Implementation of Restorative Justice Principles in Indonesia: A Review

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Abstract

Restorative justice is a phrase that is very popular among law enforcers understood in various dimensions. Simple questions about restorative justice whether a "principle" or "value" or "mechanism or even" program "is interesting to look at the understanding of policymakers and law enforcers as executors in line with efforts to implement it within the criminal equity framework and preventive endeavors and wrongdoing anticipation based on the current legitimate framework that's broadly pertinent in nations around the world. This paper is a literature study that uses secondary data with a qualitative analysis that is used to describe the development of an understanding of restorative justice.

Keywords: Approach, Restorative Justice, Criminal Justice System.

A. INTRODUCTION

In developing an understanding of restorative justice, questions often arise in line with efforts to implement it in the Program of Criminal Justice and to prevent and deal with a crime based on the current legal system that is widely applicable in countries around the world. Then it can be seen various adjustments to then justify that restorative justice applies. Some discussions state that restorative justice is another name for the concept of customary justice, which was abandoned in many eastern countries as a result of colonialism that occurred in the 17th century to the 19th century (Juan et al., 1997). The concept of western law, which is considered to promote "individualism," makes this system different from restorative, which is communal justice (community justice). Institutional models such as the "*Pambarangay* Regulations or *barangay* Justice System" in the Philippines, The National Parole Board of Canada are the place to consult with aboriginal convicts in New Zealand, Communities of Restoration in Colombia, or the Fono (Village Fono Act 1990) in Samoa west is a response where local wisdom owned by traditional institutions began to be returned to its position (Zulfa, 2009). This was justified by Husman & Johnstone, who stated that the important thing from the presence of restorative justice was the placement of community participation in the resolution of criminal cases where this was present from existing customary justice institutions (Johnstone, 2002).

The thesis of Civilization "from Johnstone above, is another part that is often used to criticize the work of the program of criminal justice, That does not seem to be

ideal for the resolution of a dispute outside the legal process. Non-advisory or often termed in layman's language "86" is a negative connotation in which bribery to officers in the resolution of criminal cases becomes dominant (Kunanto, 1996; Partnership, 2002; Zulfa, 2009). This phenomenon arises, one of which is that the victim is not benefited by the operation of the existing criminal justice system.

In comparison, many studies state that victims are not benefited at all by the criminal justice system's operation. The "86" institution seems to be a middle way that is often used to assist victims in resolving other problems that were born as a result of criminal acts such as the return of goods, economic issues taken from the death of the victim, settlement of debts and debts to the recovery of the right name, which is sometimes considered more important than just imposing criminal sanctions on perpetrators. The non-Advisory system, or later known as Penal Mediation, is another term that is Involved in restorative justice or the birth of a Diversi institution recognized In the Indonesian Youth Justice Program Law no. 11 of 2012.

The above then becomes one of the criticisms that inspired the birth of restorative justice. The Basic Principles on the Use of Restorative Justice Services in Criminal Matters in 2000 indicated that 'evolving approaches to a crime that recognizes the rights and responsibility of each person, create empathy and encourages civic cohesion through the reconciliation of victims, criminals, and communities. Determination of the use of restorative justice based on these Basic Principles becomes a separate discussion considering various theories about the purpose of criminal law and the objectives of system of criminal justice never put "respects the dignity and equality of each person, builds understanding, and promotes social harmony" as an objective of the working of the justice system criminal.

From the above explanation, researchers and practitioners often translate the meaning of "restorative justice" based on their version. Some stated it as a concept, approach, theory, and even a program, without seeing how the position of restorative justice in terms of its philosophy and study of the method and the position of the State's role as the owner of the jus punale and juspuniendi. Mistakes are sometimes present in practice when translating restorative justice as an institution of buying freedom or an institution of "transaction settlement" of a criminal case worries the writer.

Discourse in presenting the true meaning of restorative justice from a struggle of concepts, theories, and approaches must be understood in full so that the birth of restorative justice as an objective for the resolution of criminal cases as a means of promotion of the harmonization of social relations in society becomes essential.

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B. METHODOLOGY

This study uses a qualitative approach using a literature study method that uses secondary data with the qualitative analysis to describe the development of an understanding of restorative justice.

C. RESULT AND DISCUSSION

1. Restorative justice as a concept

Presenting restorative justice as an up-to-date concept of thought in handling criminal cases is the same as questioning the role of the State as a tool to guard the sovereignty of society. Referring to the social contract theory, the StateState's role is as the bearer of the people's authority to be protected and protected. (Isomuddin, 2002) In criminal law enforcement, the mechanism for handling criminal acts refers to the objectives of social order as demanded by the State. Through the sub-system of criminal justice, the State is present as an investigator, prosecutor, court, and executor. In Dahrendorf's view, the role of the State is as a coercive tool. The definition of conviction as a violation of the provisions of law and public order, the offender dealing with the State as a law enforcer and punishment is translated as the State's reaction to crime becomes a means of criticism when the victim and the community feel they are not benefited from the current system.

Restorative justice offers a new perspective on seeing crime and law enforcement. The main perpetrator of a crime is not the government, as with the traditional criminal justice system. (Zulfa, 2009). Therefore crime Creation of a duty to fix damaged relations due to a crime (Zulfa, 2009). While justice is interpreted as a process of finding solutions to problems that occur in a criminal case where the involvement of victims, the community, and perpetrators become important in efforts to improve, reconcile and guarantee the sustainability of the improvement effort.

Therefore some parties then understand the concept of restorative justice and alternative dispute resolution, which is better known in the field of civil law. However, when referring to the non-intervention understanding of the State, informal institutions, and informal sanctions developed from the agreement in the ADR, this important development will be felt contrary to the principle of legality known as *lex sripta, lex stricta and lex certa.*

The question that arises then is how to implement the concept in the criminal justice system. Despite the conflicting theories, as stated above, efforts to integrate this concept have been carried out with various programs. The StateState's presence is different from being needed (Ibn Khaldun) to bring together problems in society and find ways to solve them. Therefore the Basic Principles state that The Plan for

Restorative Justice can be used at any level of the criminal justice system, subject to national legislation.

But the problem in practice is that it is not easy to integrate this concept into a system of criminal justice as we believe that the criminal justice system, "The criminal justice system can be defined as the use of a system approach to the implementation of criminal justice. As a system, criminal justice is the product of interactions between laws and regulations, institutional procedures, and social perceptions or conduct. Understanding the system itself involves the consequences of a rationally and effectively-structured mechanism of interaction. (Atmasasmita, 1996). The State (through law enforcement) sometimes forgets that it is a representative of the victims and the community. The mechanism of compensation that is limited in criminal law, which is known only as material loss, translates the meaning of the loss to something that is real and can be calculated, disputes, and revenge that sometimes is not resolved by imposing criminal sanctions into restorative justice.

The change in the State's role through law enforcement, as mandated by Ibn Khaldun, is the main requirement to present a restorative concept in the existing system of criminal justice. Therefore there have to be an "intervention" from the State in the form of the integration of this concept into legislation both in the form of values, principles formulated therein or even in the form of a mechanism (with or without mentioning) that this is an integration of the concept of Restorative justice in the context of criminal justice.

2. **Restorative justice as a theory (purpose of punishment)**

When it comes to incorporating the idea of restorative justice into the criminal justice system, it comes down to concerns regarding the goals to be met through the application of criminal law and the criminal justice system. When comparing with criminal justice theories that develop starting from retributive, deterrence, incapacitation, rehabilitation, resocialization including the concept of a correctional system that is growing at the moment, inevitably it must be recognized that the whole process boils down to the interests of the perpetrators of crime. Examples for example in Penal Code No. 12 of 1995 whereby Article 2 formulates "a penal system implemented to form a Correctional Prisoner in order to become a whole person, realize mistakes, improve themselves, and not repeat a crime so that it can be re-accepted by the community, can actively play a role in the development and can live naturally as a good and responsible citizen. " Abusers in Article 127 paragraph (3) of Narcotics Law are obliged to undergo medical and social rehabilitation if they can be proven or proven to be victims of narcotics abuse as described in the explanation of Article 54 where a person is categorized as A victim of drug addiction when someone unintentionally uses

drugs when he is manipulated, tricked, cheated, coerced and threatened with substance use.

3. Restorative justice as an approach

In the Basic Principles of restorative justice is often translated as an approach. The meaning of the approach is basically as an attitude or view, method, tactic, technique, or model (KBBI: 1995). In the SPPA Law, restorative justice is an approach where this is stated as an attitude or view in The management of the criminal justice system.

Accordingly, Article 1 Number 6 of Law No. 11 of 2012 on the framework of juvenile justice means restorative justice, as restorative justice is the resolution of criminal cases involving the offenders, victims, offenders/victims, and other involved parties to collectively pursue a just resolution by initially stressing reconciliation of the situation, rather than vengeance.

4. Restorative Justice, Diversion and Penal Mediation

As an approach, restorative justice is translated into various forms and programs. The Fundamental Principle states that the parties to all conflicts, the continuity of which is likely to jeopardize the preservation of international peace and security, shall, in the first place, seek solutions by dialogue, inquiry, and mediation: reconciliations, arbitrations, treaties or another mutual way of their choosing (R.E.Mayay, 2000). Therefore variations and forms of approaches used so far in the implementation of restorative justice have varied considerably.

Commonly known forms are diversion and mediation of penalties. These two terms in various literature are often applied interchangeably and are interpreted as common mechanisms in various restorative programs. Some of the following examples:

Children's Act, 1998. (Act 950). Ghana.	*(1) A Child Panel shall assist in victim-offender mediation in minor criminal matters involving a child where the circumstances of the offense are not aggravated.*
Act on Mediation in Criminal and Certain Civil Cases, Finland	This regulation aims to offer a mechanism whereby the perpetrators and victims of a criminal offense can meet in secret with an independent intermediary to discuss all matters relating to the loss suffered by both the victim and the perpetrator (indirectly), including the amount of compensation.
Victims' Rights Act of 2002.	Section 9:

Parliament of New Zealand.	(section 9(1) Meetings to resolve issues relating to offense If a suitable person is available to arrange and facilitate a meeting between a victim and an offender to resolve issues relating to the offense, a judicial officer, a lawyer for an offender, member of court staff, probation officer, or prosecutor should encourage the holding of a meeting of that kind. (section 9(2)): These people should only encourage a meeting if they are satisfied that the victim and offender agree to hold a meeting. The resources required for a meeting to be arranged, facilitated, and held, are available. The holding of a meeting is otherwise practicable and is in all the circumstances appropriate. Section 10: Enforceability of Principles Section 9, and the principles in it guiding the treatment of victims, do not confer any legal right that is enforceable, for example, in a court of law.

While in New Zealand, for example, the Police who handle criminal cases in this country, have 4 (four) options that can be applied to child suspects/defendants, namely:

1. They can use warnings informally.
2. Written warning
3. Designing a program within the diversion program framework
4. Design a family group conferences (although there is no evidence in the juvenile court) (Gabriel Maxwell, 2007)

In Indonesian criminal law, diversion is somewhat different when compared to the significance as formulated in the Black's Law Dictionary, namely:

> *A system that refers to some criminal offenders before the court to community services on vocational training, employment, and the like, which, if completed, can lead to the dismissal of the charges.*

In article 1 point 7 SPPA, diversion is translated as Diversi is Shift of the child's case from the criminal justice process to a procedure outside the criminal justice system. While Article 7 number (1) is formulated at the degree of investigation, prosecution, and review of child cases in the district court must be followed, Diversi. Comparing the

two definitions above, the diversion attempt in court is interesting because of several things, namely:

(a) the variant referred to in the black law dictionary above is more a kind of law enforcement authority to move cases to the sort of settlement out of the court. In the background of the criminal law of Indonesia, this is often paired with police discretion or the prosecutor's opportunity.

While Diversi refers to restorative justice is a form of mediation established by law enforcers to seek agreement between perpetrators and victims as a mechanism that can build the restoration of social relations between the two. In SPPA, this is known as a diversion agreement (compare the provisions of Article 9 to 15 of the SPPA Law with the mechanism as in some of the laws presented in the table above).

(b) Furthermore, looking at what is formulated in the SPPA where the diversion can be translated as part of the discretionary of the judge this is the basic form of the eradication of punishment and not as the basis for the eradication of prosecution (if related to the process in the adjudication phase within the SPP).

A further question is what distinguishes it from the concept of mediation of reasoning. In some of the literature, it is stated that the idea of conciliation of penalties moves far beyond the diversion, as stated above. This concept is often paired with the "buffer process buffer process," formulated in Article 82 of the Criminal Code.

> *The Buffer process Afdoening Institution is a criminal settlement mechanism outside the court allowed by Wetboek Van Straftrecht, the Netherlands. This provision in the Indonesian Penal Code is matched with the provisions contained in Article 82 which are specified in the regulation that the prosecutor / public prosecutor before the start of the trial can determine the requirements (in the Indonesian Penal Code it is stated for criminal acts that are threatened with fines, especially in paragraph (2) the form payment of maximum penalties listed in the criminal threat) to prevent or end the continuation of the prosecution of the criminal case. In the Netherlands, it was stated by Remelink that the provisions in Article 74c Sr., the Police were also given the same authority relating to minor violations (Remelink, 2006).*

In contrast to the diversion, as stated above, the terminology of mediation emphasizes the existence of settlement forms similar to the agreement in civil law. There are two opposing parties. Restorative justice is considered an institution that must accommodate the aspirations or interests of victims, perpetrators, and the community. Restorative justice is a method of reacting to criminal activity by addressing the interests of society, victims, and perpetrators. (UNODC). This view

which then makes the view that in the use of diversion with a restorative approach requires that:

a) there are victims in crime where this approach is used
b) and the existence of perpetrators and krona, who then become the subject or party to the mediation.

It is often questionable in practice whether the perpetrators and victims are mediated or brought together. Based on experience in several European countries (Ness et al., 2001), mediation does not require a direct meeting between the perpetrator and the victim. The mediator can play more roles where he meets one by one with each party until an agreement is reached on restitution to be carried out. This is done to maintain the feel and comfort of each party during the process (Ness et al., 2001). This process often waits for a certain period in which the victim or perpetrator completes a period of rehabilitation (for example, medical or psychological therapy).

In some issues surrounding crime qualifications in the form of "business crimes" or "crimes in the field of assets," mediation of penalties is easier to understand and implement given the characteristics of criminal acts and the objectives to be achieved from a process of settling crime cases in the field of assets (Hulsman, 1986). Recommendation No. (99) 19, adopted by the Committee of Ministers of the Council of Europe on 15 September 1999, a Flexible, thorough, problem-solving, participatory or alternative to conventional criminal proceedings.

In this provision, it is stated that: *The need to improve the active personal involvement of the victim and the suspect and others in criminal proceedings. We will be influenced as individuals, as well as by the participation of the group.*

a) Victims' legitimate interest is to have a stronger voice in coping with the repercussions of their victimization, to connect with the perpetrator, and to seek redress and reparation.

b) Encouraging the sense of guilt of the offender and providing them with real opportunities to make amends can further their reintegration and recovery.

c) Improve understanding of the essential role of individuals and societies in the prevention and management of crime and the resolution of its associated disputes, thereby promoting more proactive and less restrictive criminal justice outcomes.

The question then is whether it is possible to apply restorative justice in serious crimes such as murder, genocide, or gross violations of human rights, Corruption, Terrorism, or even administrative crimes.

5. Restorative Justice in Serious Crimes

Until now, it is still a question as to whether restorative justice can be applied in severe crimes. References that are often raised include the case of southern Africa. The South African government uses a restorative justice approach in resolving cases of violence committed by the Apartheid regime (Llewellyn et al., 1999)

Indeed, lessons from southern Africa can be criticized given that defining the perpetrators in crimes committed by the State becomes difficult. If the actor is a State, is it possible, then the State can declare the use of a restorative approach for itself against the community? Are the concepts of reconciliation and reconciliation a product of restorative justice? South Africa is an excellent example because the apartheid government regime collapsed so that the government that replaced it could then declare the old regime as an actor dealing with the community where the new government was the reconciler. What about the crimes of human rights, for example, in Indonesia, where it is often considered the "regime" in power? In this discussion, the definition of the actor becomes essential.

6. Restorative Justice and Victimless Crime

How about other serious crimes, such as Narcotics. In Nartotika, which is referred to as a victimless crime, what is restorative justice that focuses on the interests of the victim? To this, the concept of indirect victim developed, which later became a justification for the application of restorative justice to crime without victims (Asa, 2018).

What is meant by indirect victims, in this case, includes indirect victims that include families (children, husband, or wife) of the perpetrators or victims? Boyd stated that environmental law issues very dependent on his case in terms of discussing victims (Boyd, 2008). Depending on the type and consequences of environmental crime, victims can be different individuals whose lives, health, or properties are directly affected. Nonetheless, they may also be group members who are more profoundly influenced by future generations or by the climate and non-human biota. (Preston, 2011). Customary settlement in the Garret vs. William case in the river pollution case is stated as a settlement mechanism using restorative justice.

Siti Nafsiah, (2017) discusses this in the issue of dealing with the crime of terrorism. A prominent example is the concept of deradicalization developed for terrorist families in Solo. This program places the families of terrorists as program subjects where they can be considered victims (for terrorist husbands). Still, it is also regarded as potential offenders so that a restorative approach becomes essential to protect victims and prevent perpetrators through various forms of intervention by the State in multiple programs (Nafsiah, 2017).

This discussion becomes interesting where the question of applying restorative justice is asked to corruption crimes. Communities are often included in the qualification of "indirect victims" who are harmed in this crime. What needs to be carefully monitored is when the State demands the restoration of State assets to the actors is translated as a form of restorative justice. The same thing applies when discussed provisions in the Law on Tax Amnesty or in the Tax Law.

7. Community as victims and Public Trust Doctrine

In discussions where the State is the victim, then the reluctance to apply restorative justice is the basic concept of the State as a representative of society and crime by the State to the community. Discussions about defining the community can be declared as victims. The State justifying a settlement is a manifestation of restorative justice is often debated in connection with the view that the settlement is a subjective consideration of the State administrators. In this case, a Principle called the "Public Trust Doctrine" appears. This doctrine arises in connection with the alleged reduction in public trust with the "State" institution (Sax, 1970).

The "Public Trust Doctrine limits the discussion of restorative justice about the State's recovery effort" when relating to natural resources associated with the public interest or public property (res commune). In resolutions where a large number of crimes occur, or a widespread loss occurs, for example, in the case of forest fires, it is difficult for the perpetrator to determine which state intervention is needed to resolve it and carry out a policy restoring damage (EAZ).

D. CONCLUSION

Restorative justice is a method of addressing criminal proceedings involving the society, victims, and perpetrators of crime to obtain justice for both involved so that it is intended to establish the same environment as when the crime occurred to deter more crime from happening. The concept of restorative justice stresses the responsibility of the offenders in an attempt to alleviate the suffering of the victims, without sacrificing the goals of the rehabilitation of the offenders and the development and preservation of public order. The restorative justice approach is a philosophy that attempts to resolve frustration with the functioning of the current criminal justice system. This approach is used as a strategy frame for handling criminal cases.

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