not pay attention to the law that lives in society." Therefore, the purpose of punishment that prioritizes retaliation alone is not able to restore balance in society. Prisons are getting fuller as crimes continue to rise. "Jimly Asshiddiqie in the acknowledgement of Didin S. Damanhuri's book, *Corruption, Bureaucratic Reform and the Future of the Indonesian Economy* said that until now there is still a tendency that all problems can only be solved by law, even though the new law is

2 Luthfia Ayu Azanella, *Selain Kakek Samirin, Ini 4 Kasus Hukum Yang Sempat Menimpa Lansia*, 2020, <https://www.kompas.com/tren/read/2020/01/18/213315465/selain-kakek-samirin-ini-4-kasus-hukum-yang-sempat-menimpa-lansia?page=all>. Diakses pada tanggal 16 Juni 2022 jam 10.51 Wib

meaningful if it is carried out and enforced in practice in a real way.³

In the development of the Indonesian Criminal Justice System, and also as a form of response to the law that lives in society, the concept of resolving cases through a recovery approach such as the concept of restorative justice, alternative dispute resolution, circle sentencing and *Ishlah* have become an alternative to solve criminal cases. However, the implementation mechanism has not been regulated in formal criminal law.

For the community, concept of diversion and restorative justice is actually not new or unfamiliar. It is because, so far with the heritage of indigenous / cultural diversity, local wisdom has become the problem-solving mechanism that can be relied on to deal with children in conflict with the law who commit acts that violate norms, or are suspected of violating applicable legal provisions.⁴

The concept of restorative justice is not a new concept. Its existence may already be as old as the criminal law itself. Efforts to resolve cases with the concept of restorative justice are actually placed as the main mechanism for handling criminal acts.⁵

According to Mark Levin as quoted by Johlar Purba, "The approach that was once declared as obsolete, ancient and traditional is now actually stated as a progressive approach".⁶

As described above, on the one hand, the concept of restorative justice, alternative dispute resolution, circle sentencing, and *Ishlah* is a concept outside the provisions

3 Fuzi Narindrani, "Penyelesaian Korupsi Dengan Menggunakan Restoratif Justice," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (2020): 605.

4 Rizanizarli, "Penanganan Anak Yang Berkonflik Dengan Hukum Secara Diversi Dan Restorative Justice," *Majalah Pledoi, Edisi II*, 2010.

5 Ibid.

6 Johlnlar Purba, *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restorative Justice* (Jakarta: Jala Permata Aksara, 2017).

of the Indonesian Criminal Justice System. On the other hand, these concepts are considered capable of providing real benefits and justice for the community. Therefore, it is interesting to review and discuss how actually the existence of function and the impact of the concept of restoration (restorative justice, alternative dispute resolution, circle sentencing, and *Ishlah*) in the development of the Indonesian Criminal Justice System.

Problem Formulation

The formulation of the problem in this study is how to function the concept of restoration (restorative justice, alternative dispute resolution, circle sentencing and *Ishlah*) in the development of the Indonesian Criminal Justice System and how juridical implications for the application of these concepts to the Criminal Justice System.

Purpose

To explain the existence of the function of the restorative concept such as restorative justice, alternative dispute resolution, circle sentencing and *Ishlah* and their implications for the development of the Criminal Justice System in Indonesia and it is expected that this study can be one of the references for the renewal of the Indonesian Criminal Justice System that accommodates the laws that live in society.

Research Method

1. Approach

The research method used in this study is normative research. Normative legal research is legal research that puts the law as a building system of norms. The system of norms which is built mainly discusses the principles, norms, rules of laws and regulations, court decisions, agreements, and doctrines (beliefs).⁷

Since this research is a normative legal principle, the approach used is a conceptual approach. The concept approach is carried out to examine how the concept of the necessity of achieving goals in modern law, and also the approach of legislation.

2. Data Collection Methods

The data used in this study is secondary data obtained by conducting literature research (library research) to obtain conceptions of theories as well as doctrines, opinions or conceptual thoughts from materials in the form of books, laws and regulations and scientific work that has to do with the related research.

3. Data Analysis Techniques

The data analysis method in this study is prescriptive. It means all data that have been obtained through the literature study (library research) then will be analyzed by providing views, concepts, then providing conclusions that answer the problems raised.

DISCUSSION

The existence of the concept of restoration (restorative justice, alternative dispute resolution, circle sentencing, and *Ishlah*) and its functions in the Indonesian Criminal Justice System

In developed countries, restorative justice is no longer a discourse of academics or criminologists. "In some countries in Europe, America, and Australia, restorative justice has been implemented in conventional judicial processes both from the investigation stage to the trial."⁸

Criminal cases which have been resolved through a restorative justice approach put forward different paradigms and approaches in carrying out the process

⁷ Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif Dan Empiris* (Yogyakarta: Pustaka Pelajar, 2017).

⁸ Eriyanto Wahid, *Keadilan Restoratif Dan Peradilan Konvensional Dalam Hukum Pidana*, ed. Universitas Trisaksi (Jakarta, 2009).

of resolving criminal cases.⁹ In the restorative justice paradigm, victims in a criminal case are not the state as in the current Criminal Justice System. Therefore, the occurrence of a criminal act has obliged the parties involved to correct and eliminate the consequences of a criminal act. Furthermore, justice is a process of finding solutions to the problems encountered. It means the involvement of all related parties including victims, perpetrators, and the community is important in order to find solutions to repair, to recover, and to guarantee for the problem to be solved.

Restorative justice is a mindset concept that responds to the development of the existing Criminal Justice System. It emphasizes on the needs of the interests of the community and victims who feel excluded due to the implementation of the current Criminal Justice System.¹⁰

Restorative justice has now become a trending and popular term, especially among academics, law enforcement and legal practitioners as a paradigm or approach to punish in dealing with criminal acts or crimes, both committed by children and adults. "As a paradigm or approach to punishment, restorative justice is expected to be one of the ways or alternatives to deal with criminal acts or crimes that prioritize the restoration of the balance of relationships between the perpetrator of the crime and the victim."¹¹

There are at least five things that are emphasized in the concept of restorative justice. First, restorative justice emphasizes efforts to encourage the perpetrator to think about and provide solutions (responsible) for

the crimes he has committed to the victim. Second, the first party to think about when a crime occurs is the victim because the victim directly feels the consequences of the crime. Third, the perpetrator and the victim of the crime can then sit down together to discuss the steps that can be taken to recover the problem that occurred (*restitutio in integrum*).¹² Fourth, the state or government must ensure that the recovery process for victims proceeds according to mutual agreement between the perpetrator and the victim so as not to cause a protracted conflict. Fifth, society is an inseparable part in the implementation of restorative justice between the perpetrator and the victim. The community will play an important role in encouraging and supporting problem solving by emphasizing the recovery or positive improvement of criminal acts committed by the perpetrator.¹²

The fulfillment of the five things above, for the community is considered as a real manifestation of justice and the real benefits are felt. So, the concept of restorative justice exists to be excellent in the renewal of criminal law.

The ultimate goal of the restorative justice concept is to reduce the number of prisoners, abolish the stigma/stamp and return the perpetrator of the crime to a normal human being, the perpetrator of the crime can realize his wrong doing so as not to repeat his actions, and reduce the workload of the police, prosecutors, detention centers, courts, and prisons, save state finances by not causing resentment because the perpetrator has been forgiven by the victim, the victim quickly gets compensation and empowering communities to tackle crime.¹³

9 Purba, *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restorative Justice*.

10 Ibid.

11 Ulang Mangun Sosiawan, "Perspektif Restorative Justice Sebagai Wujud Perlindungan Anak Yang Berhadapan Dengan Hukum," *Jurnal Penelitian Hukum De Jure* 16, no. 4 (2016): 425-438, file:///C:/Users/Bimby/Downloads/400-2712-1-PB.pdf.

12 Hariman Satria, "Restorative Justice : Paradigma Baru Peradilan Pidana," *Media Hukum* 25, no. 1 (2018): 111-123.

13 Rr. Susana Andi Meyrina, "RESTORATIVE JUSTICE DALAM PERADILAN ANAK BERDASARKAN UNDANG-UNDANG NO.11 TAHUN 2012," *Jurnal Penelitian Hukum DE JURE*

Therefore, in the view of restorative justice, criminalizing or retaliating against perpetrators is not the main thing, but to grow their sense of responsibility to make amends and restore the balance that have been violated in the community, along with restoring the victims' rights on the occurrence of a criminal case. Accordingly, the main objective of restorative justice is the restoration of the relationship between the perpetrators and the victims, and the avoidance of negative stigma of retaliation."

In Canada, this restorative justice is packaged in the term of circle sentencing. Circle sentencing is a punishment and restoration in the consequence of crimes towards Indian people. This pattern was adopted by the judge and community in Yukon region and other communities in the northern Canada in 1991. Subsequently, circle sentencing spread to Saskatchewan and Manitoba, then extended to the United States in 1996 with the pilot project in Minnesota. Circle sentencing consisting of police officers, lawyers, judges, victims, perpetrators, and representatives of the people is aimed to reach the consensus of peaceful settlement of cases.¹⁴

The purposes of Circle sentencing are as follows:

1. To offer restoration to all affected parties.
2. To give "opportunity for the perpetrators to make amends.
3. To empower the victims, people, families, and perpetrators by allowing them to speak and be responsible collectively in finding a constructive settlement.
4. To address the underlying causes of criminal behavior.
5. To build a sense of community and its capacity to resolve conflicts.

19, no. 3 (2019): 339–348.

14 Ali Abubakar, "Urgensi Penyelesaian Kasus Pidana Dengan Hukum Adat," *MADANIA XVIII* (2014).

6. To offer and share the values of the community.¹⁵

Overall, circle sentencing is a vessel to find peaceful settlements of criminal cases. The actors involved in this units consisting of law enforcement officers, perpetrators, victims and other stakeholders.

Furthermore, the ADR (Alternative Dispute Resolution) Concept emphasizes the consensus settlement of disputes that has been carried out by the community for a long time, It essentially emphasizes consensus and democracy, kinship, peace and other efforts. ADR attempts special appeal due to the harmony with the traditional social culture system rooted in consensus and democracy. Philip D. Bostwick stated "that ADR is a set of legal practices and techniques aimed at:¹⁶

- a. Allowing legal disputes to be settled out of court for the benefit or advance of the disputing parties;
- b. Reducing costs or delays if the disputes are settled through conventional litigation, preventing legal disputes from being brought to court."

ADR has several forms as stated below:¹⁷

- a. Negotiation¹⁸
Negotiation "is a means for the disputing parties to perform settlement without the involvement of an unauthorized third party (mediation) nor an authorized third party (arbitration) to make decisions.

15 https://www.ncjrs.gov/html/ojjdp/2001_2_1/page4.html diakses pada Tanggal 16 September 2021

16 Eva Achjani Zulfa, *Keadilan Restoratif Di Indonesia* (Jakarta: Universitas Indonesia, 2009).

17 R F Saragih, "Fungsionalisasi ADR Dan Penyelesaian Sengketa Lingkungan Hidup," *Jurnal Hukum IUS QUIA IUSTUM* 7, no. 13 (2000): 138–147.

18 Zairin Harahap, *ADR Sebagai Alternatif Penyelesaian Sengketa Lingkungan Disampaikan Dalam Seminar Industrialisasi Dan Dampaknya Terhadap Lingkungan Hidup. Diseenggarakan Oleh LOKTIKX, KN Kimia-FMIPAUGM* (Yogyakarta, 1996).

b. Conciliation

The term Conciliation refers to the word peace in resolving a matter or a problem which commonly has negative connotation which simplifies the resolving process by penetrating the ways outside the procedure set by giving away amount of money to the involving parties in the process.¹⁹ The main requirement to implement conciliation is by early realizing the parties' rights and obligations, and having empathy towards each other's disputing issues.

c. Mediation

This mechanism of environmental dispute settlement has been applied in developed industrial countries, such as America, Canada, and Japan. According to Grenville-Wood, this method is notably described as a dispute settlement process by the assistance of a neutral third party in order to negotiate the dispute settlement. By applying this method, the parties work to find a mediator representative or a team by implementing a way of finding a lawyer that can be accepted by all parties.²⁰ "As the principle in this mediation method, the mediators support the parties to reach a deal in accordance to the need and based on the sense of justice. The mediator is unauthorized to intervene to make a decision and decide the final outcome of the deal because it belongs to the disputing parties."²¹

What is important in mediation is the

willingness of the disputing parties to negotiate. Thus, the parties are acknowledged about their rights and obligations.

d. Arbitration

This arbitration model is a mechanism by involving a neutral third party to resolve a conflict. The third party is given the authority as a judge to set and decide. Furthermore, the decision taken is final and binding.²²

Judging from its existence, ADR is a concept of resolving a dispute through non-litigation/outside formal courts. The parties involved find their own way out to solve the problem on the principle of mutual benefit, whether with the assistance of a third party or not."

In addition to the three concepts above, Islam has a concept known as *ishlah*. *Ishlah* is a dispute resolution method that is highly recommended to be implemented in settling disputes. *Ishlah* can be described as a peaceful dispute resolution which includes various settlement methods such as negotiation and mediation.²³

In terms, *ishlah* can be interpreted as a commendable act in relation to human behavior. Therefore, in Islamic terminology in general, *ishlah* can be interpreted as an activity that is eager to bring a change from a bad situation to a good one.²⁴

Then, *ishlah* concept is a fully conscious decision taken by the victim and perpetrator to achieve best means according to their belief regarding the crime that happened. *Ishlah* is a prerogative right of victim or the

19 Marsud Triatmodjo, *Allematif Penyelesaian Sengketa Lingkungan (Industrialisasi Masyarakat.*" Disampaikan Dalam Seminar Industrialisasi Dan Dampaknya Terhadap Lingkungan Hidup. Diseenggarakan Oleh LOKTIKX, KN Kimia-FMIPAUGM (Yogyakarta, 1996).

20 Koesnadi Hardjosoemantri, *Hukum Tata Lingkungan, Ed. Keenam. Cet Kesebelas* (Yogyakarta: Gajah Mada University Press, 1994).

21 Ahmad M. Ramli, *Tanggapan Atas Rancangan Undang-Undang Tentang Penyelesaian Sengketa*" Makalah Disampaikan Pada Seminar Sosfa/Zsas/AfasRUUAPS. Diseenggarakan Oleh Departemen Kehakiman RI (Jakarta, 1999).

22 Saragih, "Fungsionalisasi ADR Dan Penyelesaian Sengketa Lingkungan Hidup."

23 <https://law.ui.ac.id/v3/mediasi-sebagai-upaya-mewujudkan-islam-dalam-penyelesaian-sengketa-perbankan-syariah/> diakses pada tanggal 14 September 2021

24 Adam Rohili, "Kedudukan Islam Dalam Menyelesaikan Tindak Pidana Menurut Perspektif Hukum Positif Dan Hukum Pidana Islam," □□□□ □□□□□□□□ □□□□□□, 2018.

heir, with voluntary principle, in which both parties agree freely toward *ishlah*.²⁵ *Ishlah* happened due to the perspective shift of the victim when dealing with an occurring event. In that case, it implies that it all depends on the victim's wish.²⁶

Thus, it can be concluded that *ishlah* is a means that parties can take to reach agreement, in line with restorative justice, alternative dispute, and circle sentencing concept. Yet, what has become an imperative point is that *ishlah* is a prerogative's right from the victims or their heir.

In the development of the Indonesian Criminal Justice System, the concept of restoration (restorative justice, alternative dispute, circle sentencing and *ishlah*) has been functionalized in the settlement of criminal cases. One of them is the recognition of customary law in the settlement of criminal cases, as in Qanun Number 9 of 2008 concerning Fostering Indigenous Life and Customs. In article 13 it is explained that disputes that can be resolved through customary courts, includes:

1. domestic dispute;
2. dispute between families related to Faraidh;
3. dispute between citizens;
4. lewd seclusion;
5. dispute over property rights;
6. theft in family (minor theft);
7. dispute over common property,
8. petty theft;
9. cattle theft;
10. violation of custom regarding livestock, agriculture, and forest;
11. dispute at sea;
12. dispute in market;
13. minor abuse;

14. forest fire (on a small scale to the detriment of indigenous communities)
15. harassment, slander, sedition, and defamation;
16. environmental pollution (mild scale);
17. threatening and threat (depending on the type of threat);
18. other disputes that violate custom and tradition.²⁷

Qanun explains that several criminal cases can be resolved through customary institutions with win-win solution principle and the decision of customary institution is final and binding.

Issues related to children have been resolved by traditional leaders with a customary approach that exists and applies in the community of an area or place as local wisdom, as well as community leaders trying to solve it using a family approach known as *ishlah* (familial discussion).²⁸ In Law Number 11 of 2012 concerning the Juvenile Justice System regarding the settlement of cases of children in conflict with the law through diversion.²⁹

Diversion mechanism offered by Law No. 11 of 2012 about Juvenile Justice System is an adopted concept of *restorative justice, alternative dispute resolution, circle sentencing, ishlah* in islam.

Article 7 states:

Diversion is an obligation of law enforcement at all levels of criminal cases settlement, and diversion applies if a crime occurs under these situations:

- a. Charged with imprisonment under 7 (seven) years;

25 Lembaga Studi and D A N Advokasi, "Monitoring Pengadilan Ham Ad Hoc Tanjung Priok," no. 31 (n.d.): 1-12.

26 Annisa Rahmi Faisal, *Kedudukan Ishlah Dalam Menyelesaikan Tindak Pidana Menurut Perspektif Hukum Positif Dan Hukum Pidana Islam* (Jakarta: UIN Syarif Hidayatullah, 2015).

27 Asmadi Syam, "Implikasi Yuridis Penghentian Penuntutan Berdasarkan Keadilan Restoratif Dalam Perspektif Sistem Peradilan Pidana" (Syiah Kuala, 2022).

28 Rizanizarli, "Penanganan Anak Yang Berkonflik Dengan Hukum Secara Diversi Dan Restorative Justice."

29 Pengalihan penyelesaian perkara anak dari proses peradilan pidana ke proses di luar peradilan pidana

b. Not a repeated offense.

This diversion method has several aims. They include reaching an agreement between victim and children, resolving cases of children outside the judicial process, preventing children from the deprivation of their independence, encouraging community to participate, and instilling responsibility in children. Thus, diversion is not an attempt to reaching agreement between children in conflict with the law and the victims or their families but rather as a form of punishment for children in conflict with the law in a non-formal way.³⁰

Furthermore, as a manifestation of law enforcement and justice policies and in order to respond to the demands of fair law enforcement, the Attorney General of the Republic of Indonesia has issued the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. In the prosecutor's regulation, it is known that there is an out-of-court settlement (*Afdoening Buiten Process*).

Based on Article 3 section (2) of the Regulation of the Prosecutor of the Republic of Indonesia Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice, it is stated that the public prosecutor has the authority to close cases in the interest of law if:

- a. the defendant dies;
- b. expiration of criminal prosecution;
- c. there has been a court decision that has a permanent legal force against a person of the same name (*Nebis in idem*);
- d. the complaint for a criminal offense is withdrawn;
- e. or there has been a settlement of the case out of court (*Afdoening buiten*

process).

Furthermore, in Article 5, it is stated that:

- (1) Criminal cases may be closed in the interest of law and the prosecution is terminated on the basis of restorative justice if the following conditions are met:
 - a. The suspect has committed a crime for the first time;
 - b. Criminal acts are only charged with fine or imprisonment not more than 5 (five) years; and
 - c. Criminal acts are carried out with the value of the evidence or the values of loss caused as a result of the crime of not more than Rp. 2.500.000,00 (two million five hundred thousand rupiah).
- (2) For criminal acts related to property, in the event that there are criteria or cases of a casuistic nature, which according to the public prosecutor's consideration with the approval of the head of branch of the district attorney or the head of the district attorney's office, prosecution can be discontinued "based on the restorative justice. It is carried out with due observance of the conditions as referred in section (1) letter a accompanied by either letter b or letter c;
- (3) For criminal acts committed against people, bodies, lives, and independence of people, the provisions as referred in section (1) letter c may be excluded.
- (4) In the event that a criminal act is committed due to negligence, the provisions in section (1) letter b and letter c may be excluded.

Then, at the investigation stage based on the Regulation of the Indonesian National Police Number 9 of 2021 concerning the Handling of Crimes Based on Restorative Justice, the investigator is justified to stop the investigation of the case if it meets the requirements and is resolved through restorative justice. "Cases can be resolved through restorative justice if they meet the

30 Azwad Rachmat Hambali, "Penerapan Diversi Terhadap Anak Yang Berhadapan Dengan Hukum Dalam Sistem Peradilan Pidana," *Jurnal Ilmiah Kebijakan Hukum* 13, no. 1 (2019): 15.

requirements, based on Article 5 of material requirement as referred in Article 4 letter a, which include:

- a. does not cause unrest and/or rejection from the public;
- b. does not result in social conflict;
- c. does not have the potential to divide the nation;
- d. not radicalistic and separatist;
- e. perpetrator is not a repeat offender of crime based on court decision; and
- f. not a crime against terrorism, a crime against security, a crime against corruption, and a crime against people's lives.

Article 6 section (1)

The formal requirements as referred in article 4 letter b include:

- a. agreement from both parties, except for drug related crime;
- b. fulfillment of the rights of victim and responsibilities of perpetrator, except for drug related crime.

The functionalization of the restoration concepts (Restorative Justice, Alternative Dispute Resolution, Circle Sentencing, and Ishlah) described above has its appeal in the development of law and justice. The Indonesian community has practiced this concept for a long time, especially indigenous people. It is used as a solution to solve criminal cases. For the community, the settlement of a case must be able to provide equal justice, and the speed of the process is sometimes hard to obtain through the current Criminal Justice System. Furthermore, the functionalization of the restoration concept emphasizes resolving cases of children in conflict with the law, and for specific matters that meet the requirements and do not have a huge impact or anxiety and or not rejected by the community."

Implications of the Restoration Concept (Restorative Justice, Alternative Dispute Resolution, Circle Sentencing, and Ishlah) for the Indonesian Criminal Justice System

Talking about implications, of course, it discusses the impact or consequences of some of the concepts above on the legal system. In the Indonesian context, which adheres to the principle of legality and juridically in the Criminal Justice System, the above concept is not the main issue in resolving a criminal case. The provisions require that the settlement of criminal cases must go through a formal court that has been established based on regulation and the procedural law that has been determined until a person is found guilty or not through a court decision based on valid evidence.

In its development, it turns out that we cannot rule out the concepts above. The concept has also developed to be functional in the Criminal Justice System because law enforcement does not only consider aspects of certainty but what is more crucial is justice and the benefits of the law in society.

In his book, Johnlar Purba quotes John Rawls: "Everyone may have different opinions about it because the point of view can be from various points of view, but the most important thing is in the understanding on the concept of justice, the balance between rights and obligations." Furthermore, justice must be beneficial for the troubled or dispute party. Regarding justice, John Rawls stated, the main subject of the justice system is the basic structure of society. The basic structure is a large institution that manages the system of social cooperation, and this cooperation system then regulates the arrangement of rights and obligations and the distribution of the resulting benefits.³¹ One of the principles of justice is that everyone involved in this

31 Purba, *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restorative Justice*.

social cooperation must be free, rational, and equal.

In the author's opinion, the meaning of justice as described by John Rawls's approaches (*restorative justice, alternative dispute resolution, circle sentencing, and ishlah*), is a win-win solution and mutual benefit.

The model of the legal approach with expediency is in line with the concepts of restoration based on the principle of peace and emphasizes the restoration back to its original state due to conflicts caused by occurred crimes/criminal cases.

Law, especially criminal law, is designed to maintain order as well as to protect public and private interests. The community determines that some formal control system should guard the compelling interests. Therefore, the law must legally give the state power to enforce it. Law is a formal system of social control, which may be applied when other forms of social control are not effective.³² Criminal justice is not only seen as a crime prevention system but also as a social problem that is equal to the crime itself. Implementation of criminal sanctions needs to connect to the human development policies that shape Indonesian people. Implementation of criminal sanctions imposed on violators must follow civilized human values.³³

Muladi states that the aim of sentencing should have proven beneficial consequences and that the retributivist states that justice is achievable only if the theological goals carry out the principles of justice.³⁴

Settlement of criminal cases is done by

32 Muhaimin, "Restoratif Justice Dalam Penyelesaian Tindak Pidana Ringan," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019): 185.

33 Ibid.

34 Putu Eva Ditayani Antari, "Pemenuhan Hak Anak Yang Mengalami Kekerasan Seksual Berbasis Restorative Justice Pada Masyarakat Tenganan Pegringsingan, Karangasem, Bali," *Jurnal HAM* 12, no. 1 (2021): 75.

prioritizing restoration emphasizes recovery "back to its original state and balance of protection and interests of victims and perpetrators of criminal acts that are not oriented towards revenge. "It is a legal requirement of society and a mechanism that must be built in reforming the Criminal Justice System.

Restorative justice is also a new framework of thinking used in responding to a crime for law enforcement and legal workers in Indonesia.

In the *Explanatory Memorandum to the Council of Europe Recommendation on Mediation in Penal Matters, Recommendation No. R (99) 19 adopted by the Committee of Ministers of the Council of Frolic Oil in September 1999*, criminal mediation is defined as a process in which victims and perpetrators of crimes are voluntarily participating in the problem solving resulting from criminal acts committed by the perpetrator by involving third parties or mediator.³⁵

The development of criminal mediation is influenced by various factors as follows; crime rates and reactions through the Criminal Justice System, progress of dispute resolution, public acceptance of restoration values, the movement for victim protection, and political approaches to crime prevention.³⁶

From several descriptions in the development of criminal law above, it turns out that the restoration concept has been recognized and functionalized by law enforcement officers in Indonesia, yet its existence is still very partial and limited. Regarding the existence of the restoration concept in the Indonesian criminal law system, its regulation is still at the regional regulations

35 Fuzi Narindrani, "Penyelesaian Korupsi Dengan Menggunakan Restoratif Justice."

36 Undang Mangapol, *Penerapan Restorative Justice Dalam Proses Peradilan Pidana Indonesia*, Unisba. (Bandung, 2012).

level and internal rules of law enforcement agencies. Except for cases of children in conflict with the law, the rules of children cases are already at the statutory level. The Indonesian criminal law system, which adheres to the principle of legality, requires that every action taken by law enforcement officers must be legal. Likewise, when talking about the Criminal Justice System, the basis for law enforcement officers is the Criminal Procedure Code (KUHAP), which is the only formal criminal law. Functioning the restorative justice concept in the criminal justice practice without positive support is a practice of moral judgment.³⁷ The arrangement of the restoration concept at the level of provisions under the law results in deviations from the formal legality of the Criminal Procedure Code. It is because the Criminal Procedure Code requires every criminal incident to be resolved through legal courts so that it implements a judge's decision.

The restorative concepts by solving the case out of the justice system are considered contradictory toward KUHAP formal legality. Its existence is still practiced constantly by the law enforcement officers as one of the solving concepts of certain crime case which is able to materialize the sense of justice and the benefits of law in society.

The restorative concepts functionalism as described above is not a concept without a base and unacceptable because such law enforcement concept is what the society want. The recovery concepts implementation in handling the criminal case is similar with the purpose of the conviction itself. In RKUHP and KUHP, there have been an admittance toward those concepts. In Article 55 paragraph (1) KUHP Draft 2010, the conviction has several purposes namely:

1. To avoid the implementation of criminal act by enforcing the law norms for the protection of the society;

³⁷ Purba, *Penegakan Hukum Terhadap Tindak Pidana Bermotif Ringan Dengan Restorative Justice*.

2. To civilize the defendant by giving the guidance so that they become a good and useful person
3. To solve the conflict caused by the criminal act, to recover the balance, and bring the sense of peace in the society; and
4. To release the guilt in the defendant's side.³⁸

Later when RKUHP is approved, the restorative concepts will take place among the strategic positions in the process of law enforcement especially in the criminal case solving. Criminal mediation becomes a large attention as shown in the recommendation delivered by the United Nations about The Prevention of Crime and The Treatment of Offenders and International Conference.³⁹

The law enforcement especially in solving the criminal case must be able to fulfill the purpose of the law in a whole, the Benefits, the Justice, and the Certainty. All kinds of serious crimes, light serious, or not serious, the handling still must bring forward the law, by giving attention to the rights of the suspect, defendant, and convicted. It can be done by applying the rule of law, and also put forward the priority principle as has been stated by Gustav Radbruch, with his combination theory, which is justice first, the benefits priority is next, and the certainty is the last.⁴⁰

In the last development, there is the legalization of the Act No 11 of 2021 about the Changes of the Act No 16 of 2004 about Indonesia Republic Judiciary, the attorneys have been given the authority to conduct the penal mediation.⁴¹ Therefore, the restorative

³⁸ Antari, "Pemenuhan Hak Anak Yang Mengalami Kekerasan Seksual Berbasis Restorative Justice Pada Masyarakat Tenganan Pegriingsingan, Karangasem, Bali."

³⁹ Fuzi Narindrani, "Penyelesaian Korupsi Dengan Menggunakan Restoratif Justice."

⁴⁰ Muhaimin, "Restoratif Justice Dalam Penyelesaian Tindak Pidana Ringan."

⁴¹ Republik Indonesia, *UNDANG-UNDANG*

concepts (restorative justice, alternative dispute resolution, circle sentencing, *ishlah*) can be accepted as one of the alternatives to solve the criminal case.

CLOSING

The restorative concepts (restorative justice, alternative dispute resolution, circle sentencing, and *ishlah*) are the concepts which put forward the interest of the parties involved in the case. The interests from the victim's side, the suspect/defendant and other concerned parties are upheld. It is a win-win solution and the conflict recovery caused by a crime, and has been practiced by the society a long time ago, especially, the indigenous people. The restorative concepts are even used in the Criminal Justice System. The concepts have been functioned to solve the criminal case which fulfill the requirement starting from the investigation level as well as the prosecution as one of the alternatives to solve the criminal case. Those concepts functionalism have been implicated to Indonesia Criminal Justice System, which is considered contradictory with KUHAP formal legality. However, logically, the implications have the basis and can be accepted by the society in order to materialize the law which is fair and provides the benefit and certainty.

Suggestions

In a hope that the existence of restorative concepts (restorative justice, alternative dispute resolution, circle sentencing, *ishlah*) so far have been practiced by the law enforcement officers in solving the criminal cases. Consequently, they can be standardized in the formal criminal law provisions. Therefore, the restorative concept practices can avoid the deviation of legality

principle as the principle of Indonesia Criminal Justice System.

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