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The Principle of Restorative Justice in The Judge's Consideration of Criminal Decisions

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Abstract. Restorative justice is currently being utilised as an alternative method for resolving criminal cases. As this approach continues to evolve, there have been numerous instances where judges have considered implementing Restorative Justice efforts during trials as a factor in determining the severity of punishment. This study aims to identify the legal foundation for implementing Restorative Justice at the Court Level and examine the considerations made by judges when applying Restorative Justice in sentencing criminal cases. This research employs a prescriptive normative legal research methodology, incorporating both a statutory approach (statute approach) and a contextual approach (conceptual approach). Primary and secondary legal materials and relevant non-legal materials are utilised in this study. The findings of this research demonstrate that the Supreme Court has long embraced the concept of restorative justice through implementing policies. Furthermore, it has become a significant factor for judges to consider when making decisions.

Keywords: Criminal Decisions, Restorative Justice, Judge Consideration.

INTRODUCTION

Laws may remain fixed at a certain point in time, but life and social interactions are constantly evolving. Many events and circumstances undergo significant changes as time progresses. This rapid and dynamic development often surpasses the ability of legal systems to adapt accordingly. Society's evolving nature leads to various new forms of crime emerging. Naturally, the legal system strives to persist in addressing these ever-changing issues.

Law enforcement officers are frequently bound by the principle of legality, which mandates that statutory regulations must resolve every criminal case. They are restricted to the confines of the law, even when seeking justice and ensuring fairness, without compromising legal certainty. Unfortunately, this adherence to the law often fails to achieve the desired sense of justice for all parties involved - the perpetrators, victims, and the community [1].

Resolving issues is frequently associated with using a technique called Restorative Justice. This approach is deemed appropriate to address diverse legal challenges prevalent in

contemporary society. Despite its relatively recent adoption in resolving criminal cases, Restorative Justice draws heavily from early civilisations' traditional values and customs [2].

Restorative justice has gained widespread recognition in various countries as part of accepting Penal Mediation institutions. On July 24, 2002, the UN ECOSOC adopted resolution 2002/12 regarding the "Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters". The outlined Basic Principles highlight that the restorative justice approach can be effectively utilised within a rational criminal justice system. This perspective aligns with G. P. Hoefnagels' assertion that criminal policies should be logical, encompassing a comprehensive response to crime [3].

John Braithwaite, Howard Zehr, and Mark Umbreit, renowned figures in restorative justice, advocate for a system that focuses on accountability and participation of all parties involved - perpetrators, victims, and society. Restorative justice emphasises apology, restitution, acknowledgement of wrongdoing, and rehabilitating offenders back into society.

This approach aims to repair relationships, restore harmony, reconcile differences, and reintegrate individuals into their communities [4].

Restorative justice is commonly acknowledged as a criminal justice model that doesn't always require resolving every issue in court. It involves sharing the burden of case settlement among different parts of the criminal justice system, including the Police and the Prosecutor's Office. However, as it progresses, many court decisions consider using Restorative Justice efforts during trials as a factor in determining the severity of punishments.

Hence, considering this context, the issue is the regulation of Restorative Justice implementation in the Court setting. How does the judge factor in Restorative Justice when delivering a verdict in a criminal case? This research examines the judge's thought process in utilising restorative justice in sentencing.

METHODS

The author of this study employs a normative legal research method to analyse the concept of restorative justice in judicial decisions. The research utilises a case approach to examine court rulings that have a lasting legal impact on restorative justice, a legislative approach to explore the application of restorative justice, and a conceptual approach to delve into the concept itself and the role of judges. Primary legal materials (legislation and jurisprudence) and secondary legal materials (doctrine) are systematically identified, classified, and collected for analysis using descriptive and argumentative techniques.

RESULTS AND DISCUSSION

Waller, in his book entitled "The English Penal System In Transition", states that: "The purpose of criminal law and its operations should be the protection of the public and the promotion of justice for victim, offender, and community" [5]. The purpose of the criminal law and its operation should be to protect society and promote justice for victims, offenders, and society.

Since the evolution of human ideas in today's society, addressing criminal cases should not solely centre on the offenders but also consider the victims, the community, and the state's

interests. Restorative justice has undergone several experiments since its inception. The criminal justice system traditionally involved the perpetrator facing a court trial and receiving punishment from a judge. However, as time has progressed, there has been a push for more effective solutions to address crimes. Restorative justice emphasises the involvement of victims, offenders, and community members in the resolution process, ensuring that criminals do not disrupt community life [6].

Indonesia's adherence to this principle is inseparable from the regulations outlined in Law No 8 of 1981, which governs criminal procedure. This fundamental principle remains unchanged. In practice, the country upholds formal legal guidelines, and law enforcement imposes sanctions on offenders. As Sauer points out, criminal law revolves around three key aspects: lawlessness, guilt, and punishment [7].

Different law enforcement agencies have implemented restorative justice based on their respective rules. Each agency has its regulations governing the implementation of restorative justice. In the Police, the implementation is guided by Police Regulation No 8 of 2021, which addresses explicitly handling crimes through restorative justice. This regulation is supported by Article 16 and Article 18 of the Police Law. On the other hand, the Prosecutor's Office follows the Regulation of the Prosecutor's Office of the Republic of Indonesia No 15 of 2020, which focuses on the termination of prosecution through restorative justice. This regulation is further reinforced by Law of the Republic of Indonesia No 11 of 2021, which pertains to the Prosecutor's Office of the Republic of Indonesia.

The implementation of Restorative Justice is not limited to the investigation and prosecution stages but also extends to the trial phase. Many judicial rulings consider Restorative Justice efforts during the trial when determining the severity of the punishment. Restorative justice is a fundamental principle in resolving cases and can serve as a tool for rehabilitation. The Supreme Court has incorporated this principle into its policies through the issuance of Supreme Court Regulations and Circular Letters:

1. Regulation of the Supreme Court of the Republic of Indonesia No 2 of 2012 on the Adjustment of the Limitation of Minor Crimes and the Amount of Fines in the Criminal Code.

2. Regulation of the Supreme Court of the Republic of Indonesia No 4 of 2014 concerning Guidelines for implementing Diversion in the Juvenile Criminal Justice System.

3. Regulation of the Supreme Court of the Republic of Indonesia No 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Against the Law.

4. Circular Letter of the Supreme Court of the Republic of Indonesia No 4 of 2010 concerning the Placement of Abuse, Victims of Abuse and Narcotics Addicts into Medical Rehabilitation and Social Rehabilitation Institutions.

5. Circular Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia No 3 of 2011 concerning the placement of Victims of Narcotics Abuse in Medical Rehabilitation and Social Rehabilitation Institutions.

6. Joint Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, the Chief of Police of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Minister of Social Affairs of the Republic of Indonesia and the State Minister for Women's Empowerment and Child Protection of the Republic of Indonesia No 166A/KMA/SKB/XII/2009, 148 A/A/JA/12/2009, B/45/XII/2009, M.HH-08 HM.03.02/2009, 10/PRS-s/KPTS/2009, 02/Men.PP and PA /XII/2009 on Handling Children in Conflict with the Law.

7. Memorandum of Understanding between the Chief Justice of the Supreme Court of the Republic of Indonesia, the Minister of Law and Human Rights of the Republic of Indonesia, the Attorney General of the Republic of Indonesia, and the Chief of the National Police of the Republic of Indonesia No 131/KMA/SKB/X/2012, No M.HH-07.HM.03.02/2012, No KEP-06/E/EJP/10/2012, No B/39/X/2012 dated October 17, 2012, on the Implementation of Adjustments to the Limits of Minor Crimes and the Number of Fines, Rapid Examination Procedures and the Application of Restorative Justice.

8. Joint Regulation of the Chief Justice of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, Attorney General of

the Republic of Indonesia, Chief of the National Narcotics Agency of the Republic of Indonesia No 01/PB/MA/111/2014, No 03 of 2014, No 11 of 2014, No 03 of 2014 No Per-005/A/JA/03/2014 No 1 of 2014, No Perber/01/111/2014/BNN on Handling Narcotics Addicts and Victims of Narcotics Abuse into Rehabilitation Institutions.

9. Decree of the Director General of the General Courts No 1691/DJU/SK/PS.00/12/2020 on Guidelines for Implementing Restorative Justice in the General Courts.

10. Letter No 1209/DJU/PS/00/11/2021 dated November 15, 2021, regarding the Suspension of Decree of the Director General of the General Justice Agency No 1691/DJU/SK/PS.00/12/2020.

Judicial independence is the fundamental and most important factor for courts in upholding truth and justice. The adjudication process results from thinking, feeling, and creating, as well as conscience as a controller and controller that is neutral from various interests and intimidation. The author [8] explains that judges in certain conditions and situations are even required to make legal breakthroughs for justice. This is currently known as progressive law, a reflection of restorative justice that has been present in the development of criminal law in Indonesia.

Restorative justice can not only be in the form of out-of-court settlements such as diversion, penal mediation, and others, but restorative justice can be a guiding paradigm for judges in adjudicating a case to achieve justice for all parties [9]. Restorative justice can be the justice that underlies a judge's consideration in deciding so that court decisions reflect restorative justice that provides justice for all parties (victims, perpetrators, and society) [10].

Restorative justice is a simple concept. In the Indonesian context, it means a fair settlement involving the perpetrator, victim, family, and other parties involved and jointly seeking a settlement of criminal acts and their implications that prioritises recovery back to the original state [11]. Restorative justice will be a concept that upholds human rights values and is humanist [12].

The general provisions of Article 1 Point 11 of the Criminal Procedure Code state that a court decision is a judge's statement pronounced in an open court session. It can be in the form of

punishment, acquittal, or release from all legal charges in the case and in the manner regulated in this law. The judge's decision is the "end" of the criminal trial process for the examination stage in the district court.

Article 182 § 4 of the Criminal Procedure Code states that in the deliberation, the panel's presiding judge asks questions from the youngest to the oldest judge. The panel's presiding judge is the last to express his opinion; considerations and reasons must accompany all opinions.

Article 185 § 5 of the Criminal Procedure Code stipulates that the panel's deliberations shall be unanimous wherever possible unless this has been seriously attempted and cannot be achieved. Then two ways shall be taken: a) decisions are made by majority vote; b) the judge's most favourable opinion shall be used if those above cannot be obtained.

This judge's decision is only valid and has legal force if it is pronounced in a session open to the public (Article 195 KUHAP) and must be signed by the judge and clerk immediately after the decision is pronounced (Article 200 KUHAP).

When viewed from the provisions of the Criminal Procedure Code, it can be concluded that the judge's decision can essentially be categorised into two types: final decisions and not final decisions. Suppose a case by a panel of judges is examined until the subject matter is completed. In that case, this is based on the provisions of Article 182 § 3 and § 8 of the Criminal Procedure Code, Article 197 of the Criminal Procedure Code and Article 199 of the Criminal Procedure Code, called a final decision or verdict. Meanwhile, decisions that are not final in practice can be stipulations or interlocutory choices based on the provisions of Article 156 § 1 of the Criminal Procedure Code.

According to [13], the Panel of Judges in deciding a case according to KUHAP only allows three possibilities, namely: 1) Punishment or imposition of punishment; (*veroordeling tot enigerlei sanctie*); 2) Acquittal (*vrij spraak*); 3) Judgment of acquittal (*onslag van recht vervolging*).

The implementation of restorative justice in court is based on the Decree of the Director General of Badilum No 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Application of Restorative Justice. Based on this

decree, the implementation of restorative justice in court is led by a single judge and carried out with a speedy examination procedure as regulated in Articles 205-210 of the Criminal Procedure Code. The settlement of minor criminal cases through restorative justice can be carried out provided peace has been made between the perpetrator, victim, family of the perpetrator/victim, and relevant community leaders with or without compensation.

In practice, the judge considers the implementation of Restorative Justice during the trial when ruling. These rulings may differ, specifically:

Restorative Justice as a Basis for Criminal Probation. In the case a quo, namely the Decision of the Tanjung Pati District Court No 83/Pid.B/2023/PN Tjp, the defendants committed the crime of persecution as stipulated in Article 170 § 1 of the Criminal Code or Article 351 § 1 Jo Article 55 of the Criminal Code. The reason for the decision is that the Singkawang District Court disagrees with the recommendations and demands of the Public Prosecutor. The imposition of appropriate, fair and proportional punishment by the judge with the imposition punishment to the Defendants, therefore with imprisonment for two months each, the punishment does not need to be served unless in the future there is a judge's decision that determines otherwise because the convicted person commits a criminal offence before the probation period of six months ends ". In this case the judge considered the imposition of punishment based on the conception and philosophy of punishment, which is not only aimed at retaliation for the perpetrator by providing preventive measures but also paying attention to the restoration of the perpetrator's condition (*restitutio in integrum*) to the victim as a result of a shift in the characteristics of the purpose of punishment from retributive justice towards restorative justice, namely the Defendants have never been convicted, the Defendants have the status of wives and mothers, for their husbands and children who need attention and need the presence of the Defendants in the midst of the family, between the Defendants and the victim there is a tribal relationship and also neighbors and between the Defendants and the victim have forgiven each other and have reconciled, even the Defendants have been responsible by submitting medical expenses exceeding the actual costs incurred by

the victim, in the sense that the conflict between the Defendants and the victim has been resolved and the relationship between the two has been restored or re-established, by taking into account the principles of justice and expediency, as well as avoiding the growth of grudge/ongoing conflict between the two and preventing the imposition of counterproductive punishment, it is necessary to apply conditional punishment to the Defendants as stipulated in Article 14 (a) of the Criminal Code.

Restorative Justice as a Basis for Imposing Criminal Fines. In this context, restorative justice as the basis for imposing a fine is found in Majene District Court Decision No 39/Pid.Sus/2016/PN.Mjn. In this case, the defendant's actions were regulated and punishable under the provisions of Article 44 § 1 of Law No 23 of 2004 on the Elimination of Domestic Violence (KDRT). The public prosecutor's recommendation was to impose a punishment against the defendant in imprisonment for 8 (eight) months, minus the detention period during which the defendant was in detention.

The Panel of Judges, in their decision, stated that the defendant's actions were proven. However, from the perspective of the paradigm of punishment, they disagreed with the demands of the Public Prosecutor. Therefore, they punished the defendant with the provision that if the fine is not paid, it will be replaced with imprisonment for three months.

Restorative Justice as the Basis for a Verdict of Release from All Lawsuits (Ontslag Van Alle Rechtsvervolging). The application of restorative justice as ontslag van alle rechtsvervolging is found in the context of Edi Yanto Bin Mak Syah, namely the Decision of the Suka Makmue District Court No 63/Pid.B/2021/PN Skm dated November 08, 2021. The global nature of this case, Edi Yanto Bin Mak Syah, was charged in the primary indictment with violating Article 351 § 1 of the Criminal Code. The public prosecutor's charges stated that the defendant was imprisoned for four months, deducted in full from the period of arrest and detention that the defendant had served with the order that the defendant remain in custody and pay court costs for violating Article 351 of the Criminal Code.

The judge's ruling determined that Edi Yanto Bin Mak Syah had indeed committed the crime as outlined in the sole charge presented by the

Public Prosecutor. However, the judge concluded that he could not be held accountable for the crime due to the implementation of restorative justice during the trial proceedings. Consequently, the judge acquitted the defendant of all legal charges and ordered his immediate release from detention upon the pronouncement of the decision.

The Application of Restorative Justice as a Basis for Punishing Perpetrators for Complying with the Content of the Peace Agreement. In this context, the application of restorative justice as a basis for punishing the perpetrator to comply with the contents of the agreement is found in the Record of Decision of the Rengat District Court No 1/Pid.C/2021/PN Rgt, Record of Decision of the Muko-Muko District Court No 1/Pid.C/2021/PN Mkm and Record of Decision of the Luwuk District Court No 9/Pid.C./2021/PN Lwk. The defendant was tried in a speedy trial with a record of charges of violating Article 364 of the Criminal Code. Ratio legis consideration of the judge's decision on restorative justice refers to the Decree of the Director General of General Courts of the Republic of Indonesia No 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Application of Restorative Justice.

Based on the explanation provided, it is evident that the presence of vital justice initiatives indicates that law serves as a social control mechanism that evolves in tandem with societal progress to restore the situation to its original state. In this scenario, the judge must possess both a policy and conscience. The implementation of restorative justice represents a legal innovation that prioritises seeking fair alternative solutions for all parties involved rather than focusing on retribution against the perpetrators of criminal acts.

CONCLUSIONS

Restorative justice is implemented during the investigation and prosecution stages and is also evident in the trial process. Many judges consider the efforts made toward Restorative Justice when determining the severity of the punishment. Restorative justice is a principle of law enforcement that aims to facilitate recovery. The Supreme Court has incorporated it into policy implementation through regulations and circular letters.

Interestingly, different judges may reach different verdicts in the same case. The application of Restorative Justice in the trial serves as a factor for judges to consider when delivering their verdicts. These verdicts can vary, including using Restorative Justice as a basis for imprisonment, probationary punishment, imposing fines, acquittal from all legal charges (*Ontslag Van Alle Rechtsvervolging*), or requiring the perpetrator to comply with the terms of a peace agreement.

Implementing a policy supported by the highest court in the land is essential to improve the

efficiency of incorporating restorative justice principles in public courts. This policy must detail the organised utilisation of restorative justice principles, guaranteeing uniformity and logical progression throughout all legal proceedings. Moreover, promoting cooperation among law enforcement entities is vital. By creating interconnected systems among these entities, the integration of restorative justice can be enhanced, resulting in more significant benefits for both perpetrators and those who were harmed.

REFERENCES

1. Wulandari, C. (2021). Dinamika Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia [The Dynamics of Restorative Justice in the Indonesian Criminal Justice System]. *Jurnal Jurisprudence*, 10(2), 233–249. doi: [10.23917/jurisprudence.v10i2.12233](https://doi.org/10.23917/jurisprudence.v10i2.12233) (in Indonesian).
2. Rukman, A. A. (2023). Keadilan Restoratif Dalam Sistem Peradilan Pidana Indonesia [Restorative Justice in the Indonesian Criminal Justice System]. *Restorative Journal*, 1(1), 97–118 (in Indonesian).
3. Muladi., & Arief, B. N. (1992). *Teori-Teori dan Kebijakan Pidana* [Criminal Theories and Policy]. Bandung: Alumni (in Indonesian).
4. Menkel-Meadow, C. (2007). Restorative Justice: What Is It and Does It Work? *Annual Review of Law and Social Science*, 3(1), 161–187. doi: [10.1146/annurev.lawsocsci.2.081805.110005](https://doi.org/10.1146/annurev.lawsocsci.2.081805.110005)
5. Muladi., & Sulistiyani, D. (2020). *Catatan Empat Dekade Perjuangan Turut Mengawal Terwujudnya KUHP nasional: (Bagian I, 1980-2020)* [Notes of Four Decades of Struggle to Supervise the Realisation of. National Criminal Code: (Part I, 1980-2020)]. Retrieved from <https://repository.usm.ac.id/files/bookusm/A031/20200916100645-Catatan-Empat-Dekade-Perjuangan-Turut-Mengawal-Terwujudnya-KUHP-NASIONAL.pdf> (in Indonesian).
6. Herlina, A. (2004). *Perlindungan terhadap anak yang berhadapan dengan hukum. Buku Saku Untuk Polisi* [Protection of children in conflict with the law. Pocket Guide for Police]. Jakarta: UNICEF (in Indonesian).
7. Priyatno, D. (2007). *Pemidanaan untuk anak dalam konsep rancangan KUHP (dalam kerangka Restorative Justice)* [Criminalisation of children in the draft Criminal Code (within the framework of Restorative Justice)]. Bandung: Lembaga Advokasi Hak Anak (in Indonesian).
8. Natsir, A. M. (2014). *Hermeneutika Putusan Hakim* [Hermeneutics of Judges' Decisions]. Yogyakarta: UII Press (in Indonesian).
9. Susanto, H., Sinaulan, R. L., & Ismed, M. (2022). *Legal Certainty Regarding The Imposition Of Criminal Extortion Sanctions Involving Community Organisations (ORMAS)*. *Policy, Law, Notary And Regulatory Issues (POLRI)*, 1(2), 37–54.
10. Hariyanto, D. R. S., & Pradnya Yustiawan, D. G. (2020). Paradigma Keadilan Restoratif Dalam Putusan Hakim [Restorative Justice Paradigm in Judges' Decisions]. *Kertha Patrika*, 42(2), 180. doi: [10.24843/kp.2020.v42.i02.p06](https://doi.org/10.24843/kp.2020.v42.i02.p06) (in Indonesian).
11. Arief, H., & Ambarsari, N. (2018). Penerapan Prinsip Restorative Justice Dalam Sistem Peradilan Pidana Di Indonesia [Implementation of Restorative Justice Principles in the Indonesian Criminal Justice System]. *Al-Adl: Jurnal Hukum*, 10(2), 173. doi: [10.31602/al-adl.v10i2.1362](https://doi.org/10.31602/al-adl.v10i2.1362) (in Indonesian).

12. Istiqamah, D. T. (2018). Analisis Nilai Keadilan Restoratif Pada Penerapan Hukum Adat Di Indonesia [Analysis of Restorative Justice Values in the Application of Customary Law in Indonesia]. *Veritas et Justitia*, 4(1), 201–226 (in Indonesian).
13. Harahap, M. Y. (2000). Pembahasan Permasalahan dan Penerapan KUHAP Penyidikan dan Penuntutan [Discussion of Problems and Application of the Criminal Procedure Code of Investigation and Prosecution]. Jakarta: Grafika (in Indonesian).