

# *Diversion Model of Death Sentence in the Perspective of Restorative Justice Law Policy*

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**Abstract-** The optional (alternative) law policies in the death sentence stipulated in the draft of Criminal Code have not adopted the resitutive concept by referring to the principles of restorative justice. The optional nature needs to relate to the legal interests to be protected. The criminal law policies should apply diversion, especially for the application of death sentence that is related to individual legal interests (*individuale belengen*). The diversion model is aimed at utilizing the law as a means of social engineering. Legal justice is expected to be realized. Restorative justice is very important and strategic in renewing the system of criminal law. The criminal law policies that are based on restorative justice imply resitution, recovery, and compensation to maintain and preserve the peace in the community life.

**Keywords-** *Diversion Model, Death Sentence, Restorative Justice*

## I. INTRODUCTION

The 1945 Constitution of The Republic of Indonesia stated in an expressive verbis way, that the axiology of law [1] adopted is the “fair legal certainty.” It can be said that the constitution follows the axiology of the school of natural law by referring to the fundamental value of justice and legal positivism that refer to the value of legal certainty which refers to formal law (legislation). In other words, a legislation (both procedurally and substantially) should contain certainty and justice [3].

According to the author of legal axiology formulation, the constitution implies that justice is obtained through legal certainty in the law. It is in accordance with the postulate, “*justice stands tall in the frame of legal certainty*”. Both justice and certainty can be distinguished but cannot be separated. The Constitution does not mention the benefits of the law, despite the fact that the ideal of law (*rechtsidee*) contains three foundations of the law, namely certainty (*rechtsicherheit*), justice (*gerechtigkei*), and expediency (*zweckmassigkeit*) [2],[3], [4],[5],[6].

In relation to law enforcement [5], there are three legal interests (*rechtebelang*) to be protected in the paradigm of legal state: individual legal interest (*individuale belangen*), community legal interest (*soziale belangen*) dan state legal interest (*staats belangen*) [7]. In running the law enforcement, the three foundations of the law should underlie both the legal formation and the application stage [8].

Law enforcement is a process to realize the desire of the law, one of which is the desire of sentencing system [8] that includes death sentence. The death sentence is categorized as the cruelest punishment, because there is no hope for the convict to redeem his sins [10]. According to the old criminal law, the death sentence is more like a retaliation. The criminals deserved to suffer or to be tortured (because of their actions), and it should be carried out by the state [11]. It was how the society saw criminals at that time. Death sentence is a legal issue that gets a lot of attention not only in Indonesia, but also in various countries [12].

The application of death sentence, in terms of the teachings of the legal values adopted by the constitution, is legalized by referring to the procedural and legal justice. Procedural justice is realized in the decision making. Its parameter is the “obedience” to procedural law. Meanwhile, legal justice is realized according to the law, and this justice is manifested by imposing punishment to the laws and regulations violated. Its parameter is “the principle of legality”.

The problem concerns on how the formulation of justice prioritizes a balance between between the interests of individual and the interests of state or community. In accordance to this, it is necessary to analyze the value system within the justice so that it can be expressed in the empirical level based on corrective justice, vindictive justice (*iustitia vindicativa*) and special justice (*iustitia distributiva*). The three values of justice have become a philosophical foundation for the enforcement of death sentence which accommodates the ideals of law (*rechtsidee*), in accordance with the national goal to realize the social justice for the whole of the people of Indonesia. Based on the above background description, the problem statement of this research is, “how is the prospect of restorative-justice-based death sentence?”

## II. RESEARCH METHOD

This is a non-doctrinal legal research that aims to review and analyze the enforcement of death sentence using restorative justice approach. Secondary data were used, which included three types of legal materials: primary, secondary, and tertiary legal materials. The data were analyzed using normative-qualitative method. Here, normative means that the analysis is based on the existing legislations as a positive law, while qualitative means that

the data consist of secondary data. The problem statement was analyzed based on non-doctrinal. The qualitative method was used for the analysis. Furthermore, deductive reasoning is also used in this research. This model is done in three stages, namely reducing data, presenting data and drawing conclusions.

### III. FINDINGS AND DISCUSSION

#### 1. *The Discourse of Justice in The Sentencing*

Justice is one of the objectives of the law, because a positive legal system should be based on justice, even though the meaning of justice varies from one value system to another [13]. Yet, a legal system cannot last if it is not felt by the people regulated by the law. In other words, injustice will disrupt order. Disrupted order means that order and certainty are no longer guaranteed. Therefore, a legal order cannot be separated from justice [14]. There is a close relation between creating a prosperous society with the justice as the aim of law.

Bellefroid stated that the contents of the law should be determined by the principles of justice and expediency [15]. Apeldoorn argued that the purpose of the law is to maintain peace by establishing a balance between protected interests and the rights of the individual [16]. Law and justice are two interrelated elements which constitute "*condition sine qua non*" for each other. Law is the external manifestation of justice, and justice is the internal authentic and essence in spiritual form. Thus, the supremacy of law means supremacy of justice and vice versa, both of them are cumulative. In here, law does not exist in the dimension of absolute law (legism), but it exists in the dimension of absolute justice. The law cannot survive if it loses its spirit of justice [17].

The concept of justice is also proposed by Kelsen. First, it is related to justice and peace. The justice that comes from irrational ideals which is then rationalized through knowledge in the form of interests which eventually creates a conflict of interest. The conflict can be resolved by an order that fulfills one of the interests at the expense of other interests or by trying to reach a compromise towards peace for all the interests [18]. Second, the concept of justice and legality. According to Kelsen, justice means legality to enforce something on a solid basis of a particular social order. A general rule is considered "fair" if it is actually implemented, while a general rule is considered "unfair" if it is applied to a case and not applied to other similar cases [18].

Aristoteles divided justice into distributive justice and corrective justice. Corrective justice can be used as reference for the death sentence. Corrective justice focuses on correcting the violations by giving adequate compensation for the party who suffer losses [20],[21]. This type of justice relates to the concept of vindictive justice (*iustitia vindicativa*) and special justice (*iustitia distributiva*). Vindictive justice gives punishment based

on the wrongdoing concerned. In addition, special justice gives punishment or compensation for the crime or violation.

In the perspective of criminal law enforcement, the retributive justice develops into the restitutive justice. Durkheim stated, as quoted by Soetandyo, that in a society which has become modern, heterogeneous, and full of differentiation where organic solidarity overcomes the old mechanical solidarity, the repressive function doesn't work dominantly any longer. Its role will be taken over by the restitutive law, which emphasizes the importance of restitution, recovery, or compensation to maintain the society [22]. The history of the development of Indonesian criminal law cannot be separated from the philosophy of retributive justice which greatly influences the practice of law enforcement in Indonesia. The perspective of retributive justice legitimizes punishment as a means of retaliation for crimes committed by someone. A crime is perceived immoral among the society, so a punishment should be imposed to the criminal. The punishment has only one purpose, namely retaliation [23].

The discourse of the punishment purpose in today's law enforcement has developed close to restitutive justice, and is being supported with the concept of restorative justice. Umbreit defined restorative justice as follows: "*Restorative justice is a response to a victim-centered crime that allows victims, criminal offenders, their families, and representatives from the community to deal with damage and losses caused by criminal acts*" [24]. Regarding this perspective, Daly said that Umbreit's concept focused on recovering the damage and losses caused by crimes, which needs to be supported by restitution concept to recover damage and losses suffered by victims of crimes and facilitate peace [25]. Marshall also proposed similar argument, that a restorative justice is a concept of settling particular criminal act which involves all the parties concerned to seek for the solution to the aftermath of the crime and how to deal with its implication in the future [26].

Restorative justice is built on the basis of positive traditional community values and sanctions implemented to respect human rights. The principles of restorative justice are: making the offender takes the responsibility to recover the damage and loss caused by his crimes; giving a chance to the offender to prove his capacity and quality to redeem his guilt in a constructive way, which involves the victims, parents, family, friend, cooperation forum; and overcoming problems related to crime [27]. Van Ness stated that restorative justice tries to achieve some values through the enforcement of criminal justice: First, conflict resolution that contains a recompense and vindication. Second, a safety feeling that contains peace and order [25].

According to Gandjar, restorative justice can theoretically and practically be used to resolve a crime.

The description is as follows [29]: *“In a philosophical framework, the presence of a restorative justice approach in criminal law is not intended to abolish criminal law, or fusing criminal law and civil law, because of the restorative justice approach that prioritizes mediation between the victims and offenders. In fact, the restorative justice actually returns the function of criminal law to its initial ultimum remedium function, a ultimate weapon if other legal efforts are no longer usable in dealing with a crime in society. In a practical framework, the resolution of criminal cases using restorative justice approach also offers an alternative solution to the problems faced in the criminal justice system, such as difficult, long, and expensive administration of justice, or the accumulation of cases and court decisions that do not accommodate the interests of victims.”*

Clifford defined restorative justice as a philosophy of justice which emphasizes the importance and relevance of actors, victims, communities and governments in crimes and delinquency cases [30]. According to Centre for Justice & Reconciliation, restorative justice is a theory of justice which emphasize to recover the loss caused by the crime offenders. It is best done when the parties consciously meet to find a way to imply the theory, which can lead to a transformation of relations between communities [31]. Romli argued that the restorative model aims to fix the problematic or imbalance condition to achieve a harmonious society life or to give benefit to the nation and state [32].

## 2. Restorative Justice in The Diversion of Death Sentence

The implementation of death sentence is a country's national politics of law [33]. The politics of law of the death sentence can be done by an integral approach, using both means of penal or non-penal. Regarding the use of criminal law as a means for preventing crime, Muladi stated that the criminal law enforcement is not the only foundation to resolve or overcome a crime. This is reasonable because a crime is actually a "humanitarian problem" and "social problem" which cannot be solved merely by criminal law. Crime is a dynamic social phenomenon, which always develops and correlates to the complex phenomena and structure of society [34].

A law breakthrough is needed to renew the system of death sentence, which does not make the death sentence a *“primum remedium”*, but directs it to the *“ultimum remedium”* (last resort) concept of punishment which is supported with restorative justice concept. Restorative justice is realized through diversion of death sentence. The main principle of restorative justice is to provide legal protection (victims' rights) related to legal violations that harm victims [35].

The existence of restorative justice develops in several international legal instruments. Some provisions that regulate and recommend the application of restorative

justice are inscribed in United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) 1990, The Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, The Bangkok Declaration-Synergies and Responses: Strategic Alliances in crime prevention and Criminal Justice. The international legal instrument which regulates and recommends to implement restorative justice principles to the crime committed by adult is United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules). It recommends in detail, the minimum standard of restorative justice principles application to reduce imprisonment. The principles of restorative justice can be applied to all people who are named suspects defendants or convicts and in all processes of criminal justice administration. The principles of restorative justice are applied based on the principle of not-discriminating race, religion, gender, age, language, politics or political opinion, wealth, national origin, birth status or other status [36].

The restorative justice is recognized as one of the concepts to resolve crime cases by the United Nations in 2000. After that recognition, more and more countries are implementing it to handle criminal cases. Restorative justice is a model to resolve criminal cases that puts forward the recovery of victims, offenders, and society. The main principle of restorative justice is the participation of victims and offenders, and supported by the citizens as the mediator of case resolution [37]. The normative development shows that the principles of restorative justice have been formulated positively in Act No. 11 of 2012 on Child Criminal Justice System and Act No. 32 of 2009 on Environment Management and Protection.

By using the restorative justice approach, the victims' recovery is expected to be realized, the purpose of punishment for offenders will be successful and public order can be achieved. Restorative justice is one alternative to realize justice in accordance with the objectives of the law. It is the justice that everyone will get [38]. The implementation of restorative justice has the following basic principles [39]: a) The justice demanded is the existence of recovery efforts for the harmed party; b) Anyone who is involved and affected by a crime should have the opportunity to participate fully in following up the case; c) The government plays a role in creating public order, while the community builds and maintains peace. Referring to the above principles, there are four main values [37]: a) *Encounter*, which is creating opportunities for the parties involved and having the intention to meet and discuss problems that have occurred after the case; b) *Amends*, where it is very necessary for the offender to take steps in correcting the losses that occur as a result of his actions; c) *Reintegration*, which is looking for the recovery ways and to contribute to the society; d) *Inclusion*, which is providing opportunities for all parties involved to participate in handling the case.

This restorative application is also very related to the aspect of benefit, as described by the Roscoe Pond: “law as tool of social engineering”, which means that the law can be used as a means of renewal (to form, build, change), and law as a means of social engineering [40]. Mardjono proposed the following objectives of the criminal justice system [41]: 1) Preventing people from becoming victims of crime; 2) Resolving crimes which occur to satisfy public that justice is enacted and the convicts are punished; dan 3) Making sure that those who have committed crimes do not repeat the actions. Nigel Walker once reminded the limiting principles that should be considered, such as [42]: a) Do not use criminal law merely for retaliating; b) Do not use criminal law to punish harmless actions; c) Do not use criminal law to achieve a goal that can be obtained more effectively with other lighter means; d) Do not use criminal law if the loss or danger arising from the crime is greater than the loss or danger of the act of crime; e) Do not let the prohibitions in the criminal law to be more dangerous than the actions to be prevented; f) Do not let the criminal law to contain restrictions which public does not support strongly.

The diversion approach related to death sentence is actually recognized in the Criminal Code draft. The concept of Criminal Code draft excludes the death sentence from the basic sentencing system and categorizes it as a special or exceptional sentence. Excluding the death sentence from the basic sentencing package is considered important, because it is a compromise of retentionist and abolitionist views [44]. The exclusion of death sentence from the basic sentencing system and making it an exceptional or alternative sentence is another form of diversion, it is listed in: 1) Article 67 Criminal Code Draft of 2015: Death sentence is a basic sentence that is of a special nature and is always imposed alternatively; 2) Article 89 Criminal Code Draft of 2015: Death sentence is imposed alternatively as a last resort to protect the society; 3) Article 91 Criminal Code Draft : the implementation of death sentence can be postponed with a trial period of 10 years. If during the trial, the convict shows repentance, takes commendable actions, and the society accepts it, the death sentence can be replaced by life imprisonment or maximum imprisonment of 20 years. If the opposite happens, then capital punishment can be carried out by the orders of the Attorney General.

The diversion approach in the Criminal Code Draft with alternative trait certainly still does not show the validity of restorative justice. Furthermore, the Criminal Code Draft still leaves problems regarding the scope and circumstances where death sentence can be applied alternatively. The two matters are important to determine the diversion of the death sentence. The enforcement of death sentence diversion should be based on restorative justice, it should also be applied imperatively.

According to the author, the politics of death sentence should be distinguished in relation to the protected legal

interests. *Regarding the individual legal interests, the application of death sentence is optional. It refers to Article 340, Article 365 paragraph (4) and Article 368 paragraph (2) of the Criminal Code. In addition, Article 104, Article 111 paragraph (2), Article 124 paragraph (3), Article 140 paragraph (3), Article 444, Article 124, Article 127 and 129 regulate the state legal interests. Various laws such as Narcotics Law, Terrorism Law, and Corruption Law are included in the state legal interests.*

The diversion can be applied on death sentence based on the principles of restorative justice, regarding the individual legal interests. *In its practice, there are several models of restorative justice.* First, mediating the offenders and victims with the help of experienced mediator to develop plans of recovery, or called as victim-offender mediation [44]. Second, holding family group conference, which involves larger society groups, family members, and other parties to make sure that the offenders fulfill the agreement which has been made [44]. Regarding the state legal interests in certain cases, *diversion cannot be applied, since the victim is not individual. However, the judge should consider comprehensively to decide to impose death sentence.* The death row inmates should also be given legal rights including extraordinary legal efforts to make sure that the application of the law has been in accordance with the applicable laws and regulations.

The diversion model can be applied to premeditated murder (Article 340 Criminal Code), theft with violence that causes serious injury or death (Article 365 Paragraph (4) Criminal Code) and extortion with violence that causes serious injury or death (Article 368 Paragraph (2) Criminal Code). Meanwhile, the absolute (non-diversion) model applies for the treason against the president and vice president (Article 104 Criminal Code), persuading foreign countries to fight or have war (Article 111 Paragraph (2) Criminal Code), helping enemies during a war (Article 124 Paragraph (3) Criminal Code), treason to the king or treason against the king and neighboring countries that causes death (Article 140 Paragraph (3) Criminal Code), and sea, coast, and river piracy that causes death (Article 444 Criminal Code). In addition to the provisions in the Criminal Code, the absolute model can also be applied to crimes that are not included in the Criminal Code, such as in the Law on Terrorism Eradication, Law on Human Rights Court, Law on Corruption Eradication, and Narcotics Law.

#### IV. CONCLUSION

In the perspective of justice, the diversion concept relates to the corrective, rehabilitative, and restorative justice. All of them are a unit that forms a functional group. Corrective justice is related to the sentence imposed to the convict. Rehabilitative justice is related to efforts to recover the convict. Meanwhile the restorative justice is related to compensation. Restorative justice refers to the realization of recovery for damage and losses

suffered by victim of crimes and the compensation to the victim is based on mutual agreements. Restorative approach refers to the resolution of criminal cases by involving the offenders, victims, families of the offenders/victims, and other parties concerned to seek for a fair solution that emphasizes recovery and not retaliation. Thus, the application of restorative justice through diversion of death sentence is one model that should be applied. The death sentence is used as the last resort. The diversion can be done if the victim's family is willing to receive compensation. The diversion model is limited to the offenses relating to individual legal interests and not aimed to the offenses that threaten public order and endanger the society.

Constructive arrangements to elaborate the principles of restorative justice are needed in Indonesian sentencing system with its plural society that consists of various tribes, cultures, customary laws and religious laws that go hand in hand with national laws applied in criminal law enforcement. The formulation of criminal law policies in terms of death sentence should be able to change the views of the public so that they do not take outlaw actions. Public awareness is very influential in order to realize order and peace of life. Thus, the legal culture approach is needed.

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