



RESEARCH ARTICLE

RESTORATIVE JUSTICE PRINCIPLES IN
LAW ENFORCEMENT AND DEMOCRACY
IN INDONESIA

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ABSTRACT

Indonesian legal system has not yet adopted the concept and method of restorative justice; therefore, substantial justice for the Indonesian people has not yet been reflected in legal enforcement in the Pancasila democracy system. The research aims to elaborate on the existence of restorative justice in the criminal justice system, which supports the process of democracy in Indonesia. Normative research is used to establish the aim of the research by using secondary data and primary, secondary, and tertiary legal resources. The urgency of this article is to capture how the legal enforcer is using restorative justice. The findings and conclusion of the research determined that

restorative justice is based on legal and cultural values in the society, which gave a conventional resolution that fulfils justice. The application of restorative justice is constructed through standard procedures based on the system theory approach, which accommodates all roles and functions of the criminal justice system elements. Therefore, legitimacy, legality, responsibility, and supervision are warranted philosophically, juridically, and sociologically. As a result, implementing the concept of restorative justice in the criminal justice system is a choice for the strategy in politics of law. Restorative justice will support the law enforcement in Indonesia as required in order to create democracy in Indonesia based on Pancasila and Constitution of 1945.

Keywords: Restorative Justice; Criminal Law Enforcement; Supremacy of Law; Democracy and Law

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INTRODUCTION

SINCE THE BEGINNING of the twentieth century, aspirations towards liberty and freedom of mankind from colonial oppression has significantly increased and become open, using the democracy and human rights as instruments of effective and liberating struggle. The peak of the humanitarian struggle has resulted in very broad and fundamental changes in the mid-20th century with the emergence of a wave of decolonization around the world, leading to the establishment and formation of new independent and sovereign states in various parts of the world. The democratization took place again and strengthened after the cold war marked by the collapse of the communist power of the Soviet Union and Yugoslavia. Third world countries in the 1990s then followed this democratization process.¹

¹ SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991). The Third Wave at the end of the 20th century, Huntington predicted, would not last forever. The Third Wave may be followed by a sudden and strong reappearance of authoritarianism to form the Third Reverse Wave. However, that does not make it impossible for the Fourth Wave of Democratization to emerge at some point in the 21st century. From past records, it can be concluded that the two main factors that will affect the stability of democracy and the expansion of democracy in the future are economic development and political leadership. In fact, in many cases and some of the latest practices, democracy in addition to having a positive impact on governance, but also the proliferation of various practices of abuse of power, corruption, and various twists and turns. For comparison in Indonesia, please see Hagi Hutomo Mukti and Rodiyah Rodiyah, *Dynasty Politics in Indonesia: Tradition or Democracy?* 1 *JOURNAL OF LAW AND LEGAL REFORM* 531-538 (2020); Amarru Muftie Holish, Rohmat Rohmat, and Iqbal Syarifudin, *Money Politics in Indonesian Democratic Practices* 4 *LAW RESEARCH REVIEW QUARTERLY* 228-237 (2018); Ayon Diniyanto, *Indonesian's Pillars Democracy: How This Country Survives*, 1 *JILS (JOURNAL OF INDONESIAN LEGAL STUDIES)* 105-114 (2017); Fathul Hamdani and Ana Fauzia, *Legal Discourse: The Spirit of Democracy and Human*

Democracy² is a form of government in which all citizens have equal rights in making decisions for change of their lives. Democracy allows citizens to participate either directly or through representation in formulating, developing and making laws. Democracy includes social, economic and cultural conditions that allow the practice of political freedom freely and equally. Democracy is also a set of ideas and principles about freedom and its practices and procedures. Democracy implies respect for human dignity.³

Rights Post Simultaneous Regional Elections 2020 in the Covid-19 Pandemic Era, 5 LEX SCIENTIA LAW REVIEW 97-118 (2021).

- ² This word comes from Greek (*dēmokratía*) "people's power" Henry George Liddell, Robert Scott, "A Greek-English Lexicon", at Perseus. Democracy comes from the word "Demos" which means the people or inhabitants of a place and "cratein or cratos" which means power or sovereignty. Demos-cratein or democratos (Democracy). See MASYKURI ABDILLAH, DEMOKRASI DI PERSIMPANGAN MAKNA: RESPON INTELEKTUAL MUSLIM INDONESIA TERHADAP KONSEP DEMOKRASI 1966-1930 (1999). In the 5th century BC, it used to refer to the Greek city-state political systems, including Athens; it is the antonym of (*aristocratie*) "elite power". Theoretically, the two definitions contradict each other, but it is no longer clear in practice. See NIGEL WILSON, ENCYCLOPEDIA OF ANCIENT GREECE (2006), 511.
- ³ GUNAWAN SUMODININGRAT AND ARY GINANJAR AGUSTIAN, MENCINTAI BANGSA DAN NEGARA PEGANGAN DALAM HIDUP BERBANGSA DAN BERNEGARA DI INDONESIA (2008), 44. In fact, in the same context it is also emphasized that human rights and democracy can also be interpreted as the result of human struggle to maintain and achieve their human dignity, because until now only the conceptions of human rights and democracy have been proven to best recognize and guarantee human dignity. See also Mohammad Naefi, 1 SEMARANG STATE UNIVERSITY UNDERGRADUATE LAW AND SOCIETY REVIEW 125-140 (2022); Eko Agustinus, *Individual Freedom in the Legal Discourse in Indonesia*, 1 INDONESIA MEDIA LAW REVIEW 41-62 (2022). Mar'ie Muhammad Falah Akbar, *Legal Protection for Tolerance and Freedom Among Religious People in Indonesia*, 1 CONTEMPORARY ISSUES ON INTERFAITH LAW AND SOCIETY 39-58 (2022). Tsania Rahma, Yehezkiel Lemuel, Debby Fitriana, Tiara Rizki Annesha Fanani, and Rosa De Lima Gita Sekarjati, *Intolerance in the Flow of Information in the Era of Globalization: How to Approach the Moral Values of Pancasila and the Constitution?*, 1 INDONESIAN JOURNAL OF PANCASILA AND GLOBAL CONSTITUTIONALISM 33-118 (2022). Jerico Mathias, and Rosamine Blessica, *Hate Speech and the Freedom*

Almost all theories, even since classical times, have always emphasized that the real rulers in a democracy are the people or *demos, populus*.⁴ Democracy as the principle and the best system in the political and constitutional system is indisputable so that the democratic system is the best choice among other options.⁵ A study report sponsored by a UN organ, namely UNESCO, in the early 1950s mentioned that there is no single response that rejects "democracy" as the most appropriate and ideal foundation and system for all modern political and organizational organizations.⁶

In terms of the democratic system development in Indonesia, many parties mark the Reformation era which began in 1988 as a milestone for Indonesian democracy. It is a new chapter in Indonesia's political system dynamics. That year the democratic tradition in all political processes in this country begins.⁷ President Abdurrahman Wahid Salah issued Security Sector Reform (SSR) as a political policy within approximately two years of his leadership, marked by his political decision to separate the Indonesian Police (Polri) from the institutions and command lines of the Indonesian Army (TNI) on

Discourse, 1 INDONESIA MEDIA LAW REVIEW 1-22 (2022). Mohammad Wahyu Adji Setio Budi, *Indonesian State System Based on Pancasila and the 1945 Constitution: A Contemporary Developments*. 1 INDONESIA JOURNAL OF PANCASILA AND GLOBAL CONSTITUTIONALISM 1-16 (2022).

- ⁴ AFAN GAFFAR, *POLITIK INDONESIA; TRANSISI MENUJU DEMOKRASI* (1999), 6.
- ⁵ Ni'matul Huda, *Hak Politik Tentara Nasional Indonesia Dan Kepolisian Negara Republik Indonesia Pasca Reformasi*, 21 JURNAL HUKUM IUS QUIA IUSTUM 203-226 (2014).
- ⁶ The study, which involved more than 100 western and eastern scholars, can be seen as a very important answer to studies of democracy. See AFAN GAFFAR, "KUALITAS PEMILU MENENTUKAN KUALITAS DPR, SEBUAH SKETSA: PENGANTAR," IN *PEMILU DAN LEMBAGA PERWAKILAN DALAM KETATANEGARAAN INDONESIA*, EDS. DAHLAN THAIB AND NI'MATUL HUDA (1992), vi.
- ⁷ Heru Nugroho, *Demokrasi dan Demokratisasi: Sebuah Kerangka Konseptual untuk Memahami Dinamika Sosial-Politik di Indonesia*, 1 JURNAL PEMIKIRAN SOSIOLOGI 1-15 (2021).

April 1, 1999. Because of broad public support, this decision was stipulated in the Decrees of the People's Consultative Assembly MPR/VI/2000 and MPR/VII/2000 on the separation of the two institutions by placing the TNI under the Ministry of Defense, while Polri was directly under the President.

The logical consequence of the changes in the Security Sector Reform in the field of law enforcement was the internal reform of the National Police which includes reforms in the field of law enforcement, particularly criminal law. Polri is one of the most important elements in criminal justice systems since its role in the investigation stage is key in criminal law enforcement.

One of the concepts currently a great concern for case resolution is the restorative justice.⁸ Many people think that this concept is relatively new, especially in the criminal law enforcement system. However, if it is studied more deeply in the case settlement through the restorative justice concept further, restorative justice is a concept that already exists in dispute resolution patterns that are often used in customary law systems and have been used for centuries. The concept of restorative justice has also been there in the punishment

⁸ In the 1980s, John Braithwaite introduced a punitive system with a restorative justice approach, inspired by the Maori people in dealing with irregularities in their environment, which emphasized problem-solving by involving the community and local community officials to solve problems in a family manner. This Maori's conflict handling method was adopted in The Children, Young Person and their Families Act as policy development in solving problems among Maori tribes by involving offenders, victims and the community (*whanau, hapu and iwi*). See Eva Achjani Zulfa, "Keadilan Restoratif di Indonesia (Study Tentang Kemungkinan Penerapan Pendekatan Keadilan Restoratif dalam Praktek Penegakan Hukum Pidana)", DISSERTATION, (Universitas Indonesia, 2009), 22-23. See also Chris Graveson, "Police Involvement in Juvenile Crime: Prevention and Diversion," PAPER, Presented at the National Seminar on Juvenile Justice: Developing the Diversion and Restorative Justice Concepts (Jakarta, 2003), 2.

system in civil society.⁹ Civil society is based on the concept of the city of Medina in 622 AD built by the Prophet Muhammad. The concept of civil society is contained in the Medina charter which has an Islamic nuance, containing the discourse of "religious freedom, the brotherhood between religions, peace and calm, unity, political ethics, rights and obligations of citizens, and consistency of law enforcement based on truth and justice." The concept of civil society in the Medina charter principally leads to the creation of a democratic society who respect individual human rights following the guidelines prescribed by the Koran.¹⁰

The term civil society (Latin word "*Civilis Societas*") then appeared, first introduced by Cicerio who with his political philosophy understood it to be synonymous with the state. The initial meaning was related to the concept of citizens and Romans living in cities with legal codes. The code of law is a characteristic of civilized society or political community among uncivilized societies outside Rome. The Cicerio concept includes both individual and community conditions with their urban living culture and certain norms of decency. Currently, civil society is understood as community organizations, especially those characterized by high volunteerism and independence before the state and bound by legal norms or values of their members.¹¹

⁹ The term is a translation or another term for masyarakat madani regardless of the disagreement of many parties on the same meaning of the two terms. This term was introduced by Malaysian Prime Minister Anwar Ibrahim in his speech at the Istiqlal festival in 1991 which became popular with the term civil society. See Sunyoto Usman, "Peran Civil Society (Masyarakat Madani) dalam Tata Pemerintahan," Paper Presented at the Seminar 'Membangun Kemitraan Antara Pemerintah dan Masyarakat Madani untuk Mewujudkan Tata Pemerintahan Yang Baik' (Jakarta, 2001), 1.

¹⁰ SAFRUDIN STIABUDI, MEWUJUDKAN MASYARAKAT MADANI MELALUI PENDIDIKAN DALAM PERSPEKTIF GENDER (2003), 3.

¹¹ Masykuri Abdillah, *supra* note 2.

It is different from the restitutive justice concept as expressed by Howard Zehr¹²: *"Criminal is a violation of the law and the state; violation creates guilt; justice requires the state to determine blame (guilt) and impose pain (punishment); central focus: offenders getting what they deserve."* Justice in this concept is interpreted as a punishment, in the form of a sentence commensurate with the actions of the criminals. Thus, the focus is on the criminals, not on the victims, whereas restorative justice focuses on the victim (how to restore the victim's condition), but still imposes moral responsibility on the offenders, both to restore the victim and to impose sanctions. That's why this effort has the motto: "forgive but not forget."

Both restitutive and restorative justice concepts, basically have the same objective, that is to realize legal justice. However, the law is essentially not seeking the truth, given that law is differentiated based on space and time. Even justice itself is not the goal of the law, but justice is only one of the prerequisites that must be realized to achieve the goal of law itself.

The application of restorative justice in Indonesia shows an inadequacy in the perception of law enforcement officials, which is constrained by replacing imprisonment with the perpetrator's responsibility to restore the victim's conditions. Moreover, the concept of restorative justice is implemented as a legal remedy outside of the criminal justice system. The interpretation of law enforcement officials is not different from the concept of retributive justice elaborated above. The perception has moved away from the meaning of restorative justice, which philosophically focuses on the victim's rights. There is no single provision in the Indonesian Law of Procedures that articulates protecting victims' rights. Moreover, best

¹² AHMAD ALI, MENGUAK TEORI HUKUM (LEGAL THEORY) & TEORI PERADILAN (JUDICIALPRUDENCE) TERMASUK INTERPRETASI UNDANG-UNDANG (LEGALPRUDENCE) (2009), 249.

practices in different countries suggest that restorative justice is applied in their criminal justice system. Consequently, if restorative justice is applied outside the criminal justice system, the norms will clash.

The application of restorative justice arose when the case was regarding an old lady, Nenek Minah, who was indicted for stealing three cacao seeds, which got her house arrested for three months. The case of Nenek Minah has taken quite a lot of attention. Consequently, politics of criminal laws brought forward PERMA No. 2 Tahun 2012 on Adjustment of Limits on Misdemeanor and Amount of Fines on Code of Criminal Law of Procedures. The law was followed by a Memorandum of Understanding between the Supreme Court, Ministry of Law and Human Rights, Attorney General Office, and Indonesian Police, Nomor: 131/KMA/SKB/X/2012, Nomor: M. HH-07. HM. 03. 02 Tahun 2012, Nomor: KEP 06/E/EJP/10/2012, Nomor: B/39/X/2012 on Application on the Limits on Misdemeanor and Amount of Fines, Rapid Procedure on Examination, and Application of Restorative Justice. These regulations were established as a response to the case of Nenek Minas, as a “perpetrator”. Therefore, it is explicable that the perception of law enforcement officials on restorative justice came from the understanding of the response of the Nenek Minah’s case, which emphasises the perpetrator rather than the victim’s rights in criminal laws.

Therefore, the writer is interested in examining the construction of the restorative justice principle as a concept and method of law enforcement in Indonesia. The research emphasises the concept of restorative justice, which focuses on restoring justice for the victim in criminal law, and its implementation as legitimacy and validation in the criminal justice system.

Research on the concept of restorative justice is needed for the Indonesian community. The concept of restorative justice has been

implemented by Indonesian law enforcement institutions such as a diversion concept in Law on Child Court, rehabilitation concept in Drugs cases, Adat Court in Papua and Qonun law in Aceh. However, the perception of law enforcement officials on the concept of restorative justice shows that resolving criminal cases from imprisonment gives the perpetrator a responsibility to make restitution for the victim's condition. Nevertheless, the practice is not complying with the philosophy of restorative justice principles, which focus on the victims and victim restitution. Therefore, using the system theory approach in the criminal justice system is a must to give a better perception of the concept of restorative justice. Consequently, the implementation of restorative justice could support the realization of supremacy of law in Indonesian democracy.

THE RESTORATIVE JUSTICE: THE LAW ENFORCEMENT IN THE DEMOCRACY ERA

THE DEVELOPMENT OF the criminal justice system in Indonesia provides an overview of the controversy, polemics, forms of resistance, protests or sharp criticism of criminal justice processes and decisions. For example, in the case of Grandma Minah, the 55-year-old thief of 3 (three) cocoa beans and was detained for 3 (three) months; the case of Basar Suyanto and Kholil, the thief of watermelons worth Rp. 30 thousand and was sentenced to imprisonment of two months and 10 days; Deli case (junior high school student), voucher thief; and in the case of Rasmiah's grandmother, who was accused of

stealing her employer's oxtail soup and plate, which then ended up on the court; and many other cases without legal justice.¹³

This condition can also occur due to the criminal justice system in Indonesia which still inherits the Dutch colonial government system. The system was implemented based on the concordance principle during the independence era in 1945 and has not changed and adapted to the value system and cultural wisdom and social system in Indonesia to this day. The Indonesian Criminal Code (KUHP) is a translation of the Dutch *Wetboek van Strafrecht* (WvS), thus, the value system adopted is not rooted in the Indonesian value system. Even the substance of the Criminal Procedure Law (KUHP) which replaced the *Herzien Inlandsch Reglement* (HIR), only contains the rights of offenders and does not contain the rights of victims. As consequence, it does not provide a balanced sense of justice between the offender and the victim. Although the interests of victims have been represented by the state in the criminal justice process,¹⁴ the law has failed to guarantee legal protection and justice in a balanced manner to offenders and victims.

The restorative justice¹⁵ appears as a new concept for paradigm in the criminal law enforcement system that guarantees a balanced

¹³ SUKARDI SUKARDI, *RESTORATIVE JUSTICE DALAM PENEGAKAN HUKUM PIDANA INDONESIA* (2020), 24.

¹⁴ In the elucidation of Article 72 of the Criminal Code, it is explained that "in principle, in the event of a criminal incident, the government represented by the police, prosecutors and judiciary, without request from the parties affected by the criminal incident, will immediately act to carry out investigations, prosecutions and sentence those who guilty. However, almost all crimes of many criminal incidents, of several types, can only be prosecuted upon complaints (requests) from parties affected by the criminal incident. Criminal events of this kind are also called: complaint offences." See R. SOESILO, *KITAB UNDANG-UNDANG HUKUM PIDANA (KUHP) SERTA KOMENTAR-KOMENTARNYA LENGKAP PASAL DEMI PASAL*, 1ST ED. (1995), 86-87.

¹⁵ It is further emphasized that restorative justice is an approach to problem-solving that, in its various forms, involves the victim, the offender, their social

protection and distribution of justice to all parties affected by criminal acts. Although some parties think that this is not a new concept, it has been working into practices in the cultural systems of various societies even before the conventional criminal system. According to John Braithwaite that: “according to its proponent, restorative justice is not a new invention. Rather, it is a return to the traditional pattern of dealing with conflict and crime that had been present in different cultures throughout human history.”¹⁶

The application of the principle of restorative justice has started in the implementation of a program to solve criminal problems outside the traditional justice system carried out by the community called victim offenders mediation in Canada in the 1970s.¹⁷ The United Nations officially adopted the principle of Restorative Justice as a paradigm in the settlement of criminal cases at the 10th congress on the prevention of criminal acts and the treatment of offenders (The Tenth UN Congress on Crime Prevention and Treatment of offenders) held in Vienna in early 2000, which gave birth to the resolution: *Basic Principles on the use of Restorative Justice Programmers in Criminal Matters (UN) 2000*, confirmed later in the Vienna Declaration on

networks, justice agencies and the community. See UNITED NATIONS, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, CRIMINAL JUSTICE HANDBOOK SERIES (2006), 6.

¹⁶ JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* (Oxford: Oxford University Press, 2002), 1. See also MARGARITA ZERNOVA, *RESTORATIVE JUSTICE, IDEALS AND REALITIES* (London: Ashgate Publishing Limited, 2007), 7.

¹⁷ ALLISON MORRIS AND GABRIELLE MAXWELL, *RETROACTIVE JUSTICE FOR JUVENILE, CONFERENCING, MEDIATION AND CIRCLE* (Oxford-Portland Oregon: Hart Publishing, 2001), 4. This program was initially carried out to solve legal problems for children, especially to punish child criminals, but in the process offenders and victims are brought together to determine the form of punishment they want together through the mediation and conference process. The victim-offender mediation process focuses not only on the victims but also on the offenders directly involved to jointly decide on the agreed sentence.

Crime and Justice (Vienna Declaration on Crime and Justice "Meeting the Challenges of the Twenty-First Century) in item 27 and 28 which were later adopted in UN General Assembly resolution No. 55/59 dated December 4, 2000.¹⁸

Nature of justice in the concept of restorative justice reflects justice as a form of balance in human life so that the deviant behavior of criminals is considered as behavior that removes balance. Thus, the case settlement model carried out is an effort to restore this balance, by burdening the obligations of the criminal with the awareness that he admits mistakes, apologizes, and returns the damage and losses to the victim as before or at least resembles the original condition, which can fulfil the victim's sense of justice.¹⁹

The implementation of the concept of restorative justice in the law enforcement system in Indonesia has shown various interpretations, particularly since each element of the criminal justice system makes internal rules by not using a systems theory approach.²⁰ The Police issued Regulation of the Head of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Criminal Investigation, and Circular of the Chief of the National Police of the Republic of Indonesia Number SE/8/VII/2018 concerning the Application of Restorative Justice in Criminal Case Resolution; The Attorney General's Office issued the Attorney General's Regulation Number: PER-006/A/J.A/04/2015 concerning Guidelines for the Implementation of Diversion at the Prosecution Level, and 11 Article 13 of the Law on Juvenile Criminal Justice System 4; Attorney General Regulation Number 15 of 2020 concerning Cessation of Prosecution

¹⁸ SUKARDI, *Supra* note 13, pp. 17-18.

¹⁹ Sukardi Sukardi, *Prinsip Restorative Justice dalam Sistem Peradilan Pidana*, 39 MAJALAH FIJAR BARRU (2014).

²⁰ Sukardi Sukardi, *Penerapan Prinsip Restorative Justice dalam Konsep Penegakan Hukum Pidana*, MEDIA HOLDINGS INVESTOR DAILY, November, 2020, at 5.

Based on Restorative Justice and the Supreme Court issued Supreme Court Regulation Number 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System; and Decree of the Director-General of the General Courts of the Supreme Court Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Application of Restorative Justice²¹.

The application of the criminal law enforcement method with a sectoral restorative justice approach to each element of the criminal justice system as described above will cause various obstacles given that in Indonesia, the criminal justice system applied based on criminal procedural law that uses a system theory approach. Therefore, the roles and functions of each element in the criminal justice system are mutually influencing and complementary between elements of the system. Thus, the application of a sectoral restorative justice approach is counterproductive towards the aim of the criminal justice system.

In applying the restorative justice approach in the criminal justice system, firstly, standard procedures need to be formulated both in the substance of criminal procedural law, legal structure and legal culture using a systems theory approach, so that the restorative justice program can be carried out continuously and consistently at each element of criminal justice system. It should not contradict the norms of criminal procedure law that apply either in general or specialist terms, or in other words using the concept of restorative justice (which is a conventional law enforcement concept), but still integral, inherent, and harmonious with modern law enforcement concepts²².

²¹ *Id.*

²² *Id.*

THE APPLICATION OF RESTORATIVE JUSTICE IN THE CRIMINAL JUSTICE SYSTEM

AS DESCRIBED ABOVE, the restorative justice concept is a conventional concept and method for solving problems that occur in traditional societies, so that it is substantially not fully applicable in today's modern justice system. The mediation or conference method that produces an agreement bound by a case settlement agreement is a civil method that has been implemented in the civil procedure system. Whereas in the criminal procedure system, there are norms regarding the authority of prosecution by the state as stipulated in the provisions of Chapter VIII - Abolition of the Authority to Prosecute Criminal and to Carry Out Crime (*nebis in idem*, expire and for the sake of the law) does not cover the settlement of restorative justice, so that mediation and conference decisions are still open to be convicted.

Apart from contradicting various norms and legal principles in force, the application of the concept of restorative justice in the criminal justice process also requires a separate concept and method, as well as a separate program, for example, the process of proving the offenders' actions, auditing the loss of victims or the community, and there is no specific procedure that supports the application of the restorative justice in the process of executing the conference results. Therefore, it is impossible to apply restorative justice outside the criminal justice system separately from the criminal justice process.

Some experts doubt the application of restorative justice in the modern justice system, especially outside the criminal justice system. James Dignan feels pessimistic if the settlement of criminal cases is carried out with a restorative justice approach without interference

from the criminal justice system, especially court institutions. He questioned three (3) critical issues, namely (1) the offenders refuse to admit his guilt; (2) victims are reluctant to participate; (3) the parties are unable to reach an agreement in settling the problem peacefully; and (4) the community disagrees.²³

Kate Warner in Declan Roche warns that problems may arise in the conference scheme due to the absence of supervision and public accountability to analyze the principles of restorative justice with a perspective that often ignores young female offenders.²⁴ Then Jennifer Brown in Declan Roche also criticizes one form of restorative justice principle, especially mediation between victims and offenders, arguing that the program has many procedural deficiencies, including a lack of public accountability.²⁵

Carolyn Hoyle has conducted a comprehensive evaluation of the conference process conducted by the police in applying the principles of restorative justice in Thames Valley England. He raised concerns about the conference by highlighting the need for stronger accountability mechanisms inherent in the semi-public nature of the process and the systematics of regulation from a court perspective.²⁶ Howard Zehr argues that the use of a restorative justice approach in the settlement of a criminal case must be based on justice and

²³ SUKARDI, *Supra* note 13., p. 146.

²⁴ DECLAN ROCHE, *ACCOUNTABILITY OF RESTORATIVE JUSTICE* (New York: Oxford University Press, 2003). Kate Warner (female professor from the University of Tasmania's School of Law, a lawyer and researcher) said that many researchers have expressed concern about the adequacy of accountability mechanisms in programmes.

²⁵ Jennifer Brown said: "in her critique of one form of restorative justice-victims-offenders mediation- argues that such programmes have numerous procedural deficiencies, including a lack of public accountability." *See* ROCHE, *Id.*

²⁶ ROCHE, *Supra* note 24.

legitimacy as confirmation. Therefore, it must remain within the framework of punishment which is called "restorative punishment".²⁷

Furthermore, OC Kaligis in his professor inauguration speech on November 8, 2008, noted that there were many miscarriages of justice cases that occurred in criminal justice processes that even occurred in developed countries so that he was concerned about the criminal settlement that uses the concept of restorative justice outside the justice system criminal.²⁸

Based on the views of these experts, we can understand that the application of the concept of restorative justice requires legitimacy, accountability, restorative punishment, and a supervisory system. In addition, to apply the concept of restorative justice, it is also necessary to prove the offender's mistakes and audit the victim's or community's losses caused by criminal acts. Therefore, the concept of restorative justice can only be applied in the criminal justice system. The application of the restorative justice concept outside the criminal justice system cannot guarantee accountability, legitimacy, and effective supervision.

SYSTEMS THEORY APPROACH IN CRIMINAL JUSTICE SYSTEMS

THE WORD "SYSTEM" according to Bruggink²⁹ refers to "a whole that is interconnected." And if a law is defined as a "conceptual system of legal rules and legal decisions", then the legal system is a product

²⁷ HOWARD ZEHR, *CHANGING LENSES, A NEW FOCUS FOR CRIME AND JUSTICE* (Scottsdale PA: Herald Press, 1990), 209.

²⁸ SUKARDI, *Supra* note 13., p. 27.

²⁹ ARIEF SIDHARTA B., *REFLEKSI TENTANG HUKUM* (Bandung: Citra Aditya Bakti, 1999), 3.

of legal awareness, which means that the legal system also contains irrational aspects.³⁰ Donald Black³¹ defines the legal system, whereas the law is the social control of the government (law is the governmental social control) so that the legal system is a social control system in which the structure, institutions and processes of social control are regulated. Even so, it is recognized that not all social control is legal. Social control becomes illegal since it has no force.

The system theory approach in the criminal justice system is basically a criminal law enforcement process, starting from the investigation and investigation by the police, the prosecution stage by the public prosecutor, the examination process in front of a court session to the correctional process in correctional institutions. Therefore, the criminal justice system is closely related to the rules of criminal law, both material and formal, since criminal law is the enforcement of criminal law "*in abstracto*" to manifest in the enforcement of criminal law "*in concreto*" through the criminal justice system.³²

The constructed legal certainty in the substance of the restorative justice concept is that the settlement of criminal cases using the conference or mediation method should be based on the forgive-but-not-forget concept so that crimes must still be subject to a legal decision as a crime. This legal decision also legitimizes the execution of the results of the mediation of the parties, which in addition to providing certainty in the process also provides a certainty. Aspects of the legal structure, especially of the Indonesian National Police, apply the concept of scientific investigation so that decisions are not based on mere recognition, but scientific evidence. Furthermore, the legal culture of society is constructed to be non-permissive to

³⁰ *Id.*

³¹ DONALD BLACK, *THE BEHAVIOUR OF LAW* (New York: Academic Press, 1976), 2.

³² O. C. KALIGIS, *OC KALIGIS DAN OBSESI PERADILAN PIDANA RESTORATIF* (2008).

decriminalized crimes. Community empowerment is also needed to participate in supporting the reintegration and resocialization process.

By using a systems approach to enforce the law against criminal acts and paying attention to the meaning of "system" as a process of criminal justice, Mardjono Reksodiputro is very precise in his definition³³ that it is one of the community's efforts to control crime to be within the limits of tolerance. Referring to the definition of a system with its limitations as explained by Lawrence M. Friedman in his book *American Law: What is a Legal System* as quoted by Sudikno Mertokusumo³⁴ that the system must be examined as a unit which includes actions of reevaluation, repositioning, and reform of the structure, legal substance, and legal culture. The "integrated" legal system should be carried out simultaneously, integrally, and in parallel. This systemic approach can be used as material for solving legal issues or legal solutions as well as legal opinions, including issues of corruption, namely:³⁵

"The criminal justice system is basically a criminal law enforcement process,³⁶ including stages namely the investigation by the police, the prosecution by the public prosecutor, the examination before a court session and the correctional process in a correctional facility. Therefore, the criminal justice system is closely related to the rules of criminal law, both material and formal, since the criminal law is the enforcement of criminal law "in abstracto" which manifests in

³³ SUDIKNO MERTOKUSUMO, *PENEMUAN HUKUM SEBUAH PENGANTAR* (Yogyakarta: Liberty, 1996), 3.

³⁴ SUKARDI, *Supra* note 13., p. 4.

³⁵ *Id.*, pp. 4-8

³⁶ BARDA NAWAWI ARIF, *TEORI-TEORI DAN KEBIJAKAN PIDANA* (Bandung: Alumni, 1998), 197.

enforcing criminal law "in concreto" through the criminal justice system".

The principle of restorative justice has been used in various studies in understanding as an alternative method of solving criminal cases, especially outside the criminal justice system, although basically this method is a civil method called alternative dispute resolution. It turns out that in practice, this still has certain weaknesses, especially regarding the basis of the aspect of accountability and legitimacy. Therefore, there is a need for a scientific investigation process to determine the status of the parties involved in a case, as well as for the position of the case concerned. Based on this view, the principle of restorative justice appears to be an ideal approach to be applied in the criminal justice system.³⁷

RESTORATIVE JUSTICE APPLICATION IN SEVERAL COUNTRIES

BASED ON SEVERAL STUDIES, Eva Achjani Sulfa concluded that there are countries: Australia, Canada, Finland, Ghana, Bulgaria, Belgium and Tasmania, which interpret the principles of restorative justice as a concept of mediation that is carried out outside the criminal justice system, and there are some others: England, New Zealand, and South Africa, which includes the principle of restorative justice as part of the criminal system.³⁸

The Dutch criminal justice system is the same as Indonesia since Indonesia inherited it from this country. In applying the restorative

³⁷ Sukardi Sukardi, *Legitimacy of the Restorative Justice Principle in the Context of Criminal Law Enforcement*, 4 INDONESIA LAW REV. 196–214 (2014).

³⁸ Zulfa, *Supra* note 8., p. 159.

concept, even though the Dutch legal system has not regulated the institutional restorative justice approach, in criminal law legislation for adolescents, they have adopted various alternative sanctions that are often used to avoid imprisonment sanctions like the sanctions contained in the HALT program³⁹ that is an alternative sanction program based on the willingness of offenders and victims to refer to the police as stipulated in Article 77e of the Dutch Criminal Code. Types of sanctions are as follows:⁴⁰

- a. The perpetrator is offered a job or compensation for damages for a maximum of 20 hours
- b. Community service, which is social work that can promote the interests of the wider community and have educational value.
- c. Work as compensation for damages incurred (work to compensate for damages incurred);
- d. Learning schemes for adolescents, adjusted to the nature/characteristics of criminal acts, including the focus on the victim learning project/*slachtoffer in beeld*; the sexual education learning project/*seksuele vorming*; and the social skills learning project/*sociale vaardigheden*.

The restorative justice concept is applied in France by establishing a national institution for victim assistance and mediation (INAVEM) with Victim-Offender Mediation (VOM), as a result of amendments to the provisions of Law Number 147/174 of 1945

³⁹ In the Dutch criminal law system, a provision is known which regulates the settlement of criminal cases through a mediation process. Settlement of criminal cases through a mediation process, namely Article 77a-ff KUHP, stb. 1994, 528 which regulates the alternative (HALT), which is an acronym for alternative solutions which is a revision of the provisions of criminal law for juveniles.

⁴⁰ RUFINUS HOTMAULANA HUTAURUK, PENANGGULANGAN KEJAHATAN KORPORASI MELALUI PENDEKATAN RESTORATIF, SUATU TEROBOSAN HUKUM (Jakarta: Sinar Grafika, 2013), 160.

concerning the Criminal Procedure Code⁴¹ The United States, through Community Resolution Teams, developed the Restorative Justice Program in prison, a reconciliation program known as the Victim Offender Reconciliation Program in the Mennonite region, United States. 29 states have a Victim-Offender Mediation (VOM) institution or the VOM form regulated by law, while 23 states have a specific statutory provision for VOM and 6 states have a VOM form program that allows dialogue between offenders and victims. Meanwhile, South Africa, through The Center for Conflict Resolution (Center for Conflict Resolution) has developed a program "Prison Transformation Project".

THE SUPREMACY OF LAW IN THE LAW ENFORCEMENT

THE TERM LAW'S SUPREMACY is a series of terms, derived from the English words, namely the words "supremacy" and "law" to become "supremacy of law" or commonly known as "law's supremacy". Hornby A.S.⁴², argues that the word "supremacy" is etymologically taken from the root adjective "*supreme*", which means "*highest in degree or highest rank*" or being at the highest level or highest rank. Meanwhile, supremacy means "the highest of authority".

In principle, *rechtsstaats* or rule of law aims to limit the authorities (government in the broadest sense) in every attitude and action based on the laws and regulations that apply at a certain place

⁴¹ SUKARDI, *Supra* note 13., p. 126.

⁴² A.S. HORNBY, OXFORD LEANER'S DICTIONARY OF CURRENT ENGLISH (Oxford: Oxford University Press, 1974), 869.

and time to their people.⁴³ The doctrine of *rechtsstaats* or the rule of law can only grow in countries that adhere to democracy because without a state of law and democracy present only totalitarian, fascist, absolute and repressive understandings and politics are commanders, and where the law is a tool to maintain power that is not in line with the government (the state). power -*machtsstaat*). The transformation of the democratic transition ensures that authoritarian rule becomes a democracy based on the rule of law implies that both can be achieved simultaneously by involving all stakeholders (stakeholders) are given their respective roles and opportunities simultaneously according to the agreement that was previously agreed upon.⁴⁴

In the concept of a state of law, it is idealized that what must be made commander in the dynamics of state life is law, not politics or economics. The principle of the rule of law is the rule of law, not of man (law that governs a country, not human will). What is called government is basically law as a system, not individuals who only act as puppets of the scenario of the system that governs it.⁴⁵

The development of Indonesian democratic life is intended to build a national legal system that is open to the global order, to accommodate prevailing customary and religious laws and to normalize the existing constitutional law by upholding law's supremacy. In short, for the long term, Indonesia aspires to realize a democratic political life with a clean, moral and responsible government. To build an economic life order able to drive the people's

⁴³ Zahermann Armandz Muabezi, *Negara Berdasarkan Hukum (Rechtsstaats) Bukan Kekuasaan (Machtsstaat) (Rule of Law and Not Power State)*, 6 JURNAL HUKUM DAN PERADILAN 421-426 (2017).

⁴⁴ *Id.*

⁴⁵ MOH. KUSNARDI & HARMAILY IBRAHIM, *PENGANTAR HUKUM TATA NEGARA INDONESIA* (1983); Meriam Marcelina Kaingge, *Supremasi Hukum Atas Asas Kedaulatan Rakyat Berdasarkan Undang-Undang Dasar Tahun 1945*, 5 LEX SOC. 141–149 (2017).

economy and the availability of job and wide business opportunities. Furthermore, it should create a religious life full of tolerance and mutual understanding.⁴⁶

The legal system is one of the strategies for realizing democratic life in a country that is constitutionally based on law or *rechtstaat*. Therefore, legal politics in Indonesia is interpreted in two ways, namely that to realize a democratic system in Indonesia is built through strengthening law's supremacy, while to realize the rule of law, the legal system needs to be built through the concept of democratic law.⁴⁷

The phenomenon of law enforcement in Indonesia in the last decade has provided an overview of the law enforcement process that has caused controversy, polemic, forms of resistance, protests or sharp criticism from various circles. The opinions of various parties who disagree with this legal process are often based on the assumption of hurting the legal feelings of the community, hurting the legal justice of the community who do not agree anymore with the formal legal process through the criminal justice system.⁴⁸ This condition can be read as a form of rejection of a legal value system that is incompatible with what exists within the society. Substantially, the principle of restorative justice has been applied in Law no. 11 of 2012 concerning the Child Criminal Justice System with the diversion method, Law no. 21 of 2001 concerning Special Autonomy for Papua Province, namely by imposing a customary criminal justice system, and Law no. 18 of 2001 concerning Special Autonomy for the Province of the Special Region of Aceh.⁴⁹

⁴⁶ Arba'atun Arba'atun, *Isu-Isu Kritis Menuju Masyarakat Madani Indonesia*, 6 JURNAL MANAJEMEN PENDIDIKAN DAN KEISLAMAN 128-142 (2017).

⁴⁷ SUKARDI, *Supra* note 13., p. 126.

⁴⁸ *Id.*

⁴⁹ *Id.*

The choice for restorative justice as the concept of conventional criminal case settlement has been rooted in the culture of the nation and constituting legal values that live in society, is the concept of norms that people want for social institutions. If the legal values within society are constructed into national law, aspects of legal culture will be acceptable and very effective in fulfilling the sense of justice in society. On the other hand, the current legal system, which is a legacy from the Dutch colonialists, often creates controversy in society because it is incompatible with the ones within society.

The judicial system with a restitutive justice principles approach that has been applied so far in Indonesia, is considered not in accordance with the values of the legal culture in Indonesia. Therefore, in the development of the legal system in Indonesia, various controversies arise, and the picture has not yet realized a sense of community justice. The current development of criminal law shows a tendency to shift the concept of justice and the paradigm of punishment in the criminal law system, namely from the concept of restitutive justice (criminal justice) to the concept of Restorative Justice. Ahmad Ali called this restorative justice a modern concept of criminal law.⁵⁰ Ahmad Ali also compared restorative justice with restitutive justice in the concept of resolving criminal cases.⁵¹

⁵⁰ In his article, Ahmad Ali quoted that: "Restorative justice is criminal justice concept that views crime as violation of people, not as a violation of the state, and creates an obligation to the victim and to the community to make things right. It focuses on the crime's harm rather than on the broken rule and emphasizes redress for the victim and the community for the effects of the wrong doing over punishment imposed by the state. Restorative justice models may provide for appropriate dialogue, direct or indirect, between the victim and offender in the form of victim-offender mediation. See Ahmad Ali, *Restorative Justice adalah Konsep Modern Hukum Pidana*, HARIAN FAJAR (21 December 2011), p. 4.

⁵¹ ALI, *Supra* note 12., p. 247.

The current development of criminal law shows a tendency to experience a paradigm shift in punishment in the criminal law system caused by at least three main factors, namely:⁵² the development of human rights; Changes in society's view of crime and changes in society's view of criminals themselves. The development of attention and strengthening of the protection of human rights, considers that punishment which provides justification for giving sanctions in the form of suffering to someone as a result of a criminal act committed, at first glance is contrary to human rights. The development of attention to human rights has resulted in a number of punishments being reviewed because they are considered inhumane, such as the death penalty. Even a number of Arab countries that adhere to Islam and ratify the Convention against Torture, review the punishment of cutting hands.⁵³

The factor of changing people's views on crime, after previously known punishments were capital punishment and corporal punishment with an emphasis on the notion of retaliation (retribution), then shifted to imprisonment which is considered a more modern form of punishment because it provides opportunities for people to improve themselves. with an emphasis on the notion of improvement (resocialization).⁵⁴ The subsequent development of imprisonment is seen as being able to produce stigma and misery as well as other negative consequences for a person who is a criminal, in addition to burdening the state's finances, so that a fine then appears,

⁵² Eva Achjani Zulfa, *Pergeseran Paradigma Pemidanaan di Indonesia*, 36 JURNAL HUKUM & PEMBANGUNAN 389–403 (2006).

⁵³ *Id.*, pp. 394-395. The human rights point of view was strengthened by the birth of the UDHR, especially Article 3 which regulates the Right to Life, which is also regulated in the provisions of Article 6 of the ICCPR (International Covenant Civil and Political Rights) and Article 6 of the Convention on the Rights of the Child considered inhuman.

⁵⁴ *Id.*, p. 396.

although then this type of fine is also doubtful because it is very relative depending on a person's economic level.⁵⁵

The ambiguity of the understanding or concept of the rule of law as a result of developments that have occurred, the modern democratic state is no longer only tasked with maintaining a "*rechtsorder*" (public order). The function of the state is more focused on social functions. Likewise, economic developments in the international world encourage countries to adapt to these developments, so today there is no country that fulfills legal characteristics in a pure state as has become a state goal that has been stated in the constitution. The idealization of a pure rule of law in constitutional practice cannot be maintained.⁵⁶ Of course, the concept of "State of Law" is a concept or idea that is the basis of the thinking of a nation. Of all countries in the world, there is not one that does not include in their country's basis the concept of law, be it in a country that has a communist, liberal, religious, national or other ideological basis.

The concept of the rule of law remains the dream of all people in any country, but the possibility of its application must adapt to the nature and culture that exists in a country.⁵⁷ Karl Manheim said that humans in their lives are influenced by nature and the surrounding culture (nature and culture *Bedingungen*), so that the mindset of humans is also influenced by the state of nature and the culture

⁵⁵ *Id.*, p. 397. The criminal fine which was originally a type of punishment in civil cases only and was compensation for the damage caused by someone. The difference between fines and compensation lies in who will be paid, if the fine is paid by the State, while if the compensation is paid directly to the person who suffered the loss. See ANDI HAMZAH, *SISTEM PIDANA DAN PEMIDANAAN INDONESIA DARI RESTRIBUSI KE REFORMASI* (Jakarta: Pradnya Paramita, 1986), 43.

⁵⁶ Republic of Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (1945).

⁵⁷ *Id.*

around them, as well as the outlook on life of a nation.⁵⁸ In short, Otto Bauer said that the experience of the same suffering as a group of people raises awareness of the state or awareness to live as a nation in the environment of a state.⁵⁹

The birth of terms in law such as *rechtsstaat*, rule of law, socialist legally and others, is probably due to the nature and culture of the country itself, but the essential meaning of course has the same goal, namely the great desire of the people for the implementation of values. justice and peace in a country. The idea of a rule of law was born to stem the arbitrariness of powers that practice an absolute system and ignore the rights of the people themselves. The French Revolution is a real lesson that is worth reflecting on.

Therefore, strengthening the democratization system is built with an effective law enforcement system towards the rule of law. The rule of law is the main prerequisite for the establishment of democracy in a country. Thus, one of the strategies for enforcing the supremacy of human rights.

The application of the principle of restorative justice in the Indonesian legal system as a progressive legal option provides a new guarantee for the realization of a sense of community justice, which in essence builds a legal culture to realize the rule of law. If the legal culture of the community, especially legal awareness and legal feelings in the community, increases, then trust building in realizing the rule of law is getting stronger, then the social control mechanism for law enforcement is also getting better, so that the law is no longer a tool of authority but becomes the commander in the social system of society. This condition will support the process of democratization in the life of the nation and state in Indonesia.

⁵⁸ AZHARY AZHARY, *NEGARA HUKUM INDONESIA, ANALISIS YURIDIS NORMATIF TENTANG UNSUR-UNSURNYA*. (Jakarta: UI Press, 1995), 15-17.

⁵⁹ *Id.* pp. 3-4.

CONCLUSION

THE CONCEPT OF RESTORATIVE justice is necessary for the community in Indonesia. Moreover, Indonesian law enforcement officials have implemented restorative justice in enforcing several laws, such as the concept of diversion in Law on Juvenile Justice, rehabilitation in drug abuse cases, and the criminal adat justice system in Papua and Qonun (Islamic laws) in Aceh. However, the perception of law enforcement officials shows inadequacy in implementing restorative justice, which is constrained by replacing imprisonment with the perpetrator's responsibility to restore the victim's conditions. Therefore, the perception is that law enforcement officials do not comply with the philosophy and principle of restorative justice, which focuses on the victim and restoring the victim's condition. It is necessary to give a better perception of restorative justice by using the system theory approach in the criminal justice system. Moreover, implementing restorative justice in criminal law enforcement will uphold the law supremacy in Indonesia's democracy. The restorative justice principle is shaped by cultural values that exist in the community to settle conventional resolutions that fulfil the community's sense of justice. The application of restorative justice can be constructed through the standard procedure by using the system theory approach, which comprises all roles and elements of the criminal justice system. This application will provide the legitimacy of confirmation, legality, accountability, and supervision. In the end, it can be warranted philosophically, juridically and sociologically. Thus, the application of the concept of restorative justice in criminal law enforcement is a political-legal strategy option that can support the enforcement of law's supremacy

in Indonesia as a prerequisite for realizing democracy in Indonesia based on Pancasila and the 1945 Constitution.

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