

THE CONCEPT OF RESTORATIVE JUSTICE IN THE CRIMINAL LEGAL SYSTEM: A BREAKTHROUGH IN LEGAL BENEFITS

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Abstract

Historically, alternative efforts to resolve criminal cases have existed since the Dutch colonial era, even before Indonesia's independence. Currently, there are several forms of resolving criminal cases outside of court in force, namely diversion (transferring the resolution of children's cases from the criminal justice process to a process outside criminal justice in accordance with the Juvenile Criminal Justice System Law), Afkoop (as regulated in Article 82 of the Criminal Code), and Seponeren (dismissal of cases in the public interest by the Attorney General). The aim of this research is to analyze the concept of restorative justice in the criminal law system as a breakthrough in legal benefits. Approach The research method that can be used in this research is the empirical juridical approach. This approach combines a normative juridical approach with an empirical approach. Based on the analysis carried out, restorative justice can be applied in cases that cause financial loss or minor crimes. The principle of restorative justice in resolving criminal cases in Indonesia does not only depend on formal and material criminal law provisions but is also based on a broader concept of punishment. The model for implementing restorative justice in Indonesian criminal procedural law can be found through a criminal resolution mechanism that follows a legitimate legal problem resolution approach, which is reflected in the reform of the criminal justice system in Indonesia, which is based on an evaluation of the criminal justice system.

Keyword: Criminal; Justice; Reformation; Restorative.

A. INTRODUCTION

Indonesia is a legal state founded on Pancasila, with the national and governmental ethos organized around these ideas. With the intention of preserving and advancing human dignity, the Indonesian state regards the law as the ultimate commander¹. Justice, legal clarity, and expediency are the three fundamental values of law that the ideal law enforcement system must be able to uphold. It is difficult to achieve these three fundamental ideals in harmony, both theoretically and practically. Sometimes achieving the values of justice and expediency means sacrificing the value of legal

1 Duwi Aryadi., Implementasi Keadilan Restoratif Dalam Sistem Peradilan Pidana Sebagai Perwujudan Nilai-Nilai Yang Berwawasan Pancasila, *Al Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan*, Vol.9, No.2, 2021, page.138.

certainty. Alternatively, achieving the values of justice and expediency could mean surrendering the value of legal certainty².

The codification and unification of criminal procedural law in Indonesia through the Criminal Procedure Code has been going on for around four decades since the enactment of Law Number 8 of 1981 concerning the Criminal Procedure Code. The law of evidence is part of the Criminal Procedure Law; the main source of the law is Law Number 8 of 1981 concerning Criminal Procedure Law, or KUHAP, State Gazette of the Republic of Indonesia of 1981, Number 76, and its explanation contained in the Supplement to the State Gazette of the Republic of Indonesia, Number 3209, and contained other legal sources of evidence, such as laws, doctrines, or expert opinions Law and Jurisprudence/Court Decisions In the fourth part of the KUHAP Regarding evidence and decisions in ordinary examination procedures, it regulates the system of evidence, various types of evidence, and the strength of evidence. Evidence system regulated in Article 183 of the Criminal Procedure Code various types of evidence are regulated in Article 184 of the Criminal Procedure Code and the strength of evidence is regulated in Articles 185 to 189 of the Criminal Procedure Code. 5 Process Evidence is vital for the judge to determine and decisions on criminal cases³. This was expressed by that the Criminal Procedure Code is the result of comprehensive legal codification and unification in Indonesia, which covers the entire criminal process from the initial stage (discovery of the truth) to cassation at the Supreme Court, even including judicial review/*herziening*.

The Criminal Procedure Code regulates procedural rules in handling criminal cases, while providing legitimacy to suspects or defendants to defend their interests before law enforcement officials.⁴ This explicitly recognizes their inherent human rights and protects them from arbitrary actions⁵. The Criminal Procedure Code seeks to establish legal rules that try to free suspects or defendants, and their families, from misery and despair in the midst of an unfair law enforcement process. In accordance with the spirit of its mandate, suspects or defendants must be treated by adhering to human.

Over time, the Criminal Procedure Code has revealed shortcomings and weaknesses in its implementation. The Criminal Procedure Code is considered no longer in accordance with changes in the government system and legal developments in society, so it needs to be reformed with a more

2 Muhammad Fatahillah Akbar., Pembaharuan Keadilan Restoratif Dalam Sistem Peradilan Pidana Indonesia, *Masalah-Masalah Hukum*, Vol.51, No.2, 2022, page.199–208

3 Ronaldo Naftali and Aji Lukman Ibrahim., Proses Pembuktian Perkara Pidana Dalam Persidangan Yang Dilakukan Secara Online, *Esensi Hukum*, Vol.3, No.2, 2021, page.144–57

4 Herdino Fajar Gemilang and Rosalia Dika Agustanti., Penggunaan Plea Bargaining Dalam Sistem Peradilan Pidana: Menyeimbangkan Efisiensi Dan Keadilan, *Jurnal Interpretasi Hukum*, Vol.4, No.3, 2023, page.422–31.

5 Muhammad Fatahillah Akbar., Pembaharuan Keadilan Restoratif Dalam Sistem Peradilan Pidana Indonesia, *Masalah-Masalah Hukum*, Vol.51, No.2, 2022, page.199–208.

responsive criminal procedural law⁶, noted the existence of two indicators that describe this condition. First, the Criminal Procedure Code is still unable to meet the legal needs of society, especially in the practice of handling criminal cases which are the duty of law enforcement officials to resolve them properly and fairly⁷. Second, legal developments and political changes accompanied by global economic, transportation and technological advances also have an impact on the meaning and substance of the Criminal Procedure Code.

The weakness that is clearly visible in the Criminal Procedure Code is that it gives broad authority to law enforcement officials, especially the police and prosecutors, without being accompanied by adequate monitoring and accountability mechanisms⁸. This increases the potential for abuse and corruption at various stages, starting from determining the suspect, detaining, terminating the investigation (SP3), terminating the prosecution, to carrying out the execution.

Based on these problems, the government has officially submitted a Draft KUHAP (RKUHAP) consisting of 286 articles to the DPR since March 6 2013. However, discussions regarding the RKUHAP have not received sufficient attention and priority in its completion. Only now, the RKUHAP has been included in the list of the 2020-2024 DPR National Legislation Program (Prolegnas).

The Academic Paper in the 2010 RKUHAP outlines the rationale for the urgency of reforming the KUHAP. One of the basic reasons for this is the economic aspect, which states that all articles in the Criminal Procedure Code refer to a justice system that is speedy, simple and low cost. The introduction of a speedy justice system is implemented through mechanisms such as filing cases through "special channels", settlement outside of court (*afdoening buiten proces*), and filing cassation requests to the Supreme Court through the High Court to reduce the workload of the Supreme Court.

On one occasion, Muladi explained that the criminal justice system is a judicial network that involves material criminal law, formal criminal law and criminal implementing law. However, this institution needs to be understood in a social context. The overly formal nature of this system, if only used solely to achieve legal certainty, can have bad consequences by causing injustice.⁹

Based on Muladi's views mentioned previously, it is important for restorative justice in the criminal justice system in Indonesia to have a solid legal basis and be integrated in material criminal law, formal criminal law

6 Harahap, M.Yahya., *Pembahasan Permasalahan Dan Penerapan KUHAP: Penyidikan Dan Penuntutan Edisi Kedua/M.*, Jakarta, Ghalia, 2006.

7 AH Hakim, L., Saimima, IDS, & Putri., *Penerapan Konsep "Plea Bargaining" Dalam Rancangan Kitab Undang-Undang Hukum Acara Pidana (RKUHAP) Dan Manfaatnya Bagi Sistem Peradilan Pidana Di Indonesia*, Yogyakarta, Deepublish, 2020.

8 Miko Susanto Ginting., Menegaskan Kembali Keberadaan Klausula Baku Dalam Perjanjian, *Nucl. Phys.*, Vol.13, No.1, 1999, page.104–16.

9 Randy Pradityo, Restorative Justice Dalam Sistem Peradilan Pidana Anak, *Jurnal Hukum Dan Peradilan*, Vol.5, No.3, 2016, page.319

and criminal implementing law¹⁰. The purpose of this research is to examine the idea of restorative justice in the criminal justice system: a breakthrough in legal advantages, based on the explanation that has been published.

B. RESEARCH METHODS

Approach The research method that can be used in this research is the empirical juridical approach. This approach combines a normative juridical approach and an empirical approach. A normative juridical approach is used to analyze the legal basis and concept of Restorative Justice in the Indonesian criminal law system. An empirical approach is used to collect data and information about the implementation of Restorative Justice in the field. The data used in this research are primary data and secondary data. Primary data was obtained through interviews, observations and case studies. Secondary data was obtained from legal documents, statutory regulations and scientific literature.

C. RESULT AND DISCUSSION

1. The Concept of Restorative Justice in the Criminal Law System in Indonesia

Currently, the criminal justice system in Indonesia applies retributive justice as its main principle. However, what is hoped for is restorative justice, where all parties involved in a criminal act work together to find solutions to deal with the consequences in the future. Restorative justice is a model for resolving criminal cases that emphasizes restoration for victims, perpetrators and society as a whole¹¹.

The main principle of Restorative Justice involves the participation of victims and perpetrators as well as the participation of citizens as facilitators in resolving cases. This provides a guarantee that the victim or perpetrator will no longer disturb the harmony that has been created in society. In a restorative justice perspective, criminal acts are considered as violations against humans and human relations.

Restorative justice can be realized through several methods, such as mediation between victims and perpetrators, family group deliberations, and community services that focus on recovery for both victims and perpetrators. The application of the principles of restorative justice depends on the legal system adopted by a country. If the legal system does not encourage the implementation of Restorative Justice, then this principle cannot be enforced¹². Therefore, the principle of Restorative Justice is an option in designing a country's legal system.

10 KuartPuji Prayitno., Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum In Concreto), *Jurnal Dinamika Hukum*, Vol.12, No.3, 2012, page.407–20

11 Wahid. E., *Keadilan Restoratif Dan Hukuman Konvensional Dalam Hukum Pidana*, Jakarta, Penerbit Universitas Trisakti, 2009

12 Angela Claudia Scolastika Manurung, Made Sugi Hartono, and Dewa Gede Sudika Mangku., Implementasi Tentang Prinsip Restorative Justice Dalam Perkara Tindak Pidana Pengrusakan (Studi Kasus No. Pdm- 532/Bll/08/2020), *Jurnal Komunitas Yustisia*, Vol.4, No.2, 2021, page. 542–53

Even though not all countries implement it, this does not mean that it is impossible to apply the principles of restorative justice to provide justice, certainty and legal benefits¹³.

Law enforcement in Indonesia is currently still facing various problems that need to be resolved, especially in criminal cases involving parties involved in society.¹⁴

In the context of law enforcement in Indonesia, Law Number 8 of 1981 concerning Criminal Procedure Law plays an important role. This criminal procedure law refers to the formal implementation of the law. The term "law enforcement" can be associated with the imposition of crimes or the imposition of sanctions as a concrete form of implementing the law. (No. 8 C.E.)

Related to this, there are three basic concepts in criminal law, namely unlawfulness, error, and criminality¹⁵. Law enforcement is not only related to formal aspects, but must also be based on the regulations made. In making regulations, it is important that every regulation made has value that is beneficial to society.

Law enforcement in Indonesia can be said to be "*communis opinio doctorum*", which means that current law enforcement is deemed to have failed to achieve the objectives mandated by law¹⁶. Therefore, alternatives are needed in law enforcement, such as a Restorative Justice System, where the approach used is a socio-cultural approach, not a normative approach.¹⁷

Dissatisfaction and frustration with the formal justice system has given rise to interest in preserving and strengthening customary law and traditional justice practices, highlighting the need for alternative responses to crime and social disorder. Many of these alternatives provide opportunities for the parties involved, including the surrounding community, to participate in conflict resolution and face the consequences.

Restorative justice programs are based on the belief that parties involved in a conflict should be actively involved in resolving it and mitigating negative consequences. This approach also, in some cases, refers to a return to decision-making structures and local communities. These approaches are also seen as a means of encouraging peaceful conflict resolution, promoting tolerance and inclusivity, building respect for diversity, and strengthening responsible societal practices.

Restorative justice as an important development in human

13 Utomo, Adhi Putranto., Polres Pasuruan Implementation Of Restorative Justice As A Form Of Police Discretion Towards Criminal Acts Of Abuse In Pasuruan Police, *Sivis Pacem*, Vol.1, No.2, 2023, page.131–62.

14 Dr.Fitri Wahyuni, *Dasar-Dasar Hukum Pidana Indonesia*, Perpustakaan Nasional, Jakarta, PT. Nusantara Persada Utama, 2017.

15 Sahat Maruli Tua Situmeang., Penyalahgunaan Data Pribadi Sebagai Bentuk Kejahatan Sempurna Dalam Perspektif Hukum Siber, *Sasi*, Vol.27, No.1, 2021, page.38

16 Fuad Riyadi, Implementation Restorative Justice Case Criminal Persecution In Attorney Country Jepara Perspective Islamic Law, *Экономика Региона*, 2017, page,32.

17 *Ibid.*

thought is based on the traditions of justice found in ancient Arab, Greek, Roman and other civilizations. The restorative approach was even used in murder cases and was practiced in public assemblies in Germanic societies which later spread throughout Europe after the fall of the Roman Empire. In addition, Indian Hindu traditions, Vedic culture, and ancient teachings of Buddhism, Taoism, and Confucianism also have mixed influences with Western influences in the current North Asian context¹⁸.

The restorative approach provides various ways to resolve conflict by involving individuals who were directly involved in or affected by the incident. Community participation in the settlement process is no longer abstract, but more direct and concrete. This process is highly adapted to situations where the parties involved participate voluntarily and have the capacity to engage fully and safely in dialogue and negotiations¹⁹.

Although restorative justice discourse often focuses on restorative justice programs in criminal contexts, it is important to note that restorative approaches are also used in resolving conflict in a variety of other contexts and environments, such as schools and workplaces.

The restorative justice approach focuses on the needs of victims and perpetrators of crimes. Additionally, this approach helps criminals avoid future crimes. This approach is based on a theory of justice that sees crimes and violations as violations against individuals or society, not just against the state. Restorative justice promotes dialogue between victims and offenders, which can provide high victim satisfaction and increase offender accountability²⁰.

Restorative justice is the implementation of respect for victims and is a form of legal respect for victims. This concept can also be applied through a Victim Impact Statement, which is a written statement containing details about the impact of a criminal act on a victim. This statement is given to the judge who will sentence the defendant, and is used to assist in determining the sentence against the perpetrator²¹. When the impact of a crime is known to the court, the court must consider this and related issues in making its sentencing decision. The Victim Impact Statement can contain accurate details regarding personal injuries, losses, or damage experienced by the victim as a direct result of criminal acts, both short and long term. Details regarding emotional and psychological injuries may also be included, and medical reports and related medical expenses may be attached.

Based on this, the role of the Public Prosecutor (*dominis litis*) is in accordance with his duties and authority in the criminal field as regulated in Law Number 16 of 2004 concerning the Republic of Indonesia

18 Eva Achjani Zulfa., Restorative Justice in Indonesia: Traditional Value, *Indonesia Law Review*, Vol.1, No.2, 2011

19 Bennaris Kaban., Ganti Rugi Sebagai Upaya Perlindungan Hak Korban Kejahatan Perspektif Politik Hukum Pidana, Vol.11, No.01, 2023, page.76–92.

20 *Ibid.*

21 Puspitosari Hervina and Priambada Bintara Sura., Victim Impact Statement Model in Criminal Justice System in Restorative Justice, *SHS Web of Conferences*, Vol.54, 2018

Prosecutor's Office, including carrying out prosecutions, carrying out judge's determinations and court decisions that have permanent legal force (Reitz, 1992). As well, as supervising the implementation of conditional criminal decisions, supervised criminal decisions, and conditional release decisions. With these duties and authorities, the role of the Public Prosecutor is very important in realizing law enforcement efforts that are oriented towards fulfilling victims' rights through restitution (restorative justice), as regulated in Articles 48 to 50 of Law Number 21 of 2007 concerning the Eradication of Trafficking Crimes.

2. Application of Restorative Justice Principles in Resolving Criminal Cases in Indonesia

The concept of Restorative Justice involves perpetrators, victims, families and other related parties in resolving criminal acts and their implications with a focus on restoring the original situation. In the context of law enforcement in Indonesia, this approach replaces retaliation against the perpetrator with healing through support for the victim and responsibility for the perpetrator, assisted by family and community if necessary. The Restorative Justice approach also involves community participation in the conflict resolution process with the aim of encouraging peaceful dialogue, tolerance, inclusiveness and responsible community practices.

The application of Restorative Justice is based on the understanding that crimes and violations are basically violations against individuals or society, not just against the state. This approach results in an agreement being reached through a restorative process as a form of conflict resolution. Such agreements may include programs such as reparations, restitution, and community services aimed at meeting individual and collective needs, as well as the responsibilities of various parties to achieve reintegration of victims and perpetrators. The Restorative Justice approach can be applied in a variety of contexts and settings, including criminal cases, schools, and workplaces.

According to Tony Marshall, "Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future". In the process of restorative justice, all parties involved in a specific violation gather together to discuss how to jointly decide how to address the violation's effects going forward²². This concept leads to the conclusion that an agreement between the parties concerned, along with the interests of the future, are prioritized when resolving a criminal conduct through restorative justice. Meanwhile, according to criminologist Adrianus Meliala, the restorative punishment model was introduced because the current criminal justice and punishment system is causing problems. In the current prison system, the aim of punishment is deterrence, revenge and suffering as a

22 L Primasari., *Keadilan Restoratif Dan Pemenuhan Hak Asasi Bagi Anak Yang Berhadapan Dengan Hukum*, Diakses Pada, 36, 2012, 1-7 <https://lushiana.staff.uns.ac.id>.

consequence of one's actions. Punishment indicators are measured by the extent to which convicts comply with prison regulations. So, the approach is more about security (security approach).

To achieve justice for victims and perpetrators, law enforcement needs to be carried out progressively by considering human needs and humanitarian goals. Law is not just an absolute and final text or rule, but must be a moral and conscientious institution capable of serving humans. Justice must be the main goal in law enforcement, by creating a just and prosperous society. In the context of law enforcement for narcotics crimes, the application of Restorative Justice needs to consider the objectives of law enforcement and the position of the perpetrator. However, in narcotics cases, which do not involve victims, the agreement reached in the Restorative Justice approach may not be directly applicable.

According to Article 133 of the Narcotics Law, judges have the authority to decide whether to mandate rehabilitation or to impose jail time. Article 103 of the Narcotics Law gives them this discretion. Additionally, the time spent receiving rehabilitation is included in the sentence-serving period. Because of this, rehabilitation is essentially a component of punishment. For drug abusers, rehabilitation is a way to fulfill their right to health. From a philosophical standpoint, rehabilitation and restorative justice are similar in that both seek to help offenders and victims heal so they can reintegrate into society and abstain from drug use. Therefore, restorative justice for perpetrators of narcotics abuse will be emphasized more on its philosophical aspects through rehabilitation efforts as the state's obligation to restore the condition of perpetrators who are also victims of their own actions.

The development of the criminal justice system in several countries, both those that adhere to common law and civil law legal systems, has not experienced much change from the traditional characteristics of "due process" and "crime control". Therefore, new legal breakthroughs are needed to achieve better criminal law goals. The development of material criminal law without the development of formal criminal law can have a negative impact on the law enforcement process. Therefore, there is a need for compatibility between the development of material and formal criminal law so that law enforcement can run well.

Currently, the criminal justice system in Indonesia still follows the old pattern, except for the juvenile criminal justice system which allows for the resolution of cases outside of court through a Restorative Justice and diversion approach. The implementation of Restorative Justice is supported by the National Police by issuing a priority program for the National Police Chief in implementing restorative justice as a form of fair case resolution, by prioritizing progressive law that not only looks at legal aspects, but also benefits and justice.

3. Restorative Justice Implementation Model That Can Be Applied in Indonesian Criminal Procedure Law

Reforming the criminal justice system in Indonesia is based on legal problem solving which evaluates the current system. A good criminal justice process is a process that is fast, simple and low cost, while still paying attention to the values of justice. A fast and simple judicial process provides legal certainty for suspects/defendants and victims. This also has implications for the costs incurred by parties involved in the judicial process, thereby creating a judicial process with low costs and achieving maximum justice.

One form of reform of the criminal justice system is to adopt a Plea Bargaining or Deferred Prosecution Agreement system. In the context of Restorative Justice, several schemes can be used to fulfill restitution. The Plea-Bargaining System is an interesting topic because it involves confessions as a means of resolving cases, but is also related to the issue of torture in obtaining confessions. Everyone has the right to be free from torture, but in practice confessions obtained through torture still often occur in the criminal justice system in Indonesia. Although confessions obtained through torture should not be used as evidence or a basis for determining a person's guilt, in practice suspects often admit guilt because they were tortured, but have difficulty proving the torture they experienced. This can result in the criminalization of people who are actually innocent or what is usually called a case of wrongful arrest.

The Public Prosecutor has discretion in determining whether to engage in Plea Bargaining, and the defendant cannot force the public prosecutor to agree and engage in the process. Before entering the Plea Guilty stage, the prosecutor must pay attention to the defendant's incompetence, mental capacity and mental condition. This process involves waiving several of the defendant's rights, such as the right to appeal, the right to non-self-incrimination, and the connection with double jeopardy. Even though the right to appeal is waived after a Guilty Plea, the defendant can still file a motion for a new trial if there is a constitutional error in the Plea-Bargaining process. Before reaching a plea agreement, the public prosecutor must consider the defendant's cooperation in uncovering other crimes, the defendant's criminal history, the seriousness of the crime, and the defendant's willingness to take responsibility for his mistakes, including paying restitution to the victim.

It is also important for prosecutors to pay attention to the Victim Impact Statement, which is usually written by the crime victim or their family members if the victim cannot write it themselves. The Victim Impact Statement describes the impact of a criminal act on the victim, including material, financial and emotional losses experienced by the victim after the crime. Some states also take into account the impact of crimes on parole through victim statements. A Victim Impact Statement should avoid details of the criminal act itself, references to the offender's actions unrelated to the sentencing hearing, harsh language directed at the defendant, and personal opinions about the sentencing.

In realizing reform of the criminal justice system, it is necessary to adopt a new system such as Plea Bargaining or Deferred Prosecution Agreement, which is expected to increase the effectiveness and efficiency of the criminal justice process.

D. CONCLUSION

The concept of restorative justice in the criminal law system in Indonesia: Restorative justice focuses on the needs of victims and perpetrators of crimes. This principle can be applied in cases that result in financial losses or cases of minor crimes. The application of restorative justice in resolving criminal cases in Indonesia is not only limited to formal and material criminal law provisions. This concept prioritizes justice that involves perpetrators, victims, and society in an integrated manner. This can be reflected in law enforcement actions to stop investigations, inquiries, or prosecutions as part of the criminal justice system. The model for implementing restorative justice in Indonesian criminal procedural law is based on reforming the criminal justice system which involves legal problem-solving. This reform adopts a new system such as Plea Bargaining or Deferred Prosecution Agreement, with the aim of realizing a more effective and efficient criminal justice process. Thus, the application of restorative justice in the criminal law system in Indonesia can provide alternative case resolution that is fairer and takes into account the interests of victims, perpetrators, and society as a whole.

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