

# The Reorientation Of Criminal Justice System To Give Protection To Crime Victims

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**Abstract:** The tendency of current criminal justice is that it favours more criminals. Meanwhile, crime victims receive less attention. As a result, the objective of sentencing is rendered ineffective. This study aims at 1) Describing the development of thoughts on the criminal justice system, 2) Formulating the idea of a criminal justice system which would give more attention and protection to the crime victims, and 3) Making an argumentation that a change in the orientation of a criminal justice system to the crime victims is a necessity. This research uses a normative approach. The research data used here are the secondary ones in the form of literature. The analysis uses induction-interpretation-conceptualization flow of thought. The results show that the tendency of the current criminal justice system is focused only on criminals. As the aggrieved party, the crime victims are forgotten instead. Such a sentencing system can never satisfy the victims, especially when the crime renders the victims at a personal disadvantage. The crime victims or their heirs deserve the rights to decide what sentence should be given to the criminals which can give benefits for the victims or their family such as indemnities. The idea of changing the orientation of criminal justice for crime victims, in essence, is to give law attention and protection to the victims. This is both realistic and rational. The objective is to actualize justice and expediency in law.

**Keywords:** Reorientation; Criminal Justice; System Protection Victim.

## 1 INTRODUCTION

The sentence is a threat which is made as a strategy to eliminate crimes in the world. Any criminal law anywhere in the world makes the sentence as one consequence threatened to a criminal. Anyone committing a crime will be held liable for what he/she does. This liability is a mechanism in criminal law as a reaction to misconduct formulated as a crime. A crime is an act which is formulated in a form of prohibition equipped with a threatened sentence for that act. This serves as a reflection that the society through the state has denounced that act. Hence, anyone committing the act will also be denounced[1]. It is expected that the existence of a sentence will give some peace. A human act can be controlled to prevent it from harming others. A sentence can also drive human to do good deeds. However, the approach of sentencing is not the only effective way of eradicating crimes. Empirically, crimes will still occur despite the extremely heavy threatened sentence. Crime eradication cannot rely merely on sentencing, it should also be done in an integrative manner[2]. The threatened sentence specified in criminal law philosophically can give psychological coercion to prevent people from violating the law. Sentence philosophy has been explained by a criminal law expert Von Fauerbach with his "psychologischen zwang" theory. According to Feuerbach, a sentence needs to be threatened/included in criminal law for everyone in the society to know about it and, in turn, be willing to imagine that the sentence will be imposed to him/her when he/she violates the law. When people have known and been able to imagine the sentence threatened them, it is expected that this can prevent them from committing any crime[3]. The existence of sentencing is intended for the implementation of criminal law on the basis of a belief that people act as a result of their free will and should be deemed as a responsible human being[4][5]. Logically, the expectation from the ability of threatened sentence existence as a device of psychological coercion for future criminals can be understood through the basic characters of every human being. Human has two characters, i.e. always desiring benefit and wanting to avoid any loss. These two characters are developed in many ways in order to reach the goal of being able to survive in live competition. In reality, however, the practices developed by humans to survive are mostly directed towards the "the end justifies the means" nature, as a result, "anarchy social" takes

place. The mainstream tendency of the current criminal justice system is that it pays more attention to criminals than crime victims. Rather than preventing people from committing any crime, the criminal justice system is favouring the criminals instead. Thus, the objective of sentencing is rendered ineffective. This sentencing which favours the criminals cannot realize the concept of disciplining (educating) and preventing (maintaining people's expediency). It is even truer when the crimes threaten public security, public system, moral, and deal with individual members of society personally. If the objective of sentencing is truly to maintain people's expediency, then the criminal justice system should surely not give too much attention to the criminals, rather it should pay more attention to the victims and the society as the affected party of crime's impacts. In order for a criminal justice system to give justice and protection, there is a need to reorient this sentencing for it to take into consideration the crime victims as a form of law protection and law logic which long for justice. This logic can be developed in the framework of protection by the state to the crime victims. This attention and protection take the form of providing the rights to the victims or their heirs in sentencing the criminals and ensuring that the losses suffered by the victims can be indemnified. The current sentencing tends to focus more on criminals. The criminals who have committed the acts which harm others are financed by the state. On the contrary, the crime victims who have clearly been placed at disadvantage receive no attention from the state. Based on this fact, the problems to be discussed in this review are: 1) How is the development of the thought of the current criminal justice system? 2) How is the idea of a criminal justice system which provides attention and protection to the crime victims? 3) Is the change in the orientation of the criminal justice system to the crime victims a necessity? Based on the problems explained above, this study aims at 1) Describing the development of thoughts on current criminal justice system, 2) Formulating the idea of criminal justice system which would provide more attention and protection to the crime victims, and 3) Making an argumentation that a change in the orientation of a criminal justice system to the crime victims is a necessity.

## 2. METHODOLOGY

This research is a type of normative legal research. Normative legal research is doctrinal legal research or theoretical legal research. It is called normative legal research because what is examined is the law of the theoretical or normative aspects, not to review the applied aspects of their implementation. The approach used is philosophical. A philosophical approach is an approach that views the law as an ideal set of values, which should be a reference in the formation, regulation and implementation of a law. A philosophical approach is used because this study is ideal by using a legal philosophy perspective that views the law as law in ideas. The data used are secondary data. Secondary data is data that is not obtained by researchers directly or originating from other parties in the form of written documents. The researcher obtained data through searching library materials online. The data collected will be analyzed qualitatively. A qualitative data analyst is a form of analyst by interpreting and describing data through words in a narrative with scientific logic.

## 3. RESULT AND DISCUSSION

### Development of Thoughts on Criminal Justice Systems

Criminal justice is a mechanism in criminal law in the form of sentence imposition of specific nature (even binder leed) which has been determined by the law (het leed, door de strafwet also giving a de overtrading van de norm verboden). Criminal justice also means suffering deliberately imposed on the guilty person [4]. Another term which is sometimes used is punishment. The mechanism of criminal justice or punishment cannot be separated from the judge's roles. The judge's verdict is obtained through a set of processes called sentencing [5]. Sentencing according to Ashworth is one of elements of the criminal justice system which begins from pre-prosecution and so forth until a court verdict is given and executed. Each stage in the criminal justice system has the goal and objective of enforcing the law by preventing the crime (crime prevention) and punishing the perpetrator [5]. The tendency of thoughts on current criminal justice system which develops in the West, in particular, determines that the objectives of criminal justice are directed towards three orientations, namely: 1) Educating the criminals, rehabilitating, and helping them to return to the society as they used to be, 2) A means of isolating and even exterminating when the criminals cannot be rehabilitated; 3) A means of maintaining the society and casting fear for others to do the crime. Herbert L. Packer in his book "The Limit of the Criminal Sanction" suggests: "The three basic problems of substance (as opposed to a procedure) in criminal law: 1) What conduct should be designated as criminal. 2) What determination must be made before a person can be found to have committed a criminal offence? 3) What should be done with a person who is found to have committed criminal offences"[6] The discussion on the objectives of criminal justice in Western criminal law discourse can generally be classified into three theories; absolute, relative, and combined. The oldest theory is the absolute or retributive theory, i.e. a theory of criminal justice which is based on such notions that criminal justice is "morally justified". The absolute theory is also referred to as retaliation theory, that is the basis of legal justice should be in the crime itself. A person receives a punishment or sentence because he has committed misconduct, or as a reprisal of what he/she does. A criminal deserves a sentence because of his/her

conduct and as a form of moral responsibility for his/her misconduct. The retaliation theory legitimates the sentencing as a means of retaliating the crime, where the crime is deemed as amoral and immoral in society. The criminal should be retaliated by sentencing[7]. The absolute theory is deemed as inconsistent with the essence of criminal justice objective for it emphasizes more on retaliation. Then, from this is born the relative theory, which is frequently called a theory of objective, i.e. the basis is not to retaliate, rather the objective of sentencing. The objective of sentencing is to find the benefit from a sentence, i.e. to prevent misconduct in the future. With the sentence sanction being awarded, it is expected that any potential criminal would be discouraged due to his/her fear for the consequence. The orientation of sentence is addressed toward the society, and it serves as a prevention to the criminals from repeating their misconducts[8]. The three theories on the objective of criminal laws, in essence, is a manifestation of three schools of thought developing in the discussion of criminal law, namely: classical criminal law school (Daad strafrecht), modern criminal law school (Daalder strafrecht), and neo classic-neo modern criminal law school (Daad-deader strafrecht). Firstly, daad strafrecht. According to this school, the central point of attention of criminal law and its enforcement is the criminal's act (regardless of the motivation which drives the criminal). This thought appears theoretically as a result of the strong influence of indeterminism view, i.e. a view which sees human and act as autonomous (independent). The objective of criminal law constitutes a reflection or elaboration of the concept of the main objective of what the criminal law is implemented for, i.e. protecting interests of wider or public nature. Secondly, reader strafrecht. According to this school, the central point of consideration of criminal law is the criminals themselves. This thought is born theoretically as a result of the strong influence of determinism view, i.e. the view which sees that humans and their acts are not autonomous at all (dependent). The next development is that there is a need to replace the concept of sentencing from punishment to treatment. This school is a reflection of the concept of what the criminal law is implemented for, i.e. protecting interests of personal nature. Thirdly, daad-deader strafrecht. According to this school, the central point of attention of criminal law is the aspect of crime and the perpetrator of the crime in a balanced way. Sentencing should be based on careful and balanced consideration between facts in the form of a review of crime and subjective condition of the crime's perpetrator. This school is a reflection of the concept of what the criminal law is implemented for, i.e. protecting interests of both public and personal natures. The recent development of sentencing discourse has also given birth to a theory of criminal justice objective called "utilitarianism theory". The sentencing to the criminal should be reasonably predicted to give various utilities for both the crime victims directly, the society in general and the convicted. Through sentencing, it is expected that the victims could have mental satisfaction because their resentment is served to the criminal. The society is also expected to return to peace, no longer anxious for the criminal's misconduct threat which can at any time catches them had been dealt with. Also, the sentencing is expected to serve as a bridge for the convicted to accept that they are guilty and furthermore be willing to repent until they return to be a good and useful member of society. This theory is frequently called a combined theory of absolute and relative theories. These three tendencies of theories on criminal justice

are more or less influenced the thoughts which have been elaborated by experts. Jean Jacques Rousseau, a French philosopher (1712-1778) once argued that sentence or punishment sanction constitutes a form of social contract. The sentence is intended to maintain the people's expediency from any criminal and the effort of preventing people from harming others. Cesare Beccaria (1738-1794), an Italian criminologist, agreed that punishment served as the right to defend oneself assigned by individuals to society. The objective of punishment is to educate the criminals and to serve as a prevention for others. This theory influenced the pioneers of France Revolution and inspired the Law issued in 1791 AD. Jeremy Bentham (1748-1832), a British philosopher, agrees that the enforcement of the law should be based on its benefit for the society. The objective of punishment is to maintain society and should be sufficient to educate the perpetrators and to prevent others. Immanuel Kant (1724-1804), a Germany philosopher, agreed that punishment served as a justice. Kant argued that punishment was given as retaliation to the criminals and a form of justice for their act [9]. The development of thoughts on criminal justice then combines Bentham and Kant's theories by limiting the sentence to not exceed the need and cannot be separated from fair treatment. This theory emphasizes on the level of sentence and its influence on society. However, this theory is thought to have failed in settling criminal problems and receives many criticisms. Then, it is followed by the occurrence of scientific theory from Italy which takes into consideration the criminal's condition without paying attention to the crime he/she has committed in an absolute manner. According to this theory, the punishment should be given according to the criminal's mental state, their self-establishment, history, and level of hazard. Any perpetrator with a mischievous mind should be kept away from society as far as possible and sentenced death. Any perpetrator who has been accustomed to commit the crime should be sentenced as those perpetrators with mischievous mind if this accustomization has been deeply rooted within. Any perpetrator who committed a crime non-deliberately shall be punished with light sentence even though his/her crime is dangerous. Any perpetrator who commits a crime under the emotional influence does not need to be sentenced. This theory also fails in dealing with criminal problems because it pays attention only to the perpetrator, without even considering the crime he/she commits. The classic theory is deemed as having failed because it focuses on the form of crime without considering the perpetrator's condition. The scientific theory developed in Italy also fails because it focuses only on the perpetrator's condition and disregards the crime. There is a need to combine the two previous thoughts as well as to formulate a new thought so that every sentence sanction should reflect the two concepts of; 1) Educating the criminal and preventing others; and 2) Maintaining the criminal's condition. Yet, this theory also fails in realizing the concept of disciplining (education) and preventing (maintaining people's expediency). It is even truer in the case of heavy crimes which deal with public security, system and manner in general. The criminal would not be processed for being sentenced and his/her sentence would not be enforced when he/she violates a material criminal law regulation (prohibition from doing an act) and be one to blame for violating the prohibition. To enforce the criminal law when a material criminal law regulation is violated, there is a need for a procedure called as formal criminal law. The imposition of a sentence sanction to

an individual found guilty for breaching a material criminal law regulation through certain procedures cannot be materialized unless it is based on law regulations regarding the implementation of a sentence which has previously been established. Meanwhile, a sentence is a reaction to an offence the form of which is suffering which is deliberately imposed by the state to the offender[10]. Another term used is sanction or punishment. Some use the two terms simultaneously as "sentence sanction." And for this discussion here, the term to be used is "sentence." Herbert L. Packer mentions "... punishment is a necessary but lamentable form of social control. It is lamentable because it inflicts suffering in the name of goals whose achievement is a matter of chance" [7]. The sentence is a way to make an individual who committed an offence stop and not repeating it. The fact that a sentence exists is also expected to serve as a lesson for others to not commit the same offence. The sentence is needed as one form of social control, yet it is lamentable because it contains some suffering. The sentence is a part of criminal justice in general, i.e. the entire process in the imposition of a sentence and its execution by the institution authorized over an individual who is charged and found guilty to have committed a crime. In essence, a criminal justice system also consists of several sub-systems which strive to achieve the final goal of sentencing and executing it. In general, the sub-systems which move the operation of the criminal justice system towards the final goal of sentencing are material criminal law system, formal criminal law system and the law of punishment execution system. The criminal would not be processed for being sentenced and his/her sentence would not be executed when he/she does not violate any material criminal law regulation (prohibition from doing an act) and be the one to blame for breaching the prohibition. To enforce the criminal law when a material criminal law regulation is violated, there is a need for a procedure called as formal criminal law. The imposition of a sentence sanction to an individual found guilty for breaching a material criminal law regulation through certain procedures cannot be materialized unless it is based on law regulations regarding the implementation of the sentence which has previously been established [3]. The scope of the criminal justice system includes extremely extensive materials which encompass all fields existing in criminal law (material, formal, and execution). These materials constitute the topics of a criminal justice system in a wide sense. In a narrow sense, the criminal justice system is a relation between issues around mere punishment, such as the essence of punishment, its existence philosophy, its objectives, its kinds and methods of implementation. In short, punishment or sentence is a way employed in order for a regulation to be complied with, to hold the offender accountable, and to be a means of maintaining the society's expediency.

### **An orientation of the Criminal Justice System Which Gives Protection to Crime Victims**

The criminal liability constitutes the imposition of sentence on the offender for what he does violates the prohibition. It means criminal liability has something to do with transferring the denouncement originally addressed to the crime to its committer. Heading an individual liable in criminal law means "to forward the denouncement objectively existing in the crime to its committer subjectively [11]. A sentence should be personal in nature, i.e. it is imposed on the criminal. Someone should never be held liable for others' misconduct. This

condition has been the basic rule of a sentence. Sentences are also general in nature which can be imposed on any person to their varying extents by not discriminating them before the law between the rich and the poor, and between the educated and non-educated ones. The influence of a sentence should also be the same, i.e. prevention and education in the future. The tendency of criminal justice theory leans towards the limitation of criminal justice to not exceed the need and to not be separated from the effort of treating the convicted as a human. Criminal justice only sees the degree of crime and its influence on the offender and society. It is from this view that the tendency of criminal justice is oriented more towards the convicted and the society in general. There is something missing from the current criminal justice system, i.e. the crime victim and their heirs. Ideally, for a crime which harms an individual personally, the crime victim should also receive some law attention and protection. Examples of this include theft crime victims, and the victims or their heirs for crimes which cause others to lose their lives. The settlement of a criminal case in the future needs to consider the victims. Consideration to the crime victims constitutes the new orientation which could be used as a strategy of dealing with crimes with its aim to respond to the dissatisfaction directed towards the operation of the current criminal justice system. With consideration being given to the crime victims, the substance of justice can also be obtained by the victims who are marginalized in the current criminal justice system. There is actually a tendency of legal activity in the society which is characterized by the increasing use of legal sources and settlement of problems through the law. However, society's increasing awareness of law is inversely proportional to the process of legal problem settlement. The law does not necessarily play a role as a counterweight to the society's expediency because it tends to partially accommodate the interests of certain elites (Pekuwali, 2008). Serving as an indication of this is the fact that when the law enforcement gives too much emphasis on legal certainty aspect while ignoring the justice and legal benefits for the society. The justice adage has changed as the modern nationalism century which prioritizes the power of reasoning hardly ever satisfies the human mind about the meaning and sense of justice in the rhythm of law in society[12]. The law in its implementation should be just, yet it is an injustice which frequently occurs. The law enforcement officers have not been fully aware of this [14]. The process of law enforcement is still far from people's sense of justice. The contradictory part of this is that law, in essence, is justice in itself. The justice in law constitutes the right of every citizen which should be ensured and protected by the state. The emerging legal justice is of more legal-formal in nature, the justice which is based on the texts written in legislation (rule-bound). A crime constitutes abuse to persons and it has something to do with the state's obligation to defend those rights. Ideally, the parties related to a crime should be involved in the process of sentencing. A crime substantively has created an obligation to seek for solutions, settlement, and reconciliation and to create peace. An act is deemed as a crime when it damages or harms the interests of others. In order to provide justice and to restore things to the original state, sentencing to the perpetrator is required. It applies to any society in the world. According to the development of modern Western law, the one entitled to perform the sentencing process is the rulers. The role played by the rulers are absolute, and the people, particularly the victims, are not

involved at all. Theoretically, the rulers or the state to have the role to protect the victims, hence the criminal should face the state. This, then, makes a crime an act which abuses the state and its laws. As a result of the fact that both the society and the victims are not involved in sentencing the criminal, many problems occur in the execution of the sentence, particularly for the victims. The emerging problems which lead to the victim's dissatisfaction are:

1. The victims think they do not receive any protection from the state;
2. It gives the perpetrator and the law enforcement personnel to collude;
3. It frequently happens that despite the criminal being sentenced heavily, the victims remain dissatisfied for the losses they have to bear irreplaceable;
4. The parties are often found dissatisfied about the problem settlement, hence they require further legal processes from appeal to judicial review.

Legal processes against any crime which harms the victims personally such as theft, eliminating other's life and abuse to not involve the victims will surely never give justice to the victims or their heirs. The intended justice is merely the one created according to the ruler's standard, which is of course, unlike the one as viewed by the victim. The complete takeover of criminal case settlement by the state will not cause any reconciliation between the victims and the perpetrator. The settlement process forces the state to be the opponent of the offender. The final result is that there will be a winner and loser until the next levels. The sentencing is focused mostly on the effort of turning the offender to be a good person, to be someone of use once again to the society after completing his/her sentence, and when practicable the sentence can be as light possible. Meanwhile, the victims or their family who should suffer from loss and disharmony caused by the perpetrator's act receive neither consideration and involvement, while in fact, the case happens to them. Such a sentencing model needs to be reviewed. The justice cannot be served and the harmony in society cannot be restored when the victims or their family are not involved. Ideally, the cause of the crime should first be viewed. In order to discover or restore to the initial state, the settlement process should be by involving all parties related to the crime. This process would be much more effective and acceptable to the society because those parties connected with the crime collectively try to find the alternative settlement [1]. The objective of criminal law in the future should be directed towards protecting interests in a balanced way. The balance can be achieved by involving the parties in the process of settling the problem or crime. The settlement of a crime, particularly the crime of eliminating other's life, through the involvement of the offender(s), the victims and the society, as well as public figure, serves the public sense of justice better. This is because its emphasis is on the effort of restoring the relationship in the society, driving the recovery of communication in the society and rehabilitating the harmonious relationship in a society which was damaged due to the perpetrator's actions. It is this process of involving all parties related to the crime collectively and of finding the way to deal with the consequences in the future or its implication which is called a restorative justice approach. The need for restorative justice approach in the effort of reorienting criminal justice is urgent. The current criminal justice system for murder case brings further problem for both the victim and

the offender's families, such as:

1. The sentencing of a criminal fails to satisfy the victim's family.
2. The offender's family still feel uneasy for retaliation threat from the victim's family.
3. The criminal justice formal process takes too much time and is costly and uncertain.
4. The relationship between the victim and offender's families is terminated (if they know each other well previously).

The implementation of restorative justice in several developed countries is not merely a debate by criminal law and criminology academicians. For example, in North America, Australia, and some countries in Europe restorative justice has been applied at all steps of the criminal justice process starting from investigation to execution [15]. When restorative justice is applied, it will bring benefits to both the victim, the offender, the society in general and the state. The benefits for the victim and perpetrator are as follows:

1. Restorative justice focuses on justice for the victim according to his/her personal wish and interests, rather than letting the state to determine it.
2. It offers recovery for the perpetrator and the victim to prevent any grudge from existing.
3. It holds the perpetrator liable for the crimes he committed.

For the society in general and the state, the benefits include:

1. The society is given a chance to deal with its own legal problems which are expected to be fairer. The simple and transparent principles widely known and used in customary law in dealing with civil cases can also be applied in criminal law. This applies especially for those countries the legal system of which does not significantly recognize criminal and civil case differences.
2. The state's burden in some cases is diminished, as the burden of dealing with crimes can be solved independently by society. Both police officers, prosecutors and courts can focus more on eliminating more dangerous crimes concerning broader security such as narcotics, terrorism, human trafficking or gross human rights violations. Administratively, the number of cases brought into the judicial system can also be reduced.
3. The burden of providing the budget for implementing the criminal justice system particularly in the organization of penitentiaries is also reduced [16].

The various principles and instruments in the restorative justice approach and the dialogue process between the offender and the victim are the basic moral and the most important part. The direct dialogue between the offender and the victim allows the victim to express what he/she feels, express his/her hope for the fulfilment of his/her rights and wish of a settlement of the case. It is through this dialogue that the offender is expected to be inspired to reflect on what he/she did, to accept his/her fault and to consciously take responsibility as a consequence of the crime he/she committed. Also, from this dialogue, society can participate in realizing the agreement and monitoring its implementation. The settlement of criminal cases using a restorative justice

approach offers a different view from the one applied in the current criminal system. In a restorative justice approach a crime is defined as a violation of individuals and societal relationship. Rather than state, the victim of a crime is an individual. Thus, it is important to involve both the victim, the offender, and the society in seeking a win-win solution, and at this rate, a reconciliation is surely possible. The implementation of restorative justice serves as a concept of thought which response to the development of criminal justice system by focusing on the need to involve the society and the victim who is thought as being marginalized by the mechanism that works in the existing criminal justice system. This restorative justice approach endeavours to empower both the victims and society [16]. The crime in restorative justice approach basically has the same meaning as in the criminal law in general, i.e. an offence on individuals and the society and societal relationship. The main victim when a crime occurs is not the state, as in the case of the current criminal justice system. This crime creates an obligation to repair the damaged relationships due to the occurrence of a crime. Justice is interpreted as a process of solving the problems which occur due to a criminal case where the involvement of the victims, the society and the offender becomes important in the effort of repairing the damage and reconciling and ensuring that this reconciliation effort continues. It is important to apply this restorative justice system, for example, to a crime of eliminating other's life where the victim is the head of a household. To such a case, the state does represent the victim's family to punish the offender. Yet, the needs of the victim's wife after the case is closed no longer receive any attention from the state. In fact, the offender who is found guilty is imprisoned at the expense of the state. Using a restorative justice approach, an effort would surely be made in order for the punishment to restore the victim's state like before the crime hit her. Imprisonment would serve only as an alternative punishment [17]. As an illustration, it can be exemplified for the crime of eliminating other's life. Ideally, the victim's heirs should also receive law attention and protection with them being assigned the right of sentencing. The criminal will be punished, yet the victim's heirs should be involved to determine his/her sentence and this sentence should give some benefits to the victim's heirs. The conception of diyat (compensation) in Islamic criminal law can be used as a comparison [18]. According to the provisions in the Islamic criminal law, when the victim heirs forgive the offender, he/she should pay the diyat (compensation) and this is given to the victim heirs. This diyat the offender should pay for his/her crime of eliminating other's life amounts to 100 camels. If the current price of each camel is US\$ 1,500,000,- then the penalty he/she should pay is US\$ 150,000,000,-. If the murdered one leaves a wife and four children, this amount of money would suffice to fund the needs of the victim's family, including his children's tuition fees. As a comparison, using the currently existing criminal justice system for the case, the offender would only be imprisoned for 15 to 20 years. Of course, this sentence gives no benefit to the victim's heirs or family (wife and children). The victim's heirs will have sorrowful life for losing their rights of livelihood. On the other hand, being imprisoned, the criminal is funded by the state, he/she is even rehabilitated so that he/she can one day return to society. Psychologically, the grudge of the victim's family would not be gone with 15-years imprisonment, and it is also possible that the victim's children will one day take their revenge on the

offender. This indicates that the imprisonment sentence for the crime of eliminating other's life gives no benefits at all to the victim's family or heirs. According to the provisions in Islamic criminal law, the right of sentencing is given to the victim or his/her heirs because the crime of eliminating life is tightly related with the victim personally, and also his/her heirs in relation to his/her responsibility for their livelihood when the victim is the breadwinner. The essence of *qishâş* (retaliation in kind) sentence is to give the affected person the right to retaliate in kind the person causing him/her a loss, yet it is better to avoid it and replace it with *diyat* through the act of forgiving. Meanwhile, *diyat*, in essence, serves as social security for the victim's family. Any crime to life constitutes a violation of an individual's life and also to the social system as well as the legal system in society. As a violation of an individual's life personally, it is necessary to give some rights to the victim or his/her family as compensation, attention and protection. This provision is logical and realistic because it is more useful for the victim. This is because the crime to life has a greater influence on the victim's family than on society or even the state. The same applies to theft crime; the one experiencing the impact in the form of stolen material loss is the victim, neither the society nor the state. The idea of giving attention and protection to the crime victim is not entirely odd. On the contrary, this idea gives birth to the currently widely-proposed principle, i.e. victimological approach, and the pardoning from the victim or the heirs. Even the "conventional" law acknowledge this pardoning system, even if it is not directly from the victim, rather from the judge. The pardoning by the judge will clearly not remove the grudge. The victim or his/her family may not accept it and wish the offender to be sentenced as severe as possible or equally as what he/she has committed. It is quite contradictory considering the aim of pardoning is to produce some peace and remove any grudge in the future. Furthermore, through compensation as well as pardoning by the victim, the settlement of criminal case can be entirely finished and completed with a win-win solution, no need for an appeal, let alone causation because it will bring further losses both in terms of time and materials. Normatively, the compensation sentence for the crime of eliminating life or theft conflicts the criminal law currently applicable in many parts of the world, except in those countries applying Islamic criminal law such as Saudi Arabia. However, this model can actually maintain harmony in society and deserves consideration in the development of the criminal justice system in the future.

### **Change in Orientation of the Criminal Justice System as a Necessity**

Every society cannot be separated from several systems underlying their lives to exist despite the different principles and era. Generally, there are four basic systems serving as support, namely; family system, personal (individual) ownership system, public social system, and legal system in the society. The system in society requires the maintenance of an individual system and their rights. The legal system serves the function of enforcing the social system and providing security to the people. Ibn Qayim al-Jauziyyah, a Muslim scholar during the Middle Age once explained (Islamic) law amendment theory in his work *I'lam al-Muwaqqi'in*. The application of principles and bases of law in the society, in Ibn Qayim's opinion, should be coherent with the change of law according to the situation and condition in the society. This

logic matches the "*taghayyuru al-ahkâm bitaghayyuri al-azminati wa al-amkinati* (the change of law should be based on the situation, condition, time and locality)" rule and he referred to the objective of Islamic law of general nature, namely "*daf'u al-mafâsid muqaddam 'ala jalbi al-mašâlih* (removing harm and prioritizing public expediency) [19]. The law can also be used as a tool to change society (law as a tool of social engineering) as suggested by Roscoe Pound [20]. The laws made by power can have both direct and indirect influence on the change of society. Law is not just an expression consisting of a set of rules (judicial precedent). There is a dialogic atmosphere between the law and the existing social condition of the society [21]. Initiating a law should consider the society because it is impossible for the law to be separated from society. Savigny states "*Das Recht wird nicht gemacht, est ist und wird mit dem volke*" (the law is not made, it grows and develops together with the society) [22]. Looking at the law means looking at the relevant society. Having seen the legal problems occurring in society, Satjipto Rahardjo promotes the need for progressive law. The notion of progressive law emphasizes the interpretation of the law as an effort of exploring the values living in the society to enable the creation of a just decision. This thought matches the Indonesian people's need for law, particularly for the common people who have neither economic, political nor social bargaining position which will have some effect on the law. Progressive law also offers a new perspective in applying the law by involving the conscience [23]. The law enforcement officers should be capable of sensing the moral message contained in regulation of law. There is no such thing as everlasting law for the law itself is a definitive formulation and it should encounter the ever-changing life. Any law fixated to formulations of words will be left behind by the changes occurring in the society, which should actually be controlled and regulated [24]. A progressive law can be enforced by implementing the law which does not merely words of black and white of regulation (according to the letter). A deeper interpretation (to its very meaning) and the spirit of why that law is implemented are needed. To enforce the law having only intellectual intelligence is not enough, it should also be equipped with spiritual intelligence. In other words, the law enforcement must be done with full determination, empathy, dedication, and commitment to the suffering of the nation along with the courage to find a way other than the usual one [25]. The core of progressive law lies in the progressive way of thinking and acting which sets it free from the shackles of the legal document texts. The law is not for the legal texts, rather it is for the happiness and the welfare of human being. The thoughts on law need to go back to its basic philosophy, i.e. law for mankind, rather than the other way around, i.e. mankind for a law [24]. The law should in no time serve as an absolute and final institution, rather it should serve as an institution of moral, conscience, and therefore it is highly determined by its ability to serve the mankind. Law is an institution that aims at leading mankind to a just, prosperous and happy life. Progressive law does not think in a legal way, rather it thinks in a reasonable way. When a deadlock occurs, the progressive law will do a creative alternative way, above implementing the creative alternative "to the letter" way. The orientation of current sentencing does not give attention and justice to the victim because of its centre of focus on the perpetrator. The time has come to change in order to give attention and justice to all, not just to the criminal, but also to

the victim. The development of sentencing orientation is based on the theories of retribution, deterrence, incapacitation, rehabilitation, restitution, and integration. Retribution is a theory of sentencing which is based on the reason that sentencing is "morally justified". The perpetrator of crime deserves punishment for his/her act and it serves as a form of moral responsibility for his/her misconduct. Retributive theory legitimates sentencing as a means of retaliation to a crime, where the crime is seen as an amoral and immoral act in society. The criminal should be retaliated by sentencing [1]. Deterrence is a criminal justice theory applied to a case the threatened sentence of which is made in order to discourage others from doing any crime. This sentencing also serves as a threat to the entire society to not commit any crime. The sentencing is oriented towards giving a deterrent effect for the offender and to be a warning for the society to not commit the same crime [26]. Incapacitation is a criminal justice theory oriented towards constraining people from society for a certain period of time with an aim of protecting society in general. This criminal justice theory is used by a measure; the sentence is imposed on the perpetrator who is putting the society to danger, and the sanction takes the form of isolating the offender from the society [16]. Rehabilitation is a theory of sentencing oriented towards a method of desocialization, i.e. separating the offender from his/her social life with the society and constraining him/her from communicating with the society. This theory can give a shock therapy for the criminal to amend his/her act to prevent it from being repeated, and to make him/her acceptable to the society [16]. Restitution is a criminal justice theory oriented towards paying attention to the victim as an important part to be considered in sentencing. This theory also acknowledges reparation, i.e. the act of compensating the consequences of something improper. Reparation is deemed as a way the perpetrator should pass through as a consequence of the crime he/she commits. Meanwhile, compensation is a payment for damages or other deeds ordered by the court to the person found to have caused the damage as a further process. The compensation here is not only in monetary form, but rather it can also be in the form of other deeds [16]. Integration is a criminal justice theory which is oriented towards paying attention to the victim as well as the interests of the victim crime, the criminal and the society. To the victim, it takes the form of recovery of loss of asset, physical pain, security, dignity and satisfaction or sense of justice. Meanwhile, to the criminal, the objective is to give him a shame so as not to repeat it again. Included as the concern in this theory is the effort of reconciling the parties (the victim, the perpetrator, their family and the society) related to that event. It is this theory which leads to restorative justice and is expected to be a model in settling criminal cases [16]. The comparison of orientations in those criminal justice theories can be shown in the following table:

**Table 1**  
*Development of Orientations in Criminal Justice Theories*

Theory	Sentencing Orientation	Focus of Attention		
		Offender	Victim	Society
<i>Retribution</i>	Retaliation	√		
<i>Deterrence</i>	Deterrence and prevention	√		√
<i>Incapacitation</i>	Protection of society			√
<i>Rehabilitation</i>	Recovery	√		
<i>Resocialization</i>	Socialization	√		
<i>Restitution, compensation, and reparation</i>	Compensation		√	
<i>Integrative (Restorative Justice)</i>	Retaliation, prevention, and deterrence, Protection of society, recovery, socialisation, and compensation	√	√	√

Based on the sentencing orientations above, the settlement of a criminal case in the future needs to consider integrative orientation (restorative justice). By implementing restorative justice, it is more likely for all parties to obtain justice, especially the victim who is usually marginalized by the working mechanism in the current criminal justice system. The implementation of a restorative justice approach goes hand in hand with law enforcement in a progressive spirit to create justice that benefits all parties related to the conflict. The settlement of crime using this restorative justice approach basically solves a criminal problem using an effort of recovery to its initial state through an agreement between the parties involved. Included in it is also improving the relationship between the parties (victim, perpetrator, their family and community) associated with the event. Included in it is reconciling between the parties (the victim, the offender, their families and the society) related to the event. The implementation of a restorative justice approach is also in line with the responsive legal theory proposed by Philippe Nonet and Philip Selznick. In responsive law theory, the law is no longer seen as a stand-alone entity, rather it should be able to interact with other entities aiming mainly to adopt the interests existing in the society. The law would be able to understand or interpret better any non-compliance and irregularity occurring in the society. This is because, in responsive law, the chance is wide open for a dialogue to voice some discourses and for pluralistic ideas as a reality to exist [27]. The responsive law no longer bases its decision merely on juridical consideration, rather it sees a problem from many perspectives in the pursuit of "substantive justice". The law is a mere tool, and justice should be the goal to be pursued, even if it does not necessarily use a legal perspective. The flexibility of responsive law is high to other matters beyond the law. The chance to participate is also wider. Legal action constitutes a vehicle for groups and organization to tend to take part in determining the general policies [28]. The works of law and the results are not only legal matters, rather they are parts of larger social processes. Regulations can function effectively and be complied with or adhered to when there is a psychological bond with the bearers of these regulations. The law is not in a vacuum, rather it is present in a society with its own cultural roots. The law is tasked to serve the society, thus the legal system must be as customized as the cultural root of the society it serves [24]. The fairness of a law depends on whether it gives humans happiness or not. In reference to the change in the law, the idea of changing the orientation of criminal justice to the crime victims which essentially gives

legal attention and protection to them, it is certainly acceptable in the life of law of modern society. The objective is just like that of the law itself, i.e. to manifest justice and expediency. The sentence sanction imposed by a judge on the convicted is to counterbalance to the suffering between the convicted and the victim's family, as well as the society. This counterbalance of suffering does not reflect a decision made that is oriented towards the welfare of society. Whereas the judge as the party representing the state in the judiciary domain must also provide a decision-oriented towards the welfare of society (social) [29]. However, the judge in his/her effort of making the sentencing decision bases his/her consideration only on the acts committed by the offender, and as to the fulfilment of peace for the society, it was not as far as fulfilling the losses suffered by the crime victims or their family. The losses borne by the crime victims are not compensated by the prosecution of the criminal. The idea of re-orienting the criminal justice which gives attention and protection to the crime victims can manifest from a formal into criminal law. Psychologically, the family of a victim of a crime to life would desire that the offender is punished in kind to his/her deed, even when it is a spontaneous expression. The same applies to the victim of theft crime where he/she certainly would want the stolen goods to return. When the compensation sentence is applied, it is not only acceptable to society, it is indeed more needed by the crime victim. This concept is highly victimological just as many criminal law experts have promoted. Entitling the crime victim some right over sentencing constitutes the attention and protection given to the victims and the society. When the victims or their heirs decide to pardon the offender and ask for compensation, the settlement process then would be just as what the victims wish. The court institution must not procure another method undesired by the victims. This is legally logical since the crime victims are the one directly suffering from greater sorrow compared to others such as the society and the state, hence it is just reasonable for the law to side with them. In case the victims experience such a psychological or material sorrow so that they out their emotional feeling for revenge, then this wish for revenge will be arranged to make it proportional/non-excessive through punishment in kind. If the victims can understand the suffering resulting from crime through wise advice and finally prefer the wise decision by pardoning the offender and asking for compensation, then the court institution cannot be justified when it forces a legal proceeding beyond what the victim wishes. This is the essence of justice and experience in law.

#### 4. CONCLUSION

Based on the elaboration above, it can be concluded that three criminal justice theories have developed, namely absolute, relative, and combined theories. The tendency of criminal justice is to pay more attention to the offender than to the crime victims. The offender of crime is favoured and, on the contrary, the victim who is suffering from loss receives neither attention nor from the state. Ideally, for any crime which harms individuals personally, the crime victims or their heirs should also receive some attention and protection from the state. The crime victims or their heirs deserve the right to decide on the sentence to be awarded to the offender from which the victims or their family can benefit such as compensation. This is because the impact of the crime is directly felt by the victim, neither the society nor the state. By involving the victims or their heirs the settlement of criminal

case will be entirely finished or completed with a win-win solution. This model can maintain harmony in society and deserve consideration in the development of the criminal justice system in the future. Referring to the theory of change in the law, the essence behind the idea of changing the orientation of criminal justice to the crime victims is to give legal attention and protection to the victim. This is both realistic and rational. Its goal is to manifest justice and expediency in law.

#### 5. REFERENCES

- [1] "R. Cryer, *An Introduction to International Criminal Law and Procedure*, New York: Cambridge University Press, 2010."
- [2] "G. Andreopoulos, *International Criminal Justice: Critical Perspectives and New Challenges*, New York: Springer, 2011."
- [3] "M. Kholiq, *Kontribusi Hukum Pidana Islam dalam Pembaharuan Hukum Pidana di Indonesia*, Semarang: Program Magister Ilmu Hukum Universitas Diponegoro, 2001."
- [4] "D. Hasibuan, 'Disparitas Pemidanaan Terhadap Pelaku Tindak Pidana Narkotika,' *USU Law*, vol. 3, no. 1, pp. 87-100, 2015."
- [5] "M. Tonry, *Sentencing Matters*, Oxford: Oxford University Press, 1996."
- [6] "A. Ashworth, *Sentencing & Criminal Justice (Fourth Edition)*, Cambridge: Cambridge University Press, 2005."
- [7] "V. Bammelen, *Hukum Pidana I (Criminal Law I)*, Bandung: Bina Cipta, 1997."
- [8] "T. Prasetyo, *Hukum Pidana*, Jakarta: Raja Grafindo Persada, 2012."
- [9] "N. Fathullah, 'Perbandingan Teori-Teori Pemidanaan: Hukum Barat Versus Hukum Islam,' *Dialektika Hukum*, vol. 11, no. 1, pp. 75-77, 2013."
- [10] "Usman, 'Analisis Perkembangan Teori Hukum Pidana,' *Jurnal Ilmu Hukum*, vol. 6, no. 2, pp. 62-78, 2015."
- [11] "S. Candra, 'Pembaharuan Hukum Pidana, Konsep Pertanggungjawaban Pidana dalam Hukum Pidana Nasional yang akan datang (Criminal Law Reform: The Concept of Criminal Liability in Future National Criminal Law),' *Jurnal Cita Hukum*, vol. 1, no. 1, pp. 39-56, 201."
- [12] "R. Atmasasmita, *Reformasi Hukum, Hak Asasi Manusia dan Penegakan Hukum (Law Reform, Human Rights and Law Enforcement)*, Bandung: Bandar Maju, 2001."