

MEASURING RESTORATIVE JUSTICE THROUGH LIVING LAW-BASED CRIME SETTLEMENT SYSTEM IN INDONESIA

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Abstract - *The restorative justice approach is currently developing as an effort to fulfill justice for the justitia ballen in the settlement of criminal cases. Restorative justice emphasizes the intersection of justice between perpetrators, victims, and society. This study aims to understand the correlation of restorative justice with living law in Indonesia in efforts to resolve criminal cases; as well as find values in society that can be a source of implementing restorative justice in Indonesia. This research is a non-doctrinal research with a qualitative approach. This approach not only sees law as a set of rules but also conceptualizes law as a set of values that must be realized in society. Renewal of criminal law and the criminal justice system in Indonesia that adheres to the social and cultural values of the Indonesian people, and is based on Pancasila is an ideal concept in criminal law reform related to restorative justice.*

Keywords: *Restorative Justice; Living Law; Criminal Law; Crime Settlement.*

A. INTRODUCTION

The use of legal efforts in addressing social problems in society in terms of legal policy, one of which is criminal law. Crime prevention efforts with criminal law are essentially also law enforcement efforts, especially in the settlement of criminal cases.[1] The development of criminal case settlement in Indonesia currently requires guidelines or standards on how to determine fair punishment in deciding criminal cases in Indonesia so that there is no sense of injustice and uncertain or immeasurable legal certainty. It is known that the law works by showing its functions, namely as follows:[2]

1. Establishing norms, both those that provide provisions and those that define the relationship between one person and another;
2. Dispute settlement; and
3. Ensuring the sustainability of community life, if changes occur.

The new form or model in criminal case settlement is currently known as Restorative Justice. The focus of the restorative justice approach in the process of resolving legal cases is on the perpetrators, victims, and the community that occurs between them. The restorative justice approach model in resolving legal cases in fact continues to develop and exist and influence legal policy and practice in many countries despite the many debates at the theoretical level by experts in the field of law.[3] Restorative justice is an approach to resolving criminal cases that takes many different forms, both with reconciliation efforts and by fulfilling victims' losses, the emphasis is on the interests of victim recovery.

In the criminal justice system, the principle of restorative justice is expected to fulfill what the community needs in getting justice, which is a situation that is as conducive as possible as before the crime occurred. Given the current practice of justice, there are many cases where the sense of justice for the community is not fully met, so it is necessary to take strategic steps, one of which is the principle of restorative justice can be implemented, especially in Indonesia. Restorative justice is one of the legal efforts with the aim of establishing a humane judiciary.

Restorative justice is a crime settlement that is not only seen from a legal perspective but is also associated with aspects of moral, social, economic, religious, and local customs and other considerations. The adoption of the concept of restorative justice has implications for efforts to resolve criminal cases based on local wisdom. The settlement of criminal cases with restorative justice aims to reform the national criminal law to establish a legal order or system that basically builds the entire order of national life in the political, socio-economic, cultural, and other fields.[4] Criminal cases in Indonesia that can be resolved with restorative justice are minor offenses as stipulated in Articles 364, 373, 379, 384, 407, and 483 of the Criminal Code (KUHP). In this case, the law imposed is imprisonment for a maximum of 3 months or a fine of IDR 2.5 million.[5] The settlement of criminal cases with Restorative Justice in addition to minor offenses can also be applied to other criminal cases



such as Juvenile Crimes, Women's Crimes against the Law, Drugs Crimes, Information and Electronic Transaction Crimes, and Traffic Crimes.

In order to be able to resolve criminal cases using the Restorative Justice model in the Indonesian region, The Public Prosecution Service of the Republic of Indonesia has initiated Restorative Justice houses in 10 (ten) Provincial Prosecutors' Offices in the local area. The 10 (ten) Provincial Prosecutor's Offices are the Provincial Prosecutor's Office of North Sumatra, Provincial Prosecutor's Office of Aceh, Provincial Prosecutor's Office of South Sulawesi, Provincial Prosecutor's Office of West Sulawesi, Provincial Prosecutor's Office of West Java, Provincial Prosecutor's Office of East Java, Provincial Prosecutor's Office of Central Java, Provincial Prosecutor's Office of Riau Islands, Provincial Prosecutor's Office of Banten, and Provincial Prosecutor's Office of East Kalimantan. Until May 2022, the Attorney General's Office reported that more than 1,000 criminal cases in Indonesia had been resolved using Restorative Justice principles.

One of the many criminal cases resolved with Restorative Justice was a cattle theft case committed by a son against his mother in Asembagus, Situbondo, East Java, which occurred on April 6, 2022. The suspect was Bahri, also known as Baba Bin Suroto who had stolen a cow from his mother Miswana. In this case, thanks to his mother's generosity as both a victim and the mother of the suspect, she forgave her son for stealing her cow, and the case was resolved using Restorative Justice. This was also stated by Ketut Sumedana, the Head of the Legal Information Center of the Attorney General's Office of the Republic of Indonesia, who stated that the cattle theft case had been dropped and resolved through Restorative Justice.

Furthermore, the suspect Samsul Bahri has been unconditionally released after submitting a request approved by the Deputy Attorney General for General Crimes (Jampidum) of the Attorney General's Office (AGO), Fadil Zumhana on June 9, 2022. The prosecution was terminated on the basis of restorative justice because the victim was the suspect's parent and the victim had forgiven the suspect's actions. Another factor to consider was that the suspect, Samsul Bahri, was said to be a first-time offender with no prior criminal history. The issuance of a Letter of Termination of Prosecution (SKP2) based on Attorney General Regulation Number 15 of 2020 and JAM Pidum Circular Letter Number 01/E/EJP/02/202 concerning the Implementation of Termination of Prosecution Based on Restorative Justice in Letter E point 2 letter b confirmed the termination of the prosecution of the theft case.

Based on the previously mentioned explanation and one example of a criminal case resolved through Restorative Justice, the title of this paper is "Measuring Restorative Justice Through Living Law-Based Crime Settlement System." The problem formulated in this paper is How the Existence, Correlation, and Reform of Living Law-Based Crime Settlement System as an Effort to Realize Restorative Justice in Indonesia.

Previous studies related to the title of the article compiled by the current author have provided an overview of the existence of Restorative Justice in the crime settlement system in Indonesia and the novelty that can be provided in this paper. The following articles analyze Restorative Justice in the settlement of criminal acts:

1. The implementation of the Restorative Justice Concept in the Criminal Justice System in Indonesia written by Ahmad Faizal Azhar. The article describes the concept or approach of restorative justice which is considered to be able to address various problems in the traditional criminal justice system. The paper's findings show that the criminal justice system in Indonesia is still in the "restorative" stage because victim involvement is not the primary concern, decisions are made by parties who are not directly affected, there is no option for dialogue among those directly affected, the focus is on the rules or laws that were violated and the consequences of their actions (passive liability), rather than efforts to restore the damage or loss experienced.[5]
2. Restorative Justice Paradigm in Judges' Decisions. The article's objective was to find the restorative justice paradigm of judges in deciding criminal cases, as well as the construction of judges' decisions using the Restorative Justice paradigm. The article concludes that the restorative justice paradigm, which prioritizes recovery or repair, will seek to provide justice, legal certainty, and benefits, as well as to realize progressive and responsive law, and thus it is appropriate to be used as a judge's paradigm in deciding a case. In constructing restorative justice-based judge decisions, judges consider not only the Criminal Procedure Code (KUHAP), but also justice for all parties (victims, perpetrators, and society). Furthermore, judges do not make decisions based on the retributive/retaliatory purpose of punishment, but rather on the values, concepts, principles, and

fundamentals of restorative justice, which prioritize the parties' recovery or improvement, fulfill the parties' needs, and seek benefits.[6]

B. RESEARCH METHODS

This study employs a non-doctrinal (empirical) legal research methodology with a qualitative approach, which means it can collect data that isn't quantitative. The data were obtained from interviews, observations, recordings, or written materials (laws, documents, books, and so on) in the form of verbal expressions.[7] This research is presented in descriptive-analytical form, describing and analyzing all findings in the form of documents, which are then compiled in the form of articles to present the problem of how "the Existence, Correlation, and Reform of Living Law-Based Crime Settlement System as an Effort to Realize Restorative Justice in Indonesia."

The data collected to complete the results of this study are primary data and secondary data. Primary data is obtained directly from the source without the use of intermediaries and then collected and processed. Secondary data is data obtained indirectly from the source by a researcher through other sources in various ways or methods, both commercially and non-commercially, such as textbooks, journals, magazines, newspapers, documents, laws and regulations, and so on.[7]

The data collection techniques in this research are literature study and observation. Data collection through literature study is a collection of files or data, namely the search for information or information that is true and real and obtained from the results of data collection in the form of books, minutes, transcripts, notes, magazines, and so on.[8] Following data collection through literature study, observation is carried out, which is a method of data collection by directly observing the object of research. Observing entails not only seeing but also taking notes, counting, measuring, and recording events.[7] After the completion of the research data collection, data analysis is performed. This study uses a qualitative approach method. The data analysis used is qualitative data analysis, namely how to process and analyze non-statistical research.[9]

C. RESULTS AND DISCUSSION

Existing Conditions and Correlation of Living Law-Based Crime Settlement with Restorative Justice in Indonesia


Rick Sarre in his article entitled "Restorative Justice: A Paradigm of Possibility" says that *restorative justice is concerned with rebuilding relationships after an offense, rather than driving a wedge between offenders and their communities, which is the hallmark of modern criminal justice systems.* It means that Restorative justice is about rebuilding relationships after a crime has occurred, rather than building walls between offenders and their communities, which is the hallmark (sign or characteristic) of modern criminal justice systems.[10]

The basic concept of the restorative approach in the form of actions to rebuild relationships damaged by criminal acts has long been known and practiced in customary law in Indonesia. The basic philosophy of the restorative approach's purpose, namely "restoring the situation to its original state prior to the conflict," is identical to the philosophy of restoring the disturbed balance found in Indonesian Customary Law.[11] The concept of justice according to the concept of restorative justice has very basic elements, which include:

- a. Crime is defined as a conflict or dispute between individuals that cause harm to the victims, the community, and the perpetrators.
- b. The goal of the criminal justice process should be to create peace in society by repairing the harm caused by the conflict.
- c. The process must encourage victims, offenders, and the community to actively participate in finding solutions to the conflict at hand.[11]

In his article "*Restorative Justice an Overview*," Tony F. Marshall states that Restorative Justice is a process in which the parties involved in a particular offense work together to resolve the consequences of the offense for the sake of the future.[12] Then, in her book "*Restorative Justice: A Vision for Hearing and Change*," Susan Sharpe expanded on Tony Mashall's ideas by incorporating 5 (five) Restorative Justice principles, namely:[12]

- a. Restorative justice involves full participation and consensus;
- b. Restorative justice seeks to heal the damage or loss that is caused by the crime;
- c. Restorative justice provides direct accountability of the perpetrator as a whole;
- d. Restorative justice seeks to reunify members of society who have been divided or separated by criminal acts; and



e. Restorative justice provides resilience to the community in order to prevent such criminal acts from occurring.

Dialogue is one of the techniques or mechanisms used to implement restorative justice. The familial dialog technique is one of the forms or mechanisms of restorative justice that can be used and is very much in line with Indonesian cultural values. The dialog technique is more commonly known as deliberation and consensus among Indonesians. The concept of restorative justice benefits both perpetrators and victims; it has a positive impact on crime rates, particularly in reducing recidivism among criminal offenders, and it provides a sense of responsibility for both parties, namely the perpetrators and victims.

Based on data collected by the National Police, police in various regions, namely investigators, have begun to routinely use the restorative justice approach since the issuance of the National Police Chief Circular Letter Number SE/2/II/2021 dated February 19, 2021. As of July 2022, approximately 1,864 criminal cases had been resolved without the need for a court appearance. (citation). Based on these findings, despite the challenges of implementing restorative justice in Indonesia, restorative justice has become a top priority for the government and has become part of Indonesian cultural practices in enforcing criminal cases that can be resolved through restorative justice. However, the reality is that the government's implementation of restorative justice has yet to find a common perception among the community and law enforcement officials. There is a risk of creating a conflict between the community and law enforcement officials if there is no common standardization in applying the concept of restorative justice.

The realization of justice in the settlement of criminal acts and the avoidance of disparities in equality between the community and law enforcement officials is giving birth to a new face in the concept of Restorative Justice, namely the settlement of criminal cases based on Living Law or laws that apply in society through the implementation of Customary Law. Customary law is born and grows from the community, so its existence cannot be separated from community life. The settlement of criminal cases in customary law societies is based on a community's adopted living view (*lebensaacbuung*). This settlement is based on values, mindsets, and norms that have characterized the community. In addition, the community's characteristics are religious, communal, democratic, concerned with spiritual moral values, and unpretentious (modest).

Officially, the existence of customary law in Indonesia has been recognized as stipulated in the 1945 Constitution of the Republic of Indonesia Article 18B which states that "The State shall recognize and respects the entities of customary law communities and their traditional rights to the extent they still exist and are in accordance with the development of the society and the principle of the Unitary State of the Republic of Indonesia, which shall be regulated by laws." It can be said that the state recognizes the existence of customary law and its constitutional rights in the Indonesian legal system.

Customary justice institutions can be seen as a point of view in the settlement of criminal cases using the concept of Restorative Justice based on Living Law. The existence of customary justice institutions as a formal requirement of the Indonesian justice system can help to avoid the dynamics of overload in resolving criminal cases in official (state) justice institutions. Customary justice will make the settlement of criminal cases more efficient; however, not all criminal cases can be classified as cases that can be resolved with restorative justice. Minor offenses, juvenile offenses, and complaints are examples of criminal cases that can be resolved through restorative justice. Cases settled through customary courts based on living law and deliberation and consensus can further realize Restorative Justice, allowing Living Law to be enforced in people's lives. [5]

Living Law is not a common term; it is the central concept that must be studied in various branches of law, one of which is legal anthropology. Living Law exists because it is a law that is actually adopted or applies in people's lives. It is understood in the study of legal pluralism that state law is not the only law that can regulate people's behavior or the behavior of human life. In practice, in addition to state law, there are customary laws, religious laws, and customs that can be said to be effectively enforced in community life. State law has strong binding power due to its supremacy. As a result, if someone is suspected of violating a legal act, the police, as a representative of the state, have the authority to arrest the perpetrator of a criminal offense in accordance with statutory regulations.

If the settlement of criminal cases that can be resolved through Restorative Justice is forced to use the national justice system, it is certain that a long flow or procedure based on the legislation will be followed. It is different if criminal cases that can be resolved with Restorative Justice are based on Living Law. Legal norms in society can be understood methodologically through the decisions of a person or group of people who are socially authorized to impose sanctions on lawbreakers. The law



enforcement process is informal and justice is always felt by the parties who use the Living Law-based criminal law system.[13]

The approach method that can be used in resolving criminal cases with Living Law-based restorative justice is the Legal Pluralism approach. All legal systems come in contact in order to create a state of mutual influence and mutual adoption, and the law will change over time or follow the circumstances of the times as a result. One of the legal correlations in West Sumatra is customary law meets religious law to form “*adat basandi syarak, syarak basandi kitabullah*,” the Minangkabau people's philosophy of life in which Islamic teachings serve as the sole foundation and or guidelines for patterns of behavior in life. Likewise, the correlation of legal systems in other regions of Indonesia. Legal pluralism is defined as the existence of various legal systems in a specific field or social arena, as well as the occurrence of meetings and mutual adoption between legal systems.[6]

Return of Living Law-Based Crime Settlement System as an Effort to Realize Restorative Justice in Indonesia

The existence of criminal law is expected to be able to provide justice to the community in the midst of a developing and changing situation. It is important to realize that despite the existence of laws and regulations intended to meet the demands of legal certainty, the interests of the larger community are frequently overlooked. Public demands for justice and welfare are sometimes difficult to realize through the Criminal Justice System. Likewise, utility, which is also the ultimate goal of the legal process through the Criminal Justice System as a social system and which must be viewed as a system that is integrated as a whole, becomes difficult to accomplish.[3]

Criminal law reform is based on the main problems that are generally developed in criminal law. The main problems of the law include the problem of criminal acts, criminal liability (guilt), and retribution or punishment.[14] According to Barda Nawawi Arief, when considered from a normative dogmatic point of view, the main problems of criminal law are:[15]

- a. What actions should be punished or commonly referred to as the problem of “criminal offense”;
- b. What conditions should be met in order to hold the person accountable for the act, also known as the problem of “offense,”
- c. What sanctions (punishment) should be imposed on the person suspected of committing a criminal act or commonly referred to as the problem of “punishment.”

Based on the nature of the central problem of criminal law, exactly the major reason why criminal law reform is necessary. To put it simply, the reform of Indonesian criminal law basically entails a reorientation and reform of positive criminal law as seen from the concept of the central values of the Indonesian nation (from the socio-philosophical, socio-political, and socio-cultural aspects) which underlie social policy, criminal policy, and law enforcement policy in Indonesia.[15]

The function of law is not only to prevent or eradicate crime but also to protect the community, including criminal law. Legal development can be regarded as important if it helps the community live in order, peace, and comfort. Legal disputes are resolved with the intention of restoring the balance of life between parties, not just punishing or blaming one party. By following this principle, a court ruling won't determine whether a party is losing or winning, it won't force them to end their relationship (including business relationships), but rather gives them both the chance to move forward by making up for any mistakes that have been made. This sums up a win-win situation (*infra*).[4]

One of the criminal case settlements in Indonesia is currently implementing Restorative Justice. The settlement of criminal acts through a restorative approach will not become a reality that can be implemented if a structural model with a restorative paradigm cannot be constructed or developed which will become an alternative option in the criminal law system.[3] In the United Nations Office for Drug Control and Crime Prevention, it is explained that Restorative Justice is a new term for an old concept. Restorative Justice approaches have been used in solving conflicts between parties and restoring peace in society. Because recent efforts to combat crime have been deemed ineffective, whether through retributive or rehabilitative approaches. Hence the impetus to turn to Restorative Justice approaches. The Restorative Justice framework involves the offender, the victim, and the community in an attempt to create a balance, between the offender and the victim.[16]

Marian Liebmann, provides several formulations of the basic principles of restorative justice as follows:[17]

1. Prioritizing victim support and healing;
2. The offenders are responsible for what they did;



3. Dialogue between victim and offender to reach a mutual understanding;
4. There is an attempt to put right the harm caused;
5. The offender must be aware of how not to repeat the crime in the future;
6. The community helps integrate both victims and offenders.

Out-of-court dispute settlement is usually only applicable to civil disputes. However, it does not rule out the possibility in criminal cases to resolve criminal cases outside the court through various discretions by law enforcement officials. Regulations related to police discretion contained in Article 18 of Law Number 2 of 2002 are sufficient to provide a juridical basis for police investigators to apply restorative justice in handling criminal cases.

This paper's analysis is focused on implementing Restorative Justice in the settlement of Living Law-based criminal cases in Indonesia. Some examples of law enforcement cases in Indonesia that are considered by the community to be unable to fulfill the sense of justice of the community and are not in accordance with the values of Pancasila are law enforcement on the case of a grandmother who stole cocoa beans, a grandmother who stole firewood, a child who sued his biological mother, and many more minor and trivial criminal cases but ended in punishment.

Some countries such as Japan, the United States, the United Kingdom, the Netherlands, and Poland are examples of countries that use the concept of deliberation when disputes arise between their citizens through informal procedures. Japan in particular is a country that prefers to resolve disputes or conflicts out of court through the institutions of *chotei* (mediation) and *jidan*. By taking into account legal proof in the form of a "letter of forgiveness" from the victim to be presented in court proceedings, the results of the agreement reached between the perpetrator and the victim may have an impact on the formal justice process, such as terminating the case or reducing the sentence for the perpetrator. Indonesia can use the "a letter of forgiveness" approach to handle criminal cases that are classified as criminal acts that can be resolved with restorative justice by using the aspects of deliberation and mediation used by various nations, one of which is Japan.

Mahrus Ali stated in his article entitled "Accommodation of Madurese Cultural Values on Carok Settlement in Criminal Law," that the use of a pattern of resolving criminal cases through peace that is realized through family deliberation is seen as an appropriate method of approach in the context of cases in society.[18] Based on his research, the settlement of criminal cases is a requirement with the values and cultural sentiments of the community that can only be resolved effectively when accompanied by a settlement pattern based on the values of the local wisdom of the local community.[18]

D. CONCLUSION

The implementation of Restorative Justice in resolving criminal cases in Indonesia is in line with the values of Pancasila which is the country's highest form of national ideology. Restorative Justice is in accordance with customary law and Islamic law which prioritizes deliberation in solving problems between communities. The implementation of restorative justice will eliminate the people's view of Indonesian law enforcement, which is frequently considered to lack a sense of justice for the community. The concept of Restorative Justice is also in line with the principle of criminal law as an *ultimum remedium*, which means that it should only be employed as a last resort when all other options have failed or the method will only be used when other efforts outside of criminal law cannot be effectively used.

It is fitting that the settlement of criminal cases in Indonesia using Restorative Justice or Living Law-based Restorative Justice with the concept of peace (deliberation) in a family manner that can provide a sense of justice for victims and perpetrators can be accommodated in statutory policies. The reform of criminal law and the criminal justice system in Indonesia that adheres to the social and cultural values of Indonesian society is a necessity which is a reflection of the values of the philosophy of life based on Pancasila and global developments but still pays attention to and respects cultural values, local wisdom, and customs in the community.

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