

RESTORATIVE JUSTICE IN THE RENEWAL OF CRIMINAL LAW IN INDONESIA

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ABSTRACT

Restorative justice is an approach that focuses on the conditions of creating justice and balance for the perpetrators of the crime and also the victims. The procedural and criminal justice mechanisms that focus on prosecution are converted into a process of dialogue and mediation to create an agreement on the settlement of criminal cases that are more fair and balanced for the victims and perpetrators. The regulation on restorative justice as an effort to resolve criminal cases has been recognized internationally. This concept is also in accordance with the law that lives in Indonesian society (customary law). Legal reform determines the direction of the formation of the nation's character, from one real condition to an ideal condition, so that the Draft of Penal Code is a planned tool of social transformation and culture of the society.

Keywords : *Restorative Justice, Renewal of Criminal Law, Indonesia*

A. Introduction

The study of the implementation and distribution of justice in Indonesia is a very important matter to be discussed, because Indonesian society is still classified as a pluralistic society that cannot avoid the problem of conflict or disputes. In the life of society today has and will continue to be an ordinary phenomenon in society, both related between two individuals and more. This situation will further complicate the world of law and justice if all conflicts or disputes are processed legally by the Court.

Therefore, other efforts need to be sought outside the existing criminal justice procedures, so that the community does not only depend on the current procedures. But still get justice and problem solving, especially for victims as the most disadvantaged party (suffering), in addition to the accountability of the perpetrators. One form of solution offered is the process of completion in the context of restorative justice.

The concept of a restorative justice approach is an approach that focuses on the conditions of creating justice and balance for perpetrators of crime and their victims. The procedural and criminal justice mechanisms that focus on prosecution are converted into a process of dialogue and mediation to create an agreement on the settlement of criminal cases that are more just and balanced for the victims and perpetrators.¹

Restorative justice itself has the meaning of justice that restores, while restoration here has a broader meaning than what is known in the conventional criminal justice process of restitution or compensation for victims.

This departs from the view that in an incident of crime, the suffering of people who have become victims not only affects the person himself, but also affects the people around him. Even it has an impact on society and the country in a wider scope. In criminal justice practices, victims are only required or positioned as witnesses (victims), without the right to participate actively in court proceedings.²

Law enforcement officers only place victims as instruments in order to help them to punish or impose penalties on the perpetrators, without ever continuing to what they give for the benefit of the victims.

However, the concept of restorative justice involves the restoration of relations between the victim and the perpetrator. The recovery of this relationship can be based on a mutual agreement between the victim and the perpetrator. The victims can say about the losses they suffered and the participants were given the opportunity to redeem them, through the mechanism of compensation, peace, social work, and other agreements. This is important, because the conventional prosecution process does not provide space for the parties involved, in this case victims and perpetrators to actively participate in resolving their problems.

In recent times it seems as if only the court is the best place to resolve legal problems and seek justice. So that every indication of a criminal act, without taking into account the escalation of his actions, will continue to roll out the law enforcement that only becomes the jurisdiction of law enforcement. Active participation from the community does not seem to be important anymore, all of which only lead to court decisions in the form of punishment (punishment) regardless of their essence. In fact, in a criminal justice, the parties involved are public prosecutors, judges, defendants, and legal

¹ <http://www.hukumonline.com/berita/baca/lt4e25360a422c2/pendekatan-irestorative-justice-i-dalam-sistem-pidana-indonesia-broleh--jecky-tengens--sh->, accessed on July 10th, 2018.

² <https://rechtsvinding.bphn.go.id/artikel/ARTIKEL%208%20Vol%202%20No%202.pdf>, accessed on July 10th, 2018.

counsel and witnesses. The victim is represented by the public prosecutor and to corroborate the usual proof the person concerned is made a witness (victim).³ But this has not given any real impact or benefits for victims of crime.

Whereas in many countries have begun to think of other alternatives to resolve conflicts in society. This is due to dissatisfaction and frustration with the application of the existing criminal law, as well as the application of the criminal justice system that does not provide justice for individuals, protection of victims, and does not provide benefits to the community. When viewed from its history, the restorative justice model approach is actually an emergency approach in the 1960s era in order to resolve criminal cases, which do not use the criminal justice system.

With this restorative justice approach, this approach focuses on participation directly from the perpetrators, victims and the community in the process of resolving criminal cases. Indeed, this approach in practice still experiences debates in theory, but this view develops and has an impact on legal policies and law enforcement practices in several countries. Restorative justice is considered as a new form of thinking that can be used to respond to various crimes and answer dissatisfaction with the current performance of the criminal justice system.

Based on the description above, the scope of the problem is how the restorative justice approach can become part of the reform of criminal law in the future.

B. Discussion

The introduction of Restorative Justice in the Indonesian legal system is still partial and not comprehensive, which is spread in various regulatory provisions and several practices that have emerged, in several law enforcement policies, including:

1. Circular of the Supreme Court (SEMA) No. 6 of 1959, stated that child trials must be conducted in a closed manner.
2. Supreme Court Circular Letter (SEMA) No. 6 of 1987, November 16, 1987 concerning the Rules of the Child Assembly.
3. Circular of the Attorney General of the Republic of Indonesia SE-002 / j.a / 4/1989 concerning Prosecution of Children
4. The Supreme Court's Jurisprudence No. 1644 K / Pid / 1988 dated May 15, 1991 where in the ratio decidendi the decision states that if a person violates customary law then the Head and Customary Leaders give customary reactions (customary sanctions) the concerned cannot be submitted again (for the second time) as a defendant in the trial of the State Judiciary (District Court) with the same charges violating the law there is a sentence of imprisonment according to the provisions of the Criminal Code (Article 5 paragraph (3) sub b Law Drt Number 1 Year 1951) so in such circumstances transfer of case files and prosecutors' demands in the District Court must be declared unacceptable (niet ontvankelijk Verklaard).
5. Letter of Deputy Attorney General for General Crimes B-532 / E / 11/1995, Nov. 9, 1995 concerning Technical Guidelines for Prosecution of Children
6. Presidential Instruction No. 8 of 2002 concerning the granting of legal certainty to debtors who have completed their obligations or legal actions to debtors who do not settle their obligations under the settlement of shareholders' obligations
7. Memorandum of Understanding No. 20 / PRS-2 / KEP / 2005 DitBinReh Sos Depsos RI and DitPas DepKumHAM RI about coaching outside institutions for children dealing with law
8. Circular of the Chief of the Supreme Court of the Republic of Indonesia MA / Kumdil / 31 / I / K / 2005 concerning the obligation of each PN to convene a special courtroom & special waiting room for children to be tried.
9. The appeal of the Chairperson of MARI to avoid detention of children and prioritize decisions rather than imprisonment, 16 July 2007.
10. Regulation of KAPOLRI 10/2007, 6 July 2007 concerning the Women and Children Service Unit (PPA) and 3/2008 concerning the Establishment of RPK and Procedures for Examining Witnesses / Victims of Crime.
11. TR / 1124 / XI / 2006 from the National Police Headquarters, 16 Nov 2006 and TR / 395 / VI / 2008 9 June 2008, concerning the Implementation of Diversity and Restorative Justice in Handling the Cases of Perpetrators of Children and the Fulfillment of the Best Interests of Children in the Case of Children As Actors, Victims Or Witness.
12. Joint Agreement between the Ministry of Social Affairs Number: 12 / PRS-2 / KPTS / 2009, Ministry of Law and Human Rights RI Number: M.HH.04.HM.03.02 Th 2009, Ministry of National Education Republic of Indonesia Number 11 / XII / KB / 2009, Ministry of Religion RI Number: 06 / XII / 2009, and National Police of the Republic of Indonesia Number: B / 43 / XII / 2009 concerning Social Protection and Rehabilitation of Children Against the Law, on 15 December 2009.
13. Joint Decree of the Chief of the Supreme Court of the Republic of Indonesia, Indonesian Attorney General, Indonesian National Police Chief, Minister of Law and Human Rights of the Republic of Indonesia, RI Minister of Social Affairs, Minister of Women's Empowerment and Child Protection, NO. 166/KMA/SKB/XII/2009, NO .148A/A/JA/12/2009, NO. B/45/XII/2009, NO.M.HH-08 HM.03.02 of 2009, NO. 10/PRS-2/KPTS/2009, NO. 02/Men.PP and PA/XII/2009 dated December 22, 2009 concerning the Handling of Children Against the Law.

³ Bambang Waluyo, *Viktologi Perlindungan Saksi dan Korban*, Jakarta : Sinar Grafika, 2011, p. 8

14. National Police Chief No Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 concerning Case Handling through Dispute Resolution (ADR) Alternatives.
15. Regulation of the Chief of the National Police of the Republic of Indonesia Number 7 of 2008 concerning Basic Guidelines for the Strategy and Implementation of Community Policing in the Implementation of Polri Duties.
16. Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Justice System
17. Republic of Indonesia Law Number 12 of 1995 concerning Corrections.

The purpose of criminal prosecution to carry out the supporting function of the criminal law function in general which is to be achieved as the ultimate goal is the realization of welfare and public protection (Social defense and social welfare).⁴

The criminal purpose and punishment of the perpetrator of a crime, because one part that is inseparable from criminal law is the punishment itself. It is not a criminal law a regulation that only regulates the norm without being followed by a criminal threat. Crimes handed down for those who are considered wrong are an attitude of suffering that must be followed, however, criminal sanctions are not solely intended to bind pain.⁵

Crime is essentially a tool to achieve the objectives and how to formulate these goals in the concept or material of a law which the establishment wants to enforce by including a criminal code. In addition to being enforced, there are also criminal objectives and criminal terms. The purpose of punishment is community protection and protection or coaching of the perpetrators. Barda Nawawi Arief stated,⁶ that crime is essentially only a tool to achieve goals that depart from the balance of two main objectives, namely the protection of society and the protection or coaching of individual perpetrators of crimes. Starting from this equilibrium, the terms of punishment according to the concept also depart from the point of view of the monodualistic balance between the interests of society and individual interests, between objective factors and subjective factors.

Thus, the criminal is the sorrow imposed by the state on someone who violates the provisions of the law. Crimes were deliberately dropped by the state against the convicted person to be felt as sorrow. Criminal suffering is the redemption of sin from the maker. With the atonement of sin, the error will be restored to the balance of value in the maker. Self-redemption is a fundamental need for our moral nature.⁷

There are several objectives to be achieved by the conviction G Peter Hoefnagels, as stated by Muladi and Barda Nawawi Arief said that the criminal purpose is to:

- a. Conflict resolution (Conflict resolution)
- b. Influence violators and other people towards more or less lawful acts (influencing offenders and possibly other thanenders toward more or less law-conforming behavior).

The concept of Restorative justice has actually appeared quite a long time, more than 20 years ago as an alternative solution to criminal cases, especially children with various considerations. As stated by John Braithwaite, restorative justice is a new direction between "justice" and "welfare model", then between retribution "and" rehabilitation ".⁸ In North America, Austria and parts of Europe, restorative justice has been applied at all stages of the conventional criminal justice process, namely the stages of investigation and prosecution, the adjudication stage and the imprisonment stage.⁹

In the development of growth and the spread of restorative justice has the support of the United Nations (UN). At the 5th Five-Year Congress in Geneva in 1975, the United Nations began to pay attention to compensation for victims of crime, as an alternative to retributive criminal justice.

The original concept of restorative justice practices comes from the practice of peacekeeping used by Maori tribes (indigenous tribes in New Zealand), when conflicts arise, restorative practices will deal with the perpetrators, victims and stakeholders.¹⁰

Jeff Chistian, an international correctional expert from Canada said that in fact, restorative justice has been practiced in many societies thousands of years ago, long before the birth of the formalities of state law, now called modern law.¹¹

⁴ Barda Nawawi Arief, *Teori-teori dan Kebijakan Pidana “ Kebijakan Penanggulangan Kejahatan dengan Hukum Pidana*, Alumni, Bandung, 1992, p. 153.

⁵ Naniek suparni, *Eksistensi Pidana denda Dalam sistem Pidana dan ppidanaan*, Jakarta : Sinar Grafika, 1993, pp. 1-2

⁶ Barda Nawawi Arief, *Bunga Rampai Kebijakan hukum Pidana*, Bandung : Citra Aditya Bakti, 2002, p 88

⁷ Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara*, Semarang : Badan Penerbit UNDIP, 2000, p. 159

⁸ John Brithwaite, *Restorative Justice and responsive Regulation*, Oxford :University Press, 2002.

⁹ Eriyanto Wahid, *Keadilan Restoratif dan Peradilan Konvensional dalam Hukum Pidana*, Jakarta : Universitas Trisakti, 2009, p 1.

¹⁰ Hadi Supeno, *Kriminalisasi Anak, tawaran Gagasan Radikal Peradilan Anak Tanpa Pidanaan*, Jakarta : Gramedia, 2010, p. 196

He pointed out that in the old British society, before the State law was applied, restorative law was used. Canada as a former British colonial state also has a legacy of restorative justice paradigm. The same thing applies in Australia, New Zealand, even America itself has a mechanism to practice restorative justice.

Basically, restorative justice prioritizes the meaning of the meeting between parties with an interest in crime and the period thereafter, as stated by Achmad Ali who cites the opinion of Howard Zher, a pioneer of restorative justice in the United States, meaning that restorative justice is a process that involves interested parties from a special violations and jointly identify losses and fulfill obligations and needs and place changes as rights that must be received.¹²

Based on this opinion, efforts to resolve conflicts and at the same time healing between perpetrators and victims is the way to bring together or introduce actors in one forum with victims or their families to foster empathy on both sides.

Thus, in resolving conflicts that are highlighted rather than asserting the mistakes of violators then imposing criminal sanctions, but the active role of the parties in conflict through mediation or compensation for material and immaterial losses in the form of restitution or compensation and restoration of the honor of humanitarian relations between the parties (humanization). Van Ness, as quoted by Mudzakkir, said that restorative justice is characterized by several prepositions, namely: 13

- a. Crime is a conflict between individuals that causes harm to the victim, the community and the perpetrator itself;
- b. The goal that must be achieved from the criminal justice process is to reconcile between parties while repairing the losses caused by crime;
- c. The criminal justice process must facilitate the active participation of victims, violators and the public, not necessarily criminal justice dominated by the state by excluding others.

Based on the aforementioned opinions, the criminal justice system should be carried out in a variety of approaches that continue to uphold justice for victims and perpetrators. Theoretically there are 3 (three) models that place restorative justice relations with the criminal justice system, namely:¹⁴

- a. As part of the criminal justice system. It is reasonable if restorative justice as a punishment considering the nature of punishment is compelling, telling along with the emergence of guilt and remorse in the perpetrator;
- b. Outside the criminal justice system through other institutions / institutions outside the system. The view of restorative justice is inversely proportional to the criminal justice system which is forbidding the harsh nature of criminal law or referred to as soft justice because it must be outside the criminal justice system;
- c. Outside the criminal justice system by continuing to involve law enforcement. This is an illustration of a quasi system where the emphasis here is that the settlement model with a restorative approach must still coexist with the criminal justice system because basically this settlement model can be used as the basis for the handling of criminal cases whose purpose is directed at the good of the perpetrators, victims and the community. In addition to making it part of a legitimate mechanism in the country's legal system.

Furthermore, if seen from the regulation on restorative justice as an effort to resolve criminal cases, it has been recognized internationally. This concept is also in accordance with the law that lives in Indonesian society (customary law). In Indonesia alone, the concept of restorative justice has long been practiced in Indonesian society, such as people in Papua, Bali, Toraja, Minangkabau, Klimantan, Central Java and other community communities that still hold strong culture. In practice the settlement is done by meeting or consensus deliberations attended by community leaders, perpetrators, victims, and perpetrators / family parents to reach an agreement to correct mistakes. This is actually a value of the characteristics of the Indonesian philosophy contained in the four precepts of Pancasila, namely consensus, thus, restorative justice is actually not new to the people of Indonesia. If this settlement does not agree between the victim / family of the victim and the perpetrator, then the settlement of the problem is in the process of the existing court mechanism (litigation).

The concept of restorative justice in the reform of criminal law in Indonesia. Efforts to reform the criminal law ("penal reform") are essentially included in the "reasoning policy" which is part and closely related to the "law enforcement policy", "criminal policy", and "social policy". criminal law is essentially:¹⁵

- a. Is part of policy (rational effort) to improve the substance of the law (legal substance) in order to make law enforcement more effective;
- b. Is part of the policy (rational effort) to eradicate / overcome crime in the context of protecting the community;

¹¹ *Ibid*

¹² Ahmad Ali, *Menguak Teori Hukum (Lergal Theori) dan Teori Peradilan (Judicial Prudence)*, Jakarta : Kencana Prenada Media, 2009, p. 247

¹³ Mudzakkir, *Viktinologi : studi kasus di Indonesia, Makalah pada Penataran Nasional Hukum Pidana dan Kriminologi Ke XI*, Surabaya, 2005

¹⁴ Eva Achjani, *Keadilan Restoratif di Indonesia (Studi tentang kemungkinan penerapan pendekatan keadilan restoratif dalam praktek penegakan hukum pidana)*, Disertasi, pada Universitas Indonesia, 2009, pp. 180-183

¹⁵ Barda Nawawi Arief, *Pokok-Pokok Pemikiran (Ide Dasar) Asas-Asas Hukum Pidana Nasional Presented in National Seminar "Asas-asas Hukwn Pidana Nasional"*, by BPHN Departemen Kehakiman dan HAM cooperated with FH UNDIP, in Ciputra Hotel, Semarang, 26 - 27 April 2004

- c. Is part of policy (rational effort) to overcome social problems and humanitarian problems in order to achieve / support national goals (ie "social defense" and "social welfare");
- d. It is an effort to review and re-evaluate ("reorientation and re-evaluation") main points of thought, basic ideas, or socio-philosophical, socio-political, and socio-cultural values that underlie criminal policies and policies (enforcement) criminal law so far. It is not a reformation ("reform") of criminal law, if the value orientation and criminal law cited are the same as the value orientation of the old criminal law of the colonial inheritance (the old Criminal Code or WvS).

Comprehensive criminal law reform must include material criminal law reform (substallfive), formal criminal law (criminal procedural law), and criminal implementation law. The three fields of criminal law must be updated together. If only one field is updated and the other does not, there will be difficulties in the implementation, and the purpose of the reform will not be fully achieved. The main purpose of the reform is crime prevention. The three fields of law are closely related to efforts to combat and eradicate crime.¹⁶

Renewal of the criminal code of law in the form of the Draft Penal Code, is an effort to realize the ideals of the rule of law, so that the Draft Penal Code is a manifestation of that which has an Indonesian personality. Legal reform not only improves the law, but replaces existing law with better law, so that the Draft Penal Code is not just about making the necessary changes that change colonial clothes into National packaging, but rather the actual manifestation of national independence and sovereignty. Even legal reform determines the direction of the formation of the nation's character, from one real condition to an ideal condition, so that the Draft Penal Code is a planned tool of social and cultural transformation of society.

This principle is then known as restorative justice which was introduced in the Draft Penal Code, the emergence of this concept to provide a balance of attention between criminal law stakeholders namely perpetrators, victims, society and the state. This balance is also seen in terms of criminal regulation with the arrangement of actions and the possibility of a combined sanction between criminal and action (double track system) given the heterogeneity of crime problems, as well as awareness of the importance of appropriate therapy for victimless crime.

Thus, restorative justice in handling criminal acts is only seen from the perspective of the law, but also associated with moral, social, economic, religious and local customs aspects as well as various other considerations. In addition, in the development of criminal law at this time also known as penal mediation. In criminal law practice, reasoning mediation is considered a derivative of restorative justice because it does not need to carry out criminal law through the courts. Although the resolution of the Alternative Dispute Resolution (ADR) is general or commonly applied in civil cases, but not for criminal cases it cannot be resolved outside the Court, but in practice for certain matters it may occur, it may even be an outside settlement. The court is ideal.

In the development of theoretical discourse and the development of criminal law reform in various countries there is a strong tendency to use reasoning mediation as an alternative solution to problems in the field of criminal law. It is undeniable, that the practice of law enforcement in Indonesia in criminal cases is resolved outside the Court through the discretion of law enforcement officers, which then leads to demands to positively resolve forms of settlement of cases outside the Court in Indonesia.

The concept of Restorative justice in the Law of the Republic of Indonesia Number 11 of 2012 concerning the Criminal Justice System of Children. In the Law of the Republic of Indonesia Number 11 of 2012, which was ratified on July 30, 2012 has adopted the restorative justice paradigm. Where there are provisions regarding diversion which can be a form of restorative justice. Diversion is a diversion that is presumed to have carried out or without conditions. The principle contained in the implementation of the diversion program is that the prosecution process will not be continued for a child if there is an alternative solution to the case, except for public interest.

The concept of diversion was accepted as the value of restorative justice in the Law of the Republic of Indonesia Number 11 of 2012, among others aimed at encouraging children not to undergo criminal proceedings. The panel of judges who adjudicate must facilitate if requested by the litigant party, and if agreed to make peace then the trial is immediately stopped. It is seen that the criminal law as a maximum remedium is actually applied.

Therefore diversion through the concept of restorative justice is a very important consideration in resolving criminal cases committed by children. Under Article 40 of the Convention on the Rights of the Child, said that the state is obliged to review and establish laws that can be applied specifically to children who are suspected, accused, or admitted to have violated the provisions of criminal law, in order to provide non-imposition of handling measures legal action. The factors that can be taken into consideration in the implementation of the diversion are:

¹⁶ Nyoman Serikat Putra Jaya, *Urgensi Pembahasan Buku I Tentang Ketentuan Umum Hukum Pidana Dalam Ruu Kuhp Dalam Rangka Pembaruan Dan Pembentukan Sistem Hukum Pidana Nasional* presented at *Lokakarya Perencanaan Pembangunan Hukum Nasional Perkembangan Hukum Pidana Dalam Undang-Undang di Luar KUHP dan Kebijakan Kodifikasi Hukum Pidana, diselenggarakan oleh BPHN bekt:rja sama dengan Kanwil Kementerian Hukum dan HAM Jawa Tengah*. Semarang, 3-5 November 2010

1. Nature and condition of actions;
2. Previous violations committed;
3. Degree of involvement of children in cases;
4. The child's attitude towards the act;
5. Reaction of parents and / or family of children to these acts;
6. Impact of actions on victims;
7. Judge's view of the background and causes of the act

C. Conclusion

Restorative Justice is a model for solving criminal cases by involving the perpetrators, victims, families of the perpetrators / victims, and other related parties to jointly seek a just solution by emphasizing the restoration of the original state, and not retaliation, where the mechanism is used in a manner consensus deliberations between perpetrators, victims / families of victims, communities and the state as stakeholders of criminal law. The mechanism for resolving criminal cases with a restorative justice approach has long been applied by the Indonesian people. Even developing and existing in people's lives, because concrete can bring mutual benefit and avoid the adverse effects of imprisonment and recovery for victims of their rights, it's just not formally part of the Indonesian legal system.

Criminal law reform in Indonesia has also accommodated the principle of restorative justice as regulated in the National Criminal Code Bill, in which the formulation of criminal types contains restorative properties. Likewise, the law in the criminal justice system of children, so it is very likely that the concept of restorative justice can be used as part of the renewal of criminal law in Indonesia in the future.

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