

SETTLEMENT OF CRIMINAL CASES WITH RESTORATIVE JUSTICE IN THE CRIMINAL LAW SYSTEM JUDGING FROM THE POLITICS OF CRIMINAL LAW IN INDONESIA

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ABSTRACT

Today, when a crime occurs, society tends to use the court route which conceptually and theoretically will create justice, but in reality, this is something that is not easy to achieve. It should be realized that the results to be achieved from the process of resolving cases through the judiciary are win-lose solutions, with such characteristics, there will be winners and losers. The data analysis used in this study is a qualitative data analysis technique, which can be narrative. The concept or approach of restorative justice must be carried out in an integrated manner. 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 cannot 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. Implementation of the concept of restorative justice (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-systems of criminal justice (police, prosecutors, judiciary, correctional institutions) in Indonesia do not fully understand what exactly is meant by the concept of restorative justice.

Keywords: Restorative Justice, Criminal Justice, Law

ABSTRAK

Saat ini, ketika terjadi kejahatan, masyarakat cenderung menggunakan jalur pengadilan yang secara konseptual dan teoritis akan menciptakan keadilan, namun pada kenyataannya hal tersebut tidak mudah untuk dicapai. Perlu disadari bahwa hasil yang ingin dicapai dari proses penyelesaian perkara melalui peradilan adalah win-lose solution, dengan ciri demikian akan ada yang menang dan ada yang kalah. Analisis data yang digunakan dalam penelitian ini adalah teknik analisis data kualitatif yang dapat dilakukan secara naratif. Konsep atau pendekatan keadilan restoratif harus dilakukan secara terpadu. Hal ini penting mengingat jika salah satu komponen tersebut tidak menerapkan konsep atau pendekatan restorative justice, maka putusan restorative tidak dapat dilaksanakan. Misalnya polisi dan kejaksaan sudah mengadopsi konsep restorative justice tetapi hakim masih menganut pola pikir hukum, dalam kasus seperti ini hakim akan membuat putusan yang sangat normatif sehingga penjara pun tidak bisa menerapkan konsep restorative justice. Oleh karena itu, pendekatan atau konsep restorative justice harus dilakukan secara terpadu antara satu komponen dengan komponen lainnya. Implementasi konsep restorative justice (keadilan restoratif) dalam sistem peradilan pidana terpadu di Indonesia belum dilaksanakan secara terpadu. Hal ini antara lain karena subsistem peradilan pidana (kepolisian, kejaksaan, kejaksaan, pemasyarakatan) di Indonesia belum sepenuhnya memahami apa sebenarnya yang dimaksud dengan konsep restorative justice.

Kata Kunci: Keadilan Restoratif, Peradilan Pidana, Hukum

A. Background

Today, when a crime occurs, society tends to use the court route which conceptually and theoretically will create justice, but in reality, this is something that is not easy to achieve. It should be realized that the results to be achieved from the process of resolving cases through the judicial pathway are win-lose solutions, with such characteristics, there will be winners and losers. With the reality like this, the settlement of a case through traditional justice channels in general often creates an "uncomfortable" feeling of holding grudges, feeling unfair and even worse intending to take revenge.

These things will be firmly entrenched in the minds of the losing party so that he will try to seek "justice" at a further level of justice (both making appeals and cassation for those who are dissatisfied with the high court's decision). With this phenomenon, of course, it has caused the flow of cases through the courts (both at the level of the district court, high court and at the level of the supreme court) to go very fast so that there is a backlog of cases.

Seeing this phenomenon, it is true what was stated by Joni Emirxon in his book entitled alternative dispute resolution outside the 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.¹

A similar statement was made by Satjipto Raharjo which resulted in a court verdict being a law enforcement towards a slow track. This is because law enforcement goes a long way, through various levels starting from the police, prosecutors, district courts, high courts and even up to the supreme court. In the end it has an impact on the accumulation of cases that are not small in number in court.²

In addition, justice that is expected through formal channels does not necessarily reflect a sense of justice, is expensive, prolonged, tiring, does not

¹ Joni Emirzon, *Alternatif Penyelesaian Sengketa di Luar Pengadilan*, Jakarta, PT Gramedia Pustaka Utama, 2001, hlm. 3-5

² Satjipto Rahardjo, *Sisi-Sisi Lain dari Hukum di Indonesia*, Jakarta: Kompas, 2003, hlm.170.

solve problems and what is even worse is that it is full of practices of corruption, collusion and nepotism.³

Apart from causing a backlog of cases, many cases have occurred, particularly in Indonesia, for example the case of theft of flip-flops against AAL, the case of theft of plates against Rasminah, the case of theft of cocoa worth Rp. 2500.00 that befell Aminah, as well as several other similar cases should not be prosecuted and go to court. It was said that because the judge's decisions in these cases and other similar cases were widely criticized by the public because they were deemed not to fulfill a sense of justice.

This is exacerbated by the role and function of the traditional judiciary which is considered to be no longer functioning as it should. Quoting a statement from Bambang Sutiyoso in his book "business dispute resolution, solutions and anticipation for business enthusiasts in dealing with current and future disputes" states that: Today dispute resolution through courts has received sharp criticism, both from practitioners and legal theorists. The role and function of the judiciary today is considered to be overloaded, slow and a waste of time, very expensive and unresponsive to the public interest, or considered too formalistic and too technical, moreover the presence of the "judicial mafia" which seems to indicate that a judge's decision can be bought.

Responding to the various problems above, in recent developments an alternative has emerged, namely by implementing the concept of restorative justice. The concept of restorative justice is a popular alternative in various parts of the world for handling unlawful acts (against the law in the formal sense) because it offers a comprehensive and effective solution.⁴ Restorative justice aims

³ R. Budi Wicaksono, *Community Policing dan Restorative Justice Sebagai Paradigma Baru dalam Resolusi Konflik*, Tesis Fakultas Ilmu Sosial dan Ilmu Politik Departemen Kriminologi Program Pasca Sarjana Universitas Indonesia. Depok, 2008.hlm.47. Lebih lanjut, dapat dilihat bahwa pengadilan sebagai tempat masyarakat berharap; tempat di mana keadilan dapat terwujud. Dalam kenyataannya saat ini, pengadilan berubah menjadi pasar yang memperdagangkan putusan pengadilan. Padahal, tujuan dari hukum itu sendiri adalah untuk keadilan dan menciptakan ketertiban dan juga keseimbangan dalam masyarakat. Lihat selengkapnya dalam: Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, Universitas Atmajaya, Yogyakarta 2010., hlm. 99-100.

⁴ Gordon Bazemore dan Mara Schiff, *Juvenile Justice Reform and Restorative justice: Building Theory and Policy from Practice*, Willan Publishing, Oregon, 2005, hlm.5. Dikutip juga oleh Dewi DS dan A. Syukur Fatahilah, *Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia*, Depok, Indie Publishing, 2011, hlm. 4

to empower victims, perpetrators, families and community to correct an unlawful act by using awareness and conviction as a basis for improving social life

B. Problem Formulation

Referring to the description on the background, several problems are formulated as follows:

1. How is the implementation of the concept of restorative justice in the integrated criminal justice system in Indonesia?
2. Has the integrated criminal justice system in Indonesia adopted the concept of restorative justice?

C. Finding & Discussion

1. Definition of Restorative Justice

The concept of restorative justice or restorative justice is a model of a new approach in efforts to resolve criminal cases. In contrast to the existing system (traditional criminal system), the approach or concept of restorative justice or restorative justice focuses more on the direct participation of perpetrators, victims and the public in the process of settling criminal cases. Therefore, this popular approach is also known as the term "non-state justice system" in which the role of the state in resolving criminal cases is small or even non-existent. However, the presence of approaches or concepts of restorative justice is colored by various questions both theoretically and practically.⁵

The main problem for imposing or implementing a restorative justice approach or concept in a legal system in general and in a criminal justice system in particular lies in the settlement mechanism offered by the approach or concept of restorative justice which is different from the settlement mechanism offered by the existing criminal justice system so that it is still difficult to accept. This is because the mechanism offered by the approach or concept of restorative justice (restorative justice) prioritizes the concept of peace, the concept of "mediation" and the concept of reconciliation in which perpetrators, victims, law enforcement officials and the wider community participate directly in resolving criminal cases,

⁵ Eva Achjani Zulfa, *Geoge pavlich, Towards an Ethics of Restorative Justice, dalam Restorative Justice and The Law*, ed Walgrave, L., WWillan Publishing, Oregon, 2002, hlm. 1. Di kutip juga oleh: Dewi DS dan A. Syukur Fatahilah, *Ibid*.

of course compared reversed or contrary to the traditional criminal justice system that has been in force for a long time and is in effect today.

This is motivated by the focus of attention and views on a crime and the justice that is achieved in a settlement of a criminal case.⁶ 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". Meanwhile, justice in the traditional criminal justice system is understood as "proven indictment and criminal conviction by the state as the holder of sovereignty in imposing crimes." In the end, such authority has an impact on the non-representation of the interests of victims and society in a system that is related to one another.⁷

In contrast to the concept of restorative justice, Tony Marshall and Howard Zehr state the following:

1. 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"⁸ (restorative justice restorative justice as a process involving all parties who have an interest in a particular violation issue to come together to collectively resolve how to address and resolve the consequences of the violation and its implications for the future)⁹
2. Howard Zehr: "viewed through justice lens, "crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reinsurance".¹⁰ (Viewed through the lens of restorative

⁶ *Ibid*

⁷ *Ibid*

⁸ Tony Marshall, Keadilan restoratif: Tinjauan di London, *Home Office Research Development and Statistics Directorate*, 1999. Jakarta: Office Home Penelitian Pengembangan dan Statistik Direktorat, 1999., Page. 5. Lihat juga dalam: Kristian, Penyelesaian Perkara Pidana Dengan Konsep atau Pendekatan Keadilan Restoratif (Restorative Justice) Khususnya Secara Mediasi (Mediasi Penal) Dalam Sistem Hukum Pidana Indonesia Ditinjau Dari Filsafat Hukum, *Jurnal Hukum Mimbar Justitia* Vol. VI No. 02 Edisi Juli-Desember 2014., hlm. 460

⁹ Heru Susetyo dan Tim Kerja Pengkajian Hukum, Laporan Tim Pengkajian Hukum Tentang Sistem Pembinaan Narapidana Berdasarkan Prinsip Restorative Justice, Badan Pembinaan Hukum Nasional Kementerian Hukum Dan Hak Asasi Manusia Republik Indonesia Tahun 2012., hlm.9

¹⁰ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, Scottdale, Pennsylvania; Waterloo, Ontario: Herald Press, 1990. page. 181. Lihat juga dalam: Eva Achjani Zulfa, Keadilan Restoratif dan Revitalisasi Lembaga Adat di Indonesia, *Loc Cit.*, hlm. 188

justice, crime is the violation of people and this relationship creates an obligation to do the right thing. Justice involves victims, perpetrators and society in finding solutions that promote repair, reconciliation and reassurance).

2. Criminal Justice System

Muladi in his book entitled "*Kapita Selekt Sistem Peradilan Pidana*" Criminal Justice System argues that the criminal justice system is a judicial network that uses material criminal law, formal criminal law and criminal law enforcement. However, this institution must be seen in a social context.¹¹ An overly formal nature if it is based only for the sake of legal certainty will bring disaster in the form of injustice¹²

The criminal justice system in Indonesia is strictly regulated in the Criminal Procedure Code (KUHAP) or Law no. 8 of 1981. It is said that because of Law no. 8 of 1981 or the Criminal Procedure Code (KUHAP) is actually synonymous with criminal law enforcement which is a system of power or authorities given to the state in enforcing criminal law, namely the police, prosecutors, judges and correctional institutions.

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 to uphold abstract legal rules.¹³

Related to the integrated criminal justice system or integrated criminal justice system, Muladi in his book entitled "*Kapita Selekt Criminal Justice System*" emphasized that the meaning that the integrated criminal justice system or integrated criminal justice system is a synchronization or uniformity and harmony, which can be distinguished in the following cases:¹⁴

1. Structural synchronization is similarity or harmony in the context of relations between law enforcement agencies;

¹¹ Muladi, *Sistem Peradilan Pidana, Kapita Selekt Semarang*: Badan Penerbit UNDIP, 1996, hlm.

¹² *Ibid*

¹³ Bryan A. Garner, *Black's Law Dictionary Edisi Delapan*, West Publishing CO, Amerika Serikat, 2004, hlm. 901.

¹⁴ Muladi, *Op.Cit.*, hlm. 1-2

2. Substantial synchronization is vertical and horizontal alignment or harmony in relation to positive law; and 3. Cultural synchronization is harmony in living out the views, attitudes and philosophies that as a whole underlie the running of the criminal justice system.

Adding to Muladi's opinion above, the authors assume that the sub-systems contained in the criminal justice system must have the same structural, substantial and cultural (structural, substantial and cultural in applying the concept or approach of restorative justice). 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 properly.

3. Implementation of the concept of restorative justice in Indonesia.

Before discussing further about the implementation of the approach or concept of restorative justice in Indonesia, a question arises, 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"¹⁵

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 or culture of the Indonesian nation as has been done in West Sumatra, even though it was carried out by certain elite groups of society. Braithwaite believes that by providing a little training, it is not only the elite who 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.¹⁶

¹⁵ Rufinus Hotmaulana Hutaauruk, *Penanggulangan Kejahatan Korporasi Melalui Pendekatan Restorative Justice Suatu Terobosan Hukum*, Sinar Grafika, 2013.hlm. 109.

¹⁶ *Ibid*

4. The Concept of Restorative Justice in Indonesia.

The implementation of the concept of restorative justice in Indonesia can be started from the Supreme Court (MA). This is because the Supreme Court (MA) is a state institution that exercises judicial power and is the peak of the judiciary. This is regulated explicitly and clearly in various laws and regulations, for example the 1945 Constitution of the Republic of Indonesia; Law Number 48 of 2009 concerning Judicial Power, Law Number 14 of 1985 as amended by Law Number 5 of 2004 as last amended by Law Number 3 of 2009 concerning the Supreme Court. Thus, considering 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 the approach or concept of restorative justice. 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 also adopt, adhere to and apply the concept of restorative justice. In this way, it is hoped that the concept of restorative justice can be applied to the entire justice system in Indonesia, from the District Courts to the High Courts and the Supreme Court itself.

Apart from that, Article 5 of the Law on Judicial Power, namely the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, specifically in Article 5, unequivocally states that judges are obliged to explore the values that live in society (the living law or local wisdom). Thus, in essence the judge must or is obliged to apply the approach or concept of restorative justice (restorative justice) in resolving cases because the approach or concept of restorative justice (restorative justice) is in accordance with the spirit of the Indonesian nation, namely Pancasila, in accordance with customary law values and in accordance with religious values.

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 justice seekers both at the level of

investigation, investigation, prosecution, examination in court up to the stage of imposing a judge's decision. 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 carried out in an integrated manner. This is important considering that if one of these components does not apply the concept or approach of restorative justice, then a restorative decision is impossible. can 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 cannot 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.

D. Conclusions & Recommendations

Based on this explanation, it can be concluded the following:

1. The 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-systems of criminal justice (police, prosecutors, judiciary, correctional institutions) in Indonesia do not fully understand what exactly is meant by the concept of restorative justice.
2. Judicial institutions in Indonesia have not implemented or fully implemented the concept of restorative justice. This is proven that when viewed from the "series of development of the concept of restorative justice", the implementation of the concept of restorative justice in Indonesia has not been implemented or is included in the "can be restorative" category (meaning that it has not used the concepts of restorative justice) or at least up to the "restorative' stage. part". The

criminal justice system in Indonesia is still at the "can be restorative" stage because victim involvement is not the main concern, decisions are made by parties who are not directly affected, there is no option for dialogue among those directly affected, the focus is on rules or the law that is violated and the consequences of his actions (passive liability), does not focus on efforts to recover the damage or loss experienced. In addition, the author is of the view that the criminal justice system in Indonesia has at least entered the "partially restorative" stage because stakeholders are the key to providing information to a limited degree, some stakeholders have some decisions or input however, the final decision remains created and approved by the formal system. In the partially "restorative" phase, there is limited opportunity for dialogue between various stakeholders, the main concern is paying for the harm and necessity but the main focus is the rule or law that was broken and any consequences that arise and some efforts are made to remedy some very real losses. Often times, harm and remedies are assigned to people other than those directly affected.

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