

## The Settlement of Crimes Out of Court (Restorative Justice)

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**Abstract.** Settlement of cases using the litigation route in practice does not always go according to what is expected and aspired to by the Indonesian people. because the settlement of cases using the litigation route in the traditional criminal justice system currently creates new problems, for example the pattern of punishment that is still retaliatory in nature, causes a buildup of cases, does not pay attention to the rights of victims, is not in accordance with the principles of simple justice, lengthy processes, complicated and expensive, settlements are legal and rigid, do not restore the effects of crime, do not reflect justice for society and so on. even though the law was made in essence to provide justice and benefits for humans which is reflected in the values of Pancasila. Seeing these phenomena, In recent developments, a new concept emerged, namely the concept of restorative justice. The concept or approach of restorative justice is considered to be able to overcome various problems in the traditional criminal justice system as mentioned above. This research will discuss the application of restorative justice in the criminal justice system in Indonesia. This research is a normative legal research that is descriptive analytical. The approach used is the statutory approach, the conceptual approach and the legal principles approach. This research will discuss the application of restorative justice in the criminal justice system in Indonesia. The Supreme Court (MA) as a state institution that exercises judicial power and as the peak of the judiciary should adopt or adopt and apply the approach or concept of restorative justice. In this way it is hoped that the judiciary under it (District Court and High Court) will adopt, adhere to and apply the concept of restorative justice. The adoption and application of the concept of restorative justice should be carried out at various levels or judicial processes (levels of investigation, investigation, prosecution, trial in court) and also carried out by advocates and the Judicial Commission.

**Keywords:** Criminal; Justice; Restorative.

### 1. Introduction

In the current development of social life, there are many crimes among Indonesian people which end up in the courts, where people tend to use the courts as an effort to resolve a case which they think conceptually and theoretically will create

justice, but in reality and in fact this in fact, it is not easy to achieve because of its nature which tends to be a win-lose solution, with a reality like this, the settlement of a case through the judicial route which is only a win-lose solution in general often creates a feeling of "bad or disappointed", holding grudges, feeling dissatisfied, feeling unjust is even worse, namely intending to take revenge.

The feeling of discomfort or disappointment that is firmly entrenched in the minds of the losing party will try to seek "justice" at a further level of justice such as the high court, the Supreme Court and even the Constitutional Court. This of course causes a buildup of cases flowing through the courts which can hamper the justice system, especially in Indonesia. From this phenomenon, it is true that what was stated by Joni Emirzon in his book entitled *Alternative Dispute Resolution Out of Court*, that this can generally be categorized as one of the weaknesses for a litigation institution which cannot be avoided even though it has become a provision.<sup>1</sup>

Satjipto Raharjo who stated that the settlement of cases through the justice system which ends in a court verdict is a law enforcement towards a slow track. This is due to enforcement. The law has traveled a long distance, through various levels starting from the Police, the Attorney General's Office, the District Court, the High Court and even up to the Supreme Court which in the end has an impact on the accumulation of cases that are not small in number in the courts.<sup>2</sup> Thus causing the criminal justice system to be less than optimal in its implementation. In addition, justice that is expected through formal means does not necessarily reflect a sense of justice, because it is expensive, prolonged, tiring and does not solve problems and what is even worse is that it is full of practices of corruption, collusion and nepotism.<sup>3</sup> What makes Indonesian law considered to have no soul of justice.

Bambang Sutyoso in his book entitled "*Settlement of Business Disputes, Solutions and Anticipations for Business Enthusiasts in Facing Current and Future Disputes*" states that: Today the settlement of disputes through the courts receives very sharp criticism, both from practitioners and legal theorists because of the role and function of the judiciary is currently considered to be overloaded, slow and a waste

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<sup>1</sup> Joni Emirzon, *Alternative Dispute Resolution Out of Court*, Jakarta, PT Gramedia Pustaka Utama, 2001, . 3-5.

<sup>2</sup> Satjipto Rahardjo, *Other Sides of Law in Indonesia*, Jakarta: Kompas, 2003, .170.

<sup>3</sup> R. Budi Wicaksono, *Community Policing and Restorative Justice as a New Paradigm in Conflict Resolution*, Thesis of the Faculty of Social and Political Sciences, Department of Criminology, Graduate Program, University of Indonesia. Depok, 2008... 47. Furthermore, it can be seen that the court is a place where people hope; a place where justice can be manifested. In reality today, the court turned into a marketplace trade court decisions. In fact, the purpose of the law itself is for justice and to create order and balance in society. See more in: Sudikno Mertokusumo, *Knowing the Law: An Introduction*, Atmajaya University, Yogyakarta 2010., . 99-100.

of time, very expensive and not responsive to the public interest, and considered too formalistic and too technical, moreover the existence of a "judicial mafia" which seems to indicate that judges' decisions can be bought.<sup>4</sup>

During the development of the various problems above, options emerged in resolving cases that ended in litigation which were considered irrelevant to be applied at this time. For this reason, it is necessary to offer a new breakthrough in order to achieve a sense of justice in deciding cases, namely by implementing the concept of restorative justice where the concept of restorative justice is a popular alternative in various parts of the world for handling and preventing acts against the law in the sense because it offers comprehensive and effective solutions.<sup>5</sup> Restorative justice aims to empower victims, perpetrators, families and communities to correct an unlawful act by using awareness and conviction as a basis for repair social life.<sup>6</sup>

## **2. Research Methods**

In compiling the research this journal was compiled using the library research method which was carried out by examining various secondary data sources in the form of books, journals, and other legal writings related to the research subject. Normative method is also used which is descriptive analysis. The approach used is approach legislation, conceptual approach and legal principles approach. which examines and explains the problem of applying the concept of restorative justice in the Criminal Justice System in Indonesia.

## **3. Result and Discussion**

### **3.1. Definition and Implementation of Restorative Justice**

Restorative justice or other terms often called restorative justice is a new approach in efforts to resolve criminal cases. The approach or concept of restorative justice or restorative justice focuses more on the participation or direct participation of perpetrators, victims and the public in the process of resolving criminal cases. so that this popular approach is also known as the term "non-state justice system" in which the role of the state in the settlement of criminal cases is

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<sup>4</sup> Bambang Sutyoso, Business Dispute Resolution, Solutions and Anticipation for Business Enthusiasts in Facing Current and Future Disputes, Yogyakarta, Citra Media, 2006, . 30.

<sup>5</sup> Gordon Bazemore and Mara Schiff, Juvenile Justice Reform and Restorative justice: Building Theory and Policy from Practice, Willan Publishing, Oregon, 2005, .5. Also quoted by Dewi DS and A. Gratitude Fatahilah, Penal Mediation: Application of Restorative Justice in Indonesian Juvenile Courts, Depok, Indie Publishing, 2011,. 4.

<sup>6</sup> Geoge pavlich, Towards an Ethics of Restorative Justice, in Restorative Justice and The Law, ed Walgrave, L., W Willan Publishing, Oregon, 2002, . 1. Also quoted by: Dewi DS and A. Thankfully Fatahilah, Ibid

small or even non-existent. However, the presence of approaches or concepts of restorative justice is colored by various questions both theoretically and practically.<sup>7</sup>

The main problem for implementing or applying the approach or concept of **restorative justice** is because the mechanism offered by the approach or concept of **restorative justice** prioritizes the concept of peace, the concept of "mediation" and the concept of reconciliation in which perpetrators, victims, enforcement officers the law and the wider community participate directly with each other to take part in resolving criminal cases. So in this case, of course, it is inversely proportional to or contrary to the traditional criminal justice system which is rigid and too formalistic which is more concerned with legal certainty than justice in society.

From the problems above, the background is the focus of a crime and justice achieved on the settlement of a criminal case. The view of the meaning of a crime and punishment adopted in the current traditional criminal justice system is "is a violation of the state, defined by lawbreaking and guilty" (state violations are defined as violations of the law and guilty) so that it is rigid and does not give freedom to victims and defendants in solving their cases.<sup>8</sup>

Justice in the traditional criminal justice system is understood as "proven indictment and sentencing of perpetrators by the State as the holder of sovereignty in imposing crimes. Such authority or power ultimately results in the non-representation of the interests of victims and society in a system that is related to one another."<sup>9</sup>

In contrast to the concept of restorative justice, which was put forward by Tony Marshall stating "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."<sup>10</sup>(restorative justice as a process that involves all parties who have an interest in a particular violation problem to come together to solve collectively and jointly how to address and resolve the consequences of violations and their implications for the

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<sup>7</sup> Eva Achjani Zulfa, <http://evacentre.blogspot.com/2009/11/restorative-justice.html>. "Restorative Justice: Alternative Law". last accessed on Monday, 09 September 2013 at 12.33.

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> Tony Marshall, Restorative Justice: An Overview in London, Home Office Research Development and Statistics Directorate, 1999. Jakarta: Home Office Research Development and Statistics Directorate, 1999., Page. 5. See also in: Kristian, Settlement of Criminal Cases Using the Concept or Approach of Restorative Justice, Especially Mediation (Penal Mediation) in the Indonesian Criminal Law System in View of Legal Philosophy, Journal of Law Mimbar Justitia Vol. VI No. 02 Issue July-December 2014., . 460.

future).<sup>11</sup>The original concept of restorative justice practices comes from the peacekeeping practices used by the Maori people, the indigenous people of New Zealand. When conflicts arise, restorative practices will deal with the perpetrators, victims and stakeholders.<sup>12</sup>

Tonny Marshall's view of the concept of restorative justice, according to the author, is very well applied in order to create justice that puts more emphasis on freedom in resolving cases through a peaceful approach so as to create justice based on the principles of just and civilized human values.

### 3.2. Definition of the Criminal Justice System

The criminal justice system in Indonesia is often alluded to in Muladi's book entitled "Kapita Selekta Criminal Justice System" which argues that the criminal justice system is a network of courts that use material criminal law, formal criminal law and implementing law. criminal. However, this institution must be seen in a social context.<sup>13</sup>An overly formal nature if it is based only for the sake of legal certainty will bring disaster in the form of injustice.<sup>14</sup>It is clear that implementing a justice system that is only concerned with legal certainty and is formal in nature will bring a sense of injustice in society.

The definition of the criminal justice system (criminal justice system) is also known as the law enforcement system because it contains an understanding that basically what these institutions do is a concrete effort or a real effort to uphold abstract legal rules.<sup>15</sup>Regarding the integrated criminal justice system, Muladi in his book entitled "Kapita Selekta Criminal Justice System" emphasizes that the meaning of an integrated criminal justice system or integrated criminal justice system is a synchronization or uniformity and alignment, which can be distinguished in several ways. the following:<sup>16</sup>

- a. structural **sync** (*structural synchronization*) is similarity or harmony in the context of relations between law enforcement agencies;

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<sup>11</sup> Heru Susetyo and the Legal Study Working Team, Report of the Legal Study Team on the Convict Development System Based on the Principles of Restorative Justice, National Legal Development Agency, Ministry of Law and Human Rights of the Republic of Indonesia, 2012., . 9. .

<sup>12</sup> Dewi Yolandasari Lenap, Forms of Legal Protection for Children as Crime Victims Based on Restorative justice, Scientific Journal of Mataram University, Mataram, 2014, 36.

<sup>13</sup> Muladi, Kapita Selekta Criminal Justice System, Semarang: UNDIP Publisher Agency, 1996, . 2.

<sup>14</sup> Muladi, Kapita Selekta Criminal Justice System, . 2.

<sup>15</sup> Bryan A. Garner, Black's Law Dictionary, Eighth Edition, West Publishing CO, United States of America, 2004, . 901.

<sup>16</sup> Muladi, Kapita Selekta Criminal Justice System, . 2.

- b. substantial **sync** (*substantial synchronization*) is the similarity or alignment that is vertical and horizontal in relation to positive law; And
- c. cultural sync (*cultural synchronization*) is harmony in living the views, attitudes and philosophies that as a whole underlie the running of the criminal justice system.

Opinion from Muladi above, according to the author, that the sub-systems contained in the criminal justice system must have the same structural, substantial and cultural. In short, if one of the sub-systems contained in the criminal justice system does not implement the concept or approach of restorative justice then the concept or approach of restorative justice cannot work well.

### **3.3. Application of the Concept of Restorative Justice in Indonesia**

The approach or concept of restorative justice in Indonesia currently raises a question, can the approach or concept of restorative justice be applied in Indonesia? Related to this question, Braithwaite said that "Indonesia is a nation with wonderful resources of intracultural restorative justice. Traditions of deliberation (deliberation) decision by friendly cooperation and deliberation-traverse the archipelago. Adat law at the same time allows for diversity to the point of local criminal laws being written to complement universal national laws.<sup>17</sup>This means that Indonesia is a country with extraordinary intracultural restorative justice resources. The tradition of deliberative decisions with friendly cooperation and deliberations crosses the archipelago. Customary law at the same time allowed for diversity to the point where local criminal laws were written to complement universal national law.

Based on Braithwaite's opinion, it is clear that the practice of problem solving with the approach or concept of restorative justice already exists in the culture of the Indonesian nation as has been done by Indonesian society, although in practice it is still being carried out by certain elite groups of society.

Braithwaite believes that by providing a little training, not only the elite can facilitate problem solving practices with a restorative justice approach or concept but more people, even so, efforts to democratize restorative practices towards Asian people can potentially lead to a mistake. in society.<sup>18</sup>

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<sup>17</sup>Rufinus Hotmaulana Hutauruk, *Overcoming Corporate Crime Through a Restorative Justice Approach A Legal Breakthrough*, Sinar Graphic, 2013..... 109.

<sup>18</sup>Rufinus Hotmaulana Hutauruk, *Overcoming Corporate Crime Through a Restorative Justice Approach is a Legal Breakthrough*, ....109.

Based on the criteria for the development of the concept or approach to **restorative justice** above, if it is associated with the application of the concept or approach to **restorative justice** in Indonesia, the application of the concept or approach to **restorative justice** in Indonesia is only at the stage "can be restorative or at least at the "partially restorative" stage and have not been able to apply (restorative justice) fully because the community tends to view rules that are formal and rigid so that they do not provide other alternatives for perpetrators and victims in solving their problems.

#### **3.4. The Criminal Justice System in Indonesia in Adopting the Concept of Restorative Justice**

The implementation of the justice system in Indonesia in applying the concept of restorative justice can be started from the Supreme Court (MA) as the highest institution in the justice system in Indonesia. This is because the Supreme Court (MA) is a state institution that exercises judicial power and is the peak of the judiciary. As has been expressly regulated in various laws and regulations, for example the 1945 Constitution of the Republic of Indonesia; Act No. 48 of 2009 concerning Judicial Power, Act No. 14 of 1985 as amended by Act No. 5 of 2004 as last amended by Act No. 3 of 2009 concerning the Supreme Court.

Given that the Supreme Court (MA) is a state institution that exercises judicial power and is the peak of the judiciary, it is appropriate for the Supreme Court (MA) to adopt or adhere to and apply an approach or concept of restorative justice to create justice based on values. humanity that has been mandated in the 1945 Constitution.

In this case, the author highlights the Supreme Court (MA) because the Supreme Court (MA) is the pinnacle so that if the Supreme Court (MA) adopts or adheres to and applies the concept of restorative justice, the judiciary under it will adopt, adhere to and apply the concept. restorative justice. In this way, it is hoped that the concept of restorative justice can be applied in the entire justice system in Indonesia, starting from the District Court, the High Court and the Supreme Court itself.

In addition, judges are given freedom by the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, precisely in Article 5 which expressly states that judges are obliged to explore the values that live in society (the living law or local wisdom). Thus, in principle, judges must or are obliged to apply the approach or concept of restorative justice in resolving their cases in order to realize the approach or concept of restorative justice in accordance with the spirit of the Indonesian nation, namely Pancasila, in accordance with customary law values and in accordance with also with religious values, so as to



form a justice system that has a high value of authority in the legal order in Indonesia.

It should also be stated that the concept of restorative justice cannot only be applied to the Supreme Court (MA). In the criminal justice process in general and the criminal justice process in Indonesia in particular, there are several stages or processes that must be passed by seekers of justice at the level of inquiry, investigation, prosecution, examination in court up to the stage of imposing a judge's decision.<sup>19</sup> Even at the stage where justice seekers make legal efforts (both ordinary legal remedies and extraordinary legal remedies). Thus, the authors consider that the adoption and application of the concept of restorative justice should be carried out at various levels or the judicial process as stated above.

Based on the explanation above, the authors also conclude that the concept or approach of restorative justice must be implemented in an integrated manner, meaning that it is carried out in stages starting from the investigation, prosecution and trial stages. This is important considering that if one of these components does not apply the concept or approach of restorative justice, a restorative decision may not be implemented. For example, the police and prosecutors have adopted the concept of restorative justice but judges still adhere to a legal mindset, in cases like this the judge will make decisions that are very normative so that even prisons are unable to apply the concept of restorative justice. Therefore, the approach or concept of restorative justice must be carried out in an integrated manner between one component and the other. Conversely, if one component does not apply the approach or concept of restorative justice, then the approach or concept of restorative justice itself will not be realized properly.

#### 4. Conclusion

Implementation of the concept of **restorative justice** in the integrated criminal justice system in Indonesia has not been carried out in an integrated manner. This is partly because the sub-criminal justice system (police, prosecutors, judiciary, correctional institutions) in Indonesia do not fully understand what exactly is meant by the concept of restorative justice.

#### 5. References

1945 Constitution

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<sup>19</sup> Seeing that the central point in the current Integrated Criminal Justice System is the judge, it is the judge who is most criticized by the public if the decisions they make are deemed not to reflect a sense of justice.



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