

# CONCEPT OF RESTORATIVE JUSTICE IN CRIMINAL LAW: SETTLEMENT THROUGH THE APPROACH OF LOCAL WISDOM VALUE

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**Abstract:** "Restorative Justice" is a model approach that emerged in the 1960s in an effort to resolve criminal cases. In contrast to the approach used in the conventional criminal justice system, this approach focuses on the direct participation of perpetrators, victims, and the community in the settlement process. The theory of this approach is still debated, but this view has in fact evolved and has had a great influence on legal policy and practice in several countries. The United Nations through its basic principles views the restorative justice approach as an approach that can be used in a rational criminal justice system. Restorative justice is a concept of thought that supports the development of the criminal justice system by focusing on the necessary community involvement. It also involves victims who are excluded from the current criminal justice system. In several countries, restorative justice has been translated into various formulations to accommodate a variety of values, philosophical foundations, terms, strategies, mechanisms, and programs. A good consultation with the perpetrators and victims themselves can provide a different mindset to the community in preventing problems from arising. This process may involve the police, the prosecutor's office, or traditional institutions. Therefore, without excluding work in the formal legal system, the institutional mechanism for settlement through deliberation works in the community. In various principles and models of restorative justice approaches, the dialogue process between perpetrators and victims is a fundamental and also the most important part of the application of restorative justice. Direct dialogue between the perpetrator and the victim provides an opportunity for the victim to express feelings, hopes for human rights, and the desire to reach a criminal settlement.

**Key Words:** Restorative Justice, Local Wisdom, Criminal Law.

## 1. INTRODUCTION:

Criminal law enforcement is one of the existing means to achieve legal goals. According to Gustav Radbruch (Ali, 2008) who has introduced the theory of "idea des Recht", there are three identified legal objectives, namely: justice, usefulness, and legal certainty. The process of enforcing criminal law in the context of achieving legal objectives is interpreted in the criminal justice system. The criminal justice system is the driving force. Behind the enforcement of criminal law is expected to be able to realize a sense of community justice, legal certainty, and its usefulness for the benefit of mankind.

Santoso (1995, quoted in Twining, 2000:19) initiated the need to accept the concept of interlegality. That we live in an age of legality with legal pores, various networks of law and order that force us to continue to make transitions and crossings. Our legal life is shaped by interlegality. Interlegality is the phenomenological equivalent of legal pluralism and is a key concept in postmodernist legal ideas (Menski, 2008).

The concept of law enforcement in the Indonesian Criminal Code (KUHP) adopts two concepts of the mechanism of the criminal law process, namely criminal acts which are normal offenses and which are complaint offenses (Soesilo, 1995). Complaints are crimes that are reported to be revoked at any time by the complainant, or who are represented by the state by the Police and prosecutors, do not have the authority to take legal proceedings unless it is reported to the competent authority. On the other hand, a normal violation is a form of criminal act that cannot be revoked by the complainant or the complainant at all time, because the Prosecutor has the discretion to sue. In the course of criminal law the development of the law enforcement process has become evidence that in fact reports of cases which are ordinary violations that are often revoked by investigations being called by investigators or public prosecutors, based on friendly considerations, a settlement has been reached between the victim (the reporter) and the suspect, for consideration, humanity, or in the public interest.

One concept that is considered appropriate to be applied in dealing with various legal issues as described above is the approach to the principle of restorative justice. The restorative justice approach in resolving criminal cases (penal) is considered a new method, although most of the patterns applied have been rooted in the value of local wisdom of primitive communities (Sulfa, 2009). The principle of restorative justice is an approach that focuses more on creating

conditions of harmonization and balanced justice for victims and perpetrators of crime (Cruz, 1999). The criminalization-oriented mechanism of criminal and judicial procedures is shifted to a dialogue and mediation process with an orientation on restoring justice for victims and reaching an agreement to settle criminal cases that is more just and balanced for the victims and perpetrators concerned (Sulfa, 2009).

In many countries, there is dissatisfaction and frustration with the application of formal criminal law. The conventional criminal justice system does not offer justice for the community, there is no protection for victims and does not provide benefits to the community. Therefore, the idea arose to look for alternative handling of criminal acts in these countries. The implementation of the long-running and current criminal court process shows that the system is no longer adequate to provide protection of human rights and is also not transparent to the public.

Every five years the United Nations convenes the famous "Congress on the Prevention of Crime and the Treatment of Offenders". The congress discussed the development of crime, handling, and management of criminals, and other related topics. The Congress also welcomes countries to share their experiences of the programs developed as well as emerging practice issues. On this occasion, a number of countries also took advantage of this opportunity to establish a cooperation framework for crime prevention/reduction, particularly for criminal activities across the country.

In 1990 and 1995 Non-Governmental Organizations of several countries sponsored certain sessions of Congressional meetings to discuss restorative justice. Since then, various interests and programs, and policies have been developed with this approach. In the 1995 Cairo congress, a number of sessions discussed sharply and in-depth technical issues related to the use of a restorative justice approach in handling criminal cases. The next congress in 2000 produced the United Nations Basic Principles for the Use of a Restorative Justice Program in Criminal Matters which contained a number of basic principles regarding the use of a restorative justice approach.

The restorative justice approach is currently considered the latest shift from various models and mechanisms in the criminal justice system in handling criminal cases. The United Nations, through its adapted basic principles, argues that a restorative justice approach is an approach that can be used in a rational criminal justice system. This is in line with the views of G.P. Hoefnagels who states that criminal policy must be rational (total rational response to crime) (Muladi & Arief, 1992).

The restorative justice approach is a paradigm that can be used to frame a criminal case management strategy that aims to answer the dissatisfaction of the criminal justice system today. Restorative justice is a concept that responds to the development of the criminal justice system thinking by focusing on community involvement and the perceived needs of victims, which are felt to be sidelined by a mechanism that works within the criminal justice system that is being developed. At the moment. On the other hand, restorative justice is also a new framework of thinking that can be used by law enforcement in responding to a crime.

Here are some definitions of restorative justice:

Restorative justice provides a very different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, not just an abstract violation of laws against the state. Those most directly affected by crime – victims, community members, and offenders – are therefore encouraged to take an active role in the judicial process. Rather than the current focus on punishing offenders, reparation for emotional and material harm resulting from crime is far more important (Umbreit, 1999).

“In the (procedural) view, restorative justice is a process that brings together all stakeholders affected by the loss. It has been done... These stakeholders met in circles to discuss how they had been affected by the harm and reached some agreement on what to do to correct the wrongs suffered. ... Restorative justice is about healing (restorative) rather than hurting” (Braithwaite, 1990).

Seen through the lens of restorative justice, “crime is an offense against people and relationships. This creates an obligation to fix it. Justice engages victims, perpetrators, and communities in finding solutions that promote reparation, reconciliation, and reassurance” (Zehr, 1990).

The definition of restorative justice includes the following fundamental elements: “first, crime is viewed primarily as a conflict between individuals resulting in injury to the victim, the community, and the offender himself; second, the objective of the criminal justice process should be to create peace in the community by reconciling the parties and repairing the wounds caused by disputes; third, the criminal justice process must facilitate the active participation of victims, offenders, and their communities to find solutions to these conflicts” (Galaway & Hudson, 1990).

It is not easy to provide a definition of this restorative justice approach, given the many variations and models developed in the form of its application. Therefore, a lot of terminologies is used to describe the flow of restorative justice, including, "Communitarian justice (justice, communitarian), positive justice (fairness positive), relational justice (relational justice), reparative justice (reparative justice), and community justice (community justice). and communal justice". The term is used to refer to "communitarian justice" which comes from the communitarian theory that is developing in Europe today.

Referring to this understanding, the handling of criminal cases through a restorative justice approach offers different views and approaches in terms of understanding and handling a crime. In the sense of restorative justice, criminal acts are essentially the same as the view of criminal law in general: attacks on individuals and society as well as social relations. However, in the restorative justice approach, the main victim of crime is not a country, as in the current criminal justice system (Siswosoebroto, 2009). Therefore, a crime creates an obligation to repair the relationship damage caused by a crime. Justice, in this approach, means the process of finding solutions to problems in criminal cases. This process involves perpetrators, victims, and the community as important actors in repairing, reconciling, and ensuring the sustainability of improvement efforts.

## 2. METHOD :

This research uses doctrinal research. The doctrinal term used here is to refer to “legal concepts and principles of all kinds-cases, statutes, rules” (Hutchinson & Duncan, 2012). The doctrine has been described “as a synthesis of rules, principles, norms, interpretive guidelines and values.” Doctrinal research is also referred to as pure legal research, which is essentially a library-based study which means that materials needed by a researcher may be available in the library, archives and other databases (Yaqin, 2007). Fundamental research will involve critical analysis of material from both primary and secondary sources.

## 3. RESEARCH RESULT AND DISCUSSION:

### A. Application of restorative justice in some countries

The growing trend shows that restorative justice is only limited to certain crimes and is mostly applied to cases of crimes committed by children and adolescents in New Zealand, England and Wales, the Philippines, and Canada. This view may be different if you look at the case of post-apartheid South Africa. The South African government instead adopted a restorative justice approach to resolve cases of violence perpetrated by the Apartheid regime (Llewelly & Howse, 1997).

The translation of this restorative justice produces various formulations that accommodate various values, philosophical views, terms, strategies, mechanisms, even types of crime, and who is involved in it. Some of the interesting things from these regulations are:

There are several countries such as Australia, Canada, Finland, Ghana, Bulgaria, or Belgium, which translate the concept of mediation as an opportunity that opens a criminal case after being resolved by the interim justice system, or

There are some countries, such as the UK, New Zealand, or South Africa, that incorporate the concept as part of their criminal prosecution system. From these two concepts, it can be seen that restorative justice in the view of the regulator has been translated as a mechanism for handling criminal cases outside the criminal justice system as well as philosophical criminal prosecutions that give birth to new forms of criminal sanctions for conventional types of crime.

The description above offers only a few examples of the many countries that are trying to apply the paradigm of restorative justice in handling criminal cases. It is interesting to see the development of the application of the restorative justice approach that is seen today. The assumption of this paradigm has brought many positive changes that are beneficial for society and the country. Some of these important benefits are:

- a) That the community is given the opportunity to handle their legal problems in a way that is considered fairer. In this case, the principle of simple, clear and direct (or simple, clear, and cash) which is more widely known and used in customary law in handling civil cases can also be applied in criminal law. Moreover, Indonesian customary law basically does not recognize differences in the legal process of criminal or civil cases.
- b) State spending in some cases is reduced for example:
  1. The burden of managing crimes that can still be resolved independently by the community. Police officers, prosecutors, and courts can focus on combating more dangerous crimes such as narcotics, terrorism, human trafficking, or gross violations of human rights.
  2. Administratively, the number of cases that enter the judicial system can be reduced so that the burden on the judiciary is reduced.
- c) Budget expenditure for the criminal justice system can be seen from savings. In particular, correctional institutions, which focus on criminal settlements, mostly end with the imposition of imprisonment on the perpetrators. It is hoped that the birth of new sanctions will be better and more efficient (as is being developed in the draft of law. Criminal Code which is currently used in Indonesia).

## B. Restorative Justice and Local Wisdom

Many authors do not consider restorative justice a new concept. Its existence is probably as old as criminal law itself. Even a thousand years earlier, this approach was touted as the main mechanism for dealing with crime. Marc Levin states that the traditional approach is now expressed as a progressive approach (Levin, 2005). Meanwhile, Hooker explains the basic universal elements of customary law and its system as follows:

- 1) The division of responsibilities is often a function of actual or suspected genealogical relationships;
- 2) Communities, defined by genealogy or territory, almost always have greater rights over land distribution than individual owners or colonists.
- 3) Mutual assistance and mutual assistance institutions provide examples of individual obedience to the same set of obligations;
- 4) And all customary law (adat has the preservation of harmony between society and nature).

The concept of Indonesian customary law in customary justice institutions has also received a concept that can be said to be the root of restorative justice. In Indonesia, the characteristics of customary law in each region/province are generally very supportive in the administration of restorative justice. With regard to violations or violations of customs and the mechanism for resolving them, customary law has its own views. This includes actions that disturb the peace of life or violations of decency in the society. The following are some examples of violations of customary law:

- 1) Action events from the parties in the community;
- 2) Actions that cause balance disorders;
- 3) Balance disorders cause reactions;
- 4) The reaction that appears serves to return from the disturbance state to its original state.

This concept is very different from the notion of crime or offense in the sense of criminal law. Based on this definition, the nature of traditional law can be stated as follows:

- 1) Comprehensive and integrated. Its comprehensive and integrated nature is due to the cosmic background of customary law which is interrelated with one another. As a result, one cannot be separated from the other. Likewise in the field of law, there is no separation between civil and criminal violations, religious or moral violations, and the trial.
- 2) Open. Violation of customary provisions is intended to maintain a sense of justice according to the perception of public awareness and pay attention to time, place, and circumstances ("village", "kala", and "Patra" for the Balinese people). Along with the development of the community, it will also affect the development of settlement provisions in customary law because these provisions are prepared based on deliberation and consensus.
- 3) Distinguishing the problem. Customs violations do not look at the problem solely from the actions and consequences, but also consider the background and who is responsible. This view will provide a new type of settlement and legal action for criminal acts.
- 4) Justice on request. The trial process and the examination of cases that violate customary law are based on a request / or without a request, and a complaint from a person who has been harmed or treated unfairly.
- 5) Reaction or correction action. Law enforcement officers act based on customary reactions; by taking steps to solve crimes not only against the perpetrators, but also carrying out correctional actions against family members or other actors, or to the relevant legal community, with the aim of returning the balance to its original state by holding traditional ceremonies and so on.

In the traditional view, there are no valid circumstances that support the use of force to ensure compliance.

The application of customary sanctions is an effort to return the space (location) to a state that does not interfere with public order. Customary sanctions are an effort to restore the disturbed balance. Therefore, in the past, judicial activities including the criminal justice system could not be separated from religious, cultural and government activities, as well as the economy and other life (UNAFEI, 2000).

During the reign of Majapahit and the reign of Sultan Iskandar Muda, the law book of Kutara Manawa was written by Qonun Mangkuta Alam. The book is labeled as a criminal law book and contains reflections on the application of customary law. This reflection is still a reference in the application of customary law in parts of Indonesia. Article X "Pandecten van het Adatrecht (1936)" explains that customary sanctions can be in the form of:

- 1) Compensation for non-material damages by various means such as forcing to marry the insulted girl;
- 2) Payment of "customary money" to affected people, in the form of sacred objects, not spiritual harm;
- 3) Celebration (of the victim) to cleanse society from all impurities supernaturally
- 4) Closing shame, an apology;

- 5) Various forms of corporal punishment to the death penalty
- 6) Isolation of the community and placing the community outside the legal system (in this case restrictions by being isolated or sanctioned with rights as members of indigenous peoples).

In this case, the main element of restorative justice is the willingness and participation of victims, perpetrators, and the community in repairing criminal acts which also happen to be a feature of customary law. In Kutara Manawa of Astacorah articles 55-56, it is stated that the form of criminal prosecution for perpetrators of theft is as follows (Mulyana, 1979):

If a thief is caught in the theft, he is sentenced to death, his wife and children, property, and land are taken over by the ruling king. If the thief has male and female slaves, he is not taken over by the ruling king but is released from all debts to the thief concerned.

If the thief submits a life proposal, then he must compensate for his release of eight strings, and pay a fine of four laksa to the ruling king, pay compensation to those affected by the return of the stolen goods twice. In this case, Kutara Manawa has implemented a law where the interests of the victim are taken into consideration in the decision of criminal prosecution in the form of restitution of losses.

### C. Prospects in Indonesia

In Indonesian society, public consultation is considered as part of the mechanism for resolving a criminal case. Consultations are carried out by the perpetrators and victims themselves or with the involvement of the police or the prosecutor's office, or customary institutions to influence the public's mindset to better detect problems that arise. Incorporating consultative problem-solving in criminal cases is capturing the mindset underlying restorative justice, as defined above. Therefore, without neglecting the formal functions of the legal system, the use of institutional mechanisms for consultative settlements has been running in the community.

In various principles and models of the restorative justice approach, the dialogue process between the perpetrator and the victim is the fundamental and most important aspect of implementing this justice. Direct dialogue between the perpetrator and the victim allows the victim to express what she feels, expresses her hopes for human rights, and wishes for a criminal settlement. Through the dialogue process, also inspires actors to correct themselves, realize their mistakes, and accept responsibility and the consequences of the crimes committed. From this dialogue process, the public can also participate in forming agreements and monitoring their implementation.

By many writers who study restorative justice, this consultative body is recognized as a highly institutionalized mediation in the civil justice system. A. Victim-Offender Mediation (VOM: Mediation between perpetrator and victim) is a process that encourages a meeting between perpetrator and victim and includes a mediator as coordinator and facilitator of the meeting.

Conferencing is a process similar to VOM, but in this form, there is a difference in that it involves settlement. This does not only involve the perpetrator and the direct victim (primary victim), but also the indirect victims (secondary victim), such as the victim's family or close friends as well as the perpetrator's family and close friends. The reason for the involvement of the parties above is because they can be affected either directly or indirectly in the criminal acts committed. They may have high concern and/or interest in the outcome of the consultation, and they may also participate in the creation of a successful process and end result.

A Circle is another model used in restorative justice. The application of this model compared to the two previously mentioned models involve more stakeholders not only victims, perpetrators, families, or mediators, but also people who care about the case (Ness et al, 2001).

In addition to thinking about the advantages and disadvantages of resolving disputes outside the criminal system that are not formally recognized by applicable law, restorative justice has become a community need. This is closely related to the principles and objectives of criminal prosecution in the customary justice system which is different from the existing formal system, resulting in very different decisions (in this case the author does not see what the positive or negative impacts are). However, in some of these situations, the existence of these institutions in society is still an option to achieve the ultimate goal that cannot be obtained through the criminal justice system, this provides direct benefits that are recognized by the victim, the perpetrator as a community. The real form of compensation is in the form of returning stolen goods, repairing vehicles to providing cash compensation if the victim dies. The criminal settlement mechanism with a restorative justice approach provides a wider role for the community.

In the mechanism of resolving criminal cases with a restorative justice approach, the position of the community is not only seen as an active participant or victim participant. The community through this approach can be given a wider role in monitoring the implementation of criminal case settlement agreements. The implementation can be done in various ways and can include monitoring the rehabilitation of victims. or monitor the implementation of the

perpetrator's accountability, whether it is the restoration of damaged facilities, return of goods, customs compliance, fines, and so on.

The process of handling cases through a restorative approach can be done quickly and precisely. Because it does not go through a convoluted bureaucratic procedure, the settlement process, especially for criminal cases that are settled out of court, both in the criminal justice system and those resolved by the community by traditional institutions can be carried out quickly. This appears to be a simplified model of the settlement system for certain criminal cases. This is a well-known model of criminal settlement through ordinary courts or judicial briefs in Indonesian criminal law proceedings. However, it seems that this mechanism has not answered the community's needs as described above.

Evaluation of criminal settlements with the principle of restorative justice is one of the benchmarks in assessing these cases. Many core values are applied to make restorative justice a pillar in the settlement of criminal cases. Some weaknesses still exist in the understanding of the justice of the restorative approach. The incomplete involvement of the perpetrator and the victim, the principle of pre innocent suspect, the achievement of equality in the settlement process. Weaknesses also still exist in efforts to achieve resolutions that refer to the goals of restorative justice which see the need for perpetrators, victims, and the community to improve social relations between them.

#### 4. CONCLUSION:

Restorative Justice is a model for resolving criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to jointly seek a fair solution by emphasizing restoring the original situation, and not revenge, where the consensus mechanism is used in a way between perpetrators, victims/families of victims, society 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 people of Indonesia. Even developing and existing in people's lives, because concrete can bring mutual benefits and avoid the bad effects of imprisonment and restoration of rights for victims, it is 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, where the formulation of the type of crime contains a restorative nature. Likewise with the law in the juvenile criminal justice system, so it is very possible that the concept of restorative justice can be used as part of reforming criminal law in Indonesia in the future.

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