

THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES

TO THE PERPETRATORS OF NARCOTIC CRIMES

A THESIS



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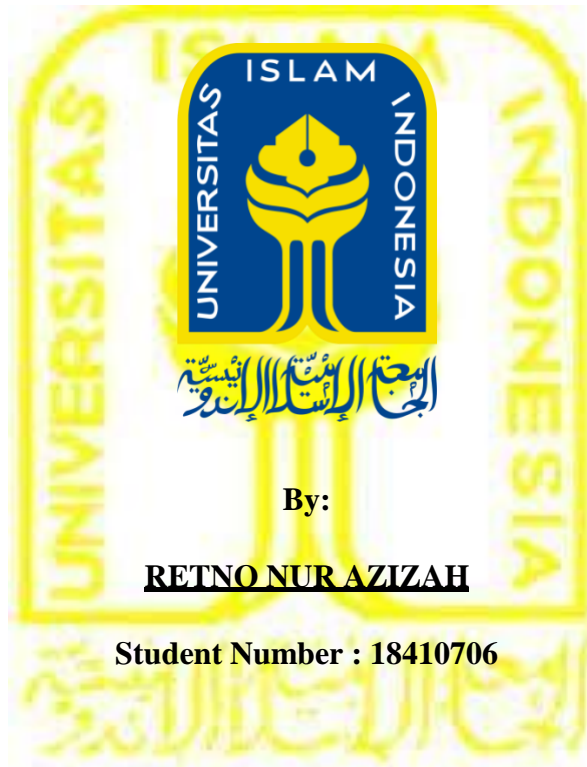
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YOGYAKARTA

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**THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES
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A THESIS**

**Presented as the Partial Fulfillment of the Requirements to Obtain a
Bachelor's Degree at the Faculty of Law
Universitas Islam Indonesia
Yogyakarta**



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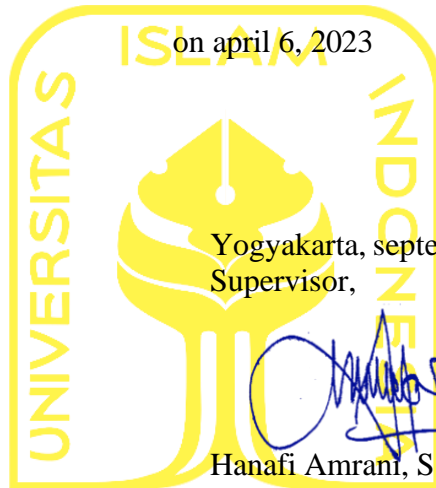
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THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES TO THE PERPETRATORS OF NARCOTIC CRIMES

It has been checked and approved by the Final Project Supervisor for submission
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الجامعة الإسلامية
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**THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES
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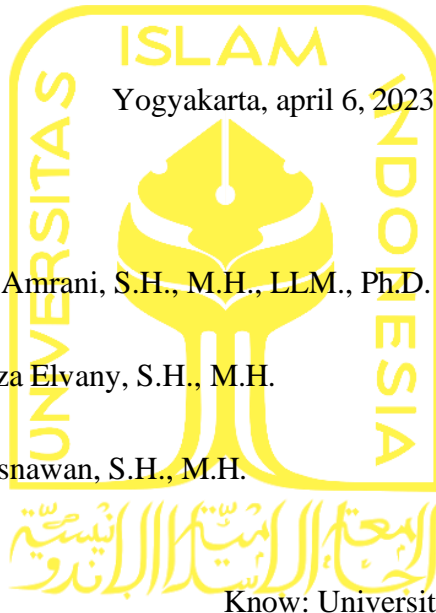
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THE PERPETRATORS OF NARCOTIC CRIMES**

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SURAT PERNYATAAN

ORISINALITAS KARYA TULIS ILMIAH BERUPA TUGAS AKHIR MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

Bismillahirrahmanirrahim

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Adalah benar-benar Mahasiswa Fakultas Hukum Universitas Islam Indonesia yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi dengan judul :

THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES TO THE PERPETRATORS OF NARCOTICS CRIMES.

Karya Ilmiah ini saya ajukan kepada Tim Penguji dalam Ujian Pendarasan yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia.

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Demikian surat pernyataan ini saya buat dengan sebenarnya, dalam kondisi sehat jasmani dan rohani, dengan sadar dan tidak ada tekanan dalam bentuk apapun dan oleh siapapun.

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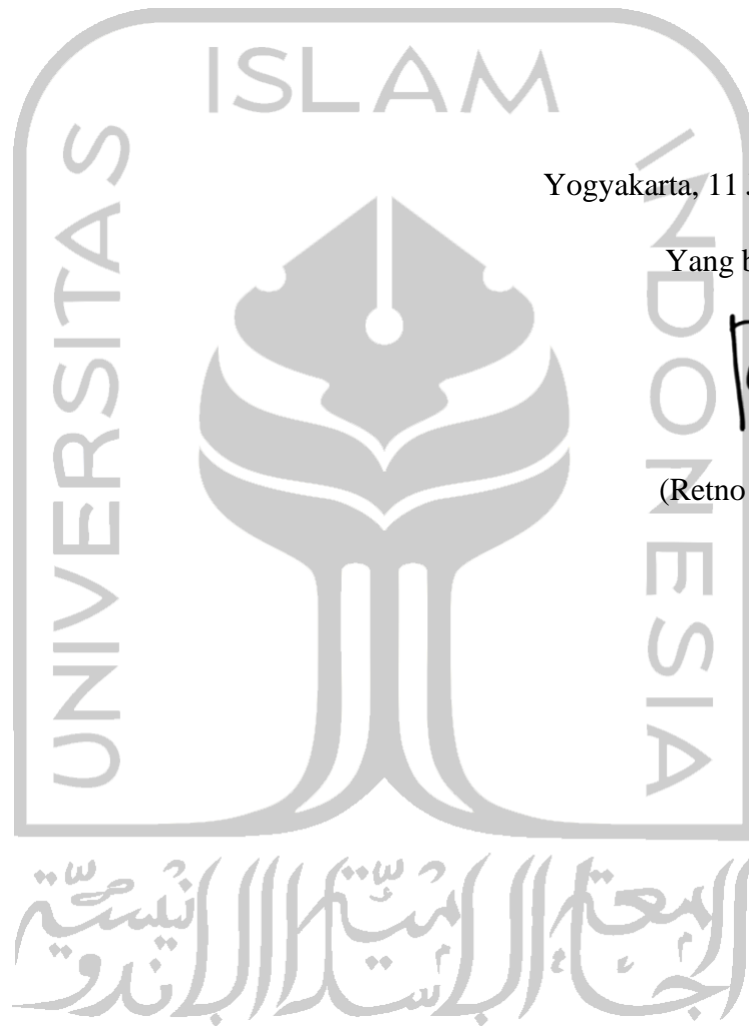
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MOTTO

Life is unpredictable. Not everything is in our control. But as long as we're with the right people, we can handle anything

(Amy Santiago)

Life is hard enough if you make good decisions, but if you make bad ones it gets even harder, because some decisions you cannot walk away from and they will affect the rest of your life

(Mary Cooper)

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DEDICATION

This thesis is wholeheartedly dedicated to:

Allah Subhanahu wa ta'ala,

Thanks Allah SWT who always gives me strength, health and load knowledge
which made it possible to complete my thesis;

My Beloved Parents, Little Sister and Family,

Who always provided me love, continues support and affection;

Myself Retno Nur Azizah

Who never fails me, always there for yourself and always being the tough one;

My Alma Mater,

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Who always be on my side in easy and hard times;

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Wherever you are, thank you always encouraging me to finish my study, my
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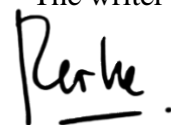
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The writer



Retno Nur Azizah.

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ABSTRACT

Narcotics is an extraordinary crime and is quite difficult to eradicate directly. Often when dealing with narcotics, the criminal justice system becomes a legal tool used to deal with narcotics. In its development, the guidance carried out was not optimal because of problems in prisons, namely overcrowding. This created something new in law enforcement by applying a restorative justice approach to narcotics cases. This study aims to analyze the concept of sentencing perpetrators of narcotics abuse from the perspective of restorative justice and the obstacles in implementing restorative justice in tackling narcotics crimes. This type of research is research with normative methods, which are carried out by examining library materials or secondary data. This study concludes that restorative justice requires perpetrators of narcotics crimes to undergo medical rehabilitation or social rehabilitation at a narcotics addiction rehabilitation center. Medical and social rehabilitation is intended to restore and develop the physical, mental, and social abilities of addicts, with the ultimate goal of curing drug addiction. Obstacles in implementing restorative justice in narcotics crime cases are divided into two, namely the first comes from internal factors such as the legal factor itself, the lack of coordination between institutions, the lack of facilities and infrastructure, the budget factor, then external factors such as the public's perspective, the family, and factors from self-abuser.

Keywords : Narcotic, Restorative Justice, Rehabilitation.

CHAPTER I

INTRODUCTION

A. Background

Indonesia is currently experiencing/facing narcotics emergency which should be taken care by all people/societies pro-actively. This country is included as one of the countries suspected of being a place for narcotics traffic, so that narcotics crime is no longer a local crime but has spread to all parts of Indonesia moreover, it is often used as a transit area by perpetrators before arriving at their destination (other countries). Therefore, the rate of development of narcotics cases from year to year is increasing.¹

Narcotics itself can be regarded as an extraordinary crime, which is a very large crime and is quite difficult to eradicate directly. When dealing with Narcotics cases, the Criminal justice system becomes a legal instrument that can be used in tackling Narcotics cases, causing law enforcement officers such as the Police to actively make arrests and detentions. Likewise, the Prosecutor's Office prepares a prosecution which ends in a judge in a court giving a sentence in the form of a maximum imprisonment. However, the criminal justice system is different from the Criminal Procedure Code, in its development the training carried out is not optimal due to the complexity of the problems that occur in prisons. One of them is the problem of excess capacity (overcrowding).

¹ Data penelitian BNN dengan Pusat Penelitian Kesehatan Universitas Indonesia, "Modul Pendidikan Anti Narkoba", Direktorat Diseminasi Informasi Deputi Bidang Pencegahan, Jakarta 2017, p.3.

The Ministry of Law and Human Rights of Indonesia, Yasonna H Laoly, wants the revision of the Narcotics Law as a step to reduce the overcrowding that occurs in almost all prisons. Based on data from the Directorate General of Corrections of the Ministry of Law and Human Rights of the Republic of Indonesia, as of April 2022 there were 278,849 prisoners. Most of them came from Narcotics cases, as many as 135,758 people. This number far exceeds the ideal capacity that can be accommodated by prisons and detention centers in total which is only 131,931 people.²

As a result of being overcrowded, it has an impact on the health and psychology of inmates and detainees, and it is easy for prison resident to come into conflict with other residents unfortunately, coaching is not optimal and does not run according to regulations in addition, there is an increase in the budget due to increased use of water, electricity, food ingredients, and as well as supervision that is not optimal as a result of the imbalance in the number of prison guards and prison residents.

One of the efforts to overcome these problems is to increase the capacity of prisons and detention centers. However, it would be better if it could at least start from the beginning of law enforcement by applying a Restorative Justice approach to Narcotics cases. This approach is targeted at those who abuse or victims of abuse.

In this case, the Restorative Justice approach is a shift in punishment in the criminal justice system that prioritizes justice for victims and

² Direktorat Jenderal Pemasyarakatan Kementerian Hukum dan Hak Asasi Manusia, *Meretas Kebijakan Asimilasi Bagi Narapidana*, <http://www.ditjenpas.go.id/meretas-kebijakan-asimilasi-bagi-narapidana>, accessed on May 18, 2022.

perpetrators of criminal acts. Bagir Manan stated that the substance of restorative justice contains the following principles: building joint participation between perpetrators, victims, and community groups in resolving an event or criminal act; placing perpetrators, victims, and the community as "Stakeholders" who work together and trying to find a solution that is seen as fair for all parties (win-win solution).³

However, even though the application of restorative justice provides a win-win solution, in practice in Indonesia based on these data, there are more than 50% of the applications of restorative justice have not been fully implemented because there is still a lot of overcrowding that occurs in prisons due to narcotics cases.

Thus, from the explanation described above, that the application of Restorative Justice in the Criminalization of Narcotics Abusers is interesting to be discussed. Therefore, researchers conduct a research entitled **“The Application of Restorative Justice Principle to the Perpetrators of Narcotic Crimes”**.

³ Bagir Manan, *Restorative Justice (Suatu Perkenalan) dalam Refleksi Dinamika Hukum Rangkaian Pemikiran dalam decade terakhir*, Perum Percetakan RI, Jakarta, 2008. P.4

B. Problem Formulation

The problems of the research are :

1. How is the sentencing concept of narcotics abusers in the perspective of restorative justice?
2. What are the obstacles in implementing restorative justice in tackling narcotics crimes?

C. Research Objective

The purpose of doing this thesis research is to answer the main problems as formulated in the formulation of the problem, namely:

1. To analyse how the sentencing concept of narcotics abusers in the perspective of restorative justice is.
2. To analyse what the obstacles in implementing restorative justice in tackling narcotics crimes are.

D. Research Originality

To confirm this study's authenticity and prevent replication or reproduction of themes with the same emphasis on the study, so, to assess the originality of the research, a search was first carried out on previous studies, both those written by Indonesian authors and writers from other countries. Several studies that are relevant to the writing of this research have been compiled as a comparison with previous studies.

No	Sources	Discussion
1.	<p>Andy Fadly Hasibuan, <i>Application of Restorative Justice in imposing criminal decisions on children who abuse narcotics in the legal area of the Medan District Court, Faculty of Law, Muhammadiyah University of North Sumatra</i>, 2016.⁴</p>	<p>Problem Formulation</p> <ol style="list-style-type: none"> 1. How to handle children who abuse narcotics? 2. How is restorative justice applied to children who abuse narcotics? 3. What are the obstacles faced in implementing restorative justice for children who abuse narcotics? <p>Conclusion</p> <p>Handling of children who abuse narcotics is done by restorative justice. Basically, this type of crime is committed by other people. In this case, drug dealers create a bad stigma such as being called a drug addict or drug convict to a child. This stigma will certainly have a negative impact on the child's life in the future.</p> <p>The application of restorative justice to children who abuse narcotics in the Medan District Court is to improve their health by means of rehabilitation. By upholding</p>

⁴ Andy Fadly Hasibuan, *“Penerapan Restorative Justice dalam menjatuhkan putusan Pidana terhadap anak yang menyalahgunakan Narkotika di wilayah hukum Pengadilan Negeri Medan”* Thesis, Fakultas Hukum Universitas Muhammadiyah Sumatera Utara, 2016.

		<p>restorative justice, children will get space from a justice system whose involvement is due to the influence of a wider crime syndicate. This restorative justice makes children avoid the bad effects of prison. This is due to the future development of children if they are in the same cell with adults who are involved in the same case, then the children will not recover, and will fall further into narcotics crimes.</p> <p>The obstacles faced in implementing restorative justice for children who abuse narcotics are the principle of punishing children as the last step (<i>ultimum remedium</i>). However in practice, children are positioned as objects and the treatment of children in conflict with the law tends to harm children because they have not comprehensively provided special protection for children in conflict with the law.</p>
2.	Haposan Sahala Raja Sinaga, <i>Application of</i>	The author discussed the Application of Restorative Justice in Narcotics cases in

	<i>Restorative Justice in Narcotics Cases in Indonesia.</i> Faculty of Law, Indonesian Christian University, 2021. ⁵	Indonesia based on the Circular Letter of the Chief of the Police of the Republic of Indonesia Number SE/8/VII/2018 concerning the Application Restorative Justice in the Settlement of Criminal Cases
3.	Windia Nugraha, <i>Settlement of Narcotics Crimes was carried out by children in Balikpapan city.</i> Faculty of Law, University of Balikpapan, 2019. ⁶	The application of Restorative Justice in the handling and settlement of Narcotics Crimes committed by children in the City of Balikpapan and efforts to resolve diversion in acts Narcotics crime by children is associated with the protection of victims based on the principles of Restorative Justice in Balikpapan City.

E. Literature Review

1. Criminal and Sentencing

a. Definition of Criminal and Sentencing

⁵ Haposan Sahala Raja Sinaga, "Penerapan Restorative Justice dalam Perkara Narkorika di Indonesia", *Jurnal Hukum Lex Generalis*, volume.2, No.7, 2021.

⁶ Windia Nugraha, "Penerapan Restorative Justice dalam Penanganan Penyelesaian Tindak Pidana Narkotika yang dilakukan oleh anak di Kota Balikpapan", Thesis, Pascasarjana Magister Hukum Universitas Balikpapan, 2019.

The term criminal comes from the word *straf* (Dutch), which means punishment. However, by some scholars, the term *straf* has a different meaning from the term *recht* which means law. According to Mulyatno translating *straf* with "criminal", because it is more appropriate than "punishment". Because punishment is the result or the effect of the application of law which has a broader meaning than criminal, because it includes judges' decisions in the field of civil law and administrative law (State).⁷

Burton M. Leiser states that the definition of a criminal is a crime that is imposed by someone in a position of power over another person who is judged for violating a rule or law.

Simons as quoted by P. A. F. Lamintang, criminal or *straf* is a suffering which by the criminal law has been associated with a violation of a norm, which with a judge's decision has been handed down for someone who is guilty.⁸

According to E, Utrecht, the notion of *strafbaar feit* is a criminal event in the form of an offense, because the incident was a positive or negative act or a negligent-negativity, as well as its consequences (conditions caused by the act or neglect). A criminal event is a legal event (*rechtsfeit*), namely a social event that has consequences that are regulated by law.⁹

⁷ H. R. S. Effendy, *Pengantar Hukum Indonesia*, Rajawali Pers, Jakarta, p.5.

⁸ P. A. F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, Sinar Baru, Bandung, 1984, p.48.

⁹ Utrecht, *Hukum Pidana II*, Pustaka Tinta Mas, Bandung, 1965, p.15.

Pompe defines *strafbaar feit* in theory as a violation of norms or disturbances to the legal order that has been intentionally or unintentionally committed by a perpetrator, where the imposition of punishment on the perpetrator is important for the maintenance of legal order and the guarantee of the public interest.¹⁰

In general, it can be defined that punishment is a form of suffering that is intentionally imposed/given by the state to a person or persons as a result of law (sanctions) for his actions that have violated the prohibition of criminal law. In particular, this prohibition in criminal law is referred to as a crime (*strafbaar feit*).

Based on the various opinions above, the criminal contains the following elements:¹¹

1. The criminal is essentially an imposition of suffering or misery or other unpleasant consequences;
2. The criminal is given intentionally by a person or body who has power (authorized person or institution);
3. The criminal is imposed on a person who is responsible for a criminal act according to the law.

A criminal act is any act that is prohibited by law that must be avoided and whoever violates it will be subject to a criminal. So certain prohibitions and obligations that must be obeyed by every

¹⁰ Erdianto Effendi, *Hukum Pidana Indonesia – Suatu pengantar*, PT Refika Aditama, Bandung, 2011, p.96.

¹¹ Muladi dan Barda Nawawi Arief, *Teori – Teori dan Kebijakan Pidana*, Alumni, Bandung, 2005, p.4.

citizen must be included in laws and government regulations, both at the central and regional levels.¹²

Sentencing can be interpreted as the stage of determining sanctions and also the stage of imposing sanctions in criminal law. The word "criminal" is generally defined as law, while "sentencing" is defined as punishment. The doctrine distinguishes material criminal law and formal criminal law.

J.M. Van Bemmelen explains these two things as follows:¹³

"Material criminal law consists of the criminal acts referred to in a row, general rules that can be applied to the act, and the punishment that is threatened for the act. Formal criminal law regulates how a criminal procedure should be carried out and determines the order that must be observed on that occasion".

Material criminal law contains a prohibition or order if it is not fulfilled, it is threatened with sanctions, while formal criminal law is a legal rule that regulates how to run and implement material criminal law.

b. Purpose of Criminal and Sentencing

Wirjono Prodjodikoro stated that the purpose of sentencing is:¹⁴

1. To scare people not to commit crimes, either by scaring the crowd (general preventive) or by scaring certain people who

¹² P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, PT. Citra Aditya Bakti, Bandung, 1996, p.7.

¹³ Leden Marpaung, *Asas-Teori-Praktik Hukum Pidana*, Sinar Grafika. Jakarta, 2005, p.2.

¹⁴ Wirjono Prodjodikoro, *Hukum Acara Pidana di Indonesia*, Sumur Bandung, Bandung, 1981, p.16.

have committed crimes so that they will not commit crimes again (special preventive), or

2. To educate or improve people who commit crimes so that they become people of good character so that they are beneficial to society.

P.A.F. Lamintang stated:¹⁵

‘‘Basically, there are three main ideas about the goals to be achieved with a sentence, namely:

- a. To improve the personality of the criminal himself,*
- b. To make people a deterrent in committing crimes, and*
- c. To make certain criminals incapable of committing other crimes, i.e. criminals which by other means are irreparable.’’*

2. Restorative Justice Concept

Restorative justice is a “victim-centred response to crime that allows victims, offenders, their families, and representatives of society to deal with the damage and harm caused by the crime.”¹⁶

Clifford Dorn, a leading scholar of the restorative justice movement has defined justice as a philosophy of justice emphasizing the importance and interrelationships of perpetrators, victims, society, and government in cases of crime and juvenile delinquency.¹⁷

¹⁵ P.A.F Lamintang, *Hukum Penitensier Indonesia*, Armico, Bandung, 1988, p.23.

¹⁶ Mark Umbreit, *Family Group Conferencing: Implications for Crime Victims*, *The Center for Restorative Justice*, http://www.ojp.usdoj/ovc/publications/infores/restorative_justices/9523_family_group/family3.html, 2001. See Mark M. Lanier dan Stuart Henry, *Essential Criminology*, Second Edition, Wastview, Colorado, USA, 2004, p.332 and 407-408.

¹⁷ Susan C. Hall, *Restorative Justice in the Islamic Penal Law. A Contribution to the Global System*, Duquesne University School of Law Research Paper, No. 2012, p.4.

Restorative justice is concerned with how to rebuild relationships after a crime has occurred, rather than to build a dividing wall between criminals and their communities, which is a hallmark (sign/characteristic) of modern criminal justice systems.

Restorative justice has become a term that is commonly used in the sentencing approach (as a punishment system such as a disciplinary school system) which emphasizes the concept of putting the victim and the environment back to their original state rather than punishing the perpetrator of a crime.¹⁸

Restorative justice is a fair settlement that involves perpetrators, victims, their families and other parties involved in a criminal act jointly seeking a solution to the crime and its implications by emphasizing restoration back to its original state. Restorative justice is a concept of sentencing, but as a concept of sentencing it is not only limited to the provisions of criminal law (formal and material). Restorative justice must also be observed in terms of criminology and the correctional system. From the facts, the existing criminal system does not fully guarantee integrated justice, namely justice for perpetrators, justice for victims, and justice for the community.¹⁹

Restorative justice is a concept based on legal objectives as an effort to resolve conflicts and reconcile between perpetrators and victims of crime. Imprisonment is not the only punishment that can be imposed

¹⁸ Miriam Liebman, *Restorative justice: How It Works*, Jessica Kingsley Publishers, London, 2007, p.27.

¹⁹ Bagir Manan, *Restorative Justice (suatu pengenalan)*, Perum Percetakan, Jakarta, p.3.

on criminals, but it is the recovery of losses and suffering experienced by victims due to crimes that must be prioritized. The obligation to restore the consequences of crimes in the form of restitution and compensation as well as reconciliation and social integration is a form of crime in the concept of restorative justice. The emergence of the concept of Restorative justice is basically expected to be able to provide and fulfill a sense of social responsibility to perpetrators and prevent stigmatization of perpetrators in the future.²⁰

3. Narcotics Crime

a. Definition of Narcotics

Based on the provisions of Article 1 Point (1) of Law No. 35 of 2009 concerning Narcotics, narcotics are defined:

"Substances or drugs derived from plants or non-plants, both synthetic and semi-synthetic, which can cause a decrease or change in consciousness, loss of taste, reduce to disappearance of pain, and can cause dependence".

The complete class of narcotics can be seen in the attachment of Law no. 35 of 2009.

According to Mardani, narcotics are: "drugs or substances that can calm conditions, cause unconsciousness or anesthesia, relieve aches and pains, cause drowsiness or stimulate, can cause

²⁰ Rena Yulia, *Viktimologi: Perlindungan Hukum Terhadap Korban Kejahatan*, Rajawali Press, Jakarta, 2007, p.164-165.

stupor, and can cause addiction or addiction and are stipulated by the Minister of Health as narcotics".²¹

Narcotics etimologically comes from the English language *narcolepsy* or *narcolepsy* which means to sleep and anesthetize. The word narcotics comes from the Greek word ‘*narke*’ which means anesthetized so that you don't feel anything. From the pharmacological term used is the word drug, which is a type of substance which when used will bring certain effects and influences on the wearer's body such as affecting consciousness and providing calm, stimulating and causing hallucinations.²²

According to several scholars and legal experts, the definition of Narcotics is as follows:

- a. Soedjono D stated that what is meant by narcotics is a kind of substance, which when used (inserted in the body) will have an effect on the body of the wearer. The influence is in the form of calming, stimulating and causing delusions or hallucinations.²³
- b. Edi Karsono, Narcotics are substances / active ingredients that work on the central nervous system (brain) which can

²¹ Mardani, *Penyalahgunaan Narkotika dalam Perspektif Hukum Islam dan Hukum Pidana Nasional*, PT. Raja Grafindo Persada, Jakarta, 2008, p.80.

²² Soedjono, D, *Narkotika dan Remaja*, Alumni, Bandung, 1977, p.3.

²³ *Loc.Cit.*

cause a decrease to loss of consciousness and pain (pain) and can cause dependence (addiction).²⁴

- c. Elijah Adams gives the definition that Narcotics are made up of synthetic and semi-synthetic substances, the well-known is heroin made from morphine that is not used, but is widely seen in illicit trades, as well as being known as *dihydro morphine*.²⁵

So based on the explanation of the definition of Narcotics above, it can be concluded that Narcotics are substances derived from plants or not plants that can cause a decrease, change in consciousness, reduce to eliminate pain, cause delusions or hallucinations and can cause dependence effects which are divided into groups as follows attached to the law or later determined by a decree of the Minister of Health.

b. Narcotics Group

²⁴Soedjono D, *Hukum tentang Narkotika di Indonesia, Karya Nusantara*, Alumni Bandung, Bandung, 1977, p.5.

²⁵Wilson Nadaek, *Korban dan Masalah Narkotika*, Indonesia Publing House, Bandung, 1983, p.122.

Narcotics are substances or drugs whose use is widely used by medical personnel for use in treatment and research. Narcotics are classified into 3 (three) groups, namely:²⁶

a. Narcotics Category I are narcotics that can only be used for the purpose of developing science and are not used in therapy, and have a very high potential to cause dependence.

Example: heroin, cocaine, marijuana.

b. Narcotics Group II is narcotics with medicinal properties used as a last resort and can be used in therapy and/or for the purpose of developing science and has a high potential to cause dependence. Examples: morphine, pethidine, derivatives / salts in this group.

c. Narcotics Group III is narcotics that have medicinal properties and are widely used in therapy and/or scientific development purposes and have mild potential to cause dependence. Example: codeine, narcotic salts in class.

c. Narcotics Abuse

Narcotics crime is a criminal act of a person or even a large group who distributes, uses, or distributes narcotics. Narcotics are substances that cannot be used arbitrarily because they can cause something bad. Narcotics abuse can also be interpreted as a use of narcotics itself which is not used for treatment, but wants to enjoy

²⁶ Article 6 Section (1) Law No. 35 of 2009 concerning Narcotics.

narcotics in large quantities so that it can cause mental, physical, and social disorders. Excessive use of narcotics can make a person become dependent on narcotics itself.²⁷

F. Definition Term

1. **The Principle of Justice** is equal rights for everyone in court.
2. **Restorative Justice** is the process involving all relevant parties, pays attention to the needs of victims, acknowledges losses and violence, reintegrates relevant parties into society, and motivates and encourages perpetrators to take responsibility.
3. **Criminal Settlement** is a series of actions by investigators in terms of and according to the method regulated in this law to seek and collect evidence which with that evidence makes light of the criminal act that occurred and in order to find the suspect.
4. **Narcotics Crime** is an act that violates the law and constitutes an organized crime. Narcotics crime is a transnational crime which is a form of cross-border crime.

G. Research Method

1. Types of Research

The type of the research is Normative legal research it is a research method carried out by researching library materials or secondary

²⁷ Muhammad Iqbal, "Analisis Yuridis Kewenangan Badan Narkotika Nasional Batam dan Polresta Brelang Pada Tahap Penyidikan Terkait Tindak Pidana Narkotika Ditinjau Dari Pendekatan Integrated Criminal Justice System," Universitas Internasional Batam, Batam, 2017, p.11.

data. It is carried out by searching for materials based on library materials or secondary data as sources in writing research.

2. Research Approach

The approach method used in this research is a normative juridical approach where in finding the data, used is by adhering to the juridical aspect which relies on secondary data. The normative approach taken is based on the consideration that this study aims to discuss and examine various regulations relating to the idea of implementing social work punishment as a criminal offense for certain serious crimes. Formulating a policy based on a certain background, values, culture, conceptions, or theories.

3. Research Data Sources

The data used is secondary data in the form of primary legal materials, secondary legal materials, tertiary legal materials. Primary legal materials include, Legislation and conceptual approaches. Meanwhile, secondary legal materials include library materials such as books, theories, scientific journals, research results and papers in seminars and expert opinions in the field of law.

In addition, the author also uses tertiary legal materials or supporting legal materials, which basically include materials that provide instructions on primary legal materials and secondary legal materials,

which are better known as reference materials in the field of law or reference materials in the field of law, such as legal dictionaries, language dictionaries, encyclopedias, and legal encyclopedias.

4. Research Data Collection Techniques

a. Literature Study

The author looks for legal materials through library research, namely studies, by collecting, studying, and citing data from various sources such as laws and regulations, books, literature, journals, articles, and papers. This study is intended to obtain a theoretical basis that is strong enough to support the analysis of this study.

b. Document Study

The author looks for legal materials by means of one method of collecting qualitative data by viewing and analyzing documents made by the subject himself or by others about the subject.

5. Nature of Research

This research is descriptive in nature, namely research that is expository in nature, and aims to obtain a complete description (description) of the legal conditions that apply in a certain place, or regarding existing juridical phenomena, or a certain legal event that occurs in society.²⁸

²⁸ Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, Citra Aditya Bakti, Bandung, 2004, p.48.

6. Data Analysis

In the process of writing using descriptive-qualitative analysis method, the data obtained are qualified according to the research problem and then described by analyzing the data obtained from the research results. The analysis of the data is arranged systematically so that a clear and complete picture is obtained and can produce a conclusion that answers the formulation of the problem in the research.

H. Thesis Framework

The author starts with writing that reveals the contents of the object of research as follows:

CHAPTER I INTRODUCTION

In this chapter, the author describes the background that made the writer interested in raising the title of the thesis ‘‘Application of Restorative Justice Principles in Sentencing Narcotics Crime Perpetrators’’. Then, the author describes the formulation of the problems that arise from the background, and continue with the purpose of this research. Next, the author describes the originality of this research against previous studies and the author begins with a study of the literature in this study. After that, the author tries to show the research method used and explain the writing system used by the author.

CHAPTER II LITERATURE REVIEW

In this chapter, the author describes definitions, principles, theories, laws and regulations regarding criminal law in general, acts and mistakes according to

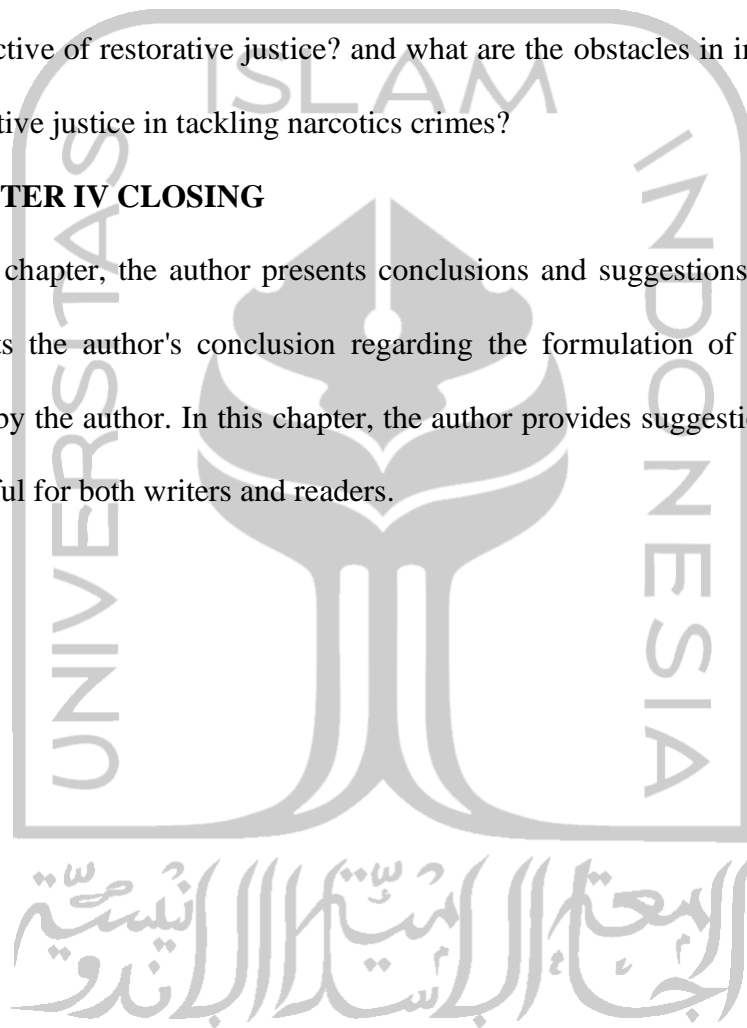
criminal law, and how to apply the concept of restorative justice in narcotics abusers.

CHAPTER III FINDINGS AND RESULTS

In this chapter, the author describes the answers to the formulation of the problem, namely how is the sentencing concept of narcotics abusers in the perspective of restorative justice? and what are the obstacles in implementing restorative justice in tackling narcotics crimes?

CHAPTER IV CLOSING

In this chapter, the author presents conclusions and suggestions. The author presents the author's conclusion regarding the formulation of the problem posed by the author. In this chapter, the author provides suggestions that may be useful for both writers and readers.



CHAPTER II
GENERAL OVERVIEW OF RESTORATIVE JUSTICE PRINCIPLES
SENTENCING SYSTEMS AND NARCOTICS CRIMES

A. General Overview of Restorative Justice Principles

1. Definition of Restorative Justice Principle

The term restorative justice is a foreign terminology that has only been known in Indonesia since the 1960s with the term restorative justice. In several developed countries, restorative justice is not just an academics discourse of criminal law or criminology. North America, Australia and several countries in Europe have been implemented restorative justice in the conventional stages of the criminal justice process, starting from the stages of investigation, prosecution, adjudication and execution.²⁹

According to the Indonesian Dictionary (KBBI), application is an act of applying and application is an act of practicing a theory, method and other things to achieve certain goals and interest desired by a group or groups that have been planned. Based on the above understanding, it can be concluded that application is an action carried out both individually and in groups with the aim of achieving the goals that have been formulated. The elements of implementation include:

- a. There is a program implemented;

²⁹ Eriyantouw Wahid, *Keadilan Restoratif Dan Peradilan Konvensional Dalam Hukum Pidana*, Universitas Trisakti, Jakarta, 2009, p.1.

- b. The existence of a target group, namely the people who are targeted and expected to receive benefits from the program;
- c. There is implementation, both organizations or individuals who are responsible for managing, implementing and supervising the implementation process.

According to Wright, that the main goal of restorative justice is restoration, while the second goal is compensation.³⁰ This means that the process of overcoming criminal through a restorative approach is a process of resolving criminal acts, which aims to restore conditions which include compensation for victims through certain methods agreed upon by the parties involved in it.

According to the United Nations Office on Drugs and Crime (UNODC), what is meant by restorative justice is an approach to solve problems, in its various forms, involving victims, perpetrators, their social networks, judicial bodies and society.³¹ Then, Umbreit in his writing explained that:³²

“Restorative Justice is a “victim-centered response to crime that allows the victim, the offender, their families, and representatives of community to address the harm caused by the crime”.

In this regard, Daly said that the Umbreit concept focuses on "repairing damage and losses caused by criminal acts" which must be supported through the concept of restitution, namely "making efforts to

³⁰ Wright, Restorative Justice Exchange, <http://www.restorativejustice.org>, Accessed on October 7, 2022.

³¹ Dandurand, *Handbook on Restorative Justice Programmes. Criminal Justice Handbook Series*, Vienna, UN New York, 2006, p.5.

³²

recover damages and losses suffered by victims of criminal acts and facilitate peace".³³

According to the Center for Justice & Reconciliation (CJR) restorative justice is a theory of justice that emphasizes repairing losses caused by criminal behavior. This is best done when the parties consciously meet together to decide how to go about this. This can lead to a transformation of relations between people.³⁴

Meanwhile, Clifford Dorn, a leading scholar of the restorative justice movement, has defined restorative justice as a philosophy of justice emphasizing the importance and interrelationships of perpetrators, victims, society, and government in cases of juvenile crime and delinquency.³⁵

From the various opinions of the experts above, the author can define that restorative justice is in principle of an approach used to solve problems outside the court by mediation or deliberation in achieving justice expected by the parties, namely among others the perpetrators of crimes and victims of crimes to find the best solution agreed upon by the parties.

In this case, restorative justice means restored justice. Each party involved in a crime is given the opportunity to deliberate emphasizing

³³ Stephanie Coward-Yaskiw, *Restorative Justice: What Is It? Can It Work? What Do Women think?* <http://web.infotrac.gale-group.com.html>, Accessed on October 12, 2022

³⁴ Dvannes, *Restorative Justice Briefing Paper-2*, Centre for Justice & Reconciliation, November 2008, p.1.

³⁵ Susan C. Hall, *Restorative Justice in the Islamic Penal Law. A Contribution to the Global System*, *Duquesne University School of Law Research Paper*, No. 2012-11, p.4.

welfare and justice. Victims of criminal acts have the right to demand compensation from the perpetrators of criminal acts, namely the losses they have suffered, while the perpetrators of criminal acts are obliged to compensate for the losses they have caused to the victim.

2. The Concept of Restorative Justice

Initially, the settlement of legal issues, one of which was the problem of the Narcotics crime at that time, was only resolved by the parties concerned. However, with the existence of the state, it is with that that the state takes over to solve these problems. In Indonesia, this was stated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia 4th Amendment which said that "Indonesia is a country based on law". A rule of law means a country that stands above the law which can guarantee justice for its citizens.

The concept of Restorative Justice is a development of the results of human thought which is based on judicial practices from the civilizations of the Romans, Ancient Arabs and Ancient Greeks in resolving legal issues including the settlement of criminal offenses. The development of this concept was also influenced by the system of public representative institutions from the German nation which spread to every corner of Europe after the collapse of the Roman empire.³⁶

³⁶ Anas Yusuf, *Implementasi Restorative Justice Dalam Penegakan Hukum Oleh Polri*, Universitas Trisakti, Jakarta, 2016, p.103.

Likewise, this approach is inseparable from the influence of the judicial system used by Indians who lived in the valleys of the rivers in Hindustan in ancient times, as seen in the Vedic civilization, namely a system of solving problems through the imposition of sanctions against anyone who commits a mistake as a ransom for his sin or through the provision of compensation or repayment of his debt to be counted and considered in pardoning the offender.³⁷

The emergence of the idea of Restorative Justice was the impact of criticism on law enforcement problems and the application of the criminal justice system with imprisonment which was deemed ineffective in resolving social conflicts, because the parties involved in the conflict were not involved in conflict resolution.

Restorative Justice in principle is a philosophy (basic guideline) in the process of peace outside the court by using mediation or deliberation in achieving justice that is expected of the parties involved in the criminal law, namely the perpetrators of criminal acts (their families) and victims of criminal acts (their families) to find the best solution agreed upon and agreed upon by the parties. The concept of Restorative Justice is a concept of solving legal violations that occur, carried out by bringing victims and perpetrators together to sit in a meeting to discuss together.³⁸

Restorative Justice is a popular alternative in various parts of the world for handling children who have problems with the law because it

³⁷ *Ibid.*

³⁸ Marlina, *Peradilan pidana anak di Indonesia, pengembangan konsep diversifikasi dan Restorative Justice*, PT. Refika Aditama, Bandung, 2012, p.180.

offers a comprehensive and effective solution. Restorative Justice aims to empower victims, perpetrators, families and communities to correct an unlawful act by using awareness and conviction as a basis for improving social life explaining that the concept of Restorative Justice is basically simple.³⁹

The concept of restorative justice according to experts such as Burt Galaway and Joe Hudson states that the concept of justice according to the concept of restorative justice has very basic elements, namely: ⁴⁰ First, a crime is seen as a conflict/opposition between individuals which results in harm to the victims, society, and the perpetrators of the crime itself. Second, the aim of the process (criminal justice) must be to create peace in society by repairing the losses caused by the conflict. Third, the process must support active participation by victims, perpetrators and the community to find solutions to the conflict in question.⁴¹

The elements that underlie the restorative approach, as stated by Burt Gallaway and Joe Hudsob provide an understanding that the victim as a party experiencing the impact of loss or damage arising from the occurrence of a crime has the full right to participate in the settlement and recovery process for the crime. This understanding brings logical consequences to the meaning and understanding of a crime which no

³⁹ Nikmah Rosidah, *Budaya Hukum Hakim Anak di Indonesia*, Pustaka Magister Semarang, 2014, p.103.

⁴⁰ Burt Galaway dan Joe Hudson, *Criminal Justice, Restitution and Reconciliation (Criminal Justice) Penggantian Kerugian dan Perdamaian*. Monsey, NY: Criminal Justice Press, 1990. p.2.

⁴¹ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Scottdale, Pennsylvania Waterloo, Ontario; Herald Press, 1990, p.181.

longer has to be seen as an unlawful act that must be sanctioned by the State but an act that must be restored through compensation or other types of sanctions that are in nature away from the effects of imprisonment.

3. The Principles of Restorative Justice

Some of the universally applicable principles inherent in the concept of a restorative approach in the settlement of criminal acts are as follows:

a. Principles of Fair Settlement (Due Process)

In the criminal justice system throughout the country, suspects are always given the right to know in advance about certain protective procedural procedures when faced with prosecution or punishment. The judicial process (due process) must be considered as a form of protection to provide a balance for the power of the State to detain, prosecute, and carry out punishment from a sentencing decision.⁴²

In its implementation, the mechanism of the restorative approach process requires the desire to continue to provide protection for suspects related to the due process. However, because the restoration process requires prior admission of guilt, this raises a statement regarding the extent to which informed consent and

⁴² Van Ness dan Strong, <http://www.restorativejustice.org> Accessed on November 8, 2022.

voluntary waiver of rights can be used as a precursor to a just settlement.⁴³

According to the author, the basic concept of settlement through a restorative approach that requires an admission of guilt for the perpetrator is a condition for finding a way out to continue the recovery process and at the same time as a signal that the perpetrator must be responsible for his actions because an admission of guilt is another form of responsibility.

b. Equal Protection

In the process of resolving criminal acts through a restorative approach, rights must emerge from a process of mutual understanding of the meaning and purpose of justice, regardless of ethnicity, gender, religion, national origin and other social positions.⁴⁴

There are doubts about the ability of the restorative approach system to solve a problem and provide a "sense of justice" among different participants, because one party may have excess economical, intellectual, political or even physical strength.⁴⁵ So there is an inequality between the parties participating in a restorative process.

⁴³ Dr. Rufinus Hotmalana Hutauruk, *Penanggulangan Kejahatan Korporasi Melalui Pendekatan Restoratif Suatu Terobosan Hukum*, Sinar Grafika, Jakarta, 2013, p.127.

⁴⁴ *Ibid*

⁴⁵ Wright, website <http://www.restorativejustice.org> accessed on 12 September 2022

c. **Victims Rights**

In solving problems through a restorative approach, the rights of victims need attention because victims are interested parties who should have a (legal) position in the settlement process. In the criminal justice system in general, it is suspected that victims do not receive equal protection from the authorities in the criminal justice system, so that the true interests of victims are often neglected and even if they do exist, they are only fulfilling the administration or management system of criminal justice.⁴⁶

According to the author, the recognition in giving the opportunity to provide explanations or statements related to the incidents experienced by the victim in the trial process does not reflect the existence of an equal position in the law. In order for the victim's legal position to be equal in the settlement process, the victim must also be given the right to obtain adequate compensation for the suffering they have experienced.

d. **Proportionality**

The idea of fairness in a restorative system is based on consensus agreement which provides alternative choices in solving problems, while the notion of proportionality is related to the scope

⁴⁶ Dr. Rufinus Hotmalana Hutauruk, S.H., M.M., M.H, *Loc. Cit*

of similarity in suffering sanctions that must be imposed on offenders who commit violations. In criminal justice in general, proportionality is considered to have been fulfilled if it has fulfilled a feeling of retributive justice (a reciprocal balance between punish and reward), whereas in a restorative approach it can impose disproportionate sanctions on offenders who commit the same offense.⁴⁷

e. Presumption of Innocence

In criminal justice, the state has the burden of proof which functions to prove the guilt of the suspect. The suspect must be presumed innocent until the burden of proof is carried. However, the restorative process required for an admission of guilt is a condition for continuing the settlement cycle.

In the restorative process, the suspect's rights regarding the presumption of innocence can be exercised by means of which the suspect has the right to terminate the restoration process and refuse the guilty plea process. To then be able to choose a formal process where errors must be proven, or the suspect may obtain the right to appeal to the Court and agreements that can be agreed upon in the restorative process are declared not to have binding force.⁴⁸

⁴⁷ Warner, <http://www.restorativejustice.org>, accessed on November 08, 2022.

⁴⁸ Moore, <http://www.restorativejustice.org>, accessed on November 08, 2022.

f. Right to Consultation Assistance or Legal Counsel

In the restorative process, legal advisors have a very important role to play in building the ability of offenders to protect their rights *vis a vis* the assistance of legal advisors. In all the restorative informal stages, suspects can be given information through the assistance of legal advisors regarding their rights and obligations which can be used as considerations in making decisions.⁴⁹

However, once the suspect chooses to participate in a restorative process, he or she should act and speak on his or her own behalf. Their positions of allowing attorneys to represent participants at all stages of the restorative process would undermine many of the expected benefits of encounters, such as direct communication and expression of feelings, and proactive collective decision-making. Lawyers can also be very helpful in advising their clients on the most likely outcomes to achieve and should expect.

B. Sentencing System according to Criminal Law and The Concept of Criminal Sanctions in a Restorative Approach

1. Definition of Criminal and Sentencing

The definition of a criminal is divided into 2 (two) views or schools of thought, namely monistic and dualistic schools. The monistic

⁴⁹ Moore dan Connel, <http://restorativejustice.org>, accessed on November 08, 2022.

school is a view that unites or does not separate between criminal acts and their consequences on the one hand, and criminal liability on the other. While the dualistic school is a view that separates actions and their consequences on the one hand, and criminal responsibility on the other hand or it can be interpreted that the dualistic school has the understanding that criminal acts must be seen and proven first by the perpetrators of criminal acts, so that the perpetrators can be punished or not.

Several experts have expressed their opinions regarding the meaning of criminal. The author will successively provide the opinions of experts regarding criminal, both monistic and dualistic. A legal expert who adheres to monistic views. Monistic flow in formulating the notion of a crime, he provides the elements of a crime as follows:

- 1) Human actions (positive or negative; doing or not doing);
- 2) Threatened with a crime;
- 3) Against the law;
- 4) Done by mistake;
- 5) People who are capable of being responsible.

According to the dualistic school, the elements of a criminal act are formulated as follows:

- 1) Deeds (human);
- 2) Fulfill the formulation in the law (a formal requirement); and
- 3) Unlawful (a material requirement).

Formal requirements must exist because of Article 1 Paragraph (1) of the Criminal Code (legality principle); and the material requirement that is against the law is needed because the act must really be felt by the community as an act that is not permissible or should not be done.

Nature against the law is an element of crime (*strafbaar feit*). This is an important component in the principle of legality because an act cannot be punished if it is not spelled out in the law which limits the actions that can be held accountable in addition to the fault of the perpetrator. Criminal law is known for 2 (two) teachings on formal unlawfulness and material law-against teachings in positive and negative functions. The first is against formal law, which means it is against written law. Second, it is against material law, that someone commits an act that is against the law that exists in society (unwritten law). This nature against material law is known in its negative and positive functions.

Punishment can be interpreted as the stage of imposing sanctions and also the stage of imposing sanctions in criminal law. The word "criminal" is generally interpreted as law, while "punishment" is defined as sentencing. The doctrine distinguishes material criminal law and formal criminal law. J.M. Van Bemmelen explains these two things as:

Material criminal law consists of successively referred to criminal acts, general regulations that can be applied to said actions, and punishments that are threatened with those actions. Formal criminal law regulates how criminal procedures should be carried out and determines the rules that must be observed on that occasion.⁵⁰

⁵⁰ Leden Marpaung, *Asas teori praktik hukum pidana*, Sinar Grafika, Jakarta, 2005, p.2.

- 1) *Material criminal law is a collection of legal rules that determine criminal offenses, stipulate conditions for criminal offenders to be punished, indicate that people can be punished and can determine penalties for criminal offenses.*
- 2) *Formal criminal law is a collection of legal rules that regulates how to defend material criminal law against violations committed by certain people, or in other words regulates how material criminal law is realized so that a judge's decision is obtained and regulates how to implement a judge's decision.*

Material criminal law contains prohibitions or orders if it is not fulfilled it is threatened with sanctions, while formal criminal law is a law that regulates how to carry out and implement material criminal law. Punishment as an action against a criminal can be justified normally not primarily because the punishment has positive consequences for the convict, the victim as well as other people in society. Therefore this theory is also called the theory of consequentialism. Criminals are imposed not because they have committed crimes but so that the perpetrators of crimes will no longer commit crimes and so that other people are afraid of committing similar crimes.

2. The Sentencing System according to Indonesian Criminal Law

In criminal law the concept of "responsibility" is a central concept known as the teaching of error. In Latin, the notion of guilt is known as *mens rea* which is based on an act that does not result in a person being guilty unless the person's thoughts are evil. In English the doctrine is formulated with an act not make a person guilty, unless the mind is legally blameworthy. Based on this principle, two conditions can be formulated. Those must be met in order to be able to impose criminal sanctions on

someone, namely there is an outward act that is prohibited or a criminal act (*actus reus*) and an inner attitude of evil or disgraceful (*mens rea*).⁵¹

According to Van Hamel in Lamintang and Theo Lamintang's book, the definition of criminal (*straf*) is a suffering that is specific in nature, which has been imposed by the competent authority to impose criminal acts on behalf of the State as the person in charge of public law order for an offender or perpetrator, namely solely because the said person has violated a legal regulation that must be enforced by the State.⁵²

The form or embodiment of criminal responsibility is the punishment of the perpetrators. Punishment is a process or method of imposing penalties or sanctions on people who have committed crimes (*recht-delict*) or violations (*wets-delict*). The word criminal can generally be said to be law and the word punishment as sentencing. Jerome Hall in M. Sholehuddin provides a formulation regarding sentencing, as follows:⁵³

- a. Convict is deprived of necessary things in life;
- b. Forced it violently
- c. It is given on behalf of the "authorized" State;
- d. Punishment it requires the existence of rules, violations and determinations that are expressed in decisions;

⁵¹ Mahrus Ali, *Dasar Dasar Hukum Pidana*, Sinar Grafika, Jakarta, 2011, p.155-156.

⁵² Lamintang and Theo Lamintang, *Hukum Penitensier Indonesia*, Sinar Grafika, Jakarta, 2012, p.33.

⁵³ Marlina, *Hukum Penitensier*, Refika aditama, Bandung, 2011, p.34.

- e. It is given to offenders who have committed crimes and this requires a set of values with reference to which crime and punishment are ethically significant;
- f. The level or type of punishment is related to the crime and is aggravated or reduced by looking at the personality (personality of the offender), his motives and motivations.

3. The Concept of Criminal Sanctions in Restorative Justice

As explained above, the idea or concept of criminal sanctions according to the restorative approach does not recognize the approach of retaliation in the form of conventional criminal sanctions, such as the concept of criminal sanctions with a retributive approach. The concept of criminal sanctions according to the restorative approach tends to the concept of recovery which aims to make things right.

Anas Yusuf put forward several concepts of criminal sanctions that are known in the restorative approach, namely:⁵⁴

a. Restitution

In the process of resolving crimes through a restorative justice approach, the perpetrators of crimes are required to pay back losses to victims which can be in the form of services or in the form of money.

The concept of restitution has been institutionalized since the birth of the Babylonian Code of Hammurabi (code of hammuabi) around 1750

⁵⁴ Anas Yusuf, *Implementasi Restorative Justice Dalam Penegakan Hukum oleh Polri*, Penerbit Universitas Trisakti Jakarta, 2016, P.103

BC, which entitles the victim to receive payment as compensation for violations of certain property. According to Eriyantouw Wahid, the victims' losses, which must be paid by the perpetrators of crimes, have been recognized in restorative justice since forty centuries ago.

In its implementation, restitution often cannot be monitored and its fulfillment is often carried out by means of coercive power. Even though it is realized that the concept of a sanction approach through restitution faces many obstacles, the restitution approach has been successfully carried out through mediation meetings. It turns out that such a method can reduce prison income and reduce recidivism.

b. Social Work

Social work can be a reparative witness that creates a sense of responsibility for offenders for their actions and, at the same time, can reduce the burden on the prison system and at the same time is an extraordinary resource for government organizations and non-profit organizations.

c. Compensation for Victims

Since ancient Babylon as contained in the Code of Hammurabi, the concept of providing compensation funds to victims has been known as payment to victims which is a part of the process of resolving crimes while simultaneously creating better conditions for

victims and for environmental actors, by the government or by parties who are not related to the violation, as already stated, restitution can be paid with money or services in non-monetary form. While compensation is always in the form of payment of money.

C. Overview of The Crime of Narcotics Abuse

1. Definition of Narcotics

Narcotics are generally referred to as drugs, namely a type of substance that can cause certain effects for those who use them by inserting it into the human body. The influence is in the form of anesthesia, pain relief, enthusiasm stimulation and hallucinations or delusions. Etymologically, the word narcotics comes from the Greek word *narke*, which means drugged so that you don't feel anything. Some people argue that narcotics come from the word *Narcissus* which means a type of plant that has flowers which can cause people to become unconscious.⁵⁵

In addition, according to the Indonesian Encyclopedia, medical pharmacological narcotics are drugs that can relieve pain originating from the visceral area and can cause stupor effects (stupefied or conscious condition but must be bullied) and addiction, the effects of narcotics are that apart from causing unconsciousness they can also cause delusions / hallucinations and cause stimulation / stimulants.

⁵⁵ Hari Sasangka, *Narkotika dan Psicotropika dalam Hukum Pidana*, Mandar Maju, Bandung, 2003, p. 35.

Smith Klise and the French Clinical Staff say, "Narcotics are drugs which produce ineligibility due to their depressant effect on the controlled nervous system. This definition includes opium derivatives (morphine, codeine, heroin, and synthetic opiates (meperidine, methadone). Affect the central nervous system. This definition of narcotics consists of the types of opiates and their derivatives (morphine, codeine, heroin) and synthetic opiates (meperidine, methadone).⁵⁶

According to the Decree of the Minister of Health of the Republic of Indonesia Number 2882 of 1970, narcotics or anesthetics are generally defined as all medicinal ingredients which generally have a work effect that is anesthetizing (can reduce consciousness), stimulate (increase work performance), charge (increase dependence), and fantasize (hallucination).

According to health experts, narcotics are psychotropics which are generally used to anesthetize patients when they want to be operated on or drugs for certain diseases. However, at this time the perception was misused due to use that was beyond the recommended dosage limit.⁵⁷

According to Law Number 35 of 2009 concerning Narcotics, Article 1 number (1) states that:

Narcotics are substances or drugs derived from plants or non-plants, both synthetic and semi-synthetic, which can cause a

⁵⁶ Djoko Prakoso, et.all, *Kejahatan-kejahatan yang Merugikan dan Membahayakan Negara*, Bina Aksara, Jakarta,1987, p.480.

⁵⁷ Rizka Kurnianingsih Pramono, SKM, "Kasus Narkoba di Kota Banjarmasin"www.kumpulan-artikel-tentang-narkoba.2015.blogspot.co.id accessed on January, 27, 2023

decrease or change in consciousness, loss of taste, reduce to eliminate pain, and can cause dependence, which are differentiated into groups.⁵⁸

2. Purpose of Arrangement and Utilization of Narcotics

Law No. 35 of 2009 concerning Narcotics aims to:

- a. guarantee the availability of narcotics for the benefit of health services and or the development of science and technology;
- b. prevent, protect and save the Indonesian nation from Narcotics abuse;
- c. eradicate the illicit traffic of narcotics and Narcotics precursor;
- d. ensure arrangements for medical and social rehabilitation efforts for Narcotics abusers and addicts;
- e. drugs or materials that are useful in the field of medicine or health services and the development of science. However, on the other hand can also cause dependence which is very harmful if misused or used without strict and thorough control and supervision;

Utilization of Narcotics according to Law No. 35 of 2009 concerning Narcotics:

- a) Narcotics can only be used for the benefit of health services and/or the development of science and technology;
- b) Narcotics class I are prohibited from being used for the benefit of health services;

⁵⁸ Law No.35 of 2009 about Narcotics.

- c) In limited quantities, Narcotics Group I can be used for the benefit of developing science and technology for diagnostic reagents, as well as laboratory reagents after obtaining ministerial approval on the recommendation of the Head of the Drug and Food Control Agency.

3. Narcotics Classification

Furthermore, regarding the classification of Narcotics, it is regulated in Article 6 paragraph (1) of Law No. 35 of 2009 concerning Narcotics, namely:

- a) Narcotics Category I are narcotics which are only used for scientific purposes and are not used in therapy and have a very high potential to cause dependence
- b) Narcotics Group II are narcotics with medicinal properties used as a last resort and can be used in therapy and/or for scientific development purposes and have a high potential to cause dependence.
- c) Narcotics Group III are narcotics with medicinal properties and are widely used by convicts and/or for scientific purposes and have a mild potential to cause dependence.

4. Definition of Narcotics Crime

Criminal acts are human behavior formulated in the law, against the law that should be convicted and carried out with mistakes. People

who commit criminal acts will be responsible for these actions with criminal acts if they have mistakes, someone has a mistake if when committing acts seen in terms of the community shows a normative view of the mistakes he has made.⁵⁹

Criminal acts are a basic understanding of criminal law. Criminal acts are a juridical understanding, another case with the term evil deeds or crime. Juridically formal, crime is a form of behavior that violates the criminal law. Therefore, every act that is prohibited by the law must be avoided and the charcoal who violates them will be subjected to criminal. So certain prohibitions and obligations that must be obeyed by every citizen must be included in the law and government regulations, both at the central and regional levels.⁶⁰ Criminal acts are the act of committing or not doing something that has an element of error as an act that is prohibited and threatened with criminal, where the criminal offense against the perpetrators is for the sake of maintaining legal order and guaranteed public interest.

The elements of criminal are as follows:

- a. Behavior and consequences (deeds)
- b. Things that accompany the actions
- c. Additional conditions that are burdensome for criminal
- d. Element against objective law

⁵⁹ Andi Hamzah, *Bunga Rampai Hukum Pidana dan Acara Pidana*, Ghalia Indonesia, Jakarta, 2001, p.2.

⁶⁰ P.A.F. Lamintang. *Dasar-Dasar Hukum Pidana Indonesia*. PT. Citra Aditya Bakti. Bandung. 1996, p.7.

e. Elements against the subjective law

The Narcotics Law itself does not explain in detail about what is meant by narcotics criminal acts but in Chapter I Article 15 of the Narcotics Law, it explains the abuse of narcotics is a person who uses narcotics without rights or against the law and in number 20, it is explained that Organized crime is a crime committed by 3 (three) or more people who have existed for a certain time and act together with the aim of carrying out a narcotics crime. Furthermore, in Article 1 number 6 of Law Number 35 Year 2009 concerning Narcotics, it is stated:

"The illicit trafficking of narcotics and narcotics precursors is every activity or a series of activities carried out without rights or against the law determined as a narcotics and narcotics precious acts".

Gatot Supramono in his book divides the types of narcotics criminal acts based on the rules stated in the Narcotics Law. Types of Narcotics Criminal Act regulated in Law Number 35 Year 2009 concerning Narcotics:⁶¹

- a. Every person who is without the right or against the law of planting, maintaining, owning, storing, controlling or providing narcotics group I in the form of plants, Article 111; Every person who without the right or against the law of planting, maintaining, owning, storing, controlling or providing narcotics group 1 is not a plant, Article 112;

⁶¹ Gatot Supramono, *Hukum Narkotika Indonesia*, Djambatan, Jakarta, 2009, p.90.

- b. Every person who is without rights or against the law produces, imports, exports, or distributes narcotics group 1, Article 113;
- c. Every person who is without rights or against the law offers for sale, sell, buy, receive, becomes an intermediary in buying and selling, exchanging, or handing over narcotics group I, Article 114;
- d. Every person who is without rights or against the law brings, sends, enables, or makes transit Narcotics Group I, Article 115;
- e. Every person who is without rights or against the law uses Narcotics Group I to others or provides narcotics group I for other people, Article 116;
- f. Every person who is without rights or against the law has, stores, controls, or provides narcotics group II, Article 117;
- g. Every person who is without rights or against the law produces, imports, exports, or distributes narcotics group II, Article 118;
- h. Every person who is without rights or the law of law offers for sale, sell, buy, receive, become an intermediary in buying and selling, exchanging, or submitting narcotics group II, Article 119;
- i. Every person who is without rights or against the law brings, sends, transportes, or makes transit Narcotics Group II, Article 120;
- j. Every person who is without rights or against the law uses narcotics group II to others or provides narcotics group II for other people, Article 121;

- k. Every person who is without rights or against the law of planting, maintaining, owning, storing, controlling or providing narcotics group III, Article 122;
- l. Every person who is without rights or against the law produces, imports, exports, or distributes narcotics group III, Article 123;
- m. Every person who is without rights or the law of law offers for sale, sell, buy, receive, become an intermediary in buying and selling, exchanging, or submitting narcotics class III, Article 124;
- n. Every person who is without rights or against the law brings, sends, transportes, or makes transited Narcotics Group III, Article 125;
- o. Every person who is without rights or against the law uses class III narcotics to others or provides class III narcotics for others, Article 126;
- p. Every abuse of narcotics for groups I, II, and III for yourself, Article 127; Parents or guardians of addicts who are not old enough, as referred to in Article 55 paragraph (1) who deliberately do not report, Article 128;
- q. Have, store, control, or provide narcotics precursors for narcotics acts; Producing, importing, exporting, or channeling narcotics precursors for the manufacture of narcotics; Offer to be sold, sell, buy, receive, become an intermediary in buying and selling, exchanging, or submitting narcotics precursors for narcotics

- manufacturing; Bring, send, transport, or transit narcotics precursors for the manufacture of narcotics Article 129;
- r. Every person who deliberately did not report the existence of narcotics criminal offenses Article 130;
 - s. Experiments or evil agreements to commit narcotics crime and narcotics precursors Article 131;
 - t. Everyone who tells, gives or promises something, gives an opportunity, encourages, provides convenience, forces with threats, forces violence, does tricks, or persuades children who are not old enough to commit narcotics crimes; To use narcotics Article 133;
 - u. Narcotics addicts who are old enough and deliberately do not report themselves; Families of narcotics addicts who deliberately do not report the narcotics addict Article 134.

Narcotics abuse is a criminal offense that has its own specificity compared to criminal acts in general. Special characteristics of narcotics criminal acts are described by Suwanto (1999; 12) as follows:

- a) The culprit with the cell system means that there is no direct relationship between consumers and dealers, and no direct relationship (cut off), so if consumers are caught, it is difficult to know the dealer and vice versa.
- b) In narcotics crimes, the perpetrators are also victims, so narcotics crimes reporting is very minimal.

Thus it can be said that, narcotics crime is a criminal offense of narcotics abuse without rights or against the law other than those specified in the law.

5. Narcotics Abuse

Indonesian people are currently faced with a very worrying situation due to the increasingly valid use of various narcotics. This concern is increasingly sharpened due to the widespread circulation of narcotics and psychotropic senses that have spread in all walks of life, including among the younger generation. This will greatly affect the lives of the nation and state next, because the younger generation is the successor to the ideals of the nation and state in the future. Related to this, the focus is that the abuse of narcotics today has reached a situation that has been destined to become a urgency national and international. Moreover, Indonesia is not only a transit area but also has become a marketing area.

This is very alarming because victims of narcotics abuse in Indonesia lately tend to increase and include not only limited to capable community groups but have also penetrated into people who are less able both in cities and rural areas. Narcotics cases are currently very surprising because the victims are mostly young people who are still very productive so that the threat of damage to the nation's next generation is

in sight. Narcotics abuse is currently not only involving high school students but has also penetrated elementary school students.

Narcotics in Indonesia are drugs needed in health services, so their availability needs to be guaranteed. On the other hand, narcotics can cause dependence if abused, because they can cause physical, mental, social, security, and public order that ultimately disrupts national resilience. Because of these adverse traits, narcotics must be monitored properly nationally and internationally. At this time, Indonesia is being hit by serious drug abuse because it threatens the younger generation. They have dynamic nature, energetic, they are also curious in trying something new, so they easily tempted and easily discouraged so that they easily fall into the problem of narcotics abuse.⁶²



⁶² Gatot Supramono, *Hukum Narkoba Indonesia*, Penerbit Djambatan, Jakarta, Edisi Revisi, 2004, p.23.

D. The Concept of Islamic Criminal Law in Narcotics Crimes

In *Fiqh Jinayah*, *jarimah* is also called a criminal act. The meaning of *jinayah* in a language is the name for the results of someone's evil deeds and what they earn.⁶³ The meaning of *jinayah* in a language is *a term for action prohibited by sara', whether in the form of these actions concerning souls, property, or others.*⁶⁴

There are several kinds of definition of *jarimah* (crime) : according to the language, *jarimah* is *doing actions or things that are considered not good, hated by humans because they conflict with justice, truth and straight path (religion).*⁶⁵

In classical Fiqh, *Jarimah* is divided into :

a. *Jarimah Hudud*

Namely, *Jarimah*, who was threatened with punishment. Had is a punishment that has been determined by *sara'* and is the right of Allah SWT.

Jarimah Hudud includes : Adultery, Qadzaf, Drinking Khamr, Theft, Hirabahh, Riddah and Albagyu (rebellion)

b. *Jarimah Qishas-Diyat*

Namely, *Jarimah* who was threatened with *Qishas* and *diyat*.

Both *Qishas* and *diyat* have been determined by *sara'*. The difference with had law is that had the right of Allah

⁶³ H. Ahmad Wardi Muslich, *Pengantar dan Asas Hukum Pidana Islam Fikih*, Sinar Grafika, 2006, p.1.

⁶⁴ *Ibid*

⁶⁵ *Ibid*, p.9.

(community rights), while Qishas and Diyat are human rights (individuals).

Jarimah Qishas-Diyat includes : Intentional homicide, imitating homicide, guilt homicide, intentional maltreatment, accidental maltreatment.

c. Jarimah Ta'zir

Tha is threatened with ta'zir punishment. Ta'zir is an educational punishment based on a sin (crime) that has not been determined by sara'.

Narcotics are substances or drugs derived from plants or non-plants that can cause dependence which is differentiated into groups in Law No. 35 of 2009 concerning narcoics, one of the narcotics class I is methamphetamine.⁶⁶ Narcotics do have two very antagonistic sides. First, narcotics can greatly benefit the interests of life with several conditions. Second, narcotics can be dangerous because of their negative, destructive effects. In this regard, the government of the Republic of Indonesia has made policy lines contained in Law number 35 of 2009 concerning narcotics. The abuse of narcotics and similar stimulants by teenagers is closely related to several causes—motivation and results to be achieved. Sociologically, drug abuse by adolescents is a conscious act based on knowledge or experience as a direct or indirect influence on social interaction.⁶⁷ Individually subjectively, drug abuse by adolescents is one of the accelerations of individual or subject

⁶⁶ Aziz Syamsudin, *Tindak Pidana Khusus*, Sinar Grafika, Jakarta, 2011, p.90.

⁶⁷ Oemar Seno, *Hukum hakim Pidana*, Erlangga, Jakarta, 1984, p.124

efforts in order to be able to uncover and capture satisfaction that has never been felt in family life, which is essentially a primary and fundamental need for every individual, especially for adolescents who are growing and developing. In all aspects of life. Objectively, narcotics abuse is a physical process of isolation that is sure to be physically and mentally burdensome so that it can hinder healthy growth.⁶⁸

We already know a lot about the arguments for the prohibition of narcotics, and the first is from the Al-Qur'an Surah Al-A'raf verse 157. Allah SWT says :

وَأُحِلَّ لَهُمْ
الْبَاطِلُ
طُحُوتُ
وَالزُّبُرُ
لَعْنَةُ
بَابِ

“He will make lawful for them all good things and prohibit for them only the foul’ (QS. Al-A’raf : 157)”

The second argument is that Allah SWT says in Surah Al-Baqarah verse 195 which reads :

وَلَا تُؤْتُوا
بِأَيْدِيكُمْ
الْمَوْتَ
الْبَاطِلَةَ

“and be not cast by your own hands to ruin’ (QS. Al-Baqarah : 195)”

The two verses above show that it is forbidden to self-destruct. The name of drugs is damaging a person's body and mind. So from this verse, we can state that drugs are haram.

The ta'zir punishment, according to language, is ta'dib or giving

lessons. Ta'zir is also interpreted as ar-Rad wa al-Man'u, meaning to reject and prevent. However, the terms are as follows:

⁶⁸ Soedarsono, *Kenakalan Remaja*, Rineka Cipta, Jakarta, 1990, p.67-68.

Ta'zir is an educational punishment for sins (crimes) that have not been determined by syara'.⁶⁹

Ta'zir punishment has not been determined by syara', but is left to the judge, both for its determination and implementation.⁷⁰ Syara' does not mention the various punishments for the finger for each finger ta'zir, but only mentions a set of punishments, from the lightest to the most severe. In this case, the judge is given the freedom to choose which punishments follow the ta'zir punishment and the maker's circumstances. So ta'zir punishment does not have a certain limit.⁷¹

The amount of jarimah ta'zir is not determined, whereas, for jarimah hudud and qishas, the diyat has been determined, it is impossible to determine the number of jarimah ta'zir. In comparison, the ta'zir finger is left to the judge to determine it, with the condition that it must follow the interests of the community and not conflict with the syara' nas (provisions) with general principles.⁷²



⁶⁹ Ahmad Wardi Muslich, *Pengantar dan Asas Hukum Pidana Islam*, Sinar Grafika, Jakarta, 2004, p.19.

⁷⁰ *Ibid*

⁷¹ Ahmad Hanafi, *Asas-Asas Hukum Pidana Islam*, PT. Bulan Bintang, Jakarta, 1990, p.8

⁷² *Ibid*

CHAPTER III
THE APPLICATION OF RESTORATIVE JUSTICE PRINCIPLES
TO THE PERPETRATORS OF NARCOTIC CRIMES

A. The Concept of Punishment of Narcotic Abuse Actors in the Perspective of Restorative Justice

The application of restorative justice will lead to a shift in the direction of punishment and the purpose of punishment that is being punished or revenge by accounting for every act carried out into a settlement that emphasizes more on efforts to heal/restore in its original state before the occurrence of a crime. To realize a restorative justice in law enforcement in Indonesia, the role of society is needed which is not only the object of law itself but also plays an active role in law enforcement.⁷³

The purpose of law enforcement is to build public confidence in the law by demonstrating that the law is broadly concerned with societal expectations. Appreciating a person's moral values by law gives a wider space for their morals to carry out the rule of law voluntarily. In this case, the relation with diversion is an effort to reduce the use of legal force, trying to resolve and end the conflict.

PERMA No. 4 of 2014 states that it is necessary to conduct deliberations involving several elements to achieve a restorative justice, it can be carried out with a diversion deliberation between the perpetrators and victims, the perpetrators' repairs to correct everything they are damaged, the

⁷³ Satjipto Rahardjo, *Ilmu Hukum*, Citra Aditya Bakti, Bandung, 1996, p 181.

conference of victims involving families from both parties and leaders in the community and an attempt by the perpetrators to be more concerned about the impact of their actions.⁷⁴

Talking about restorative justice in narcotics crimes, here are some legal basis for reference that can be applied:

- a. The Criminal Procedure Code (Article 14 of the Criminal Code);
- b. Law of the Republic of Indonesia Number 35 of 2009 concerning Narcotics;
- c. Circular of the Supreme Court of the Republic of Indonesia Number 4 of 2010 concerning Placement of Abuse, Victims of Misuse and Narcotics Addicts into Medical Rehabilitation and Social Rehabilitation Institutions;
- d. Circular of the Supreme Court of the Republic of Indonesia Number 3 of 2011 concerning Placement of Victims of Narcotics Abuse in Social Rehabilitation and Rehabilitation Institutions;
- e. Joint Regulation of the Chairperson of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Head of the Republic of Indonesia State Police, Minister of Social Affairs of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Head of the Indonesian National Police, Head of the National Narcotics Agency of the Republic of Indonesia , Head

⁷⁴ Marlina, *Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, Cet. Ke-1, Refika Aditama, Bandung, 2009, p 180.

of the National Narcotics Agency of the Republic of Indonesia Number 01/PB/III/2014, Number 03 of 2014, Number 11 Year 2014, Number 03 of 2014 Number PER-005/A/JA/03/2014 Number 1 of 2014, Perber Number/ 01/III/2014/BNN concerning Handling of Narcotics Addicts and Victims of Narcotics Abuse and Narcotics Abuse Victims into Rehabilitation Institutions;

Restorative justice is a new concept of thought that develops from society as a pattern of modern criminal law thinking. This concept developed in response to the approach of Retributive and Criminal Justice System justice which was felt to be unsatisfactory in the sense of justice of the community. The concept of restorative justice has been accommodated in a small portion of national law. The regulation of restorative justice in handling criminal offenses can now also be found in the Prosecutor's Office Number 15 of 2020 and the National Police Regulation of the Republic of Indonesia Number 08 of 2021. In general, the practice of using a restorative justice approach is carried out by bringing together the perpetrators and victims to then agree to forgive and by giving the amount of compensation for victims to recover in its original state.

In the legal system in Indonesia, narcotics abuse is qualified as a crime in the field of narcotics regulated in Law No. 35 of 2009 concerning Narcotics. Narcotics crime is seen as a form of crime that has a serious effect on the future, of the Indonesian people because it damages life and the future,

especially in the younger generation. In addition to the perpetrators, the family is also one of the disadvantaged parties.

The basis of this restorative justice theory is the necessity to believe and strive that the perpetrators or their families can return to their original situation as before the criminal offense. The purpose of restorative justice is to get clarity from the events that has been occurred by encouraging the perpetrators, and then the joint responsibility of the target is to provide opportunities for the perpetrators to be directly involved in the discussion and decision making regarding violations that occur with the right sanctions for the perpetrators and hear directly the explanation from the perpetrators about the violations that occurred. Next, it increased the awareness of the perpetrators of the consequences of their actions and gave the opportunity to the perpetrators, so that they were fully responsible for their actions. Finally, it provides an opportunity for the perpetrators to be interconnected in strengthening the order of the community that was divided due to violations by the perpetrators.⁷⁵

Restorative justice in its application is not only addressed to the perpetrators as a form of law enforcement in the completion of a case, but by applying the principle of restorative justice also able to bring law enforcement and justice for victims and drug abuse.

This restoration theory considers that criminal offenses neither provide "retaliation" and "improvement" of perpetrators of crime, nor deny

⁷⁵ OC. Kaligis, *Perlindungan Hukum atas Hak Asasi Tersangka, Terdakwa dan Terpidana*, Alumni, Bandung, 2006, p.189.

that the perpetrators of crime must get sanctions. It's just that this theory focuses more on the settlement than imprisonment. The problem of legal protection for actors who used the first time is one way to protect it. Legal Protection of Actors who used to use the first time regarding all applicable legal rules.

Consideration of narcotics users cannot be separated from the criminal system adopted by the legal system in Indonesia. The purpose of punishment is essentially an operationalization of law enforcement carried out by the judicial system based on legal instruments governing the criminalization of narcotics abuse and illicit trafficking, namely Law No. 35 of 2009.

Developments in the world today show the tendency of strong changes in looking at narcotics users who are no longer seen as criminals, but as victims or patients who must be given empathy.⁷⁶ If a narcotics addict has been convicted by the judge for the narcotics crime he committed, to provide an opportunity for the person concerned to be free from his addiction, the judge could decide to order the person concerned to undergo treatment and/or care.

Criminal sanctions imposed on narcotics addicts as self-victimizing Victims are in the form of serving a sentence in prison, while the sanctions of actions given to narcotics addicts as victims are in the form of treatment and/or treatments organized in the form of rehabilitation facilities, the

⁷⁶ Dani Krisnawaty and Eddy O.S. Hiariej, *Bunga Rampai Hukum Pidana Khusus*, Pena Pundi Aksara, Jakarta, 2006, p.99.

implementation system is the treatment period and /or treatment is calculated as a period of serving a sentence.

Talking about the concept of narcotics crime, this concept is contained in Article 127 of Law Number 35 of 2009 concerning Narcotics which states that:

Every abuse of Narcotics Group I for yourself is sentenced to a maximum imprisonment of 4 (four) years; Every abuse of Narcotics Group II for yourself is sentenced to a maximum imprisonment of 2 (two) years; And every abuse of class III narcotics for yourself is sentenced to a maximum imprisonment of 1 (one) year.

In addition, to the regulation on punishment and confinement for every narcotics abuse is stated in Article 127 of the Narcotics Law. The Narcotics Law also guarantees and enforces the concept of Narcotics Crimes in the form of restorative justice as contained in Article 4 letter (d) of Law No. 35 of 2009 which:

Ensure regulation of medical and social rehabilitation efforts for drug abusers and addicts".

It is also in line with further regulations as contained in Article 54 of the Narcotics Law states:

"Narcotics addicts and victims of narcotics abusers are required to undergo medical rehabilitation and social rehabilitation".

Based on the basis of the two articles, this is the basis that the Narcotics Law guarantees rehabilitation efforts and requires the addicts and victims of narcotics abuse to first be required to carry out rehabilitation which is a form of the Justice Restorative Approach in the concept of criminalization of narcotics abuse in Indonesia.

In its application, the following are some of the basic references that open up opportunities for the application of Justice Restorative in Narcotics Crimes. First, Article 55 of Law No. 35 of 2009 concerning Narcotics says:

- (1) *Parents or guardians from narcotics addicts who are not old enough to report to the Center for Community Health, Hospitals, and/or Medical Rehabilitation and Social Rehabilitation Institutions appointed by the government to get treatment and/or care through medical rehabilitation and social rehabilitation*
- (2) *Narcotics addicts who are old enough to report themselves or reported by their families to the Center for Community Health, Hospitals, and/or Medical Rehabilitation and Social Rehabilitation Institutions appointed by the Government to get treatment and/or care through medical rehabilitation and social rehabilitation.*

Based on Article 55 of the Narcotics Law, this provision contains narcotics criminal offenses committed by children who are not old enough as contained in paragraph (1) request for rehabilitation for narcotics addicts are represented by the guardian. Then verse 2, this rehabilitation application was reported by the addict or family to the medical and social rehabilitation institutions. Therefore, the purpose of the application for medical rehabilitation and social rehabilitation submitted by parents/guardians is care and improvement, which is more viewing the granting of criminalizations to perpetrators of crimes not to their debuts. So that the purpose of legal use for addicts in narcotics crimes can be achieved as an alternative to criminal criminalized approaches to the Restorative Justice Approach for narcotics addicts.

Second, Article 103 of Law No.35 of 2009 concerning Narcotics states:

- a. *Judges who examine narcotics addicts can:*

- 1) *decide to order the person concerned to undergo treatment and/or treatment, if the narcotics addict was proven guilty of committing a narcotics crime; or*
 - 2) *set to order the person concerned to undergo treatment and/or treatment, if the narcotics addict is not proven guilty of committing a narcotics crime.*
- b. *The period of undergoing treatment and/or treatment for narcotics addicts as referred to in paragraph (1) letter a, is calculated as a period of serving a sentence.*

Based on Article 103 of Law No.35 of 2009 Concerning Narcotics, it can be included that the judge, as one of the law enforcement officials, was also ordered to decide on narcotics acts by promoting the restorative justice approach. This authority acknowledged that narcotics addicts are also Victims of Crime, apart from being equivalent to criminal acts. Judicial Power in Article 8 Paragraph (2) of Law Number 48 of 2009 Concerning Judicial Power, stated that in considering the severity of the criminal, judges must also pay attention to the good and evil nature of the defendant. The article's description focuses on the judge's power in deciding the narcotics case.

- 1) Further talking about the side of judicial impression in implementing a restorative justice approach in the concept of criminalization of narcotics crime as stated in article 103 of Law No. 35 of 2009 Concerning Narcotics, there is also an arrangement governing the implementation of the guidelines for the application of restorative justice which is a reference of the basis of the judge in cracking down on a narcotics case, as stated in the decree of the director of the general of the General Court of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 Concerning the

Application of Guidelines for the Application of Restorative Justice in the General Court (Abbreviated "Decision") on December 22, 2020.

The Main Decision Is: Ordered all district court judges to carry out guidelines for the application of restorative justice in an orderly and responsible manner; and

- 2) The Chairperson of the High Court is obliged to conduct supervision, monitoring and evaluation, and report the implementation of restorative justice in the relevant jurisdiction.⁷⁷

The Decree of the Director General of the General Court of the Supreme Court of the Republic of Indonesia Number 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice (Restorative Justice) within the General Courts of this Decision states restorative justice as a settlement of criminal offenses by involving the perpetrators, victims, families of the perpetrators/victims and other related parties, to jointly seek a fair resolution by emphasizing the recovery in its original state, not retaliation (prison sentence), which is based on matters contained in Article 54 of the Narcotics Law it. Reflects the concept of criminalization by emphasizing the restorative justice approach because in the event that it is required to carry out medical rehabilitation and social rehabilitation is one of the efforts to emphasize recovery in its original state for addicts and victims of narcotics abuse.

⁷⁷ Haposan Sahala Raja Sinaga, "Penerapan Restorative Justice dalam Perkara Narkotika di Indonesia (Implementation of Restorative Justice in Indonesian Narcotics Cases)", *Jurnal Hukum Lex Generalis*, Vol.2, No.7, Fakultas Hukum Universitas Kristen Indonesia, Jakarta, 2021, p.535.

Furthermore, the Supreme Court issued SEMA Number 7 of 2009 addressed to District Courts and High Courts throughout Indonesia to place narcotics addicts in rehabilitation homes and the latest is the issuance of SEMA number 04 of 2010 concerning the placement of abuse, victims of abuse, and drug addicts into Medical rehabilitation and social rehabilitation institutions, as the revision of SEMA number 7 of 2009. Surely this is a step forward in building a paradigm of terminating the criminalization or decriminalization of narcotics addicts. Prison sentences for narcotics abusers are proven not to be able to reduce the number of narcotics abusers.

Narcotics addicts and victims of narcotics abuse must undergo medical rehabilitation or social rehabilitation at the rehabilitation center of narcotics dependency. By having medical rehabilitation and social rehabilitation, it is intended to restore and/or develop physical, mental, and social abilities of addicts, with the ultimate goal of the recovery of narcotics dependence. It is intended to restore and/or develop physical, mental, and social abilities, with the ultimate goal of the recovery of addicts from narcotics dependence.

In restorative justice, the priority is not the imposition of punishment to criminal perpetrators, but rather how the perpetrators can be responsible for the committed criminal acts as well as how victims can get justice, until the situation can recover as before. The main objective of restorative justice is the creation of a just justice. In addition, it is hoped that the parties, both the perpetrators, victims, and the community play a major role in it. Victims are

expected to obtain appropriate compensation and agreed upon with the perpetrators to compensate and reduce the suffering experienced. In restorative justice, the perpetrators must be fully responsible so that the perpetrators are expected to be aware of their mistakes.

B. Obstacles in Applying Restorative Justice in Narcotics Criminal Cases

Guidelines for the Application of Restorative Justice Stated in the Decree of the Directorate General of General Court Agency Number 1691/DJU/SK/PS.00/12/2020. Include 4 (four) types of cases, one of which is the narcotics case, intended to facilitate the court in the general court in understanding and implementing the application of the Supreme Court rules and letters as well as the decision of the Chief Justice of the Supreme Court governing the implementation of the Restorative Justice, so as to increase both volume as well as the quality of the application of restorative justice in the verdict produced by the judge so that the principle of justice is fulfilled, simple and light costs with balanced justice.⁷⁸

The main problem factor in the implementation of the approach or concept of restorative justice in a system in general and in the criminal justice system in particular lies in the settlement mechanism offered by the approach or concept of restorative justice it is different from the settlement mechanism offered by the existing criminal justice system at this time so it is still difficult

⁷⁸ Apong Herlina, et.all. *Perlindungan Terhadap Anak Yang Berhadapan Dengan Hukum*. PT Raja Grafindo Persada. Jakarta, 2004.

to accept. This is because the mechanism offered by the approach or concept of restorative justice prioritizes the concept of peace, the concept of "mediation" and the concept of reconciliation in which the perpetrators, victims, law enforcement officials and the wider community participate directly in completing criminal cases, of course inversely or contrary to the system of Traditional criminal justice that has been imposed for a long time and is valid for this day.⁷⁹

The conception of restorative justice in Indonesia is still relatively new, so there are many obstacles to the application of restorative justice, namely both the hosted obstacles from internal factors originating from within the body and are directly related to the judicial institution and external factors which are the factors that are located out of court.

1. Internal Factors

a. Legal Factors Themselves

According to the results of research and findings carried out by ICJR, there are also obstacles that limit the implementation of rehabilitation guarantees and aspects of implementation about the habits of the inappropriate application of law enforcement officials or rehabilitation guarantees in rules that are not fully understood by law enforcement officials, namely:⁸⁰

⁷⁹ Bambang Poernomo dan M. Hariyanto *Strafbaarfeit Perbuatan Pidana Tindak Pidana Perkara Pidana*. <http://blogmhariyanto.blogspot.co.id>, accessed on October 22, 2022.

⁸⁰ Dio Ashar Wicaksana, "*Restorative Justice: Peluang Diversi dalam Rancangan KUHP bagi Pengguna dan Pecandu Narkotika*", institute for Criminal Justice Reform. Jakarta, 2004, p.16.

1) On the regulatory governing rehabilitation restrictions only apply to addicts and victims of narcotics abuse. This has an impact on abusers without interference sent to prison with worse effects. There should be a guarantee of assessment to test whether or not rehabilitation is applied to every narcotics user.

2) There are several rules for implementing joint regulations that limit the implementation of rehabilitation guarantees for addicts and victims of narcotics abusers.

Discussing further about the obstacles to the application of restorative justice to drug crime also came from the existence of factors that hampered the implementation of the embrace of the implementation of the application of restorative justice as stipulated in the Decree of the Directorate General of the General Court of the Supreme Court Number 1691/DJU/SK/PS .00/12/2020.

The factors that hamper the implementation of the Decree of the Directorate General of the General Court of the Supreme Court are as follows:

a. Decree of the Directorate General of the General Court of Supreme Court Number 1691/DJU/SK/PS.00/12/2020 does not clearly regulate how the stages or processes that must be carried out by judges especially judges who examine, try and decide on cases in implementing restorative Justice in a criminal case in

court. Therefore, there is a potential of every judge or panel of judges who handles the criminal case, to have opportunities to interpret themselves on how the stages of completion of the case with the mechanism of restorative justice, and have the potential Stages or other agendas in the context of restorative justice in the case examination process before the trial.

b. Decree of the Directorate General of the General Court of the Supreme Court Number 1691/DJU/SK/PS.00/12/2020 does not clearly regulate how the form of a decision for criminal cases is completed by the mechanism of restorative justice. Whether in the verdict, the defendant can be released or released from all demands because the settlement of the case has been carried out through a restorative justice mechanism, even though there has been evidence and recognition that he has indeed committed a crime and caused losses to the victim.

c. Decree of the Directorate General of the General Court of Supreme Court Number 1691/DJU/SK/PS.00/12/2020 does not clearly regulate in resolving narcotics cases so that restorative justice can be carried out. Therefore, users can be rehabilitated and there must be a letter of recommendation from the doctor that the person concerned is worth rehabilitating. However, the cost of the doctor needs to be examined so that the users can

receive appropriate treatment. Yet, the budget of the agency is not regulated.

b. Lack of Coordination Between Institutions

One of the obstacles in the application of restorative justice is the harmonious views of law enforcement officials, as seen from several rules issued by each law enforcement official with the issuance of several regulations internal. At the investigation level, the National Police Chief has issued a circular number 8/ VII/2018. At the level of prosecution of the Attorney General, there are several regulations, including the Attorney General's Regulation Number 15 of 2020. The Supreme Court itself has included a variety of restorative justice values in several PERMA and SEMA, and reiterated its implementation in the Decree of the Directorate General of the General Court Agency Number 1691/DJU/SK/PS.00/12/2020.⁸¹

However, each of these rules regulate the implementation of criminal settlement with overall restorative justice, without the harmonization between institutions. This causes the application of restorative justice to not be maximized into a method of criminal settlement that illustrates law enforcement and justice in the Integrated Criminal Justice System framework framework. The constraints of internal rules between law enforcement officials can

⁸¹ Setyo Utomo, *Sistem Pemidanaan Dalam Hukum Pidana Yang Berbasis Restorative Justice*. Mimbar Justitia, Fakultas Hukum Universitas Suryakencana.Cianjur.Vol. 5 No.01, 2018.

be resolved by the existence of a legal umbrella that can overshadow all actions and implementation of criminal settlement with the concept of restorative justice as a legal umbrella in the form of law as a product by the government that is able to become the basis of law enforcement officials. Based on this, it can be concluded that obstacles originating from the lack of coordination between institutions are also due to:

- 1) Lack of integrity and professionalism of law enforcers confirms the terms of blunt up and sharp down;
- 2) The judicial system is still in the old mindset, which is the spirit to imprison the actors who are actually iredigible to receive the sentence.

c. Law Enforcement morals Factor discriminatory

Lack of quality and quantity law enforcement resources, limited facilities and infrastructure, such as no provision of technological devices, lack of operational funds in carry out law enforcement with penal and non prenal means, factors lack of community participation participate in eradicating narcotics, culture materialistic members of society as well as the transformation of western culture that is not following the culture of the nation to be a

factor an obstacle to law enforcement tackling criminal acts of abuse narcotics.⁸²

d. Factors of Lack of Facilities and Infrastructure

As we know the facilities are tools that can be used to facilitate humans in achieving certain goals, while infrastructure is everything that supports directly to launch all types of facilities. Simpler infrastructure can be interpreted as a form of facilities provided by the government for the needs of the community.

The granting of rehabilitation of victims of narcotics abuse is about inadequate facilities and infrastructure in each region. This is because in each region there is not necessarily a place or rehabilitation institution that specifically handles victims of narcotics abusers or narcotics criminal acts. So in terms of placement of rehabilitation of victims of narcotics abuse, it often coordinates with central rehabilitation institutions, so that it requires a relatively long waiting time.

Rehabilitation facilities and infrastructure of government - owned rehabilitation at this time are still not enough to accommodate all abusers, addicts, or victims of narcotics abuse. In overcoming these obstacles, the government has made efforts to increase rehabilitation capacity by providing education to law enforcement

⁸² Mustating DG Maroa, “*Penegakan Hukum Dalam Penanggulangan Tindak Pidana Penyalahgunaan Narkotika di Kabupaten Banggai*”, Fakultas Hukum Universitas Muhammadiyah Luwuk, 2017

officials in correctional institutions to carry out rehabilitation actions.

e. Budget factor

The amount of rehabilitation membership is not in accordance with the standard specified both in terms of the amount and the number of participants. The target of the participants set by the Directorate General of Correctional with the location of the budget provided in each detention center and prison is not in accordance with even the specified budget according to the standard which is actually inadequate either.⁸³

2. External Factors

a. Factor of Community Views

Based on the concept of daily culture, culture has a very large function for society that is to regulate that humans can understand how they should do, act and determine their attitudes if they are in contact with others. The public's view of restorative justice tends to be negative, especially if the case is narcotics. Cause the emergence of being ostracized by the surrounding community. The views of the community and the attitude of the victims' families assume that the

⁸³ Tim Peneliti Data dan Informasi Badan Narkotika Nasional, *Potret Efektivitas Rehabilitasi Penyalahguna Narkotika di Lembaga Per masyarakatan*, Pusat Peneliti Data dan Informasi Badan Narkotika Nasional, Jakarta Timur, 2020, p.84.

application of restorative justice towards narcotics crimes will not make a deterrent abusers.

The community has not fully understood the existence of restorative justice. The understanding is important because no matter how good the structuring of the legal structure to carry out the legal rules set without the support of legal culture by the community, law enforcement will not run perfectly.⁸⁴

b. Family Factors

One of the main reasons why parents/guardians are reluctant to report their families/relatives who use/abuse narcotics, one of which is because of concerns dealing with the law. This is an obstacle in the effectiveness of the implementation of rehabilitation due to concerns about the law. Families/guardians are afraid after reporting their children or their relatives, they will be jailed. Yet, after they report the addict/abuse, the users will be rehabilitated with the condition of coming and reporting themselves voluntarily to rehabilitate.

c. Factor from Self –abuse

1) Denial

⁸⁴ Isharwana, “Penerapan Diversi dalam Tindak Pidana Narkotika oleh anak dikaitkan dengan Perlindungan korban berdasarkan Prinsip Restorative Justice di Kepolisian Resor Kota Balikpapan”, Jurnal Ilmu Hukum, Volume 7 Nomor 1, Universitas Riau, 2018

The main reason why narcotics users/abusers do not immediately access rehabilitation services are because abusers/users are not aware or even deny that narcotics abuse is a problem for them. Denying to admit that there are problems usually will cause defensive attitudes when others suggest that they need help.

2) Fearfull

The existence of stigma in the community about narcotics users is a criminal actors who are not seen as victims makes narcotics abusers fear to report themselves to follow the narcotics rehabilitation process. They assume they will be captured or imprisoned, even though with rehabilitation they actually get space to recover from dependence.

3) Lack of Support

Lack of support from the closest people can cause them to refuse assistance from rehabilitation facilities. Some families feel that the problem of narcotics abuse is a disgrace that must be covered so they cannot get help. The community still does not have a voluntary rehabilitation culture.

4) Rejection

People who have experienced severe addiction usually refuse to be rehabilitated because they have been very under

controlled by drugs so that it affects their brains in choosing rational and healthy decisions.

5) Embarrassment

Embarrassment prevents someone from coming to rehabilitation facilities. When someone feels ashamed, they will feel as if they are not worthy of help.

The restorative justice approach accommodates many parties to get the benefit, as for the direct benefits that can be obtained by criminal acts are related to the fulfillment and protection of their rights and educating them to be the person responsible for the damage he has made. Furthermore, to the victims they can obtain compensation to repair all the damage or losses they suffered due to actions committed by the perpetrators. The greater benefit is for the community itself, because the community will be more protected because the possibility of riots in the future or at least the intensity of criminal acts can be reduced.

This restorative justice has advantages compared to restitutive justice, namely:

- a) Paying attention to the rights of all elements of the perpetrators, victims, and the community.
- b) Trying to repair damage or losses that exist due to criminal acts that occur.

- c) Asking for direct accountability from a perpetrator as a whole so that the victim gets what should be his right.
- d) Preventing the next criminal offense.

This restorative justice needs to be applied for the creation of a justice and legal certainty needed by the community. However, it does not change a retributive justice that has developed in today's society. The restorative justice approach needs to be done because in addition to being a means to curb people's lives, as well as a means that can change the mindset and behavior of citizens and protect the interests of each member of the community, this approach is carried out in order to provide legal protection for every citizen. Through a restorative justice approach, it is hoped that a complete justice process can be achieved in accordance with the needs of the community and aimed at re-committing criminal acts.

The concept of the Restorative Justice approach is an approach that is more focused on the condition of the creation of justice and balance for the perpetrators of criminal acts and their own victims. The mechanism of the procedural and criminal justice that focuses on punishment is changed into a process of dialogue and mediation to create an agreement on the settlement of a more just and balanced criminal case for the victims and perpetrators.

CHAPTER IV CLOSING

A. Conclusion

Based on the previous discussion it can be conclude that :

1. As time passes, the concept of punishment creates a shift in the direction and purpose of punishment that is punitive or revengeful by being accountable for every act committed into a solution that places more emphasis on efforts to restore to its original state or what is known as restorative justice. In the concept of sentencing for narcotics abusers in the perspective of restorative justice, narcotics abusers will be given medical rehabilitation and social rehabilitation at the Narcotics addiction rehabilitation center as stipulated in Article 4 Letter (d), Article 54, Article 55, Article 103 of Law No. 35 of 2009 concerning Narcotics, strengthened by the issuance of SEMA Number 4 of 2010 concerning Placement of Abuse, Victims of Abuse and Narcotics Addicts into Institutions for Medical Rehabilitation and Social Rehabilitation. Medical and social rehabilitation align to implement restorative justice, which focuses on completion rather than imprisonment. The provision of medical rehabilitation and social rehabilitation is intended to restore and develop the physical, mental, and social abilities of addicts, with the ultimate goal of curing Narcotics addiction. However, restorative justice

can only be applied to narcotics cases in cases categorized as addicts, victims of abuse, and narcotics dependence.

2. Obstacles in implementing restorative justice in tackling narcotics crimes are classified into 2 inhibiting factors, namely internal factors originating from the body and directly related to the judiciary and external factors which are factors originating from outside the judiciary. As for internal factors originating from the law itself, the legal factor itself, the obstacle is the regulation regulating rehabilitation restrictions which only applies to addicts and victims of narcotics abuse. There are restrictions on the implementation of rehabilitation guarantees for addicts and victims of abusers. It is still unclear on what stages or processes that must be carried out by the judge examining the case, and it does not stipulate how the form of the verdict with the restorative justice mechanism. The second internal factor is the lack of coordination between institutions, including the lack of integrity and professionalism of law enforcers because the justice system is still in the old mindset. The third factor is the lack of facilities and infrastructure. Rehabilitation facilities and infrastructure owned by the government are still insufficient to accommodate all abusers, addicts, or victims of narcotics abuse. The last one is internal factors, namely budget factors that don't fulfil the standard of the equal number of participant. External factors include the views of the community. In the community's view factor, the community does not fully understand the existence of restorative justice. The family factor

includes to fears of being reluctant to report narcotics users because of fears of dealing with the law. Next are factors from the abuser himself, which includes several factors, namely denial, fear usually, the abuser denies admitting there is a problem. The second is fear because of the community's stigma about narcotics users as criminals. The third factor is the lack of support from those closest to them, and finally, the refusal. Usually, addicts refuse to be rehabilitated because they are already very controlled by narcotics.

A. Recommendation

From the results of the research that has been presented, the authors provide some input as follows:

1. The application of restorative justice must be carried out systematically with first strengthen the underlying legal system the good substance structure and the people who will be directly involved
2. For the Prosecutor's Office who published and implemented guideline, comprehensive training must be carried out related to the prosecutor's understanding with this guideline and socialization of this guideline to all elements of society and elements of government, moreover, the prosecutor's office must continue to coordinate with institutions related to handling acts of Criminal Narcotics Abuse.
3. For the community, it is expected to be more observant of narcotics problems in their environment and don't be afraid to report any case in

which relatives or people around their environment using narcotics, to handle narcotics abusers This has put forward the settlement of cases based on restorative justice.



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