



## The Better Law Construction of Justice in the Implementation of Restorative Justice

Oksidelfa Yanto<sup>1</sup>, Dadang<sup>2</sup>, Hasan Alzagladi<sup>3</sup>, Guntarto Widodo<sup>4</sup>, Nani Widya Sari<sup>5\*</sup>

Pamulang University, Tangerang Selatan

**Corresponding Author:** Nani Widya Sari [dosen02124@unpam.ac.id](mailto:dosen02124@unpam.ac.id)

---

### ARTICLE INFO

*Keywords:* Legal Construction, Justice, Restorative Justice

*Received :* 13, October

*Revised :* 29, October

*Accepted:* 26, November

©2024 Yanto, Dadang, Alzagladi, Widodo, Sari: This is an open-access article distributed under the terms of the [Creative Commons Atribusi 4.0 Internasional](https://creativecommons.org/licenses/by/4.0/).



### ABSTRACT

The purpose of this study is to identify and understand a new legal design to create better justice while implementing restorative justice. Then, understand and comprehend the urgency of synchronization and synergy of law enforcement for the implementation of restorative justice in a criminal act. The research method used in this study uses a normative legal research method using secondary data obtained through literature studies. The study's findings suggest that in order to improve justice for everyone, a new legal framework pertaining to the application of restorative justice must be developed in the future. All of the criminal justice system's subsystems, including the police, prosecutors, and court institutions, are subject to guidelines when the ideas of restorative justice are institutionalized and put into practice as standards in legislation. This can serve as a solid legal foundation for the application of restorative justice, ensuring that legal certainty is attained as the ideals of a state of law in accomplishing the objectives of law that is fair and advantageous in Indonesia.

---

## **INTRODUCTION**

All of us know that in the provisions of Article 1 paragraph (3) of the 1945 Constitution it is very firmly stated that, "The State of Indonesia is a State of Law." From the text of Article 1 paragraph (3), the provisions regarding *rechstaat* are expressly stated in the Amendment to the 1945 Constitution of the Republic of Indonesia. The concept of *Rechtsstaat* is based on the belief that state power must be exercised on the basis of impartial and good law.

Impartial and good law is based on the implementation of the law itself by using existing legal provisions in order to create legal certainty in a state of law. The basic principle of the concept of a state of law is that state or government actions are based on law, not on individuals and so on.

In Aristotle's view, what is meant by a state of law is a state that stands above the law that guarantees justice to its citizens. The government that governs in a state is not a human being, but the impartial intelligence that is stated in legal regulations, while the ruler only holds the law and balance. (J.J. von Schmid, 1988: 106).

In this world there are two models of the concept of a state of law that have been developed, namely the Continental European model called *rechstaat* and the Anglo Saxon model called rule of law.

The concept of *rechtsstaat* was born from a struggle against absolutism so that its nature is revolutionary. (Philipus M. Hardjon, 1987: 72). The concept of *rechtsstaat* is based on the Continental Legal system called civil law. While the concept of rule of law developed evolutionarily, (Philipus M. Hardjon, 1987: 72). which is based on a legal system called common law.

The concept of *rechstaat* according to Friedrich Julius Stahl is characterized by four elements, namely: 1) Protection of human rights; 2) The existence of separation or division of power to guarantee human rights, commonly known as *Trias Politica*; 3) government based on regulations/laws; and 4) The existence of administrative justice in disputes. (State administrative justice). (Miriam Budiharjo, 1977: 57-58).

Meanwhile, the concept of Rule of Law according to A.V. Dicey is marked by three elements, namely: 1) supremacy of law; no arbitrary power, a person can only be punished if he breaks the law; 2) equal standing before the law (equality before the Law), both for ordinary people and for officials; and 3) guaranteed human rights by laws and court decisions. (A.V. Dicey, 1977: 58).

The four principles of '*rechtsstaat*' developed by Julius Stahl above can basically be combined with the three principles of 'Rule of Law' developed by A.V. Dicey to mark the characteristics of a modern Legal State in the present era. In fact, by "The International Commission of Jurist", the principles of the Legal State are added to the principle of an independent and impartial judiciary (independence and impartiality of judiciary) which in the present era is increasingly felt to be absolutely necessary in every democratic country. The principles that are considered important characteristics of the rule of law according to "The International Commission of Jurists" are: First, the state must be subject to the law. Second, the government respects individual rights. Third, an independent and impartial judiciary. (A.V. Dicey, 1977: 58).

From the two concepts of the rule of law above, a further explanation of the concept of the rule of law should ideally be implemented that the law is the commander and is carried out on the basis of fair and good law based on the principle of human rights. The commander in the dynamics of national and state life is the law itself, not others. The law also upholds the principle of equality before the law. Therefore, good law by prioritizing the principle of human rights and equality before the law must be carried out by a legitimate and sovereign state or government. The state in this case is a system that regulates and implements the law, in the sense that the government is not an individual but a system that is built and enforced properly in order to achieve the objectives of the law, namely certainty, justice and benefit. The existence of legal certainty, with its derivative elements, namely the principle of legality where there are laws that regulate authorized actions in such a way. The principle of legality provides a condition where in a rule of law there is a state or government that implements the law in accordance with applicable rules and regulations. That the state has a great responsibility in creating safe conditions for society with all binding legal provisions.

### **THEORETICAL REVIEW**

Therefore, law is the entire norm set by the ruler of society who has the authority to set the law, stated or considered as a binding regulation for some or all members of a particular society. (Amram Suadi, 2021: 25). Because the law binds all people, the law is made the commander. In this condition, when the law is made the commander, the law has a goal that is to be achieved in society, namely justice, certainty and benefit. The law must be fair to everyone without any difference. The law must be certain, because in law there is no word possible and the law must provide benefits for people's lives.

In order to create legal goals that are based on certainty, justice and the benefits of the law, it is necessary for law enforcement in a state of law to be regulated in such a way, especially regulations regarding restorative justice. The concept of restorative justice needs to be stated in a separate statutory regulation in the Indonesian state of law with an approach to the relationship between the perpetrator and the victim. So that its implementation has a written guideline and rules that are binding for interested parties in an independent law.

Based on the description above, the author can formulate the problem as follows; First, how is the construction of new law to create better justice in the implementation of restorative justice? Second, how is the urgency of synchronization and synergy of law enforcement officers for the implementation of restorative justice in a criminal act?

### **METHODOLOGY**

A research concerning law is constructed as a scientific activity. (Salim HS and Erlies Septiana Nurbaini, 2018: 7). The writing of this research uses a normative legal research method. Therefore, the data used is secondary data obtained through literature studies. After the data is collected, it is analyzed to answer the existing problems.

## RESEARCH RESULTS AND DISCUSSION

### *The Formation of Law*

In the 18th and 19th centuries there were two views on the formation of law. First, Legism: Law is formed by legislation alone. All laws are contained in the law. Outside the law there is no law. Thus anyone who, due to his mistake, causes loss of property, life and honor to others is sentenced to imprisonment for a period of time determined in the existing law. Second, Freie rechts lehre: Law is formed by the courts. Laws, customs and others are only aids for judges to find the law in concrete cases. Therefore, judges are free to do something according to the law or not. The judge's job is to create law. The judge's decision based on his beliefs is law. Law enforcement is a must carried out by the state in protecting its citizens, because all legal events are urgent social problems that must be resolved in order to achieve a harmonious, orderly and peaceful life as a manifestation of a peaceful society. Various notes on criminal law enforcement are widely reported by the mass media, both print and electronic. This illustrates the increase and intensity of news coverage of criminal cases, which means that the public feels the need to pay attention to security, order, and justice. (Vivi Ariyanti, 2019: 55).

In accordance with the theory of law enforcement, as stated by Soerjono Soekanto, the main problem of law enforcement actually lies in the factors that influence it, which results in law enforcement not being able to run optimally. These factors consist of the legal factor itself, the law enforcement factor, the facility or facility factor, the community factor, and the cultural factor. (Tri Novita Manihuruk: 2021: 298-299).

In essence, law should be viewed as a symptom that can be seen in society through the behavior patterns of its members rather than only a black-and-white formulation as expressed in numerous laws and regulations. This indicates that non-legal elements including societal values, attitudes, and viewpoints—collectively known as legal culture—have a significant impact on the law. (Syafuruddin Makmur, 2015: 86).

Legal culture according to Friedman is also an important element in the legal system, because legal culture pays attention to the thinking of society and the power of society that determines how the law is obeyed, avoided or misused. Therefore, according to Friedman, law without legal culture is like a dead fish in a bucket, not a fish that lives swimming in the ocean of its vehicle. (A. Muhammad Asrun, 2004: 44).

Discussing law enforcement, especially criminal law, is not only about the application of applicable regulations, but also about what law enforcement officers do to overcome the problems that exist in law enforcement. Therefore, in dealing with problems in criminal law enforcement that occur in society, preventive efforts can be made or without using criminal law which focuses more on prevention before a crime occurs and repressive or criminal law which focuses more on eradication after a crime is committed with criminal law, namely criminal sanctions which are a threat to the perpetrators. (Nindia Viva Pramudha Wardani, Widodo Tresno Novianto, 2018: 205).

In community life, the existence of the function of criminal law can certainly create a safe, orderly and peaceful situation. However, when viewed in the context of social life, the function of criminal law carried out by law enforcers will always face extraordinary challenges. Because the characteristics of crime are different from each other.

Community involvement in crime prevention is very important, because crime prevention is a rational effort by the community as a reaction to the crime that occurs. This is because in a crime that occurs there are victims whose rights must be protected as legal subjects. In the existing criminal justice system, victims have not/have not received maximum special attention. In fact, in every crime that occurs, there is a loss experienced by the victim. The state focuses more on the existence of suspects to be subject to legal sanctions.

Victims who have not/have not received a place in the criminal justice process because the current criminal justice system adheres to retributive justice, where the resolution of cases is only intended to impose sanctions on perpetrators of crimes without considering the aspects of losses suffered by the victim. The imposition of sanctions is solely for revenge against the perpetrator without restoring the losses suffered by the victim. In fact, a victim is a party whose rights and interests have been directly violated and harmed.

In a crime, the interests of the victim will be directly represented by the state. Where the state has a role in carrying out the legal process for the suspect. The legal process carried out aims to provide protection to the victim, namely by sentencing the perpetrator. However, currently the Indonesian criminal law system is entering a new chapter in its development. In this section as a conclusion, we all need to understand that the law is formed because of the interests of humans that are different from each other. As a result of this difference, of course, human interests must be accommodated by law, so that a facilitator is needed to connect the different interests, so that justice is created.

### *New Legal Construction in the Implementation of Restorative Justice*

Not surprisingly that we still remember around 2014, the Indonesian legal world was shocked because of Grandma Asyani, a 63-year-old woman, who was detained since December 2014 because she was accused of stealing wood from Perum Perhutani, Situbondo, East Java. Law enforcement officers should have been able to apply the principle of Restorative Justice at that time. In this grandmother's case, we can understand that the Criminal Code as the main written source of law in the general criminal justice system which is positivistic (formal legality), is rigid and not free in providing a place for laws that live and develop in the midst of society. This is because, referring to the Criminal Code (KUHP), it is very clear that all criminal acts that are proven legally and convincingly committed by someone will be punished with a criminal sentence. The intended criminal sentence is a reaction to a criminal act in the form of misery imposed on the perpetrator of the crime (daader) by the State through a court decision. The Criminal Code (KUHP) as the main source of law in general criminal justice is positivistic (formal legality) so that it is rigid and not free in providing a place for laws that live and develop in the midst of society. Which in

the end, restorative justice is set aside in legal cases that occur. In existing literature, restorative justice has been carried out as the implementation of a victim offender mediation program that began in the 1970s in Canada, this program provides a solution outside of traditional justice which is carried out as an alternative to punishing criminals. Indonesia has basically used the concept of restorative justice in its indigenous communities, such as Bali, Toraja, Papua, Minangkabau and other indigenous communities that uphold the principles of customary law and culture. (Lidya Rahmadani Hasibuan M. Hamdan, Marlina & Utary Maharani Barus, 2022: 16).

This restorative justice perspective is a result of the shift in law from *lex talionis* or retributive justice by emphasizing restoration efforts (restorative). In an effort to restore victims when with a more retributive and legalistic approach it is difficult to heal the victim's wounds. So restorative justice seeks to emphasize the perpetrator's responsibility for their behavior that causes harm to others. In several criminal incidents that have occurred, several crimes can be seen that have been taken restorative justice efforts. In addition to cases involving children, both as perpetrators and as victims, there are also other legal incidents that have taken restorative justice steps. Take for example, the Garut District Attorney's Office, which previously acquitted a perpetrator of cell phone theft through a restorative justice approach and humanitarian reasons. In this case, the district attorney's office, with consideration and analysis for the sake of humanity and listening to the assessment of the community that the perpetrator was driven by economic problems and to help his child study online, so he was forced to do something that was against the law. Due to the efforts made by the Garut District Attorney's Office, the threat of Article 362 of the Criminal Code concerning theft against the perpetrator was officially stopped.

Restorative justice has also been given to a motorcycle theft perpetrator by the Takalar District Attorney's Office. The perpetrator of the theft, for the sake of his wife who was about to give birth, dared to steal a vegetable seller's motorcycle. However, with the victim's sincerity, he finally forgave the perpetrator. The prosecutor's office finally approved the request to stop the prosecution based on the principle of restorative justice. Restorative justice has also been given by a Police Chief in West Java to a school arsonist. With various considerations, for example, the losses due to the fire were not too great and the community also agreed to the provision of restorative justice. From the explanation above, the implementation of the concept of restorative justice in a criminal incident is certainly very good without harming any party. Restorative justice is not an effort to protect the perpetrator of the crime, but as a solution that prioritizes deliberation and family, the final result of which does not harm either party, as emphasized in the point of restoration to the original state.

Although the concept of restorative justice is well implemented, in this case, criminal cases must first be sorted out in order to carry out restorative justice. This means that not everything can be restored. Therefore, restorative justice should not then empty existing correctional institutions because many criminal acts are resolved without entering retributive justice. Retributive justice needs to be held, as long as the criminal incident that occurs is considered very

serious and has a very cruel victim and should not have happened. However, the failure to apply the concept of restorative justice in minor cases with a sentence of less than five years and or in Narcotics Crimes in cases where the perpetrator is the victim, will certainly cause prolonged problems in the process of serving a sentence in a correctional institution.

One form of renewal in Indonesian criminal law is the regulation of criminal law in the perspective and achievement of justice for the improvement or restoration of conditions after the incident and the criminal justice process known as restorative justice which is different from retributive justice (emphasizing justice in retaliation) and restitutive justice (emphasizing justice in compensation).

If we pay attention, in fact, the current concept by considering the development of human life, it turns out that the implementation of criminal sanctions for revocation of independence contains more negative aspects than positive aspects. In the negative aspect, for example, the emergence of the revocation of independence. In addition, the energy of law enforcers is drained and the state budget must be spent on physical punishment of perpetrators of crimes rather than focusing on recovery from the consequences of the crimes committed. In fact, in many criminal cases, the losses or negative consequences caused by a crime are more important to fix than depriving a perpetrator of freedom. Based on this, the concept of restorative justice then becomes another way to resolve a criminal case that occurs. In the future, restorative justice really needs to be regulated in a separate law. Restorative justice in the laws and regulations in Indonesia was first regulated and used as an alternative to punishment in cases of child crimes. Then the concept of restorative justice in Indonesia was adopted in the practice of all law enforcement institutions as an option in resolving criminal cases. Restorative Justice is a popular alternative in various parts of the world because it offers a comprehensive and effective solution. Restorative Justice aims to empower victims, perpetrators, families and communities to correct unlawful acts, by using awareness and realization as a basis for improving community life and explaining that the concept of restorative justice is basically simple.

Ultimately, restorative justice is defined as a process that involves all parties involved in a particular crime to sit together to solve problems and think about how to handle victims and perpetrators. Thus, based on the description above, in the future it is necessary to form a very special law to be able to implement restorative justice to create justice, certainty and legal benefits for society. So that later the law will function in providing protection to someone with the principle of a sense of justice. The function of law as protection of human interests so that. (Hidayatullah, 2021: 47). However, of course it is not just human protection alone, but how to protect aspects of law enforcement that are fair to all parties. So that the implementation of the concept of restorative justice in a minor criminal incident and is realized continuously and does not need to be continued in the retributive justice process.

### ***Synergy and Synchronization in the Implementation of Restorative Justice***

How urgent is the synchronization and synergy of law enforcement officers for the implementation of restorative justice in a minor crime? This question seems very important to be explained in more depth. Because, in deciding a case to a decision that has permanent legal force, good cooperation is needed in enforcing the law by law enforcement officers, starting from investigations, inquiries, to the ongoing examination in court. Thus, this certainly requires collaboration and synergy between existing law enforcers. Moreover, we know that the legal system will be able to run well if it is built by the components in it. It is very important to understand that the legal system is built by its supporting components. In his view, Friedman said that there are three components in the legal system. Among them are structural components, substance and legal culture. These three components are in an interaction with each other in a totality that is formed which we usually call a legal system. (Amran Suadi, 2022: 203). This legal system is then tasked with creating justice in the midst of community life. The public's expectations for the enforcement of impartial law are certainly very high. This is understandable because one of the purposes of the law is justice. And this is often a concern for the community. The community has great hopes that in their lives legal justice will always be upheld in accordance with applicable law. Justice must not be taken away from every individual. Because in the concept of a state of law, justice is something that must be carried out and implemented as there is a guarantee for every human being to get the same position. Therefore, one way to achieve justice in law enforcement is for law enforcers to create and apply the principles of restorative justice in the form of norms in a law. Then later implemented in law enforcement practices. For example, in handling a minor crime. This will later become a reference for all subsystems in the criminal justice system such as the police, prosecutors, and judicial institutions. The application of the concept of restorative justice in a special law is very important. With the existence of a law that regulates it, collaboration, synergy and cooperation between law enforcement officers are needed for the implementation of restorative justice in a crime, so that synchronization and synergy by law enforcement officers are very important in the application of restorative justice. This must really be implemented. This means that there should be no difference between a particular case and another case when applying restorative justice.

In order for synergy and synchronization in the implementation of restorative justice to be carried out properly, it needs to be strengthened in laws and regulations (not only through internal regulations of law enforcement officers) so that legal certainty is achieved as is the ideal of a state of law in achieving the goal of law that is impartial and provides benefits in the Indonesian state of law.

### **CONCLUSIONS AND RECOMMENDATIONS**

Based on what has been conveyed above, in the future it is necessary to build a new legal construction in creating better justice for all of us in a special law regarding the implementation of restorative justice. The concept of imposing a

penalty in the form of misery in the Criminal Code, especially for crimes with a prison sentence of less than 5 (five) years, must be abandoned and directed towards the concept of restorative justice which is more humane and responsible. Moreover, in many countries the practice of the restorative justice approach has been applied in various stages of criminal justice, of course by always improving existing human resources. Institutionalizing and implementing the principles of restorative justice in the form of norms in a law becomes a guideline for all subsystems in the criminal justice system such as the police, prosecutors, and judicial institutions. This can be used as a strong legal basis for implementing restorative justice. Therefore, the application of the concept of restorative justice in a special law is important so that there is synchronization of regulations and synergy between law enforcement officers for the implementation of restorative justice in a general crime. Synergy and common perception between law enforcers in implementing restorative justice will be stronger and more solid based on legal certainty.

### **ADVANCED RESEARCH**

This follow-up research will provide a practical and theoretical foundation for policymakers, legal practitioners, and researchers to institutionalize restorative justice. By addressing both systemic and procedural challenges, it aims to create a more just, humane, and effective criminal justice system that benefits all stakeholders.

### **REFERENCES**

- Amran Suadi, *Filsafat Hukum Refleksi Filsafat Pancasila, Hak Asasi Manusia dan Etika*, (Jakarta: Kencana, 2022).
- A. Muhammad Asrun, *Krisis Peradilan Mahkamah Agung di Bawah Soeharto*, (Jakarta: Penerbit ELSAM, Cetakan Pertama, 2004).
- A.V. Dicey, *Introduction to the Law of the Constitution*” dalam Miriam Budihardjo, *“Dasar-Dasar Ilmu Politik”*, (Jakarta: PT. Gramedia Pustaka Utama, 1977).
- Hidayatullah, *Perlindungan Hukum Justice Collaborator dalam Sistem Peradilan Pidana*, (Pasuruan: Qiara Media, 2021).
- J.J. von Schmid, *Pemikiran tentang Negara dan Hukum*, (Jakarta: Pembangunan, 1988).
- Lidya Rahmadani Hasibuan M. Hamdan, Marlina & Utary Maharani Barus, *Restorative Justice Sebagai Pembaharuan Sistem Peradilan Pidana Berdasarkan UU No.11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak*, *USU Law Journal* 3, (3), 05. Lihat dalam Masna Nuro Safitri, Eko Wahyudi, *Pendekatan Restorative Justice Dalam Tindak Pidana Pencemaran Nama Baik Melalui Media Sosial Sebagai Implementasi Asas Ultimum Remedium*, *Jurnal Esensi Hukum*, Vol. 4 No. 1 Bulan Juni Tahun 2022.

- Miriam Budiharjo, "Dasar-Dasar Ilmu Politik", (Jakarta: PT. Gramedia Pustaka Utama, 1977).
- Nindia Viva Pramudha Wardani, Widodo Tresno Novianto, Faktor-Faktor Yang Mempengaruhi Penegakan Hukum Terhadap Peredaran Magic Mushroom Atau Jamur Letong Di Wilayah Hukum Kepolisian Daerah Istimewa Yogyakarta, *Jurnal Recidive*, Volume 7 No. 2 Mei - Agustus 2018.
- Philipus M. Hardjon, *Perlindungan Hukum bagi Rakyat di Indonesia*, (Surabaya: PT. Bina Ilmu, 1987).
- Syafruddin Makmur, *Budaya Hukum Dalam Masyarakat Multikultura*, Salam; *Jurnal Sosial dan Budaya Syar'i*, Vol. II No. 2 Desember 2015.
- Salim HS dan Erlies Septiana Nurbaini, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi*, (Jakarta: Rajawali Pers, 2018).
- Tri Novita Manihuruk, *Problematika Penegakan Hukum Tindak Pidana Korupsi Dana Desa di Provinsi Riau*, *Jurnal Wawasan Yuridika*, Vol. 5, No. 2 September 2021.
- Vivi Ariyanti, *Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia*, *Jurnal Yuridis*, Vol. 6 No. 2, Desember 2019.