

The Legal Politics of Restorative Justice in Indonesia

Ahmad Nur Rohadi¹, Nanik Prasetyoningsih^{2*}

nanikprasetyoningsih@umy.ac.id

^{1,2}Master of Law, Universitas Muhammadiyah Yogyakarta, Indonesia

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Abstract

Restorative Justice needs to be implemented immediately in Indonesia. Law Number 1 of 2023, which is expected to be an oasis, does not regulate this matter optimally. This article will discuss the ideal form of regulation for implementing restorative Justice in Indonesia. Implementing restorative Justice will include more than procedural or formal law. More than that, restorative Justice must cover all aspects of criminal law enforcement. It starts from material criminal law, procedural law, litigation dispute resolution, and non-litigation case resolution. This article will use normative juridical research methods and conceptual and statutory approaches. One of the important findings in this article is the absolute need for a paradigm shift in the enforcement and regulation of criminal law. From the initial nuance of retribution to a more nuanced recovery approach (restorative). Then therapeutic justice regulation must also be included in material criminal law regulation. So, it can be used as a guide for law enforcement officials in finding substantive Justice.

I. Introduction

Restorative Justice has emerged as an alternative emphasizing reconciliation and restoration, not just punishment. According to various criminal law experts, Justice does not have to be the final point in resolving a legal problem. On the contrary, this approach emphasizes the need to balance the interests of the perpetrator and the Victim (Sulistiani & Fakhriah, 2023). Recognizing that courts often cannot satisfy all parties involved, this concept emphasizes the need for alternatives before entering the court process (Olson et al., 2023). In this context, restorative Justice believes that a reconciliation process between the perpetrator and the Victim must first occur. Conflict resolution is not solely in the hands of the court but must involve direct interaction between the two parties (Madjid & Istiqomah, 2023). Efforts such as mediation, peaceful meetings, or other forms of interaction are important to find a satisfactory solution for all parties involved (Mufidah et al., 2022). Restorative Justice places the court in the final position in resolving a case,

recognizing that formal legal processes often cannot reach the depth of understanding and feelings involved (Suartini et al., 2023). Before entering the court, it is important to undergo a mediation and reconciliation process to find a "middle way" that meets the needs of both the perpetrator and the Victim (Hayatuddin et al., 2022). Thus, this concept seeks Justice not only in a punitive sense but also to restore damaged relationships and repair the losses that have occurred (Pratama, 2023).

The concept of restorative Justice has been around for several decades, especially as an alternative to resolving criminal cases, especially those involving children (Anam & Syarifah, 2023). John Braithwaite, one of the main figures in the development of this concept, describes restorative Justice as a new paradigm that is in the middle between the "justice" approach and the "welfare model" (Widya et al., 2023). In this case, this approach focuses on restoring disturbed relationships and the needs of both the perpetrator and the Victim while still considering aspects of Justice (Ferdiles, 2019). This conception can also be seen as a middle way between the "retribution" approach, which emphasizes punishment, and "rehabilitation," which emphasizes recovery and development (Sauqi & Dj, 2022). In other words, restorative Justice punishes perpetrators and pays attention to aspects of rehabilitation and reconciliation in dealing with conflict. In practice, the concept of restorative Justice encourages the involvement of all parties involved in a crime, including the perpetrator, Victim and community (Leo & Sinaga, 2023). This approach emphasizes the process of dialogue, repentance and restoration to repair the damage caused by crime and rebuild damaged relationships in society. Thus, restorative Justice is about punishing perpetrators and creating opportunities for repentance, learning, and healing for all parties involved. This approach offers a more holistic and inclusive alternative to dealing with societal conflict and crime (Habib, 2020).

So far, law enforcement in the criminal law concept has been considered a punishment for wrongdoing. However, the right party will only get something if the wrong party is punished. So, by presenting this concept of Restorative Justice, it is hoped that the community will benefit from every criminal case resolution (Hambali, 2020). Apart from legal certainty that is fulfilled (because there is certainty about who is wrong and who is right), a certain action provides returns to the right party (Sukardi & Purnama, 2022). In its development, this concept received support from the United Nations (UN) (Badawi et al., 2024). At the Fifth Five Annual Congress in Geneva in 1975, the UN and many other countries began to pay attention to efforts to provide compensation for crime victims (Fatmawati et al., 2023). Providing compensation is certainly a manifestation of the restorative Justice to be achieved. By providing compensation to victims of crime, the concept of Justice does not only end with the concept of enforcing state law (retribution) or restoring the good name of the perpetrator (rehabilitation) (Ma'ruf et al., 2023).

The concept of restorative Justice is important because it also takes the form of changing the face of law enforcement in Indonesia, which has become "ugly". A general opinion is circulating among the public, which believes that law enforcement in Indonesia is getting sharper downwards but duller upwards (Suranta, 2023). This concept is contrary to Pancasila, especially social Justice for all Indonesians. Real evidence in concrete cases cannot be denied. For example, the public has always been presented with the imprisonment of a grandmother for stealing a bowl or watermelon (Hasibuan et al., 2024). There are also crimes against small children who steal flip-flops, a child who sues

his mother, and even punishment for other criminal cases that can be considered trivial (Ramadhani, 2024). On the other hand, many law enforcement cases involving far more serious criminal cases, such as corruption and abuse of office, actually pass easily in the law enforcement process. So, restorative Justice can be used to change the bad image of law enforcement officials (Ulum, 2023).

Problems arose when Law Number 1 of 2023 concerning the Criminal Code (from now on referred to as the National Criminal Code) began to be passed. Article 51 of the National Criminal Code states that punishment is carried out to prevent the commission of criminal acts by enforcing legal norms for the protection and guidance of society, Socializing the convict by providing training and guidance so that they become good and useful people, Resolving conflicts caused by criminal acts, restoring balance, as well as bringing a sense of security and peace in society, and fostering a sense of remorse and freeing the convict from feeling guilty (Flora, 2022).

This article shows that the orientation of punishment regulated in the National Criminal Code places more emphasis on punishment for criminals. Even though it includes efforts such as preventing criminal acts from occurring, coaching convicts, resolving conflicts, and fostering a sense of regret, there is no special emphasis on returning the losses experienced by victims, a principle that is strongly emphasized in the concept of restorative Justice (Jusuf, 2023). In the context of restorative Justice, recovering losses experienced by victims is an important aspect of resolving criminal cases. However, this has not been fully reflected in the criminal objectives regulated by the National Criminal Code (Widiyantoro & Sunarto, 2024). As a result, the orientation of punishment in the National Criminal Code still tends towards a conventional approach that emphasizes punishment of the perpetrator rather than recovery and reconciliation, which actively involves victims and the community. However, the emphasis on punishment and the development of convicts also has an important role in maintaining security and public order. However, restorative Justice offers a more holistic approach by including returning victims' losses as an integral part of the recovery and reconciliation process (Yasin, 2021). Therefore, there is room for further development in adopting restorative justice principles into the Indonesian criminal law system (Ramadhanti et al., 2022).

This research examines in depth how ideal criminal law arrangements should be structured to realize the concept of restorative Justice in Indonesia. The main focus of this research is to voice the importance of implementing restorative Justice in the Indonesian criminal law system, with the aim of law enforcement prioritizing humanitarian and Justice aspects, not just fulfilling legal certainty. Based on the principles of restorative Justice, this research will explore various aspects that need to be considered in drafting new criminal law regulations or improving existing ones. This includes integrating aspects of recovery and reconciliation in the sentencing process, paying greater attention to victims and their needs, and creating enabling mechanisms to reverse the losses suffered by victims. Thus, this research will significantly contribute to supporting the transformation of the Indonesian criminal law system towards a more humane approach oriented towards recovery, reconciliation and true Justice. Through this research, it is hoped that a strong and sustainable legal basis can be found for implementing the principles of Restorative Justice in the national criminal law system.

2. Research Method

This research is normative juridical research that uses both conceptual and statutory approaches. In this research, all sources consist of secondary legal materials, such as statutory regulations and doctrines recognized in legal science (Fitrian & Muhammad, 2021). A conceptual approach is used to explore and define concepts related to restorative Justice. In contrast, a legislative approach is used to analyze the existing legal framework related to the criminal law system in Indonesia (Zulfiani, 2023). By collecting these legal material sources, this research then carried out a qualitative analysis of them. This analysis aims to answer the aim of the research, namely to explore how ideal criminal law arrangements should be formed to realize the concept of restorative Justice in Indonesia (Wibowo et al., 2024). Through this approach, the research seeks to provide a deeper understanding of the aspects that need to be considered in integrating the principles of Restorative Justice into the national criminal law system. Thus, it is hoped that this research can significantly contribute to providing new views and direction for forming criminal law policies that are more humane and oriented towards recovery, reconciliation and true Justice in Indonesia.

3. Results and Discussion

Implementation of Restorative Justice Legal Politics in Indonesia

Many legal experts have tried to define legal politics. Some define legal politics as policy lines, some define it as the process of tug-of-war over the interests of the authorities when formulating a law, and some even define legal politics as policy choices taken by the government that determines the direction, form and substance of the law (Meliala & Sahlepi, 2024). In this article, the author defines legal politics as a policy choice that rule-makers should take in formulating a law or rule regarding a particular matter (Aminah & Rafsanjani, 2023). For example, lawmakers will formulate regulations regarding the juvenile justice system. So, what things must be regulated in the rules of the juvenile justice system, what form the regulation takes, who will be subject to these rules, and what the supervision model is are objects of study in legal politics. Simply put, legal politics is everything that lawmakers must regulate in formulating regulations on something.

In the context of this article, legal politics is directed at what things need to be regulated by rule makers regarding the formulation of restorative Justice in Indonesia. As stated at the beginning, Restorative Justice has not been fully embraced in the national criminal law system (Syahird, 2023). In this case, the system that the new National Criminal Code is trying to create. Several articles in the law still need to demonstrate the implementation of Restorative Justice. However, an article opens up the possibility of doing restorative Justice if interpreted broadly (Wahid, 2021). For example, the provisions in Article 54, paragraph (1) of the National Criminal Code states:

In sentencing, consideration must be given to:

- a. The form of guilt of the perpetrator of the crime;
- b. Motive and purpose of committing a criminal act;
- c. The inner attitude of the perpetrator of the crime;
- d. Criminal acts are committed planned or unplanned;
- e. How to commit a criminal act;
- f. The attitude and actions of the perpetrator after committing the crime;

- g. Life history, social conditions and economic conditions following criminal acts;
- h. The influence of crime on the future of criminals;
- i. The Effect of Crime on the Victim or the Victim's family;
- j. Forgiveness from the Victim and Victim's family; and
- k. The value of law and Justice that lives in society.

Apart from that, there is also a formulation of Article 70 paragraph (1) of the National Criminal Code, which states: By still considering the provisions as intended in Articles 51 to Article 54, as far as possible, imprisonment should not be imposed if circumstances are found:

- a. The Defendant is a Child;
- b. The Defendant is over 75 (seventy-five) years old;
- c. The Defendant has committed a crime for the first time;
- d. Victims' losses and suffering are not too great;
- e. The Defendant has paid compensation to the Victim;
- f. The Defendant did not realize that the criminal act he had committed would cause major losses;
- g. Criminal acts occur due to very strong instigation from other people;
- h. The Victim of a crime encourages or incites the crime to occur;
- i. The criminal act is the result of a situation that is unlikely to happen again;
- j. The Defendant's personality and behavior ensure that he will not commit another crime;
- k. Imprisonment will cause great suffering to the Defendant or his family;
- l. It is estimated that development outside a correctional institution will be successful for the Defendant;
- m. Imposing a lighter sentence will not reduce the serious nature of the crime committed by the Defendant;
- n. Criminal acts occur within the family and
- o. Criminal acts occur due to negligence.

The notes above show that restorative Justice has begun to be considered in the National Criminal Code, such as punishment, which must pay attention to forgiveness from the Victim's family, and imprisonment, which may not be applied to the Defendant who has compensated the Victim. However, according to the author, there are still several things that need to be added and improved, some of these rules. Among others are:

1. The regulatory aspects of restorative Justice, as regulated in the National Criminal Code, are still limited to resolving cases at the court level, not to resolving criminal cases at other levels. At least three things must be achieved in formulating criminal law norms and criminal threats. First, you must form or achieve the ideal of social life or the society you aspire to. Second, it maintained and upheld noble values in society, and third, it maintained something considered good (ideal) and followed by society using negative norm formulation techniques. The purpose of imposing criminal sanctions is influenced by the reasons used as the basis for the threat and imposition of a crime. In this context, the reasons for punishment are retaliation, practicality, and a combination of retaliation with a purpose or retaliation given to

the perpetrator with certain aims and objectives. Restorative Justice is present to solve the problem of this concept of punishment. The concept of punishment must be directed so that it does not simply become an arena for revenge from the Victim against the perpetrator. More than that, punishment must be directed at a more sentimental effort, namely returning to the situation as before a criminal act occurred (Edi et al., 2023).

Restorative Justice is only included in the National Criminal Code concept at the court level. This is proven by the concept of Restorative Justice, which is included in the punishment section. Strictly speaking, according to the construction of the National Criminal Code, Restorative Justice can only be established by a judge. Many law enforcement structures also handle criminal cases (Taqiuddin & Risdiana, 2022). Supposedly, if restorative Justice is the goal of the national criminal law political process, then restorative Justice can be carried out at all levels of criminal case resolution.

In practice, the police and prosecutors, as investigators and prosecutors for every criminal case, have many opportunities to enforce restorative Justice. The police, for example. If the perpetrator and Victim are deemed to have reconciled at the investigative level, the investigation process can be stopped. In this case, reconciliation is meant when the perpetrator has paid compensation to the Victim and his family or the Victim has apologized to the perpetrator. If this is done, then the enforcement of Restorative Justice will not need to wait for the sentencing process to be carried out by a judge, such as the construction of the National Criminal Code.

2. The regulatory aspects of restorative Justice, as regulated in the National Criminal Code, do not yet accommodate alternative dispute resolution through mediation. Restorative Justice is an approach to criminal law that contains several traditional values. This is based on two indicators: the values it is based on and the mechanisms it offers. This is the basis for considering why the existence of Restorative Justice is being taken into account again (Irwandi, 2023). The existence of this approach is perhaps as old as criminal law itself. Apart from imprisonment, which has consequences for the prisoner's family, the current system is considered not to provide relief or healing to the victims. Moreover, the legal process takes a long time.
3. In contrast, the therapeutic model emphasizes conflict resolution. By definition, Restorative Justice emphasizes the concept of conflict resolution. Conflict resolution is conflict resolution regarding the various methods and efforts taken to resolve a conflict. A party can resolve a conflict by actively communicating about the motives for the conflict and negotiating with the conflicting parties (Ilyas, 2021).

So far, in resolving criminal cases, it is known that there is a system of resolving cases through mediation, known as penal mediation. Apart from these terms, there are also other terms known in several languages in the world, such as "mediation in criminal cases" or "mediation in penal matters," which in Dutch terms is called *strafbemiddeling*; in German terms, it is called "Der Außergerichtliche Tatausgleich" (abbreviated ATA), and in French terms it is called "de mediation penale" (Santoso, 2023). All understandings of the term mediation that have been put

forward refer to one meaning in criminal law: bringing together the perpetrator of a criminal act and the Victim to resolve the case using deliberation to reach a consensus. Because of its nature, the term penal mediation is also known as "Victim Offender Mediation" (VOM), Täter Opfer Ausgleich (TOA), or Offender-victim Arrangement (OVA). Then, because of its nature of seeking a middle way (alternative) to resolve a criminal case, the term "the third way" or "the third path" is also known as "crime control and the criminal justice system" to refer to this penalization.

Criminal mediation was first known in terms of positive law in Indonesia since the publication of the National Police Chief's Letter Number: B/3022/XII/2009/SDEOPS dated 14 December 2009 concerning Handling Cases Through Alternative Dispute Resolution (ADR). The principle of penal mediation in the National Police Chief's Letter emphasizes that the parties to the dispute must agree on resolving criminal cases using ADR. However, if there is no agreement, it will be resolved by applicable law. Procedures professionally and proportionally. At least, that is the definition of penal mediation currently known in Indonesia. Penal mediation has not been accommodated in the concept of the National Criminal Code. Once again, in the National Criminal Code, Restorative Justice is "only" considered a conception of punishment that judges can carry out. Not by other law enforcement officials.

4. The regulatory aspect of restorative Justice, as regulated in the National Criminal Code, only regulates minor cases. It is common knowledge that restorative Justice is often only considered a method of resolving criminal cases for minor crimes. This concept is also regulated in the National Criminal Code Article 70 paragraph (2), which states: The provisions as intended in paragraph (1) do not apply to:
 - a. Criminal offenses punishable by imprisonment for 5 (five) years or more;
 - b. Criminal acts that are punishable by special minimum penalties;
 - c. Certain criminal acts are dangerous or detrimental to society; or
 - d. Criminal acts that harm the country's finances or economy

In this setting, the author questions point a. Especially for points b, c, and d, according to the author, it is not a problem. Points b and c are almost the same. In principle, the special minimum penalty is an exception, namely only for certain criminal acts deemed very detrimental, dangerous or disturbing to the community and for criminal acts that are qualified or aggravated by their consequences. Meanwhile, for point d, what is meant is criminal acts of corruption and all kinds of derivatives. Specifically for corruption, Restorative Justice cannot be implemented, considering its nature, which is detrimental to the national economy and damages the state system.

However, regarding point a, the author has a different opinion from the legislators. Supposedly, restorative Justice should also begin to be considered for criminal acts that are "considered" serious. The problem is that restorative Justice is often underestimated because it is often only applied to minor crimes. Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, for example. According to this rule, criminal cases that can be resolved using restorative Justice are minor criminal cases regulated in Articles 364,

373, 379, 384, 407 and 483 of the Criminal Code (KUHP). In this case, the law given is a maximum prison sentence of 3 months or a fine of IDR 2.5 million. Conceptually, restorative Justice never separates minor crimes from serious crimes. In essence, the concept that restorative Justice aims to achieve, as stated in the previous section, is an effort to resolve the conflict between the Victim and the perpetrator and try to restore balance to the situation before the crime occurred. (Subagiono, 2020). If restorative Justice is only intended for minor crimes, this will negate the purpose of restorative Justice itself.

5. It is necessary to emphasize law enforcement procedures that accommodate restorative Justice. The process of drafting a new KUHP to accommodate the National Criminal Code is underway (Theosalim & Hutabarat, 2023). However, in this article, the author tries to remind lawmakers to ensure that restorative Justice truly becomes the spirit of the national criminal law enforcement agenda. If restorative Justice is only contained in material criminal law and not in formal law, then the law enforcement process will be weak. As we all know, formal law is tasked with maintaining and enforcing material law. Therefore, if formal law does not accommodate restorative Justice, the enforcement of material criminal law will become weak again. This problem continues to be a parasite in the national criminal justice system.

After paying attention to various criticisms of the National Criminal Code regarding restorative Justice, the author feels obliged to provide alternative regulations regarding restorative Justice in Indonesia. This alternative arrangement also restores the concept of legal politics, as the author emphasized at the beginning. Legal politics continues beyond the regulatory evaluation process. More than that, legal politics must also formulate alternative arrangements for something in the future. According to the author, the legal politics of restorative Justice in Indonesia are:

1. Including the concept of restorative Justice in the entire process of resolving criminal cases, The occurrence of crimes or criminal acts is part of a social phenomenon that often occurs in society. Its development goes hand in hand and is in line with the development of human life. The causes of crime and criminal acts are also very diverse. There are economic, socio-cultural, and even political and state security factors. Whatever the cause, the occurrence of crime or criminal acts can destroy the balance of social conditions in society that have been formed. The order and security that individuals and collectives try to create can be damaged due to the occurrence of a criminal act. Restorative Justice is an ideal concept for determining the direction of resolving criminal cases in the future. The direction of resolving criminal cases must be directed so that the resolution is not solely an effort to take revenge from the Victim against the perpetrator. More than that, the resolution of criminal cases must aim to restore balance to the situation as it was when the crime was not committed.

As previously explained, restorative Justice has been embraced in the National Criminal Code. However, several parts of implementing restorative Justice still need to be improved. One is restorative Justice, which judges can still "only" carry out. The concept of restorative Justice in the National Criminal

Code is included in the punishment section, while a judge can only carry out the punishment. For future arrangements, judges should not only carry out restorative Justice. Other law enforcement officials must also be given the same authority. For example, the National Criminal Code must also regulate regulations such as "the investigation can be stopped if the perpetrator has received forgiveness from the victim or the victim's family".

For example, the same article formulation can be applied *mutatis mutandis* to the article on termination of prosecution. So that prosecutors can also have the same authority to implement restorative Justice. Alternatively, a new article states, "The investigation and prosecution can be stopped if the perpetrator has paid compensation to the victim or the victim's family." The formulation of this matter needs to be regulated in material criminal law, considering its duties and position as a source of original law. If all stages of resolving criminal cases can be regulated regarding restorative Justice, it is hoped that the goals of restorative Justice can be achieved.

2. Restorative Justice must also be regulated in the draft national criminal procedure law. After the National Criminal Code as material criminal law is officially promulgated, the next thing that needs to be considered is how to change and revise the Criminal Procedure Code as formal criminal law. As a rule, tasked with maintaining and enforcing material criminal law, if the material law changes, then according to basic logic, the formal law must also change. Apart from that, there are at least two reasons why the criminal procedural law must also be changed.

First, the Criminal Procedure Code was formed in 1981; then, the New Order was still very powerful. All legal products produced then were authoritarian as a form of authoritarian government. Changes to the Criminal Procedure Code must be intended to change all orthodox legislation into more democratically responsive legislation. Second, the Criminal Procedure Code must be revised to limit law enforcement officials' arbitrariness. So far, in practice, even though there are limitations in formal law, arbitrariness by authorities in enforcing and resolving criminal cases still often occurs. So, the Criminal Procedure Code needs to be revised so that similar things do not happen again.

Regarding restorative Justice, revising the Criminal Procedure Code also needs to be directed towards having a common breath and perception. In future revisions to the Criminal Procedure Code, every law enforcement officer must strive to create peace between victims and perpetrators. All law enforcement officials can initiate efforts to achieve peace at all levels of criminal case resolution. In this effort to create peace, all law enforcement officials can do things deemed necessary to achieve peace. Law enforcement officers also need to be oriented toward the goals of restorative Justice. It is not oriented towards the old view of punishment in criminal law, which is oriented towards retaliation from the Victim to the perpetrator. It is also necessary to ensure that law enforcement officials refrain from using the process of realizing Restorative Justice. There needs to be an adequate supervision concept in the

future revision of the Criminal Procedure Code so that there is no arbitrariness by the authorities. For example, Restorative Justice can be carried out so that the investigation process does not continue. To implement restorative Justice, investigators must pay a certain amount from the perpetrator to the investigator.

4. Conclusion

This article finds that the National Criminal Code is not yet complete in regulating the concept of Restorative Justice. Restorative Justice is the resolution of criminal cases that a judge can only carry out. Restorative Justice is also included in the concept of punishment, which, of course, can only be implemented by a judge. Not by other law enforcement officials. Therefore, it is necessary to improve regulations in the future so that restorative Justice can be regulated, interpreted, and implemented as it should be. In this article, the author recommends at least two regulatory formulations regarding restorative Justice in the future. First, restorative Justice should be included not only in the punishment part. More than that, restorative Justice must be achieved at all levels of criminal case resolution. Second, the concept of restorative Justice should be affirmed in the national criminal procedural law draft. If these two things can be included in national criminal law regulations, then the goals of restorative Justice in Indonesia can certainly be achieved.

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