



VOLUME 12 NO 2, DESEMBER 2023

P-ISSN: 2303-050X / E-ISSN: 2580-5797

This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/)

Restorative Justice Paradigm: Policy Problems and Practices in the Criminal Justice System in Pontianak City

Moh. Fadhil¹

¹Faculty of Sharia, IAIN Pontianak, Indonesia. E-mail: mohfadhil@iainptk.ac.id

Abstract

The paradigm shift from retributive justice to restorative justice has encouraged institutional awareness that restorative justice methods are alternatives that need to be strengthened both in terms of policy and practice. This has prompted law enforcement agencies to begin drafting and enforcing restorative justice policies in the criminal case settlement process. The purpose of this research is to analyze the working process of restorative justice policies through their implementation practices in each institution that focuses on various criminal justice institutions in Pontianak City. This study will describe the factors that influence the process of working in restorative justice by elaborating on the paradigm of law enforcement officers, policies at their institutions, and their experiences and practices. The method used is normative-empirical legal research as research on law enforcement in concreto. Although the paradigm of punishment has shifted towards a restorative paradigm, the findings in the field showed frequent obstacles. First, cross-sectoral regulatory factors that regulate restorative justice mechanisms with different mechanisms. Second, the weak integration of the criminal justice system as seen in practice between the Pontianak Police and the Pontianak District Attorney Office has not shown the integration of the criminal justice system in the corridor of enforcing the principle of functional differentiation. Third, the factor of criminal law policy is overcriminalistic so it is still overshadowed by the retributive and punitive colonial paradigm. Fourth, factor in the small period of time in the prosecutor's office due to tiered assessments within the structural corridors of leadership. Fifth, the legal culture factor of society is still mostly punitive.

Keywords: Paradigm; Restorative Justice; Criminal Justice System

INTRODUCTION

The new orientation of criminal law policy is starting to show a paradigm shift, from previously adhering to the retributive paradigm shifting towards the restorative paradigm. Zulfa assessed that in the context of law enforcement in abstracto, the design of criminal law policy is directed at fulfilling restorative justice so that the law enforcement process is based on fulfilling the interests of victims who are harmed by a

criminal act.¹ The paradigm shift in punishment is an effort to reform criminal law that has been considered punitive, focuses on punishment, and ignores the interests of victims.

The paradigm of retributive justice has always been entrenched in the perspective of people in various parts of the world. In the *common law* tradition, the retributive paradigm is considered as a form of upholding the law for a violation of the criminal law. The public will feel satisfied and assume justice has been fulfilled when criminal sanctions have been imposed by the judge. The community is actively involved in law enforcement in courts through jury representation. The fate of a defendant will be determined based on the perspective and judgment of the jurors in court.²

Not much different from the tradition of *common law*, in the tradition of *civil law*, retributive justice is justice that is believed to be a form of legal morality that must be upheld. In this regard, Immanuel Kant stated that retribution is a form of morality and the fulfillment of justice (*lex talionis*). A person who commits a crime then deserves to be punished. Through punishment, justice is considered to have been fulfilled.³

Kant's view is entrenched in the paradigm of punishment in *civil law* countries. The morality adopted in the paradigm of punishment is entrenched in Kant's concept of deontological ethics which he refers to as the "categorical imperative". In Kant's view, the morality of every human being is a universal obligation. This is then juxtaposed with legality as a legal norm that binds human actions.⁴ Kant's view then inspired retributive justice as a goal of justice in criminal law policy.

Kant's view of the concept of *lex talionis* characterized the face of criminal law as a punitive law. The purpose of criminal law is directed at retaliation and a deterrent effect. Nonetheless, Gerber and Jackson see two different dimensions in the concept of retributive justice, namely as retaliation (revenge) and also as fair deserts (just deserts). The first dimension sees the offender as someone who is considered to deserve retaliation and therefore, he must get the suffering. In psychological research, Jeffrey Osgood found a justification in American society that retribution is justified morality and justice goes if retaliation occurs.⁵

¹ Eva Achjani Zulfa, "Pergeseran Paradigma Pemidanaan Di Indonesia," *Jurnal Hukum & Pembangunan* 36, no. 3 (2006): 389-403, <https://doi.org/http://dx.doi.org/10.21143/jhp.vol36.no3.1256>.

² R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

³ Peter Karl Koritansky, "Retributive Justice and Natural Law," *The Thomist: A Speculative Quarterly Review* 83, no. 3 (2019): 407-35, <https://doi.org/https://doi.org/10.1353/tho.2019.0026>.

⁴ Ridwan Ridwan, "Relasi Hukum Dan Moral Perspektif Imperative Categories," *Jurnal Fundamental: Jurnal Ilmiah Hukum* 10, no. 1 (2021): 18-32, <https://doi.org/10.34304>.

⁵ Jeffrey M. Osgood, "Is Revenge About Retributive Justice, Detering Harm, or Both?," *Social and Personality Psychology Compass* 11, no. 1 (2016): 1-15, <https://doi.org/10.1111/spc3.12296>.

The second dimension sees that the offender has a role in improving the situation for the victim and broadly for the community. Although the offender gets a punishment, on the other hand, it had an impact on his self-change and the responsibility to repair the damage he did to the victim and society.⁶ The dimension of just deserts is a reflection of the retributive paradigm which later developed into a restorative paradigm. In practice, between the retributive and restorative paradigms, its application depends on several factors, for example, the psychology of the offender and his belief in the concept of justice, the offender's belief in the effectiveness of law enforcement, as well as the perceived advantages if choosing restorative justice.

The research of Michael Wenzel et al shows interesting finding that the preference of society for restorative justice tends to look at the perceived benefits. If restorative justice turns out not to provide a real advantage then the choice of retributive justice is the best solution. So are some notions that restorative justice is deeply intertwined with power and upper social classes. Restorative justice is often used by people in power and the upper social class to escape from their legal responsibilities. Meanwhile, if the offender comes from a lower social class, restorative justice is difficult to implement.⁷

However, whatever the factors behind these preferences, restorative justice is felt to have a meaningful impact on the victim given that the need for improvement and recovery of the situation is felt to be much more beneficial. As a dispute resolution model, restorative justice is more tactical and flexible than retributive justice. Bernie Mayer cited the views of Allan E. Barsky positing that restorative justice is practically and tactically very instrumental in the resolution of child cases. Restorative justice will position the parties equally to interact with each other to express their interests and encourage the parties to be directly involved. Constructively, this contributes to the development of the conflict in the direction and goals desired by the parties.⁸

From Mayer's view, the practice of restorative justice is directed towards meaningful improvements for victims and affected communities. Elmar G. M. Weitekamp and Stephan Parmentier stated that restorative justice is justice that restores the situation (*healing justice*).⁹ Based on the aforementioned views, the preference for the

⁶ Monica M. Gerber and Jonathan Jackson, "Retribution as Revenge and Retribution as Just Deserts," *Social Justice Research* 26, no. 1 (2013): 61–80, <https://doi.org/10.1007/s11211-012-0174-7>.

⁷ Michael Wenzel et al., "Retributive and Restorative Justice," *Law Hum Behav* 32, no. 5 (2008): 375–389, <https://doi.org/10.1007/s10979-007-9116-6>.

⁸ Bernie Mayer, "Conflict Resolution for the Helping Professions: Negotiation, Mediation, Advocacy, Facilitation, and Restorative Justice. 3rd Ed.," *Journal of Teaching in Social Work* 38, no. 4 (2018): 446–50, <https://doi.org/10.1080/08841233.2018.1489656>.

⁹ Elmar G. M. Weitekamp and Stephan Parmentier, "Restorative Justice as Healing Justice: Looking Back to the Future of the Concept," *Restorative Justice* 4, no. 2 (2016): 141–47, <https://doi.org/10.1080/20504721.2016.1197517>.

settlement of criminal cases through restorative justice is gaining popularity among law enforcement officials in Indonesia. The paradigm shift from retributive to restorative has driven institutional awareness that restorative justice methods are alternatives that need to be strengthened both from policy and practice of implementation.¹⁰

Restorative justice-based policies have been adopted into various criminal law policies. In the juvenile criminal justice system, it is known as the method of diversion as a process that must be implemented by all law enforcement officers at different levels of justice.¹¹ In the case of narcotics, there is a rehabilitation mechanism for drug addicts as an alternative to non-custodial punishment.¹² Even in the police, some cases of minor criminal acts or those that investigators think can be resolved without the need to go to court have been implemented for a long time as a penal mediation mechanism.¹³

In its development, these efforts have not been comprehensive enough to strengthen restorative justice policies. Law enforcement institutions seek to build that awareness and paradigm through sectoral policies. The Police issued The Police Regulation of the Republic of Indonesia Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice (Perpol 8 of 2021). Furthermore, the prosecutor's office issued a Prosecutor's Regulation of the Republic of Indonesia Number 15 of 2020 concerning the Termination of Prosecutions Based on Restorative Justice (Perja 15 of 2020). At the latest, the Supreme Court issued a Decree of the Directorate General of the General Judicial Agency Number 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Judicial Environment.

The inception of these sectoral policies is proof that there is a paradigm shift from retributive justice to restorative justice. Both investigators in the police, public prosecutors in the prosecutor's office, and judges in the courts have realized that retributive justice leaves many problems in the criminal justice system, ranging from the problem of accumulating cases to the biggest impact overcapacity in prisons.¹⁴

¹⁰ Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana," *Media Hukum* 25, no. 1 (2018): 111-23, <https://doi.org/https://doi.org/10.18196/jmh.2018.0107.111-123>.

¹¹ Teguh Prasetyo, "Penerapan Diversi Terhadap Tindak Pidana Anak Dalam Sistem Peradilan Pidana Anak," *Refleksi Hukum: Jurnal Ilmu Hukum* 9, no. 1 (2015): 1-14, <https://doi.org/https://doi.org/10.24246/jrh.2015.v9.i1.p1-14>.

¹² Ratih Probosiwi and Daud Bahransyaf, "Pecandu Narkoba, Antara Penjara Atau Rehabilitasi," *Sosio Informa: Kajian Permasalahan Sosial Dan Usaha Kesejahteraan Sosial* 19, no. 1 (2014): 1-19, <https://doi.org/https://doi.org/10.33007/inf.v19i1.23>.

¹³ Lilik Mulyadi, "Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori Dan Praktik," *Yustisia Jurnal Hukum* 2, no. 1 (2013): 2, <https://doi.org/10.20961/yustisia.v2i1.11054>.

¹⁴ Moh. Fadhil, "Kebijakan Kriminal Dalam Mengatasi Kelebihan Kapasitas (Overcrowded) Di Lembaga Pemasyarakatan," *Al-Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan* 9, no. 2 (2020): 168-86, <https://doi.org/https://doi.org/10.24252/ad.v9i2.15996>.

Based on this description, I assume that with the inception of sectoral policies, law enforcement officials began to strive for restorative justice and make it as a preference in the settlement of criminal cases. In the context of the criminal justice system, I assume that restorative justice has been and is being implemented by each level of criminal justice in an integrative manner. Through the legal system approach initiated by Friedman, restorative justice policies as legal substance were exist to create a new legal culture in the form of a legal culture for resolving criminal cases through restorative justice. The legal culture is aimed at all law enforcement officials as a legal structure in the criminal justice structure so that restorative justice works in an integrative manner.¹⁵

Therefore, this study aims to prove the assumptions above by analyzing the process of working restorative justice policies through the practice of applying them to each institution that focuses on various criminal justice institutions in Pontianak City. This study will outline the factors that influence the process of working restorative justice by elaborating on the paradigm of law enforcement officers, policies in their institutions, and experiences and implemented practices. This research is expected to contribute to the reformulation of criminal law policies and criminal justice system policies so that restorative justice has strong legality.

To strengthen this research, it is necessary to elaborate on some previous research so that this research has a novelty value for the development of criminal law. First, Yasser Arafat's research in 2017 discussed the practice of penal mediation in complaint offense cases. In his research, Yasser Arafat explained that penal mediation has a crucial role in solving cases of complaints, for example in domestic violence crimes, penal mediation is often a good alternative to the fulfillment of justice for both parties.¹⁶

Second, Kuat Puji Prayitno's research in 2012 which discussed restorative justice from Pancasila perspective. In his research, Kuat Puji Prayitno explained that restorative justice is based philosophic-normative on the 4th precept of Pancasila, namely the values of deliberation. Penal mediation or other forms of deliberation are justice born of peace (*just peace principle*). Kuat Puji Prayitno also observed normative loopholes for the police to be able to exercise discretion in the form of deliberation or mediation against the parties.¹⁷

Third, Bambang Waluyo's research in 2015. In his research, Bambang Waluyo explained that restorative justice can be an alternative to law enforcement reforms which

¹⁵ Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial* (Bandung: Nusa Media, 2013).

¹⁶ Yasser Arafat, "Penyelesaian Perkara Delik Aduan Dengan Perspektif Restorative Justice," *Borneo Law Review* 1, no. 2 (2017): 127–45, <https://doi.org/https://doi.org/10.35334/bolrev.v1i2.714>.

¹⁷ Kuat Puji Prayitno, "Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum In Concreto)," *Jurnal Dinamika Hukum* 12, no. 3 (2012): 407–20, <https://doi.org/http://dx.doi.org/10.20884/1.jdh.2012.12.3.116>.

in practice often cause structural injustice, for example, watermelon theft cases, cocoa bean theft cases, bamboo tree felling cases, and other structural injustice cases.¹⁸

The three studies above are having strong relevance to this study. The difference between this study and the other three studies is in the different focuses of the discussion. This research will focus on the experiences and practices of law enforcement officers in Pontianak City. The experience of investigators, public prosecutors, and judges will provide many interesting findings on the ground that can certainly contribute to the development and strengthening of restorative justice policies in the future.

METHOD

The research method used is normative-empirical legal research. This method is devoted to reviewing the practice of implementing a policy. In the context of law enforcement, this method is used in analyzing the process of working criminal law policies by law enforcement officials in each of their institutions. Therefore, legal researchers often refer to it as research on law enforcement *in concreto*.¹⁹

RESULT AND DISCUSSION

1. Implementation of Restorative Justice

Based on the data collected both through interviews and data documentation, I will achieve this based on experience in three law enforcement institutions in Pontianak City.

a. Experience and Practices in the Police Force

Research at the Pontianak City Resort Police (Polresta Pontianak), revealed findings that the practice of implementing restorative justice has been running in recent years. In fact, investigators or investigators have applied restorative justice models long before the advent of Perpol 8 of 2021, for example, diversion in children's cases or penal mediation in cases of minor crimes and cases of complaints. This finding shows that the police in Pontianak City has a very big role in resolving criminal cases based on restorative justice. The experience that ran at the Pontianak Police Station before the enactment of Perpol 8 of 2021 was the use of the penal mediation model as a form of discretion of investigators or investigator in cases that were considered to be resolved, so there was no need to go through the court process.

The implementation of restorative justice in the Pontianak Police began to run effectively and consistently after the enactment of Perpol 8 of 2021. Restorative justice is no longer only an alternative model but becomes a process that must be carried out on

¹⁸ Bambang Waluyo, "Relevansi Doktrin Restorative Justice Dalam Sistem Pemidanaan Di Indonesia," *Hasanuddin Law Review* 1, no. 2 (2015): 210-26, <https://doi.org/http://dx.doi.org/10.20956/halrev.v1i2.80>.

¹⁹ Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020).

some types of an criminal act. In the range of 2019 - 2021, the trend of implementing restorative justice is moving in a positive direction.

Table 1. Restorative Justice Trends in Pontianak Police Station

No.	Year	<i>Crime Total</i>	Restorative Justice Total	Restorative Justice Percentage
1.	2019	1884	305	16%
2.	2020	1142	294	26%
3.	2021	1113	203	18%

Source: Pontianak Police Station, 2022 (Processed by Researcher)

Restorative justice is considered a very effective and efficient model for investigators at the Pontianak Police Station. In an interview with the informant as an investigator, he explained that:

"For us, this restorative is much more effective because the case is over precisely at the level of us as the investigators, this is very good, so the case does not accumulate and we can solve it together with of course the cooperation of the parties, this is also very efficient because the police budget is not able to cover all the cases that come in too many, so with this restorative, we are more able to save money on the use of the budget and not burden the state's finances as well"²⁰

Although the process is running optimally, an interesting finding is that the application of restorative justice has not been implemented in the corridors of the criminal justice system. This can be seen in interviews with informants as investigators who explained as follows:

"If we resolve in a restorative manner, it is very facilitative and very easy if there are parties who are willing, this is different from the prosecution which is very difficult, the courts are also relatively difficult, we have followed the process in the prosecutor's office and at there is difficult, we have our own rules and in our opinion, it is quite helpful for the parties rather than the stages in the prosecutor's office"²¹

Based on these findings, it turns out that the practice of implementing restorative justice only runs sectorally and has not been connected within the corridors of the criminal justice system. To substantiate these findings, it is necessary to carry out data triangulation with the prosecutor's office.

²⁰ Penyidik Polresta, "Wawancara Dengan Penyidik Polresta" (Kepolisian Resort Kota Pontianak, 2022).

²¹ Polresta.

b. Experience and Practices in the Attorney's Office

Similar to the Police agency, the Prosecutor's Office also has restorative justice-based settlement regulations regulated in Perja 15 of 2020. Before the enactment of Perja 15 of 2020, the Pontianak District Attorney's Office only imposed a restorative justice model on the cases of children facing the law through diversion. The Pontianak District Attorney's Office has only effectively enacted restorative justice after the enactment of Perja 15 of 2020.

Unlike the Pontianak Police, which intensively applies restorative justice to various criminal cases, in the Pontianak District Attorney's Office, the number of offers submitted by the public prosecutor has been relatively small in the past two years. This can be seen in the table below.

Table 2. Restorative Justice in Pontianak District Attorney's Office

No.	Tahun	Jumlah Berhasil	Jumlah Penawaran	Persentase
1.	2021	1	4	25%
2.	2022	4	7	57%
	Total	5	11	

Source: Pontianak District Attorney's Office, 2022 (Processed by Researcher)

Hereinafter, in the process of interviewing an informant as a public prosecutor, there were some interesting findings. First, there is the "House of Restorative Justice" facility designed to provide a space of freedom for the parties to offer the interests to be achieved from the deliberative process. The deliberation mechanism at the Restorative Justice House also involves many parties, including investigators who previously conducted investigations in the case, community leaders, traditional leaders, or religious leaders. This was conveyed directly by the informant as the public prosecutor as follows.

"In the process, we immediately ask investigators, religious leaders, community leaders, or traditional leaders to attend together to provide input and also play a role in mediation so that both parties are willing to be open to each other and the assistance from these parties is very effective in restorative success. We did that in a restorative justice house, so we have a special house that we designed for restorative settlement in Sungai Beliang Village, West Pontianak District"²²

²² Kejaksaan Negeri, "Wawancara Jaksa Penuntut Umum Kejaksaan Negeri Pontianak" (Kejaksaan Negeri Pontianak, 2022).

Second, restorative justice settlements are often less effective because of the short period of time in the attorney's office, and also the process of administering permits in a tiered manner. Based on Perja 15 of 2020, the offer of restorative justice settlement requires the permission of the leader up to the high attorney's level. This tiered process of granting permits is felt to be time-consuming so it is not uncommon for some cases to fail to be resolved because the case file must be immediately transferred to the court. This was conveyed directly by the informant as a public prosecutor as follows.

"We often also have problems in the field, for example, the problem of the period of prosecution in the attorney's office. We know that the judicial process should not be long, the Criminal Code has set our timeframe and it is of course short for us to do the restorative process, we have to run with time so that it does not drag on, not if the restorative fails, we must have enough time to draft an indictment. When restorative, could be done, we must notify the Attorney General to ask for approval from the High Attorney General's Office, then it is determined that this can be done restoratively. So the approval was tiered to the center, not in us. It is only realized that the administrative process is long, for example, the top of the agreement has not yet come out, while the deadline in the Prosecutor's Office is not long, yes the impact is that the restorative justice process fails due to running out of time, so it is inevitably that it has to be devolved to the court"²³

Third, there is no functional differentiation mechanism between investigators at the Pontianak Police Station and the public prosecutor at the Pontianak District Attorney Office in a restorative justice mechanism. Several cases in the police that have been issued Notice of Commencement of Investigation (SPDP) in the process have been successfully resolved based on restorative justice by investigators. However, the process lacked coordination from the public prosecutor. This was conveyed directly by the informant as the public prosecutor as follows.

"We usually don't know that in the police force we are given the SPDP, but when we control, the case is suddenly restorative, although administratively, this is disruptive to our reporting to the case information system at the Coordinating Minister for Political Affairs, every time there is a case that the SPDP has entered into the case information system, so if the police do not coordinate and then it is restorative, we cannot input data to change that the case data has been resolved, the impact is on data that is not valid and currently the data is always used as a reference for our performance".²⁴

c. Experience and Practices in the Court

The experience of implementing restorative justice in the Pontianak District Court is much different from that of the police and prosecutors. Based on the findings from the

²³ Kejaksaan Negeri.

²⁴ Kejaksaan Negeri.

interview process, no document data was found that expressly showed the restorative justice process had proceeded. But implicitly, restorative justice is carried out in a different model and is contained in court decisions.

Based on the interview process with the judge, there were some interesting findings. First, although there are already guidelines for the application of restorative justice in the general judicial environment, judges have not implemented them effectively. The judges have not used the guidelines as a reference to certain cases that can be resolved on the basis of restorative justice. Since the guidelines came into effect until now, the new judges have only been limited to imposing diversions on cases of children facing the law and rehabilitation for drug addicts, while the mechanism for speedy procedural examinations has not been implemented for other criminal offenses.

Secondly, although the guidelines have not been effectively executed, the performance of the judges is already moving in a positive direction in terms of paradigms and the implementation of restorative justice. This is shown in several good mechanisms that have been carried out, for example, the diversion process for children's cases facing the law and the process of providing rehabilitation has been implemented effectively. Meanwhile, judges have also applied probation to defendants of minor crimes and have always provided leniency for women facing the law.

2. Some Problems in the Practice of Implementing Restorative Justice

Despite the paradigm shift of law enforcement officials towards restorative, it turned out that the research team found findings of various factors inhibiting the work of restorative justice in the field. The findings are explained as follows:

a. Cross-Sectoral Regulatory Issues

In the previous discussion, the successful implementation of restorative justice is caused by the effect of a paradigm shift from retributive to restorative. However, the process of its work has not been integral in the criminal justice system. Cross-sectoral regulatory issues are the cause of interrelationships between criminal justice sub-systems. Each of the law enforcement agencies relies on policies made by their respective institutions. When viewed from a paradigm perspective, this is obviously positive. However, if you use the perspective of the criminal justice system, this leaves holes on various sides.

Each of the created regulations has a different substance, for example, the regulation of material and formal terms, the regulation of criminal acts that can be resolved based on restorative justice, the methods or mechanisms used, the assessment process, and other arrangements. These differences are not intended that each institution has a different character in law enforcement, but rather the way each institution views in looking at the concept of restorative justice itself.

Indeed, this difference in arrangement is a good first step as a joint movement and a common enthusiasm across institutions in implementing restorative justice. However, it's time to study the differences and taken to a higher level. The government and the House of Representatives need to formulate a clear and strong concept regarding the restorative justice mechanism into the Draft Criminal Procedure Code (RKUHAP).

By included the restorative justice arrangements clearly in the RKUHAP, it will create a unity of perception and unity of work functionally within across institutions known as the principle of functional differentiation. RKUHAP is a strong formal legal rule in keeping interrelationships running harmoniously and optimally. This is also to strengthen the role of the public prosecutor as a *dominus litis* in overseeing the restorative justice process at the investigation level until it reaches the court level.

b. The Problem of Weak Integration of the Criminal Justice System

Based on the findings in the field, restorative justice mechanisms have not been integrated in the criminal justice system. Except for the diversion mechanism in the Juvenile Criminal Justice System Act and rehabilitation in the Narcotics Act, broadly speaking, the restorative justice mechanism has not been regulated in law-level arrangements.

The absence of law-level arrangements governing restorative justice within the framework of the criminal justice system is a cross-institutional trigger that it has not worked functionally. Each runs restorative justice mechanisms based on how they work without being connected within the framework of the criminal justice system

In carrying out restorative justice mechanisms, the Pontianak Police has not placed the role of the public prosecutor as *dominus litis*. If the restorative justice mechanism is carried out at the stage of investigation, the process is freely handed over to the role of the investigator. At this stage it is still tolerable because the investigation stage has not yet entered into the main process of criminal justice. It would be different if the case had entered the investigation stage, then the role of the public prosecutor as a *dominus litis* was already tied to the existence of the SPDP.²⁵

When the SPDP has entered the prosecutor's office, the investigation process is under the supervision of the public prosecutor. The case is also administratively registered in the case register with the prosecutor's office. If restorative justice is carried out at the investigation stage, then the public prosecutor must be involved in the process. The involvement of the public prosecutor has two main functions, namely the administrative function and the assessment function. The administrative function places

²⁵ Dedy Chandra Sihombing et al., "Penguatan Kewenangan Jaksa Selaku Dominus Litis Sebagai Upaya Optimalisasi Penegakan Hukum Pidana Berorientasi Keadilan Restoratif," *Locus: Jurnal Konsep Ilmu Hukum* 2, no. 1 (2022): 281-293.

the function of the public prosecutor to control the administrative process of the case, while the assessment function places the function of the public prosecutor to control the investigator's activities in a case. Both functions are the actualization of the principle of functional differentiation.²⁶

Findings in the field found that the public prosecutor at the Pontianak District Attorney's Office was not involved in the restorative justice mechanism at the investigation level at all. The investigator only sent a notice that a particular case had been resolved based on restorative justice. This is very good, but it interferes with the administrative process of the criminal justice system. The public prosecutor cannot change the status of the case in the case register system because the process requires the involvement of the public prosecutor directly in a settlement based on restorative justice at the investigation level.

As a *dominus litis*, the public prosecutor has full power in controlling the prosecution process. The power gives the public prosecutor the authority to proceed with the prosecution or stop it. If interpreted in practice in the field, then a settlement based on restorative justice at the investigation level requires the control of the public prosecutor so that it does not proceed to the prosecution process and administratively the case is considered complete.

In addition to the *dominus litis*, the rationalization of the role of the public prosecutor lies in the opportunistic principle inherent in the authority of the Attorney General. The opportunistic principle places the role of the Attorney General to not continue the prosecution process based on the public interest, the interests of society, or the interests of the law. Settlements based on restorative justice represent those interests.²⁷

c. Criminal Law Policy Issues

The next factor is the current criminal law policy which still uses the retributive paradigm. The Criminal Code (KUHP) which has been enforced since the Dutch East Indies era is a colonial legacy that has been entrenched in the paradigm of law enforcement. One of its attributes is the predominance of the threat of imprisonment within the Criminal Code as well as the rule of criminal law outside the Criminal Code. The domination of the threat of imprisonment was the result of a colonial legacy that placed prisoners as a tool of state exploitation. Prison is not just a matter of punishment.

²⁶ Mohamad Aris Dianto Aris Dianto and Mulyadi Alrianto Tajuddin, "Analisis Pelaksanaan Prapenuntutan Dalam Penyelesaian Perkara Pidana Dikaitkan Dengan Asas Peradilan Cepat, Sederhana, Dan Biaya Ringan," *Jurnal Restorative Justice* 2, no. 1 (2018): 29-37, <https://doi.org/https://doi.org/10.35724/jrj.v2i1.1922>.

²⁷ I Kadek Darma Santosa, Ni Putu Rai Yuliantini, and Dewa Gede Sudika Mangku, "Pengaturan Asas Oportunitas Dalam Sistem Peradilan Pidana Di Indonesia," *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, no. 1 (2021): 70-80.

More than that, prison is a show of power from the state over society's violation of the sovereignty of law and the sovereignty of the state.²⁸

Fadhil's previous research as citing data from the Institute for Criminal Justice Reform revealed that in the Criminal Code there are 485 norms contain the threat of imprisonment, 37 norms that contain the threat of imprisonment, and 10 norms that contain the threat of the death penalty.²⁹ Meanwhile, Akbari's research revealed that in the 1998-2014 period of 154 laws containing criminal provisions, there were 654 threats of imprisonment.³⁰ This condition is because the colonial heritage in criminal law policy also perpetuates the retributive paradigm with punitive characteristics.

Retributive characteristics in criminal law policy also influence the repressive characteristics of law enforcement due to the harsh and rigid traits of criminal law. Therefore, the face of law enforcement from the moment of independence to entering the reform era is still conditioned with those retributive characteristics. The biggest impact of this paradigm is overcapacity in detention centers and penitentiary which clearly shows the rottenness of current criminal law policy and enforcement.

The Draft Criminal Code is currently being discussed between the government and the House of Representatives strive to exit from the colonial shadow. The Draft Criminal Code has introduced various concepts that can reduce overcapacities, such as alternative punishments other than imprisonment (non-custodial), criminal individualization, the forgiveness of judges, and restorative justice mechanisms. However, the current face of the Draft Criminal Code is still overcriminalistic because prison sentences still dominate the criminal threat in the Draft Criminal Code.

If the reformation of criminal policy is not supported in harmony with criminal law enforcement policies, then law enforcement officials will still be inclined to choose the threat of imprisonment rather than pursuing non-custodial concepts. If the Draft Criminal Code is successfully passed, then the next step that must be fought by the government and the House of Representatives is to reformulate the Draft Criminal Procedure Code to be harmonious with efforts to place imprisonment as the last alternative (*ultimum remedium*).

²⁸ Iqraq Sulhin, *Diskontinuitas Penologi Punitif, Sebuah Analisis Genealogis Terhadap Pemenuhan* (Jakarta: Kencana Prenada Media Group, 2016).

²⁹ Moh. Fadhil, "Kebijakan Kriminal Dalam Mengatasi Kelebihan Kapasitas (Overcrowded) Di Lembaga Pemasyarakatan."

³⁰ Anugerah Rizki Akbari, *Potret Kriminalisasi Pasca Reformasi Dan Urgensi Reklasifikasi Tindak Pidana Di Indonesia* (Jakarta: Institute for Criminal Justice Reform, 2015).

d. The Issue of the Period of Settlement of Criminal Cases

One of the factors that caused several times the Pontianak District Attorney's Office to fail in a settlement based on restorative justice was the problem of not having much timeframe. This is indeed following the Criminal Procedure Code which only gives a short time limit at each level of the judiciary. The main purpose is that the principle of fast, simple, and low-cost justice can be properly implemented.³¹

The existence of this principle is very good for make the suspect not protracted in a long and laborious judicial process, therefore legal certainty can be obtained. If this is the case, then the restorative justice policy in the prosecutor's office should take the same energy, therefore the process in the prosecutor's office does not exceed the established deadline. However, the problem with the restorative justice policy in the prosecutor's office is the tiered administrative process starting from the public prosecutor, the application to the West Kalimantan Prosecutor's Office to the Attorney General's Office only to determine the approval of the settlement according to restorative justice.

According to the researcher, these circumstances indicate that the principle of *dominus litis* in public prosecutors is guided because the authority is not free, but rather tiered in the leadership structure. The rationalization that is built institutionally is as a tiered assessment and supervision mechanism so that the performance of the public prosecutor is in following the institutional performance. However, given its practices that have an impact on protracted processes, this is counterproductive to the passion of restorative justice itself. Tiered control in the leadership structure is no longer relevant in implementing the functions of a public prosecutor. It can be said that it creates irrationality in the principle of *dominus litis* itself.

e. Legal Culture of Society

The last factor that hinders the implementation of restorative justice is the legal culture of the community which is punitive and does not have good literacy yet regarding restorative justice. Society considers imprisonment as the only major solution in resolving criminal cases. In fact, sending the perpetrator to prison will not solve the losses and damages suffered by the victim.

Restorative justice exists to bridge that inequality of justice, that imprisonment only gives justice to the sovereignty of the law, but does not give justice to the victim. The victim will still bear the loss and damage they suffered due to the offender's actions. Thus, settlements based on restorative justice are much more effective in creating a balance of justice between legal justice and justice for victims and offender. The offender is willing

³¹ Husein Pohan et al., "Penyelesaian Tindak Pidana Dengan Pendekatan Restorative Justice Yang Dilakukan Oleh Kejaksaan (Studi Kasus Di Kejaksaan Negeri Medan)," *Locus: Jurnal Konsep Ilmu Hukum* 2, no. 1 (2022): 270–280.

to compensate for losses and repair damages, on the other hand, victims get compensation and repair damages. The restorative justice model will open the perpetrator's perspective on the interests of the victim so that it has the potential to open up the perpetrator's sympathy for the victim. The perpetrator will feel criminally responsible and the perpetrator's guilt crystallized in the form of improvements needed by the victim.

This is where the role of law enforcement officers is to provide education in advance to open up the way of thinking of offenders and victims. Explaining that a settlement based on a formal trial takes a long time, costs that may have to be incurred by both parties, and does not necessarily provide the desired sense of justice. Law enforcement officials also provide education that prisons are currently overcapacity so it is not effective if the offender gets a prison sentence.

In the context of the criminal justice system, the role of the advocate is crucial in convincing victims and perpetrators to take settlement options based on restorative justice. The role of advocates is very strategic in cooperation between law enforcement. It is also necessary to reflect on the diversion model in the juvenile criminal justice system which places the role of advocates and correctional officers who are very active in pursuing restorative justice at every level of justice.

The restorative justice model in the prosecutor's office also needs to be appreciated constructively with the existence of the Restorative Justice House. In addition, the prosecutor's office also gives a big role in the community to be involved in a settlement based on restorative justice. The conference model is one of the good alternatives by presenting various parties, ranging from perpetrators, victims, community leaders, religious leaders, traditional leaders, and the presence of law enforcement officials both as facilitators (prosecutors) and as control mechanisms in the criminal justice system (advocates and investigators).

CONCLUSION

Although the paradigm of punishment has shifted towards a restorative paradigm, the findings in the field showed frequent obstacles. First, cross-sectoral regulatory factors that regulate restorative justice mechanisms with different mechanisms. Second, the weak integration of the criminal justice system as seen in practice between the Pontianak Police and the Pontianak District Attorney Office has not shown the integration of the criminal justice system in the corridor of enforcing the principle of functional differentiation. Third, the factor of criminal law policy is overcriminalistic so it is still overshadowed by the retributive and punitive colonial paradigm. Fourth, factor in the small period of time in the prosecutor's office due to tiered assessments within the

structural corridors of leadership. Fifth, the legal culture factor of society is still mostly punitive.

ACKNOWLEDGMENTS

In the process of this research, I would like to thank Mr. Ardiansyah for his support in various matters, ranging from funding, technical research, to other assistance that is very useful for the implementation of this research to completion. This gratitude is also conveyed to my two students who played a role in the data collecting process, namely Rizky Pratama and Sabila Febriani.

REFERENCES

- Akbari, Anugerah Rizki. *Potret Kriminalisasi Pasca Reformasi Dan Urgensi Reklasifikasi Tindak Pidana Di Indonesia*. Jakarta: Institute for Criminal Justice Reform, 2015.
- Arafat, Yasser. "Penyelesaian Perkara Delik Aduan Dengan Perspektif Restorative Justice." *Borneo Law Review* 1, no. 2 (2017): 127–45. <https://doi.org/https://doi.org/10.35334/bolrev.v1i2.714>.
- Dianto, Mohamad Aris Dianto Aris, and Mulyadi Alrianto Tajuddin. "Analisis Pelaksanaan Prapenuntutan Dalam Penyelesaian Perkara Pidana Dikaitkan Dengan Asas Peradilan Cepat, Sederhana, Dan Biaya Ringan." *Jurnal Restorative Justice* 2, no. 1 (2018): 29–37. <https://doi.org/https://doi.org/10.35724/jrj.v2i1.1922>.
- Duff, R. A. *Punishment, Communication, and Community*. Oxford: Oxford University Press, 2001.
- Fadhil, Moh. "Kebijakan Kriminal Dalam Mengatasi Kelebihan Kapasitas (Overcrowded) Di Lembaga Pemasyarakatan." *Al-Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan* 9, no. 2 (2020): 168–86. <https://doi.org/https://doi.org/10.24252/ad.v9i2.15996>.
- Friedman, Lawrence M. *Sistem Hukum Perspektif Ilmu Sosial*. Bandung: Nusa Media, 2013.
- Gerber, Monica M., and Jonathan Jackson. "Retribution as Revenge and Retribution as Just Deserts." *Social Justice Research* 26, no. 1 (2013): 61–80. <https://doi.org/10.1007/s11211-012-0174-7>.
- Kejaksaan Negeri. "Wawancara Jaksa Penuntut Umum Kejaksaan Negeri Pontianak." 2022.
- Koritansky, Peter Karl. "Retributive Justice and Natural Law." *The Thomist: A Speculative Quarterly Review* 83, no. 3 (2019): 407–35. <https://doi.org/https://doi.org/10.1353/tho.2019.0026>.
- Mayer, Bernie. "Conflict Resolution for the Helping Professions: Negotiation, Mediation, Advocacy, Facilitation, and Restorative Justice. 3rd Ed." *Journal of Teaching in Social Work* 38, no. 4 (2018): 446–50. <https://doi.org/10.1080/08841233.2018.1489656>.

Muhaimin. *Metode Penelitian Hukum*. Mataram: Mataram University Press, 2020.

Mulyadi, Lilik. "Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori Dan Praktik." *Yustisia Jurnal Hukum* 2, no. 1 (2013): 2. <https://doi.org/10.20961/yustisia.v2i1.11054>.

Osgood, Jeffrey M. "Is Revenge About Retributive Justice, Deterring Harm, or Both?" *Social and Personality Psychology Compass* 11, no. 1 (2016): 1-15. <https://doi.org/10.1111/spc3.12296>.

Pohan, Husein, Madiasa Ablisar, Marlina Marlina, and Mohammad Ekaputra. "Penyelesaian Tindak Pidana Dengan Pendekatan Restorative Justice Yang Dilakukan Oleh Kejaksaan (Studi Kasus Di Kejaksaan Negeri Medan)." *Locus: Jurnal Konsep Ilmu Hukum* 2, no. 1 (2022): 270-280.

Polresta, Penyidik. "Wawancara Dengan Penyidik Polresta." 2022.

Prasetyo, Teguh. "Penerapan Diversi Terhadap Tindak Pidana Anak Dalam Sistem Peradilan Pidana Anak." *Refleksi Hukum: Jurnal Ilmu Hukum* 9, no. 1 (2015): 1-14. <https://doi.org/https://doi.org/10.24246/jrh.2015.v9.i1.p1-14>.

Prayitno, Kuart Puji. "Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum In Concreto)." *Jurnal Dinamika Hukum* 12, no. 3 (2012): 407-20. <https://doi.org/http://dx.doi.org/10.20884/1.jdh.2012.12.3.116>.

Probosiwi, Ratih, and Daud Bahransyaf. "Pecandu Narkoba, Antara Penjara Atau Rehabilitasi." *Sosio Informa : Kajian Permasalahan Sosial Dan Usaha Kesejahteraan Sosial* 19, no. 1 (2014): 1-19. <https://doi.org/https://doi.org/10.33007/inf.v19i1.23>.

Ridwan, Ridwan. "Relasi Hukum Dan Moral Perspektif Imperative Categories." *Jurnal Fundamental: Jurnal Ilmiah Hukum* 10, no. 1 (2021): 18-32. <https://doi.org/10.34304>.

Santosa, I Kadek Darma, Ni Putu Rai Yuliantini, and Dewa Gede Sudika Mangku. "Pengaturan Asas Oportunitas Dalam Sistem Peradilan Pidana Di Indonesia." *Jurnal Pendidikan Kewarganegaraan Undiksha* 9, no. 1 (2021): 70-80.

Satria, Hariman. "Restorative Justice: Paradigma Baru Peradilan Pidana." *Media Hukum* 25, no. 1 (2018): 111-23. <https://doi.org/https://doi.org/10.18196/jmh.2018.0107.111-123>.

Sihombing, Dedy Chandra, Alvi Syahrin, Madiasa Ablisar, and Mahmud Mulyadi. "Penguatan Kewenangan Jaksa Selaku Dominus Litis Sebagai Upaya Optimalisasi Penegakan Hukum Pidana Berorientasi Keadilan Restoratif." *Locus: Jurnal Konsep Ilmu Hukum* 2, no. 1 (2022): 281-293.

Sulhin, Iqraq. *Diskontinuitas Penologi Punitif, Sebuah Analisis Genealogis Terhadap Pemenjaraan*. Jakarta: Kencana Prenada Media Group, 2016.

- Waluyo, Bambang. "Relevansi Doktrin Restorative Justice Dalam Sistem Pemidanaan Di Indonesia." *Hasanuddin Law Review* 1, no. 2 (2015): 210-26. <https://doi.org/http://dx.doi.org/10.20956/halrev.v1i2.80>.
- Weitekamp, Elmar G. M., and Stephan Parmentier. "Restorative Justice as Healing Justice: Looking Back to the Future of the Concept." *Restorative Justice* 4, no. 2 (2016): 141-47. <https://doi.org/10.1080/20504721.2016.1197517>.
- Wenzel, Michael, Tyler G. Okimoto, Norman T. Feather, and Michael J. Platow. "Retributive and Restorative Justice." *Law Hum Behav* 32, no. 5 (2008): 375-389. <https://doi.org/10.1007/s10979-007-9116-6>.
- Zulfa, Eva Achjani. "Pergeseran Paradigma Pemidanaan Di Indonesia." *Jurnal Hukum & Pembangunan* 36, no. 3 (2006): 389-403. <https://doi.org/http://dx.doi.org/10.21143/jhp.vol36.no3.1256>.