

# Legal Certainty in Settlement of Criminal Cases through Restorative Justice

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**Abstract.** This article tries to examine the core of the problem, on how legal certainty is implemented in criminal case settlement through the principle of restorative justice. This research is doctrinal legal research that uses a legal approach in addition to a conceptual approach. Meanwhile, the analysis is carried out through qualitative analysis and grammatical interpretation, as well as systematic interpretation. The systematic interpretation is carried out by interpreting laws and regulations as part of the overall system of laws and regulations by connecting them with other laws logically and systematically. This article ends with a suggestion that there is a need for uniformity in regulations regarding the settlement of criminal cases through restorative justice so that it can provide legal certainty to victims and also perpetrators of criminal acts whose cases are resolved through restorative justice.

**Keywords:** Restorative Justice, Legal Certainty, Criminal Justice System

## 1 Introduction

The rise of crimes or criminal acts must be addressed firmly and wisely through consistent law enforcement. On the other hand, the community expects the prevention and eradication of criminal acts can be solved simultaneously and comprehensively. Currently, the settlement of criminal cases in Indonesia is entering a new phase in its development, one of which is the implementation of restorative justice. Restorative justice becomes popular among scholars, law enforcement, and legal practitioners. This sentencing approach aims to deal with criminal acts or crimes, whether committed by children or by adults. This approach to sentencing aims at handling criminal acts done both by children and adults. Restorative justice is expected to be one of the efforts to handle criminal acts that prioritize the restoration of relations between the perpetrators of the crime and the victims.

Restorative justice principles are popularly adopted by Indonesian law enforcement agencies. Restorative justice is determined a popular alternative around the world and is employed to solve criminal acts because it offers a comprehensive and effective solution. Restorative justice aims at empowering the victims, perpetrators, their families, and communities to rectify unlawful acts through awareness and conviction as the basis for improving community life.[1]

The concept of restorative justice is a concept of thought that responds to the development of the criminal

justice system by focusing on the involvement of the community and victims, this involvement can be seen through the mechanisms of the existing criminal justice system. On the other hand, restorative justice is also a new framework that can be used in responding to a crime for law enforcement agencies.[2] Dispute resolution mechanisms based on restorative justice are based on consensus deliberation in which the parties are asked to compromise to reach an agreement.[1]

In social life, almost all activities carried out are closely related to legal actions, including criminal acts. Law enforcement in Indonesia will not be separated from Law Number 8 of 1981 concerning the Criminal Procedure Code. It can be said that the meaning of law enforcement is the imposition of a criminal sanction against the perpetrator of a crime. With the implementation of normative law enforcement which the core is carrying out what is stated in the law, all criminal cases in Indonesia must be tried through a judicial process. Legal certainty will be achieved if law enforcers enforce the law according to the applicable law, but in terms of justice that grows in society, it has not been achieved. In line with the opinion of L.J. van Apeldoorn, stated that the purpose of the law is to regulate the peaceful of human life. The condition of peace between humans is maintained by law by protecting particular human legal interests, honor, independence, life, and property against those who harm them.

Although Restorative Justice is a concept of sentencing, it is not only focused on criminal provisions

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(formal and material) but must also be viewed from criminology and the correctional system's point of view. Encouraging the settlement of a criminal act by using a more informal and personal way, rather than resolving a case or crime using a formal and impersonal method by using a pattern before and after the trial process. What is meant before the trial process is when the case is still processed by the police and the prosecutor officers. Settlement of criminal acts with the principles of restorative justice can be completed according to the initiative of the police or the prosecutor's office.

Law Number 2 of 2002 concerning the Indonesian National Police regulates the duties of the National Police who have discretionary power. Discretionary authority is the authority regulated in the law in which the police have the right to continue or discontinue a case/criminal act. The discretion in Article 18 of Law Number 2 of 2002 concerning the State Police of the Republic of Indonesia contains an understanding that: (1) In the public interest, Indonesian National Police officers in carrying out their duties and authorities may act according to their judgment; (2) The implementation of the provisions as referred to in paragraph (1) can only be carried out in very necessary circumstances with due observance of the laws and regulations as well as the Professional Code of Ethics of the Indonesian National Police. Article 18 paragraph (1) "act according to their own judgment" means an action taken by the Indonesian National Police that should consider the benefits and risks of their actions and it should be based on the public interest. Meanwhile, when a case or criminal act is in the prosecution stage, the prosecutor is given the authority to determine whether or not a case can be brought to court and what article will be charged. And also the public prosecutor or prosecutor can stop the prosecution of his case based on the principle of opportunity or the principle of wisdom to demand. This principle that prosecutors can use is the basis for resolving criminal cases outside the court through a restorative justice approach.

In Indonesia, the implementation of criminal law enforcement that adopts restorative justice principles has been implemented in the components of the criminal justice system. However, the enforcement of criminal law that adopts the principles of restorative justice is not only regulated in a memorandum of understanding. It is found that each of the aforementioned law enforcement agencies also differently regulates the implementation of restorative justice through its technical rules. The difference in the regulations regarding the technical implementation of the restorative justice principles will cause legal uncertainty in its application. Therefore, the authors are interested in studying legal certainty in the settlement of criminal cases through the principle of restorative justice.

## 2 Research Method

This research was doctrinal legal research that employed a legal and conceptual approach. Meanwhile, the data analysis was done through qualitative and grammatical interpretation, as well as systematical interpretation.

Meanwhile, the analysis was carried out through qualitative analysis and grammatical interpretation, as well as systematic interpretation in which interpretation was done by interpreting laws and regulations as part of the overall system of laws and regulations by connecting them with other laws logically and systematically.

## 3 Results And Discussion

Settlement of cases outside the court has long been known in the civil sector, which is known as alternative dispute resolution. In the civil sector, there is Alternative Dispute Resolution (APS) which is regulated in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

Alternative dispute resolution (ADR) is an effort to resolve disputes outside of litigation (non-litigation). In ADR/APS there are several forms of dispute resolution. The forms of ADR/APS according to Suyud Margono are (1) consultation; (2) negotiation; (3) mediation; (4) conciliation; (5) arbitration; (6) good offices; (7) mini-trial; (8) summary jury trial; (9) rent a judge; and (10) med-arb.[3] Jacqueline M. Nolan-Haley in her book entitled "Alternative Dispute Resolution, in A Nutshell, explains that ADR "is an umbrella term which refers generally to alternatives to court adjudication of dispute such as negotiation, mediation, arbitration, mini-trial, and summary jury trials". [4]

The forms of ADR/APS in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution are consultation, negotiation, mediation, conciliation, or expert judgment. The meaning of each form of ADR/APS is not further elaborated in Law No.30/1999. Meanwhile, arbitration is excluded from the scope of ADR/APS and is given a separate definition in Law No. 30/1999. It defines as "a method of resolving a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties".

A general understanding of ADR/APS forms which are summarized from some literature is described as follows:

### 3.1 Consultation

Consultation is an action that is "personal" between a particular party (client) and another party (consultant) in which the consultant gives his opinion to the client based on his client's needs.[5] Marwan and Jimmy P, explain the meaning of consultation, as follows: "A request for advice or opinion to resolve a dispute amicably made by the disputing parties to a third party.[6] Thus it can be concluded that consultation is a request for an opinion from a third party (consultant) regarding the dispute at hand.

### 3.2 Negotiation

Negotiation is a means for the disputing parties to discuss the settlement without the involvement of a third party as an intermediary, so there is no standard

procedure, but the procedures and mechanisms are given to the agreement of the disputing parties. Dispute resolution is fully controlled by the parties, it is informal in nature, and various aspects are discussed, not only legal issues.[7] In practice, negotiations are carried out for 2 (two) reasons: (1) to find something new that cannot be done alone, for example in a sale and purchase transaction, the seller and the buyer need each other to determine the price, in this case, there is no dispute. ; and (2) to resolve dissensions or disputes that arise between the parties.[7] Thus, in negotiations, dispute resolution is carried out by the disputing parties themselves, without involving a third party as a mediator.

### 3.3 Conciliation

Conciliation is a dispute resolution with the intervention of a third party (the conciliator), where the conciliator is more active, by taking the initiative to arrange and formulate settlement steps, which are then offered to the disputing parties. If the disputing parties are unable to formulate an agreement, then the third party proposes a way out of the dispute. However, the conciliator does not have the power to make decisions, he/she only has the authority to make recommendations, in which its implementation is very dependent on the disputing party good intention. [3]

### 3.4 Mediation

The definition of mediation is dispute resolution assisted by a neutral/impartial third party (mediator). The role of the mediator is as a passive mediator who provides assistance in the form of alternative dispute resolutions to be determined by the disputing parties.[4] In Supreme Court Regulation No. 1 of 2016 concerning Mediation Procedures in Courts, mediation is defined as a way of resolving disputes through a negotiation process to obtain an agreement between the parties with the assistance of a mediator. The role of the mediator helps the parties to seek various possible dispute resolutions by not deciding or imposing views or judgments on issues during the mediation process.

### 3.5 Expert Judgment

Expert judgment for a technical matter is given based on their field of expertise. [5]

### 3.6 Arbitration

Unlike other forms of ADR/APS, arbitration has almost the same characteristics as adjudicative dispute resolution. Disputes in arbitration are decided by the arbitrator or arbitration tribunal in which the arbitration award is final and binding. However, an arbitral award can only be enforced if the award has been registered with the District Court (see Article 59 paragraphs (1) and (4) of Law No.30/1999). In the case that the parties

agree to resolve the dispute through arbitration, the dispute cannot be resolved through the courts.

Unlike the case with restorative justice which is a form of an out-of-court settlement for criminal cases, especially child crimes, APS is a form of an out-of-court settlement for civil cases.

The concept of the restorative justice approach is an approach that focuses more on the conditions for creating justice and balance for the perpetrators of crimes and the victims. From the restorative justice perspective, the meaning of crime is the same as the perspective of criminal law in general, attacks on individuals and society, and social relations. However, in the restorative justice approach, the main victim for the occurrence of a crime is not the state, as in the current criminal justice system.

Thus, the difference between restorative justice and alternative dispute resolution is that restorative justice is used to resolve child criminal cases while APS is used to resolve civil cases. The similarity between the two is that it is a form of an out-of-court settlement.

In Indonesia, the application of the concept of criminal law enforcement that adopts the principles of restorative justice has been applied to components of the criminal justice system. In 2012, the Supreme Court, the Attorney General's Office, the Indonesian National Police, and the Ministry of Law and Human Rights of the Republic of Indonesia have adopted the principle of restorative justice as a way to resolve a criminal case. Those four institutions even made a joint agreement called the Memorandum of Understanding with 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 Head of the State Police of the Republic of Indonesia Number 131/KMS/SKB/X/2012, Number M. -HH-07.HM.03.02 Year 2012, Number KEP-06/E/EJP/10/2012, Number B/39/X/2012 dated October 17, 2012, concerning Implementation of Adjustment of Limits on Minor Crimes and Amount of Fines, Examination Procedures Fast and Implementing Restorative Justice ("Memorandum of Understanding"), which regulates the settlement of criminal cases through the principles of restorative justice.

However, the enforcement of criminal law that adopts the principles of restorative justice is not only regulated in a memorandum of understanding but is also regulated by the aforementioned law enforcement agencies through their technical rules. These include:

- a. Circular Letter of the Head of the State Police of the Republic of Indonesia Number SE/8/VII/2018 the Year 2018 concerning the Application of Restorative Justice in the Settlement of Criminal Cases;
- b. Regulation of the Head of the State Police of the Republic of Indonesia Number 6 of 2019 concerning Criminal Investigations;
- c. Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice; and

d. Decree of the Director-General of the General Courts of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice.

However, the regulation of the restorative justice principles in each of these regulations is regulated differently. For instance, the implementation of the restorative justice principles in the general courts is regulated in the Decree of the Director-General of the General Court Number: 1691/DJU/SK/PS.00/12/2020. Settlement of cases through the restorative justice principles in the general court regulates more minor crimes, children's cases, women's cases in conflict with the law, and narcotics cases.

Meanwhile, in the police environment, the implementation of restorative justice principles is regulated in the process of initial investigation and investigation. Settlement of cases with a restorative justice approach in the initial investigation/investigation process is implemented if material and formal requirements are fulfilled. Those requirements include, there is a settlement statement letter (Deed of Settlement or Akta van Dading) from both parties (reporting party and reported party). Besides, it does not create public unrest, does not lead to social conflict, and no community rejection.

From some of the explanations above, it is found that each law enforcement agency in Indonesia has different technical guidelines for implementing the principles of restorative justice. Whereas, according to Mardjono Reksodiputro, the four components (police, prosecutors, courts, and correctional institutions) in the criminal justice system should work together and can form an integrated criminal justice system.[8]

If the system is not integrated, it is estimated that there will be at least 3 (three) disadvantages, they are difficulty in self-assessing the success or failure of each agency; difficulties in solving the main problems in each agency (as a subsystem of the criminal justice system); Because the responsibilities of each agency are often not clearly divided, each agency does not pay much attention to the overall effectiveness of the criminal justice system. [9] These three things can happen allegedly due to overlapping authorities and policies of each subsystem, weak coordination between law enforcement agencies, and an unstructured law enforcement system.

This will also create legal uncertainty. Which will have an impact on injustice for the victim. Because the concept of punishment which was originally intended solely as retaliation or commonly called retributive justice has shifted. In this case, the perpetrator is considered the sufferer and is passive in the ongoing sentencing process. However, in its development, the meaning of justice has never paid attention to the position of victims who have never received attention in the criminal justice process. The purpose of punishment is considered to have various weaknesses because it is considered to bring harm to the victim and the community.

Therefore, it is necessary to analyze the effectiveness of the implementation of restorative

justice principles that have been regulated by each law enforcement agency. It is intended to find out how to compare the implementation of the restorative justice principles in each law enforcement agency in Indonesia. Because in understanding the criminal justice system, each component in the system should work mutually sustainably with each other.

In addition, there is a need for regulation uniformity regarding the settlement of criminal cases through restorative justice, so that they can provide legal certainty to victims and also perpetrators of criminal acts whose cases are resolved through restorative justice.

## 4 Conclusion

that adopts the principles of restorative justice has been applied to the components of the criminal justice system in Indonesia. In 2012, the Supreme Court, the Attorney General's Office, the Indonesian National Police, and the Ministry of Law and Human Rights of the Republic of Indonesia have adopted the principle of restorative justice as a way to resolve a criminal case. The enforcement of criminal law that adopts the principles of restorative justice is not only regulated in a memorandum of understanding but also has been regulated in its implementation by the aforementioned law enforcement agencies through their technical rules. This will also create legal uncertainty which leads to injustice for the victim. It is due to the concept of punishment which was originally intended solely as retaliation or commonly called retributive justice has shifted. In this case, the perpetrator is considered the sufferer and is passive in the ongoing sentencing process. However, in its development, the meaning of justice has never paid attention to the position of victims who have never received attention in the criminal justice process. The purpose of punishment is considered to have various weaknesses, including bringing harm to the victim and the community. there is a need for uniformity in regulations regarding the settlement of criminal cases through restorative justice so that it can provide legal certainty to victims and also perpetrators of criminal acts whose cases are resolved through restorative justice.

## Acknowledgments

Research and membership at the International Conference on Social Science (ICSS) of (2022) can be held with financial assistance from the Institute for Research and Community Service of Trunojoyo University, Indonesia.

## References

- [1] D. D.S, F. A. Syukur, dan T. Retno, *Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia*. Depok: Indie-Publishing, (2011).
- [2] S. Fatoni, U. T. Madura, D. Muti'ah, dan D. P. Wijaya, "The existence of Criminal Justice System as Legal Safeguards for Women Victims of Domestic Violence," vol. **383**, hlm. 4.

- [3] R. A. A. Kapindha, S. Dwi M, dan W. R. Febrina, “Efektivitas dan Efisiensi Alternative Dispute Resolution (ADR) Sebagai Salah Satu Penyelesaian Sengketa Bisnis Di Indonesia,” *Privat Law*, vol. **1**, no. 2, (2014).
- [4] M. Diah M, “Prinsip dan Bentuk-Bentuk Alternatif Penyelesaian Sengketa Di Luar Pengadilan,” *Hukum dan Dinamika Masyarakat*, vol. **5**, no. 2, (2016).
- [5] F. H. Winarta, *Hukum Penyelesaian Sengketa-Arbitrase Nasional Indonesia & Internasional*. Jakarta: Sinar Grafika, (2011).
- [6] T. Idris, “Bentuk Putusan Penyelesaian Sengketa Berdasarkan Mediasi,” *Dinamika Sosbud*, vol. **3**, no. 1, (2011).
- [7] M. D. Tuti dan B. R. Heryanti, “Pengaturan dan Mekanisme Penyelesaian Sengketa Nonlitigasi di Bidang Perdagangan,” *Dinamika Sosbud*, vol. **3**, no. 1, (2011).
- [8] E. Setiadi dan dkk, *Sistem Peradilan Pidana Terpadu dan Sistem Penegakan Hukum di Indonesia*. Jakarta: Kencana, (2017).
- [9] M. Reksodiputri, *Sistem Peradilan Pidana (Peran Penegak Hukum Melawan Kejahatan)*.