

## SETTLEMENT OF CRIMINAL CASES THROUGH RESTORATIVE JUSTICE AND ULTIMUM REMEDIUM APPROACHES

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### ABSTRACT

This study aims to know and understand the implementation of restorative justice in a criminal incident. Then also want to know and understand the concept of returning the function of criminal law as ultimum remedium. The method used in this research is normative legal research or library research (document study). The results of the research show that restorative justice has actually been practiced for a long time in Indonesian indigenous peoples. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System incorporates restorative justice as a concept of thinking that responds to the development of the justice system by emphasizing the need for community and victim involvement. Besides that, there are also other legal events where restorative justice measures have been taken, such as in cases of theft. Returning the function of criminal law as an ultimum remedium in the settlement of criminal cases is very important because punishment should be the last resort in restoring better conditions. Currently, most of us see that the way of peace and deliberation is sidelined by the community and prioritizes criminal law as if criminal law is the best and foremost. It is very important to note in the future regarding the use of the ultimum remedium principle, however, its use must be limited to light cases.

**Keywords:** *Criminal case, restorative justice, ultimum remedium.*

### ABSTRAK

Penelitian ini bertujuan untuk mengetahui dan memahami penerapan restorative justice dalam suatu peristiwa pidana. Kemudian juga ingin mengetahui dan memahami konsep pengembalian fungsi hukum pidana sebagai ultimum remedium. Metode yang digunakan dalam penelitian ini adalah penelitian hukum normatif atau penelitian kepustakaan (studi dokumen). Hasil penelitian menunjukkan bahwa restorative justice sebenarnya telah dipraktikkan sejak lama pada masyarakat adat Indonesia. Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak memasukkan keadilan restoratif sebagai konsep pemikiran yang merespon perkembangan sistem peradilan dengan menekankan perlunya keterlibatan masyarakat dan korban. Selain itu, ada pula peristiwa hukum lain yang telah dilakukan tindakan restorative justice, seperti dalam kasus pencurian. Mengembalikan fungsi hukum pidana sebagai ultimum remedium dalam penyelesaian perkara pidana sangat penting karena pemidanaan harus menjadi pilihan terakhir dalam memulihkan kondisi yang lebih baik. Saat ini kebanyakan kita melihat bahwa jalan damai dan musyawarah dikesampingkan oleh masyarakat dan mengutamakan hukum pidana seolah-olah hukum pidana adalah yang terbaik dan terdepan. Sangat penting untuk diperhatikan ke depan mengenai penggunaan asas ultimum remedium, namun penggunaannya harus dibatasi pada kasus-kasus ringan.

**Kata kunci:** *Perkara pidana, restorative justice, ultimum remedium.*

## Introduction

As a rule of law country, Indonesia upholds law enforcement in the fairest way possible regardless of the status and position of each legal subject. Thus, anyone who commits a criminal act (crime), as long as the act contains an element against the law, the perpetrator must be punished according to applicable legal provisions. One of the laws that regulate crime is criminal law. The arrangements are spelled out in the Criminal Code (KUHP). The Criminal Code is an important part of law enforcement.

Law enforcement is a necessity that is carried out by the state in protecting its citizens, because crime is an urgent social problem to be overcome in order to achieve a harmonious, orderly and peaceful life as a manifestation of a peaceful society. Various notes on criminal law enforcement have been widely reported by the mass media, both print and electronic. This illustrates the increase and intensity in the reporting of criminal cases, which means that the public feels the need to pay attention to security, order and justice.<sup>1</sup>

In accordance with law enforcement theory, as stated by Soerjono Soekanto, that 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 factors themselves, law enforcement factors, facilities or facilities, community factors, and cultural factors.<sup>2</sup> Law is basically not just a black and white formulation as outlined in various forms of legislation, but law should be seen as a symptom that can be observed in people's lives through the behavior patterns of its citizens. This means that the law is heavily influenced by non-legal factors such as values, attitudes, and views of society, which is commonly referred to as legal culture/culture.<sup>3</sup>

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<sup>1</sup>Vivi Ariyanti, Kebijakan Penegakan Hukum Dalam Sistem Peradilan Pidana Indonesia, *Jurnal Yuridis*, Vol. 6 No. 2, Desember 2019, hal. 55.

<sup>2</sup>Tri Novita Manihuruk, Problematika Penegakan Hukum Tindak Pidana Korupsi Dana Desa di Provinsi Riau, *Jurnal Wawasan Yuridika*, Vol. 5, No. 2 September 2021, hal. 298-299.

<sup>3</sup>Syafruddin Makmur, Budaya Hukum Dalam Masyarakat Multikultura, Salam; *Jurnal Sosial dan Budaya Syar'i*, Vol. II No. 2 Desember 2015, hal. 86

According to Friedman, legal culture is also an important element in the legal system, because legal culture pays attention to people's thinking and community strengths that determine 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 living fish swimming in the ocean of its vehicle.<sup>4</sup>

Talking about criminal law enforcement is not only about the application of applicable rules, but also about what law enforcement officials are doing to overcome the problems that exist in law enforcement. Therefore, in dealing with problems in enforcing criminal law that occur in society, preventive efforts can be made or without using criminal law which focuses more on prevention before the occurrence of crime and repressive or criminal law which focuses more on eradicating after the crime has been committed. with criminal law, namely criminal sanctions which are a threat to the perpetrators. This repressive effort is carried out if preventive efforts are not successful.<sup>5</sup>

Criminal law is one of the public laws that regulate crimes and violations. As part of public law, criminal law then carries out the function of preventing and taking action on various possibilities or occurrences of crimes. The components involved in carrying out these functions are carried out in a system known as the criminal justice system. This system is essentially a criminal law enforcement process that is closely related to the criminal legislation itself, both materially and formally.

As a public law, criminal law finds its importance in legal discourse in Indonesia. This is because in the criminal law there are rules that determine actions that may not be carried out accompanied by threats in the form of punishment (miserable) and determine the terms of the sentence that can be imposed.<sup>6</sup>

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<sup>4</sup>A. Muhammad Asrun, *Krisis Peradilan Mahkamah Agung di Bawah Soeharto*, (Jakarta: Penerbit ELSAM, Cetakan Pertama, 2004), hal. 44.

<sup>5</sup>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, hal. 205.

<sup>6</sup> Moeljatno, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 1993), hal. 1.

In public life, the existence of the function of criminal law can of course create a safe, orderly and peaceful situation. However, when viewed in the context of the social life of society, the function of criminal law carried out by law enforcers will always face extraordinary challenges. Because the characteristics of crime have differences from each other. Supposedly, with the function of criminal law carried out by the criminal justice system, society can have a good life and be far from all actions that can be categorized as criminal acts.

To create order and peace in society, the role of society must be maximized in assisting law enforcement. Therefore, community involvement in crime prevention is very important, because crime prevention is a rational effort from society as a reaction to crimes that occur. This is because in a crime that occurs there are victims whose rights as legal subjects must be protected. In the existing criminal justice system, victims do not receive special attention. Whereas in every crime that occurs, there is a loss suffered by the victim. The state focuses more on the whereabouts of suspects to be subject to legal sanctions.

Victims do not have a place in the criminal justice process because the current criminal justice system adheres to retributive justice, where settlement of cases is solely aimed at imposing sanctions on the perpetrators of crimes without considering the aspects of the losses suffered by the victims. The imposition of sanctions is solely for revenge against the perpetrators without recovering the losses suffered by the victims.<sup>7</sup> Even though a victim is a party who has directly been deprived of and harmed by their rights and interests.

In a crime event, the interests of the victim will be directly represented by the state. Where the state has the role of carrying out the legal process for suspects. The legal process carried out aims to provide protection to victims by imposing punishment on the perpetrators. However, currently the Indonesian criminal law system is entering

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<sup>7</sup> Rena Yulia, Menelisik Pola Hubungan Hukum Antara Jaksa Penuntut Umum Dengan Korban Kejahatan Pada Sistem Peradilan Pidana (Sebuah Pemikiran Kearah Pembaharuan Hukum Pidana), *Proceedings Munasena Mahupiki*, Kerjasama Pengurus Pusat Mahupiki Dan Fakultas Hukum Universitas Sebelas Maret, Surakarta, 8-10 September 2013, hal. 163.

a new chapter in its development. One form of renewal that exists in Indonesian criminal law is the regulation of criminal law in the perspective and achievement of justice to repair and restore conditions after events and criminal justice processes known as restorative justice which is different from retributive justice (emphasizing justice on retaliation). ) and restitutive justice (emphasizing justice on compensation). When viewed from the development of criminal law science and the nature of modern punishment, it has introduced and developed what is called the doer-victim relationship approach or the "Doer-Victims" Relationship. A new approach that has replaced the action or actor or "daad-dader strafrecht" approach.

Along with the development of human life and civilization, it turns out that the implementation of criminal sanctions for the revocation of independence contains more negative aspects than positive aspects. The negative aspects arising from the imposition of the crime of revocation of independence include dehumanization, imprisonment and stigmatization.<sup>8</sup> In addition, another negative aspect is the depleted energy of law enforcers and the state budget to focus on efforts to physically punish the perpetrators of crimes rather than focusing on recovering the consequences of the crimes committed. In fact, in many criminal cases, losses or negative consequences caused by a crime are more important to repair than depriving a criminal of independence.<sup>9</sup>

Restorative justice in Indonesian laws and regulations was first regulated and used as an alternative to punishment in cases of juvenile offences. Then the concept of restorative justice in Indonesia was adopted in practice by all law enforcement institutions as an option in resolving criminal cases. Restorative Justice is a popular alternative in many parts of the world because it offers a comprehensive and effective solution. Restorative Justice aims to empower victims, perpetrators, families and communities to correct an unlawful act, by using awareness and conviction as a basis

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<sup>8</sup> Muladi Dan Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana*, Bandung: Alumni, 1984, hlm. 77-78.

<sup>9</sup> Rida Ista Sitepu, Yusona Piadi, Implementasi Restoratif Justice Dalam Pemidanaan Pelakutindakpidana Korupsi, *Jurnal Rechten: Riset Hukum Dan Hak Asasi Manusia*, Vol. 01 No. 1, April-Juli 2019, hlm. 3.

for improving social life and explaining that the concept of restorative justice is basically simple. Restorative justice is interpreted as a process that involves all parties related to certain crimes to sit together to solve problems and think about how to handle victims and perpetrators.

Based on the description above, the discussion of this paper will focus on the urgency of resolving criminal cases through restorative justice and ultimum remedium approaches. Even so, this paper certainly will not be able to answer the existing problems as a whole in the context of criminal law. However, as a means of indirect dialectics between writers and readers, this writing is something that is obligatory to present to readers wherever they are.

#### **B. Formulation of the problem**

In fact, the concept of restorative justice only focuses on a restoration of the relationship between the victim and the perpetrator as a result of a crime. In resolving a legal event that occurred, in fact the approach to restorative justice has been the main feature of the Indonesian nation since ancient times, especially in its customary law community. Therefore it becomes interesting to study further. First, how is the implementation of the concept of restorative justice in solving a criminal case? Second, how to restore the function of criminal law as ultimum remedium in the settlement of criminal cases?

#### **C. Research methods**

Usually in a study, there are types, characteristics and objectives of a legal research which in this case are divided into two, namely normative legal research and empirical legal research. The author on this occasion presents in the form of normative legal research or what is called doctrinal legal research or also called library research (document study). This research is more aimed only at written regulations or other legal materials. Besides, this research is mostly done on secondary documents or data in the library. The data analysis method used is qualitative data analysis, namely the process

of compiling, categorizing qualitative data, looking for patterns or themes with the intention of understanding their meaning. After the data analysis is complete, the results will be presented descriptively, namely by telling and describing what is in accordance with the problems under study. From these results then conclusions are drawn which are the answers to the problems raised in this writing.

#### D. Discussion

##### 1. Implementation of the concept of restorative justice in a criminal incident

Discussions about restorative justice are increasingly popular among the public, especially for legal activists, legal practitioners, academics and students. Restorative is recovery. Victims can convey the losses they have suffered and the perpetrators are also given the opportunity to make up for it, through mechanisms of compensation, peace, social work, and other agreements.

Restorative justice has been carried out as the implementation of a victim offender mediation program which began in the 1970s in Canada, this program provides a settlement outside of traditional justice which is carried out as an alternative to punishing criminals.<sup>10</sup> Indonesia has basically used the concept of restorative justice in its indigenous peoples, such as Bali, Toraja, Papua, Minangkabau and other indigenous peoples who adhere to the principles of customary law and their culture.<sup>11</sup>

Restorative justice according to Eva Achjani Zulfa is a concept of thinking that responds to the development of the criminal justice system by focusing on the need for community involvement and victims who feel excluded from the mechanisms that

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<sup>10</sup>Alisan Morris & Gabrielle Maxwell, *Restorative Justice for Juvenile; Conferencing, Mediation and Circle*, Oxford-Portland Oregeon USA, Hart Publishing, 2001 hal.4. Lihat dalam Masna Nuros 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, hal. 16.

<sup>11</sup>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, hal .66. Lihat dalam Masna Nuros 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, hal. 16.

work in the existing criminal justice system.<sup>12</sup> Furthermore, according to Bagir Manan, the definition of restorative justice is the restructuring of a more just punishment system, both for perpetrators, victims, and society.<sup>13</sup>

Taufik Makarao put forward three basic principles of restorative justice, namely: First, there is restoration for those who have suffered losses due to crime; Second, the perpetrator has the opportunity to be involved in restoration; Third, the role of the Court is to maintain public order and society has a role to preserve a just peace.<sup>14</sup>

In other traditional communities that still hold strong culture, if a criminal act occurs by someone, dispute resolution is carried out within the indigenous community internally without involving state officials. The measure of justice is not based on retributive justice in the form of revenge or imprisonment, but based on conviction and forgiveness, even though common criminal acts handled by the community itself are contrary to positive law, it is proven that this mechanism has succeeded in maintaining harmony in society.<sup>15</sup>

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System incorporates restorative justice as a concept of thinking that responds to the development of the justice system by emphasizing the need to involve the community and victims who feel excluded from the mechanisms that work in the existing criminal justice system.<sup>16</sup> Restorative justice is a process that aims to provide rights to victims of crime. To achieve this goal, a meeting is held between the victim and the perpetrator.<sup>17</sup>

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<sup>12</sup> Eva Achjani Zulfa, *Keadilan Restoratif*, FHUI, Jakarta, 2009, Hlm. 3

<sup>13</sup> Bagir Manan, *Majalah Varia Peradilan*, Tahun XX. No. 247, Penerbit Ikatan Hakim Indonesia, 2006, hal. 3.

<sup>14</sup> Taufik Makarao, *Pengkajian Hukum Tentang Penerapan Restorative Justice Dalam Penyelesaian Tindak Pidana Yang Dilakukan Oleh Anak-Anak*, Badan Pembinaan Hukum Nasional Kementerian Hukum Dan HAM Republik Indonesia, 2013, hal. 33.

<sup>15</sup> Hadi Siupeno, *Kriminalisasi Anak*, (Jakarta: Gramedia, 2010), Hal. 5

<sup>16</sup> Marlina, *Peradilan Pidana Anak Di Indonesia, Pengembangan Konsep Diversi Dan Restorative Justice*, Bandung: Refika Aditama, 2007, hal. 95.

<sup>17</sup> *Ibid.*



Restorative justice is carried out in an effort to produce restorative justice, namely a process that involves all parties involved in a particular crime jointly solving the problem of how to compensate for the consequences in the future. The implementation of restorative justice can be carried out through victim mediation activities with perpetrators/offenders, family group deliberations, in the community which are remedial for both victims and perpetrators..<sup>18</sup>

Restorative justice is a form of conflict resolution and seeks to explain to the offender that this behavior cannot be justified, then at the same time as a step to support and respect individuals. Thus, restorative justice means the settlement of criminal cases by involving perpetrators, victims and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation.<sup>19</sup>

Restorative justice is different from retributive justice in the current criminal justice system. These differences, among others, exist in a number of ways, such as: First, looking at criminal acts in a comprehensive manner. Not only defines crime as a mere violation of the law, but also understands that the perpetrator harms the victim, society and even himself. Second, involving many parties in responding to crime, not only in the affairs of the government and perpetrators of crime, but also victims and society. Third, measure success in different ways, not only by how much punishment is imposed, but also by measuring how much loss can be recovered or prevented.<sup>20</sup> Talking about restorative justice, then talking about the protection given to victims.

Protection of victims in principle must be the provision of a set of rights that can be utilized in their position in the criminal justice process. This protection is a form

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<sup>18</sup> Muladi, *Kapita Selekta Hukum Pidana*, (Semarang: Badan Penerbit Universitas Diponegoro, 1995), Hal. 125.

<sup>19</sup> Sari Mardiana, Keadilan Restoratif: Solusi Pengembalian Kerugian Keuangan Negara Akibat Tindak Pidana Korupsi, *Proceedings Munasena Mahupiki*, Kerjasama Pengurus Pusat Mahupiki Dan Fakultas Hukum Universitas Sebelas Maret, Surakarta, 8-10 September 2013, Hal. 101.

<sup>20</sup> Rena Yulia, Penerapan Keadilan Restoratif Dalam Putusan Hakim, *Jurnal Yudisial*, Volume 5 No 2 Agustus 2012, Hal. 233.

of appreciation for their contribution in the criminal justice process to achieve material truth.<sup>21</sup>

The implementation of the concept of restorative justice in a criminal incident can be seen in criminal incidents involving children as perpetrators. This can be further seen in the process of the juvenile justice system that is being carried out. In the juvenile justice system, maximum protection efforts are made. So that the juvenile justice process that is dealing with the law does not end in punishment of the child.

With regard to efforts to provide protection for children who are in conflict with the law, the juvenile justice system must be interpreted broadly, not only interpreted as simply handling children who are in conflict with the law, but the juvenile justice system must include the root causes of why children commit criminal acts and their prevention efforts.<sup>22</sup>

The Law on the Juvenile Criminal Justice System strictly regulates restorative justice and diversion to avoid and keep children away from the judicial process so as to avoid stigmatization of children who are in conflict with the law and it is hoped that children can return to the social environment normally. In the law on child protection, it is stated that children who are less than 12 (twelve) years old will only be subject to action, while children who have reached the age of 12 (twelve) to 18 (eighteen) years can be subject to action and punishment. Restorative justice itself according to the Law on the Juvenile Criminal Justice System is the settlement of criminal cases involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, not retaliation.

In principle, restorative justice recognizes 3 (three) stakeholders, namely victims, perpetrators, and the community in determining the settlement of child cases.

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<sup>21</sup> Abdul Hakim Siku, Perlindungan Hukum Terhadap Saksi Dan Korban Dalam Proses Peradilan Pidana, *Jurnal Perlindungan*, Volume 2 No. 1 Tahun 2012, Jakarta, Lembaga Perlindungan Saksi Dan Korban, hal. 45-46.

<sup>22</sup>Rendy H. Pratama, Sri Sulastri, & Rudi Saprudin Darwis, Perlindungan Terhadap Anak Yang Berhadapan Dengan Hukum, *PROSIDING KS: Riset & PKM*, Volume 2, Nomor 1, 2017, hal 10.

Through restorative justice, there are efforts to bring together victims and perpetrators in order to seek recovery for victims. On the other hand, the perpetrator is burdened with the obligation to be accountable for his actions to the victim and the community and is responsible for admitting his crime and if possible, remedy the victim's suffering.<sup>23</sup>

Settlement of juvenile criminal cases that are oriented towards the interests of the perpetrators is the aim of the restorative justice approach, in accordance with the provisions of Article 10 paragraph (1) of the Covenant on Civil and Political Rights which guarantees that every person who is deprived of his liberty must be treated humanely by respecting the dignity inherent in him. Restorative justice is an attempt to treat children in conflict with the law according to their dignity. Restorative justice is a process of transferring from formal to informal criminal proceedings as the best alternative for handling children as perpetrators of crimes by means of all parties involved in a particular crime jointly solving problems to deal with the consequences of children's actions in the future.<sup>24</sup>

As described above, talking about the implementation of the concept of restorative justice in a criminal incident can be seen in cases of children who are in conflict with the law. The concept of restorative justice basically provides protection to children. Not only protection for children as perpetrators of crime, but also protection for child victims of crime as stipulated in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. The law explains that for the protection of children who are in conflict with the law, the process of resolving cases can not only be resolved through the judicial process but can also be resolved outside the judicial process through diversion with a restorative justice approach involving all parties, both perpetrators, victims and witnesses with other

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<sup>23</sup> Rika Saraswati, *Hukum Perlindungan Anak Di Indonesia*, (Bandung: Citra Aditya Bakti, 2009), hal.125.

<sup>24</sup> Lilik Purwastuti Yudaningsih, *Penanganan Perkara Anak Melalui Restorative Justice*, *Jurnal Ilmu Hukum*, Volume 5 Nomor 2, Oktober 2014, hal. 73.

parties. other related parties to sit together to find solutions for resolving child cases in the best interests of the child. That is, to provide protection for children who are in conflict with the law, the government has issued a restorative justice policy.

In this case, the related parties sit together to find a fair solution for the victim and the perpetrator. There is an obligation for law enforcement officials to seek diversion first by prioritizing restorative justice specifically for children whose criminal penalties are under 7 (seven) years in resolving child cases. Child protection as referred to in the law is to guarantee the fulfillment of children's rights so that they can live, grow and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination, for the realization of quality Indonesian children, with noble character, and prosperous.

Apart from child cases contained in the provisions of the child protection law, other provisions are only found in cases of minor crimes contained in the following regulations: First, Article 310 of the Criminal Code (KUHP). Second, Article 205 of the Criminal Procedure Code (KUHP). Third, Regulation of the Supreme Court of the Republic of Indonesia Number 2 of 2012 concerning Adjustments to the Limits of Minor Crimes and the Amount of Fines in the Criminal Code. Fourth, Memorandum of Understanding with Chief Justice of the Supreme Court, Minister of Law and Human Rights, Attorney General, Head of the National Police of the Republic of Indonesia Number 131/KMA/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 the Implementation of the Application for Adjusting the Limits on Misdemeanor Crimes and the Amount of Fines, the Quick Examination Procedure and the Implementation of Restorative Justice. Fifth, Letter of the Director General of the General Judiciary Agency Number 301 of 2015 concerning Settlement of Minor Crimes. Sixth, Police Regulation Number 8 of 2021 concerning Handling of Crimes based on Restorative Justice. Seventh, Regulation of the Attorney General Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Criminal cases that can be resolved with restorative justice are minor criminal cases.

Cases that include minor crimes regulated by PERMA Number 2 of 2012 are in the articles contained in the Criminal Code, namely articles 364,373,379,482,384 and 407 where the value of the loss does not exceed Rp. 2.500.000,-. Law enforcement for minor crimes through a restorative justice approach is also regulated in police institutions, one of which was issued by the National Police Chief, namely the Chief of Police Regulation No. 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Police Duties, as the first step in regulations with the concept of implementing settlements outside the court. This Regulation of the Chief of Police determines the application of the ADR concept. Where the type of ADR used is through penal mediation so that minor crimes can be resolved at the police level.<sup>25</sup>

Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, provides an opportunity for public prosecutors to take a restorative justice approach to suspects who are the first to commit a crime and their actions are threatened with no more than 5 (five) years and the resulting losses are not more than Rp. 2,500,000.00. (two million five hundred rupiah). The restorative approach in Circular Letter Number SE/8/VII/and the Attorney General's Office Regulation of the Republic of Indonesia Number 15 of 2020 is casuistic in nature, assessments and considerations are carried out subjectively by investigators and also public prosecutors by taking into account the subject, object, loss and background of the crime which will determine whether or not a restorative effort can be carried out.<sup>26</sup>

At the judicial level, restorative justice is also regulated in the Decree of the Director General of the General Court of the Supreme Court of the Republic of

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<sup>25</sup>A.A. Ngurah Bagus Krishna Wirajaya dkk, Tindak Pidana Ringan Melalui Restorative Justice Sebagai Bentuk Upaya Pembaharuan Hukum Pidana, *Jurnal Konstruksi Hukum*, Vol. 3, No. 3, 2022, hal. 555.

<sup>26</sup>Masna Nuros 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, hal. 8.

Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning Enforcement of Guidelines for Implementing Restorative Justice. The principle of restorative justice in this guideline is the recovery of victims who have suffered as a result of the perpetrator's crimes by providing compensation, peace for the perpetrators to do social work or other agreements. This guideline is applied to a restorative justice approach to minor crimes, child cases, narcotics and women in conflict with the law.<sup>27</sup>

In several criminal incidents that occurred, it can be seen that several crimes have been taken by restorative justice efforts. So apart from cases involving children, both as perpetrators and as victims, there are also other legal events where restorative justice measures have been taken. Take, for example, some time ago the Garut district attorney acquitted a cell phone theft perpetrator through a restorative justice approach and humanitarian reasons. In this case, the state prosecutor, with consideration and analysis for the sake of humanity and listening to the assessment of members of the public, said that the perpetrator was motivated by economic problems and to help his child study online, so he was forced to commit an act that was against the law. For the efforts made by the Garut district attorney, the threat of Article 362 of the Criminal Code regarding theft against the perpetrators was officially terminated.

The provision of restorative justice was also given to the perpetrators of motorcycle theft by the Takalar district attorney. The perpetrator of the theft for the sake of his wife who was about to give birth was desperate to steal a vegetable seller's motorcycle. However, with the sincerity of the victim, he finally apologized to the perpetrator. The Attorney finally agreed to the request for termination of prosecution based on the principles of restorative justice. The provision of restorative justice has also been given by the Garut Police Chief to the perpetrators of the school arson. With various considerations, for example, the losses due to the fire were not too large and the community also agreed to the provision of restorative justice.

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<sup>27</sup>*Ibid.*

From the description above, the implementation of the concept of restorative justice in a criminal incident can be seen in cases related to children. Besides that, in cases of theft, including in this case, the perpetrators are adults. Stealing small amounts of money can be resolved between the victim and the perpetrator with their respective families and law enforcement agencies. The settlement is carried out properly without harming any party. Thus it becomes clear, that restorative justice is not an effort to protect the perpetrators of crime, but as a solution that prioritizes deliberation and kinship which results in no harm to either party, as emphasized in the point of restoration to its original state.

## 2. The Concept of Returning the Function of Criminal Law as an *Ultimum Remedium* in Criminal Cases

Criminal law is basically a law of sanctions, this is based on the characteristics of criminal law which do not establish norms, but these sanctions are held to comply with other norms outside of criminal law.<sup>28</sup> As a law that provides sanctions, criminal law as part of positive law will always be demanded for its role in the life of legal subjects to create a better order of life for society. With this role, criminal law becomes a protector of rights and at the same time usurps the rights of legal subjects for the purpose of creating justice.

"In Kelsen's view, justice is a matter of irrational ideal ideology.<sup>29</sup> In fact, sometimes the sense of justice lives outside the law which will be very difficult to balance. Vice versa, the law itself is felt to be unfair<sup>30</sup>" Justice according to L.J Van Apeldoorn should not be seen as synonymous with equality, justice does not mean that everyone gets an equal share. Basically the justice that is felt will be different from one

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<sup>28</sup> Made Satria Wibawa Nugraha, Suatra Putrawan, Pemberian Sanksi Pidana Sebagai *Ultimum Remedium* Dalam Undang-Undang Perlindungan Dan Pengelolaan Lingkungan Hidup, *Jurnal Ilmu Hukum Kertha Wicara*, Vol. 07, No. 02, Maret 2018, hal. 3.

<sup>29</sup> Achmad Ali, *Menguak Tabir Hukum*, (Jakarta: Ghalia Indonesia, Edisi ke dua, 2011), hal 208.

<sup>30</sup> Sukorno Aburaera, Muhadar dan Maskun, *Filsafat Hukum Dari Rekonstruksi Sabda Manusia dan Pengetahuan hingga Keadilan dan Kebenaran*, (Makasar: Pustaka Refleksi 2010), hal. 180.

person to another. So that justice as the goal of law is required to create a balance between protected interests and everyone gets according to his rights. The study of justice in a juridical way must also coincide with the conception of the sociological philosophical values of society, with the aim of realizing justice that accommodates the sense of justice in society, not only based on the sense of justice of government delegations, namely through the courts.<sup>31</sup> The field of law and justice is a field that is the target of the community in accessing justice. Achieving access to justice can be done by analyzing six approaches, namely: First, the element of norms. Second, the element of legal awareness. Third, the elements of the appropriate dispute resolution forum. Fourth, the element of effectiveness in handling public complaints. Fifth, the element of satisfaction in the restoration of rights. Sixth, elements of solving the problem of poverty.<sup>32</sup>

Returning to the issue of criminal law as part of the forerunner of the realization of justice. Satochid Kartanegara defines criminal law as the entire rule of positive law which contains prohibitions or obligations regulated by the state or authorized officials to determine criminal rules, prohibitions or obligations accompanied by punishment for those who violate it.<sup>33</sup> Therefore, criminal law is not a law that contains new norms, but as a law that provides sanctions to confirm and strengthen so that the rules contained in other legislation are obeyed.<sup>34</sup> The usefulness of the importance of complying with laws and regulations is to achieve legal objectives.

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<sup>31</sup> A.Rachmat Wirawan dan, Avelyn Pingkan Komuna, Pengampunan Pidana Dalam Mewujudkan Keadilan, Kepastian Dan Kemanfaatan, *Jurnal Hukum, Humaniora, Masyarakat dan Budaya* Vol.1(No.1) 2021, hal. 12.

<sup>32</sup> Jaja Ahmad Jayus, Kewenangan Dan Fungsi KY Dalam Mewujudkan Keadilan, *Makalah Komisi Yudisial RI*, Jakarta 14 Agustus 2012. Lihat Dalam Sari Mardiana, Keadilan Restoratif: Solusi Pengembalian Kerugian Keuangan Negara Akibat Tindak Pidana Korupsi, *Proceedings Munasena Mahupiki*, Kerjasama Pengurus Pusat Mahupiki Dan Fakultas Hukum Universitas Sebelas Maret, Surakarta, 8-10 September 2013, hal. 103.

<sup>33</sup> Satochid Kartanegara dalam Sofjan Sastrawidjaja, *Hukum Pidana 1*, Armico, Bandung, 1990, hal. 10. Lihat dalam Made Satria Wibawa Nugraha, Suatra Putrawan, Pemberian Sanksi Pidana Sebagai Ultimum Remedium Dalam Undang-Undang Perlindungan Dan Pengelolaan Lingkungan Hidup, *Jurnal Ilmu Hukum Kertha Wicara*, Vol. 07, No. 02, Maret 2018, hal. 5.

<sup>34</sup> Made Satria Wibawa Nugraha, Suatra Putrawan, *Op cit*, hal. 5.



According to Sudikno Mertokusumo<sup>35</sup> law that functions as the protection of human interests in its enforcement must pay attention to 3 (three) fundamental elements of law, including: legal certainty (Rechtssicherheit), expediency (Zweckmassigkeit) and justice (Gerechtigkeit). Therefore, in determining the imposition of criminal sanctions in a law, it is necessary to pay attention to the three fundamental elements of the law because basically that is the essence of the purpose of law.

Thus one of the criminal policies used by the state is the imposition of criminal sanctions through laws.<sup>36</sup> Criminal punishment is made the most important thing to punish perpetrators who can harm or disturb public peace.<sup>37</sup> However, in practice the determination of criminal sanctions through current law is more used as *primum remedium* than as *ultimum remedium*. This can be seen from several existing laws where most of the laws include criminal sanctions.<sup>38</sup>

Based on the description above, actually in terms of imposing sanctions, actually in criminal law there is a principle known as the *Ultimum Remedium* principle. The principle of *ultimum remedium* contains elements of the objective so that the imposition of criminal sanctions can be given to the right person, because the perpetrators of criminal acts also have human rights including the right to obtain justice, the right to life, and the right to self-improvement. The application of *Ultimum Remedium* must be interpreted as an effort (middle way) that can benefit all parties, both as victims, as perpetrators and for the benefit of the wider community.<sup>39</sup>

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<sup>35</sup> Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, Yogyakarta: Liberty, 2005, hal.160. Lihat dalam Titis Anindyajati, Irfan Nur Rachman, Anak Agung Dian Onita, The Constitutionality of Criminal Sanction Norms as *Ultimum Remedium* in the Making of Laws, *Jurnal Konstitusi*, Volume 12, Nomor 4, Desember 2015, hal. 878.

<sup>36</sup>Titis Anindyajati, Irfan Nur Rachman, Anak Agung Dian Onita, The Constitutionality of Criminal Sanction Norms as *Ultimum Remedium* in the Making of Laws, *Jurnal Konstitusi*, Volume 12, Nomor 4, Desember 2015, hal. 876.

<sup>37</sup> Kania Tamara Pratiwi , Siti Kotijah , Rini Apriyani, Penerapan Asas *Primum Remedium* Tindak Pidana Lingkungan Hidup, *SASI*, Vol. 7 No. 3, Juli-September 2021, hal. 364.

<sup>38</sup> Titis Anindyajati, Irfan Nur Rachman, Anak Agung Dian Onita, *Op cit*, hal. 877.

<sup>39</sup>Novita Sari, Penerapan Asas *Ultimum Remedium* Dalam Penegakan Hukum Tindak Pidana Penyalahgunaan Narkotika, *Jurnal Penelitian Hukum Dejure*, Volume 17, Nomor 3, September 2017, hal.353.

Ultimum Remedium is one of 1 (one) principles contained in Indonesian criminal law which states that criminal law should be used as a last resort in terms of law enforcement. This means that if a case can be resolved through other channels (kinship, negotiation, mediation, civil law, or administrative law) that route should be followed first.

If it is related between ultimum remedium and restorative justice, then in fact these concepts are related to one another. Even so, ultimum remedium actually exists first in the settlement of criminal cases. This means that the principle of ultimum remedium has long been known than restorative justice. However, in every settlement of a criminal case it is more to the imposition of a prison sentence. It is very rare that the principle of ultimum remedium is applied, only after the appearance of restorative justice has the settlement of minor criminal cases been carried out using the approach of finding the best solution between the interests of the victim and the perpetrator.

Van de Bunt argues that criminal law as ultimum remedium has three meanings, namely: First, the application of criminal law only to people who violate the law is ethically very heavy. Second, criminal law as ultimum remedium because criminal law sanctions are heavier and harsher than sanctions in other fields of law, and often have side effects, so they should be applied if sanctions in other fields of law are unable to resolve the problem of violation of law (last remedy). Third, criminal law serves as an ultimum remedium because it is administrative officials who first know about the occurrence of a violation. So they are prioritized to take steps and actions rather than criminal law enforcers.<sup>40</sup>

Indeed, for every sentence given to the perpetrators of crimes, the criminal threat is very heavy. Every individual who experiences it will definitely feel an extraordinary amount of suffering and sorrow. Thus all those who were sentenced for committing a crime were extremely severe. However, this does not mean that even the most severe punishment will be abolished, but all the advantages and disadvantages

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<sup>40</sup> Mas Putra Zenno Januarsyah, The Implementation Of Ultimum Remedium Principle In Criminal Case Of Corruption, *Jurnal Yudisial*, Vol. 10 No. 3 Desember 2017, hal. 267.

arising from the imposition of the criminal sentence must also be considered. Therefore, every criminal case that occurs needs to be considered with *ultimum remedium* for its settlement.

Based on the description above, we are actually talking about criminal law, so we are talking about sanctions, because that is what distinguishes criminal law from other laws. Sanctions in criminal law can be in the form of imprisonment and confinement. Both of these sentences make a convict alienated and separated from society and even his own family. The sanctions given are a form of law enforcement in order to create justice.

Then is *ultimum remedium* a principle in law enforcement? Of course, we can explain that *ultimum remedium* is one of the principles of criminal law and is part of law enforcement efforts. This principle explains that criminal law should be used as a last resort in terms of law enforcement. This means that if a case can be resolved through other channels (kinship, negotiation, mediation, civil law, or administrative law) that route should be followed first.

Returning the function of criminal law as *ultimum remedium* is appropriate and can be carried out as part of criminal law enforcement as explained in several provisions of laws and regulations. The application of *ultimum remedium* can also reduce the fullness of correctional institutions, because in this case cases or legal cases that can be resolved using the principle of *ultimum remedium* are cases or legal cases that are light or cases that could be threats. sentence of less than five years in prison. So that if this is done, then not all minor cases where the perpetrators are put in prison, but can be resolved by applying the principle of *ultimum remedium*. The principle of *ultimum remedium* is very important because punishment should be the last resort in returning to a better condition. Currently, most of us see that the method of peace and deliberation is sidelined and prioritizes criminal law as if criminal law is the best and foremost. It is very important to note in the future regarding the use of the *ultimum remedium* principle, but once again its use must be limited to light cases.

## Conclusion

Restorative justice has actually been practiced for a long time in Indonesian indigenous peoples. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System incorporates restorative justice as a concept of thinking that responds to the development of the justice system by emphasizing the need for community and victim involvement. In several criminal incidents that occurred, it can be seen that several crimes have been taken by restorative justice efforts. So apart from cases involving children, there are also other legal events where restorative justice steps have been taken, such as cases of theft, including in this case the perpetrators of adults. Returning the function of criminal law as an ultimum remedium in the settlement of criminal cases is very important because punishment should be the last resort in restoring better conditions. Currently, most of us see that the method of peace and deliberation is sidelined and prioritizes criminal law as if criminal law is the best and foremost and is able to resolve all legal problems. It is very important to note in the future regarding the use of the ultimum remedium principle, however, its use must be limited to light cases or in cases of children.

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