

Conference Paper

Restorative Justice in the Application of Criminal Law

NoenikSoekorini*, Hartoyo

Faculty of Law, Dr. Soetomo University, Surabaya, Indonesia

ORCIDNoenikSoekorini: <https://orcid.org/0000-0002-1960-9006>**Abstract.**

Restorative justice in accordance with the Pancasila way of life. Restorative justice in criminal law is an alternative for resolving criminal cases through a mediation process. Deliberation by involving the criminal acts, victim, family, and other related parties to jointly create a fair agreement between the perpetrator and the victim for the restoration of the situation as before. This research uses normative juridical, namely by reviewing or analyzing legal materials, especially primary legal materials and secondary legal materials by understanding law as a set of positive rules or norms in Indonesia. Restorative justice has been regulated in the Draft Criminal Code which is a hope that will come true. The position of the Criminal Code which is a general provision for criminal legislation outside the Criminal Code will make the position of restorative justice stronger because it will become a benchmark for law enforcement officers to carry out their duties.

Keywords: restorative, justice, criminal law

Corresponding Author:

NoenikSoekorini; email:

rocky_marbun@univpancasila.
ac.id

Published: 4 October 2022

Publishing services provided by
Knowledge E NoenikSoekorini, Hartoyo

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Selection and Peer-review under the responsibility of the INCLAR Conference Committee.

1. INTRODUCTION

Discourse The Indonesian nation as a dignified nation and has a noble soul reflects the noble values of Indonesian culture. The implementation of Indonesia's National development in the context of realizing a just and prosperous society as well as peaceful and prosperous based on Pancasila, the 1945 Constitution of the Republic of Indonesia. Indonesia as a legal state as mandated by the 1945 Constitution cannot be separated from the principle of justice. Justice in accordance with the Indonesian nation is justice based on the Indonesian nation's view of life, namely Pancasila.

Pancasila as the philosophy and way of life of the Indonesian people, there are 5 (five) precepts which cannot be separated from one another. Only the most important thing here is the existence of precepts 1, 2 and 4. As a nation that recognizes the existence of God Almighty, it will uphold the values of humanity. In making decisions, especially regarding important matters relating to human rights, it is always carried out

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by deliberation and consensus based on the reality of the existence of equality and human dignity, freedom of expression and criticism. Through deliberation, it is hoped that a good solution can be found that can be accepted by both parties in particular and the community in general.

Restorative justice that has been expected so far is in accordance with the Pancasila view of life. Restorative justice in the Pancasila view of life is to explore values based on customs that exist in society by involving local traditional leaders. In criminal law, restorative justice is an alternative to resolving a criminal case not through a court but through a mediation process. Deliberations are carried out by involving the criminal acts, victims, families, other related parties and traditional leaders to jointly create a fair agreement between the criminal acts and victims in order to restore the situation as before. The problems, how has the application of and restorative Justice in Criminal Law in Indonesia been carried out as expected.

2. METHODOLOGY/MATERIALS

This research uses studies based on statutory regulations, by reviewing or analyzing legal materials, both primary legal materials and secondary legal materials by understanding law as a set of positive rules or norms in Indonesia. And the approach taken is through a conceptual approach (Conceptual Approach), by studying the views and doctrines that develop in the science of law. By studying the views and doctrines in the science of law, it will be possible to find ideas that give birth to legal understandings. The understanding of these views and doctrines is the basis for building a legal argument in solving the legal issues faced.

3. RESULTS AND DISCUSSIONS

3.1. Various Opinions About Justice

Fair is treating everyone with the same treatment, not impartial, impartial, or in favor of what is right and does not apply arbitrarily. While justice is defined as a trait or act or fair treatment of everyone. Justice can also be said as placing a person in his place / portion, not necessarily equally but in accordance with his rights and obligations. Here are some experts who issue their opinions regarding the meaning of the word justice.

1. Van Apeldoorn

Van Apeldoorn argues that justice can be distinguished into distributive justice, namely justice that can give to everyone according to his services and commutative justice, namely justice that gives everyone as much as he does regardless of his services. Distributive justice refers to the principle of individualization while commutative justice leads to generalization. The two principles of justice are at two opposite poles. The principle of individualization demands legal justice in a substantive sense, while the principle of generalization demands legal certainty. Between the two poles, which are always at odds, need to be synthesized with the principle of expediency. The principle of expediency as a balance between legal certainty and justice [1].

2. Plato

Plato argues that justice is an attitude of obeying all applicable laws and regulations. In addition, he also revealed that justice is something that is beyond the limits of ordinary human abilities and stems from changes in the scope of society, so that justice can be realized by returning to its original structure.

3. Hans Kelsen

Kelsen confirmed that the basis of legal justice is not on the individual but on the legal norms themselves arguing that the standard of justice for each individual in fact differs from one individual to another, and these differences are often irreconcilable with one another. Only for an individual who recognizes the existence of a suitable norm of justice, and this norm only for those who will what the norm requires. It is impossible to define the norm of justice in a particular way. In the end it is a statement of individual interest that states the fairness or injustice of a social institution [2].

4. Teguh Prasetya

Teguh Prasetya with his theory of Dignified Justice states that the law must be able to create a dignified society. The law must be able to humanize humans. The law must uphold human values. Humans are noble creatures created by God Almighty so that it is in accordance with the values of Pancasila so that they must be treated fairly in accordance with their dignity as human beings [3] [4].

5. Kaelan -- Pancasila Justice

Kaelan thinks that The values contained in the fifth precept, namely Social Justice for All Indonesian People, are based on the first principle: Belief in One Supreme God, the second principle: just and civilized humanity, the third principle: Indonesian unity, and the fourth principle: populist values. Led by Wisdom of Wisdom in Deliberation/Representation.[5] In the 5th (five) precepts contained the value of justice that must be realized in life together (social life). Justice is based on and inspired by the

nature of human justice, namely justice in human relations with themselves, humans with other humans, humans with society, nation and state and human relations with God. The values of justice must be a basis that must be realized in living together in a state that strives to realize the state's goals, namely the creation of prosperity, protecting all citizens and their territories, and educating all citizens. And these values of justice serve as the basis for the association between nations in the world and the principle of creating order to live together in an association between nations, eternal peace and social justice [6].

3.2. Restorative Justice

Restorative justice is a non-penal law enforcement effort that has been applied in the customary law of the Indonesian nation.[7] This non-penal law enforcement effort provides solutions to situations that provide a sense of justice not only for one party [8]. Although restorative justice is a solution that is contrary to the principle of legal certainty and the principle of legality that since colonial law in the 18th century was enforced in Indonesia. Our Criminal Law, especially those contained in the provisions of the Criminal Code, has clearly stated that criminal sanctions for criminal acts of the most serious crimes are the death penalty, and then imprisonment, confinement and fines. These criminal sanctions are only for the criminal acts without regard to the position of the victim of the crime. Even though the victim has received legal protection in Law no. 31 of 2014 concerning Amendments to Law No. 13 of 2006 concerning the Protection of Witnesses and Victims but has not been able to fulfill the victim's sense of justice.

The main purpose of restorative justice is to make improvements to the actions of the criminal acts of crimes without compromising the rights of the victims as the injured party through conciliation and reconciliation of the criminal acts, victims and the community. The alternative solution in this case focuses more on peace between the victim and the criminal act which is expected to provide substantial justice, not just based on the law in the text alone [9].

The application of the law that is only based on the law will only produce legal certainty in accordance with the sound of the law without paying attention to the real meaning (legal substance) for the criminal acts and victims, namely a sense of justice [10]. Whereas the purpose of the law that provides happiness, benefit and justice for all people is what is achieved. Respect for human rights is guaranteed.

Our laws and regulations already recognize restorative justice but have not been coordinated in one law. As an example :

1) Law no. 30 of 1999 concerning arbitration and alternative dispute resolution as regulated in Article 1 number 10 which states: Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely an out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert judgment.

2) Law no. 11 of 2012 concerning the Juvenile Criminal Justice System Article 1 number 6 states as follows: Restorative Justice is the settlement of criminal cases by involving the criminal act, victim, family of the criminal act/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation.

3) Memorandum of Understanding with the Chief Justice of the Supreme Court of the Republic of Indonesia, the Minister of Law and Human Rights, the Attorney General and the Chief of the Police of the Republic of Indonesia No. 131/KMS/SKB/X/2012 dated October 17, 2012 regarding the implementation of the adjustment to the TIPIRING limit and the amount of fines for prompt examinations and application of restorative justice which regulates the settlement of criminal cases through the principles of restorative justice

4) Head of National Police Circular SE/8/VII/2018 Year 2018 concerning Guidelines for Handling the settlement of criminal cases with a Restorative justice approach, including the following:

Fulfillment of material requirements, namely

1. Does not cause public unrest and there is no community rejection;
2. does not result in social conflict;
3. there is a statement from all parties involved not to object, and waive the right to sue before the law;
4. The limiting principle;

* For the criminal act: The criminal act's error is relatively light, namely an error (schuld) or mensrea in the form of intention (dolus or opzet), especially intentional as an intention or purpose (opzet als oogmerk); and the criminal act is not a recidivist

* On criminal acts in progress: Investigation and investigation before the SPDP is sent to the Public Prosecutor

Fulfilled formal requirements, namely:

1. Letter of request for reconciliation of both parties (the reporting party and the reported party)
2. The statement of reconciliation (deed of dading) and the settlement of disputes between the litigants (the reporting party and/or the reporting family, the reported party and/or the reported family and representatives of community leaders) are known to the investigators;
3. Minutes of additional examination of the litigants after the settlement of the case through restorative justice (restorative justice)
4. Recommendations for special cases that approve the settlement of restorative justice (restorative justice)
5. The criminal act does not object to responsibility, compensation or is done voluntarily
6. All criminal acts can be carried out by restorative justice for general crimes that do not cause human victims

5) Regulation of the National Police Chief No. 6 of 2019 concerning the investigation of criminal acts Article 12 which contains the same content as the Circular Letter of the Chief of Police SE/8/VII/2018 of 2018

6) The Republic of Indonesia Prosecutor's Office Regulation No. 15 of 2020 concerning termination of prosecution. Based on Restorative Justice Article 1 point 1 states that: Restorative justice is the settlement of criminal cases by involving the criminal act, victim, family/victim, and other related parties to jointly seek a fair solution by emphasizing restoration back to its original state, and not retaliation.

7) Regulation of the Supreme Court of the Republic of Indonesia No. 3 of 2017 concerning guidelines for adjudicating women's cases in conflict with the law

With regard to the principle of justice, especially prioritizing the public interest in addition to the interests of victims and criminal acts, not all types of criminal acts can be resolved with restorative justice. Types of crimes that can be resolved with restorative justice include:

- a. Criminal acts of defamation, slander, humiliation
- b. Minor crime
- c. Cases where the criminal act is still a minor (child age)
- d. Narcotics cases for users
- e. Criminal acts who are elderly, for example above 75 years old

3.3. Restorative Justice Based on the Draft Criminal Code

Restorative justice has been regulated in the Draft Criminal Code which is a hope that will come true [11]. The position of the Criminal Code which is a general provision for criminal legislation outside the Criminal Code will make the position of restorative justice stronger because it will become a benchmark for law enforcement officers to carry out their duties [12]. Restorative justice is implied in article 51 on the purpose of sentencing which states that Sentencing aims to:

1. Preventing the commission of criminal acts by enforcing legal norms for the protection and protection of the community;
2. socialize the convicts by conducting coaching and mentoring so that they become good and useful people;
3. resolve conflicts caused by criminal acts, restore balance, and bring a sense of security and peace in society; and
4. cultivate a sense of remorse and free the guilt of convict

Furthermore, Article 52 of the Criminal Code states that punishment must not demean human dignity and Article 53 paragraph 1 of the Criminal Code which is a sentencing guide states that to try a case, a judge is obliged to uphold law and justice. Paragraph 2 states that if in upholding law and justice there is a conflict between legal certainty and justice, the judge prioritizes justice.

When a judge will decide a case, he must consider before deciding a case, namely:

- a. the effect of criminal sanctions imposed on the criminal act on his future
- b. The effect of the crime committed by the criminal act on the victim
- c. Benefit for the victim and/or his family
- d. The values of law and justice that live in society.

The Draft Criminal Code has also accommodated criminal acts of a criminal act who are elderly or over 75 years of age. For the criminal acts of criminal acts who have reached an advanced age as regulated in Article 70 paragraph 1, as far as possible, they are not sentenced to imprisonment.

4. CONCLUSION AND RECOMMENDATION

4.1. Conclusion

Restorative justice is a mandate given by the Pancasila philosophy which was born from the noble values of the Indonesian nation.

The application of restorative justice can only be applied to certain criminal acts.

4.2. Recommendations

1. It should be strictly regulated in statutory regulations, both material criminal law and formal criminal law
2. It is a must for coordination between law enforcement officers for the realization of justice for criminal acts, victims and peace in society
3. Prepare facilities and infrastructure as well as capable human resources to be able to resolve a case fairly for the sake of repairing and restoring the situation after events and criminal justice processes

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