

# The Juridical Study on the Implementation of Restorative Justice in the Crime of Adultery

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## Abstract.

*The purpose of this paper is to find out, examine and analyze the interpretation of the implementation of restorative justice in the crime of adultery. In this research, the writer uses sociological juridical method. In the conclusion of the discussion that the mechanism for the implementation of the settlement of cases of adultery by restorative justice without contact with the criminal justice system is carried out in stages after the occurrence of the case, it is necessary to have a forum in which the initiative comes from the community, namely community leaders or other interested parties. . This forum then arranged a meeting for deliberation and recovery. Furthermore, the forum invites the perpetrators and victims to carry out deliberation in resolving existing cases. After that, a report is needed to account for the results of the deliberation to the related parties. In the event that the case of the crime of adultery has come into contact with the criminal justice system, in this case the Police, when a case occurs the Police, namely the investigator, conducts an examination of the reported criminal event. During the investigation process, the parties, namely the perpetrator and the victim, were brought together.*

*Keywords: Adultery; Justice; Restorative.*

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## 1. Introduction

Indonesia is a state of law, the statement is contained in the Elucidation of the 1945 Constitution of the Republic of Indonesia stating that "the Indonesian state is based on law (rechtstaat) not based on mere power (machtstaat)".<sup>1</sup> As a state of law, Indonesia has a series of regulations or laws so that the interests of the community can be protected. The fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, which is the constitutional basis of this country, states that one of the goals of the state is to create public welfare. So all efforts and developments carried out by this country must lead to this goal so as to create people's welfare.<sup>2</sup>

The law is actually a reflection of the social life of a society where the law is formed. It can be said that law is a function of the social history of a society, but law is not a static social building, but it can change and this change occurs because of its function to serve the community.<sup>3</sup> A law in society does not always act as a

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<sup>1</sup>Haris Wahyu Sunarno and Akhmad Khisni, *Analysis of Criminal Liability as Doer of Preening Criminal (Case Study in the Blora State Court)*, Jurnal Daulat Hukum: Volume 3 Issue 1, March 2020, url:<http://jurnal.unissula.ac.id/index.php/RH/article/view/8779/4074>

<sup>2</sup>Sulistiyawan Doni Ardiyanto, Eko Soponyono, and Achmad Sulchan, *Judgment Considerations Policy in Decree of the Court Criminal Statement Based On Criminal Destination*, Jurnal Daulat Hukum: Volume 3 Issue 1, March 2020, url: <http://jurnal.unissula.ac.id/index.php/RH/article/view/8409/4067>

<sup>3</sup>H. Zamhari Abidin, (1996), *Pengertian dan Asas Hukum Pidana*, Ghalia Indonesia, Jakarta, p. 84.

barrier to social change. The existence of a public attitude that cares about the law can serve as a source of extraordinary strength for the peace of the community itself.<sup>4</sup>

Indonesia's National Development has clear and directed directions and objectives, namely to achieve a just and prosperous Indonesian society, both materially and spiritually.<sup>5</sup>The Indonesian government system to regulate its people in matters of personal and family protection from deviant behavior against one's dignity, especially against women, which is called adultery, which is regulated in the criminal code of law. Adultery is an act that is prohibited by both divine law and human law since ancient times. However, in Indonesia the law that prohibits adultery is very weak and does not represent the will of society in general.

The criminal law system regarding criminal acts in Indonesia views differently the offense of adultery as part of the offenses regarding decency. This is due to the different perspectives and values behind it. The legal system that applies in a society that still upholds moral values. Adultery will be seen as a form of action that can depend on the will of each individual. Adultery will be considered disgraceful if it is done within the framework of marriage and is not considered a crime against God's law that must be eradicated. The role of law enforcement officers in uncovering and resolving cases of criminal acts of adultery is required to be professional, accompanied by intellectual maturity and high moral integrity.

This is necessary so that the judicial process in resolving cases of adultery can run completely and the perpetrators are subject to the fairest punishment. Adultery appears as a very personal activity, but basically adultery is a personal activity that has a broad social dimension. Therefore, state intervention has a solid foundation, among others, that one of the main causes of the spread of HIV and AIDS is sex outside of marriage. Efforts to tackle the crime of adultery have always been an interesting discussion for many people, especially criminal law experts and criminologists. In criminal law there is talk about values and norms, namely prohibitions or orders, and there are sanctions for violating these values and norms in the form of criminal threats.

Adultery will be considered despicable or prohibited in the Criminal Code if it occurs within the framework of marriage. The efforts to reform Indonesia's criminal law that have been touted so far are expected to make many new changes regarding the weakness of the criminal law regarding adultery offenses as regulated in Article 284 of the Criminal Code. Therefore, since the Draft Criminal Code was issued in 1964, the rules for adultery offenses have undergone significant changes.

The provisions of the Indonesian criminal law (KUHP) regarding the offense of adultery have a different meaning from the conception given by the community. According to the Criminal Code, adultery is identified with overspel which has a

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<sup>4</sup>Sumaryono and Sri Kusriyah, *The Criminal Enforcement of the Fraud Mode of Multiple Money (Case study Decision No.61 / Pid.B / 2019 / PN.Blora)*, Jurnal Daulat Hukum: Volume 3 Issue 1, March 2020, url: <http://jurnal.unissula.ac.id/index.php/RH/article/view/8811/4075>

<sup>5</sup>Ari Yudistira and Widayati, *The Investigation Process of Prospective Children in Criminal Action*, Jurnal Daulat Hukum: Volume 4 Issue 1, March 2021, url:<http://jurnal.unissula.ac.id/index.php/RH/article/view/13695/5374>

much narrower meaning than adultery itself. Overspel can only occur if one of the perpetrators or both actors have been bound by marriage. This is different from the communal and religious conception of Indonesian society/nation. Every form of adultery, whether tied to marriage or not, is a taboo act that violates moral values. This conception of society will not mean much if the future national criminal law does not accommodate its provisions.

The crime of adultery as referred to in Article 284 of the Criminal Code paragraph (1) of the Criminal Code is a crime that must be committed intentionally. This means that the element of intentionality must be proven to the perpetrator so that he can be proven intentionally in committing one of the adultery crimes of adultery as regulated in Article 284 paragraph (1) of the Criminal Code.

As for this intentional act, the Criminal Code does not provide a clear definition. Instructions for knowing the meaning of intentional can be taken from *Memorie van Toelchting (MvT)* which defines intentionality (*opzet*) as wanting and knowing (*willens en wettens*). So it can be said that intentionally means willing and knowing what he is doing.<sup>6</sup>

If the intentional element of the adulterer cannot be proven, then the perpetrator is not proven to want or is not proven to know the adultery committed, so the judge must decide to be free from lawsuits (*onslag van rechtsvervolging*) for the perpetrator. According to Simons, for the existence of an adultery according to Article 284 of the Criminal Code, it is necessary to have a *vleeslijk gemeenschap* or it is necessary to have a completed sexual intercourse between a man and a woman. So if it is done by two people of the same sex it is not adultery as referred to in Article 284 of the Criminal Code and if it is done by those who are not yet in a marriage bond with another person, it is also not included. Another condition that needs to be considered so that the act of having sex between a man and a woman, one or both of whom is married, can be called an adultery offense according to the Criminal Code is that there is no agreement between the husband and wife. This means that if there is an agreement between husband and wife, for example, a husband who works as a pimp and his wife becomes a prostitute for his subordinates, then such an act is not an act of adultery.<sup>7</sup>

The restorative justice approach in resolving criminal cases is very rational to choose if faced with a complaint offense criminal case. In essence, in a complaint offense, a criminal act can only be prosecuted if there is a complaint from the victim. This means that the complaint offense case is actually a criminal case with a private feel where the party who feels aggrieved submits a complaint in this case on the crime of adultery.

Based on the above background, the purpose of this research is to find out and analyze the implementation of restorative justice in the crime of adultery.

## 2. Research Methods

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<sup>6</sup>Sudarto, (1990), *Hukum Pidana I*, Semarang: Fakultas Hukum Universitas Diponegoro, p. 102

<sup>7</sup>Lamintang, (1990), *Delik-delik Khusus: Tindak Pidana-Tindak Pidana yang Melanggar Norma-norma Kesusilaan dan Norma*, p. 89

To conduct a study in this paper, the author uses the sociological juridical method, namely research that uses an approach to the problem by looking at the norms or laws that apply as positive provisions, the following theories are relevant to this paper by linking their implementation to the facts contained in field.

### 3. Results and Discussion

#### 3.1. Implementation of Restorative Justice in the Crime of Adultery

Adultery is essentially regulated in Article 284 of the Criminal Code with specifications, namely Article 284 paragraph (1) 1 letter a of the Criminal Code regulates married men who commit adultery, Article 284 paragraph (1) 1 letter b of the Criminal Code regulates married women who commit adultery. commit adultery, Article 284 paragraph (1) 2nd letter a of the Criminal Code regulates that a man participates in the act (*zina*) while it is known that the woman has a husband, Article 284 paragraph (1) of the 2nd letter b of the Criminal Code regulates women who there is no husband who participates in the act (*zina*) while it is known that the man is married. Based on this explanation, the crime of adultery that is not completed not because of the will of the perpetrator, which is called attempted adultery, is also included in the category of complaint offense.

So far, there has been no distinction in terms of the process of resolving ordinary offenses with complaints. For victims who really want to hold a prosecution for a complaint offense that has happened to themselves, they can immediately make a complaint report to the police. With this complaint report, the flow of settlement of criminal cases is carried out as in ordinary offenses, namely through the stages of investigation, prosecution, examination at trial, and implementation of decisions. The concrete form of law enforcement is in the form of criminal sanctions or sanctions.

However, often the criminal decisions handed down are not satisfactory for the parties, especially for the victims. The criminal imposition of the perpetrator does not necessarily restore the condition of the victim. According to Bagir Manan, Indonesian law enforcement can be said to be "communis opinio doctorum", which means that law enforcement is now considered to have failed in achieving the objectives required by the law.

This has led to demands for criminal law reform by looking for alternative punishments through a restorative justice concept approach. The emergence of the concept of restorative justice itself is motivated by an abolitionist understanding which considers the criminal justice system to contain structural problems or defects so that they realistically see the need to revolutionize the structural foundations of the system, which in turn this view becomes the basis for the formation of modern theory.

As stated by JE Jonkers that criminal sanctions are focused on the punishment applied to the crime committed. Meanwhile, action sanctions are based on the idea "what is the punishment for?" If in retributive theory, criminal sanctions are directed at the actions of one person through the imposition of suffering (so that the person concerned becomes a deterrent), then the action sanctions will be directed at efforts to provide advice and help so that he changes.

Action sanctions are aimed at being more educational and oriented towards community protection. Restorative Justice is a court that emphasizes the repair of losses caused or related to criminal acts. Restorative Justice is carried out through a cooperative process that involves all parties (stakeholders).<sup>8</sup>

*Restorative justice* itself is an approach in solving criminal problems involving victims, perpetrators, and elements of society in order to create justice. By using this approach, the procedural and criminal justice mechanisms that focus on punishment as a form of retaliation for the perpetrator's actions are transformed into a process of dialogue and mediation between the victim and the perpetrator to create an agreement on a more just and balanced settlement of criminal cases.<sup>9</sup> If in the conventional criminal justice process it is known that there is restitution or compensation for victims, then with a restorative justice approach what is to be achieved is not only compensation but also restoration of relations between the victim and the perpetrator.

According to Sudikno Mertokusumo, the 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*). To realize these three values, it is necessary to enforce the law.<sup>10</sup>

The restorative justice approach in resolving criminal cases is very rational to choose if faced with a complaint offense criminal case. In essence, in a complaint offense, a criminal act can only be prosecuted if there is a complaint from the victim. This means that the complaint offense case is actually a criminal case with a quite private feel where the party who feels aggrieved submits a complaint.<sup>11</sup>

In the criminal justice process that has been going on so far, the sentencing of crimes only focuses on giving misery to the perpetrators of criminal acts. However, according to the restorative justice paradigm, the settlement of criminal cases focuses more on dialogue between the victim and the perpetrator and returns to its original state. To realize justice, restorative justice offers another alternative for resolving criminal cases outside of litigation.

In general, out-of-court dispute resolution only applies to civil disputes. However, it does not rule out the possibility of an out-of-court settlement for criminal cases of adultery through various discretion of law enforcement officials. The regulation regarding police discretion as contained in Article 18 of Act No. 2 of 2002 is sufficient to become a juridical basis for Polri investigators to apply restorative justice in handling criminal cases.

Referring to the principles mentioned above, there are main efforts in the application of restorative justice in the crime of adultery, namely:

<sup>8</sup>Andi Hamzah, (1986), *Sistem Pidana dan Pemidanaan Indonesia*, dari Retribusi ke Reformasi, Jakarta: Pradnya Paramita

<sup>9</sup>Andi Hamzah, (1986), *Sistem Pidana dan Pemidanaan Indonesia*, dari Retribusi ke Reformasi, Jakarta: Pradnya Paramita, p. 7.

<sup>10</sup>Sudikno Mertokusumo, (2005), *Mengenal Hukum Suatu Pengantar*, Liberty, Yogyakarta, p. 160.

<sup>11</sup>Kevin Minor and J.T. Morrison, (1996), *A Theoretical Study and Critique of Restorative Justice*, in Burt Galaway and Joe Hudson, eds., *Restorative Justice: International Perspectives*, Monsey, New York: Ceimical Justice-Press and Kugler Publications,



- *Encounter*(meeting each other) namely creating opportunities for the parties involved and having the intention to hold meetings to discuss problems that have occurred and after the incident;
- *Amends*(remediation) where it is very necessary for the perpetrator to take steps to repair the losses incurred as a result of his actions;
- *Reintegration*(rejoining the community) i.e. seeking steps for recovery of the parties as a whole to contribute to the community;
- *Inclusion* (open) which opens opportunities for all relevant parties to participate in the handling.<sup>12</sup>

The mechanism for the implementation of the settlement of cases of adultery by restorative justice without contact with the criminal justice system is carried out in stages after the occurrence of the case, it is necessary to have a forum in which the initiative comes from the community, namely community leaders or other interested parties. This forum then arranged a meeting for deliberation and recovery. Furthermore, the forum invites the perpetrators and victims to carry out deliberation in resolving existing cases. After that, a report is needed to account for the results of the deliberation to the related parties. The implementation of this mechanism is carried out by the National Police by prioritizing preventive actions through a partnership forum between the Police and the community that is oriented towards problem-oriented policing.<sup>13</sup>

In the event that the case of the crime of adultery has come into contact with the criminal justice system, in this case the Police, when a case occurs the Police, namely the investigator, conducts an examination of the reported criminal event. During the investigation process, the parties, namely the perpetrator and the victim, were brought together. If an agreement is obtained for a settlement by deliberation and kinship or restorative justice, then a case is held in a restorative justice forum for a joint decision to be made, which is then carried out by SP3 (Termination of Investigation) using the discretionary authority of the police, thus the case stops at the investigation level and does not reach the court. Court.<sup>14</sup>

Police investigators as the initial gate of the process of resolving adultery criminal cases provide an opportunity for victims to reconsider whether they choose to continue the legal process or prefer to make peace through a penal mediation mechanism. Investigators position themselves as mediators in building communication between perpetrators and victims in order to achieve a sense of justice and benefit for all parties. If at the penal mediation stage it has been agreed that there is peace, then the complaint from the victim will be revoked and this can be used as a basis for the investigator to stop the investigation process. If the police succeed in directing the settlement of the complaint offense case through restorative justice, the police can focus more on other, more serious criminal cases.

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<sup>12</sup>B.E. Morrison, (2001), *The School System: Developing its capacity in the regulation of a civil society*, in J.Braithwaite & H. Strang (Eds.), *Restorative Justice and Civil Society*, Cambridge University Press, p. 83

<sup>13</sup>Agus Andrianto, (2012), *Strategi Penerapan Prinsip Restoratif Justice Guna Meningkatkan Pelayanan Prima Dalam Rangka Terwujudnya Kepercayaan Masyarakat*, Mabes Polri, Pendidikan SESPIMTI Dikreg ke-20, p.74

<sup>14</sup>Anakotta, *Kebijakan Sistem Penegakan Hukum Terhadap Penanggulangan Tindak Pidana Terorisme Melalui Pendekatan Integral*, Jurnal Belo, Vol.5 No.1, 2019, p.46-66.

#### 4. Conclusion

The mechanism for the implementation of the settlement of cases of adultery by restorative justice without contact with the criminal justice system is carried out in stages after the occurrence of the case, it is necessary to have a forum in which the initiative comes from the community, namely community leaders or other interested parties. This forum then arranged a meeting for deliberation and recovery. Furthermore, the forum invites the perpetrators and victims to carry out deliberation in resolving existing cases. After that, a report is needed to account for the results of the deliberation to the related parties. In the event that the case of the crime of adultery has come into contact with the criminal justice system, in this case the police, when a case occurs, the Police, namely the investigator, conducts an examination of the reported criminal event. During the investigation process, the parties, namely the perpetrator and the victim, were brought together. If an agreement is obtained for a settlement by deliberation and kinship or restorative justice, then a case is held in a restorative justice forum for a joint decision to be made, which is then carried out by SP3 (Termination of Investigation) using the discretionary authority of the police, thus the case stops at the investigation level and does not reach the court.

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