



The Concept of Restorative Justice and Transformative Justice in the Indonesian Criminal Justice System

Gusti Muhammad Andre; Umi Rozah

Master of Law Study Program, Faculty of Law, Diponegoro University, Indonesia

Email: gustiandre0209@gmail.com; ochadear17@gmail.com

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Abstract

The concept of restoring justice and transforming justice in the Indonesian justice system is, of course, still a new one. Just as the new concept of restorative justice is applied to the child's justice system in the form of a diversion. Whereas in modern systems it is no longer the concept of justice used in law as retribution, but it is restorative justice. However, restorative justice has not been able to address the problem of criminal law. Because restorative justice is focused solely on the perpetrator, the victim and the parties involved, without regard to outside the law of political, social and cultural sides. Therefore, the concept of transformative justice is rebuked capable of being a complementary concept of restorative justice. The transformative concept is a corruption of justice's restorative concept.

Keywords: *Restorative Justice; Transformative Justice; Criminal Justice System*

Introduction

In a life, it turns out that it is inseparable from deeds, crimes or criminal acts (starfbaar feit). For that the existence of law is very necessary. Indeed, the law is the basis, basis, principle, morals and as a guard to achieve the goals of life that are aspired together. Of course the law also has a function to prevent, reduce and eradicate criminal acts.

Because Indonesia is a constitutional state (rechtsstaat), then as a consequence of a constitutional state is a state governed by laws and regulations. In article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia, Indonesia exercises its power based on law. one of the characteristics of Indonesia's rule of law state is the recognition and protection of human rights based on legal provisions and not the will of a person or group which is the basis of power.

The basic implementation of a rule of law state is justice, in this case criminal justice. The many criticisms of the settlement of cases in the criminal justice system are facts. Some of the detrimental facts are trials which often take a long time, are expensive, complicated and in addition, trials are not able to fulfill the sense of justice in society. As a system, of course, there are many factors in cases through the criminal justice mechanism, both in terms of legislation products (legal substance), law enforcement institutions (legal structure) and community legal habits and culture (legal culture). These three things are fundamental in the justice system. The close interrelationship of the three components can be described in the same way as the "running the car" system. If the law is illustrated as a tool or means in the form of a car to achieve a certain goal, then enforcing or implementing the law is essentially synonymous with "running a car". A car as a (legal substance) can only run if it has a driver as a (legal structure), namely (legal structures, officials, law enforcement agencies) and the driver must have a driver's license, while the knowledge of operating a car is synonymous with the science of law "the science of enforcing the law". is (legal culture). Of course, it is not enough just to have a legal driver's license, but you also have to know and master environmental conditions, so that the car can go in the right direction. A car as a (legal substance) can only run if it has a driver as a (legal structure), namely (legal structures, officials, law enforcement agencies) and the driver must have a driver's license, while the knowledge of operating a car is synonymous with the science of law "the science of enforcing the law". is (legal culture). Of course, it is not enough just to have a legal driver's license, but you also have to know and master environmental conditions, so that the car can go in the right direction. A car as a (legal substance) can only run if it has a driver as a (legal structure), namely (legal structures, officials, law enforcement agencies) and the driver must have a driver's license, while the knowledge of operating a car is synonymous with the science of law "the science of enforcing the law". is (legal culture). Of course, it is not enough just to have a legal driver's license, but you also have to know and master environmental conditions, so that the car can go in the right direction.

The discourse that was built to support the intention to make changes to the Criminal Justice System continues to develop following the development of patterns and dynamics in the system of people's lives. Many ideas emerge along with the various perspectives used in order to support the arguments put forward. Of course this diversity is also influenced by the background of each bearer of the idea.

Since the enactment of criminal law (Wetboek van Strafrecht) has become the book of Indonesian criminal law, through law No. 73 of 1958, the orientation of Indonesian criminal law is based on a retributive philosophy. This can be seen from the several types of punishment included in Article 10 of the Criminal Code, which stipulates death penalty and imprisonment as the main punishment. Whereas in the Criminal Code of the Netherlands, Germany and France the type of death penalty has been abolished so that the Criminal Code with a retributive philosophy has been completely abandoned in criminal law in European countries which govern the civil law system as well as countries which adhere to the common law system. If only these countries have experienced reform of their criminal law which was originally oriented towards being retributive to being restorative. What about the Indonesian state which has the Pancasila ideology and has laws that live in a society such as religious law, customary law and habits? Of course, it is very irrelevant and admissible anymore if Indonesian criminal law is still oriented towards retributive justice, but reforms must be made towards restorative justice and even transformative justice. Because this is in accordance with the ideology of the Indonesian nation, namely Pancasila and the religion, customs, culture of the Indonesian nation.

Based on the description above, it can be seen that the problems in this journal are as follows:

1. What is the concept of restorative justice and transformative justice?
2. How is the concept of restorative justice and transformative justice in the Indonesian criminal justice system?

Research Methods

This research was conducted by normative legal research. Normative legal research is also called doctrinal legal research. In this type of research, law is conceptualized as what is written in laws and regulations or law is conceptualized as rules or norms which are standards for human behavior that are considered appropriate.

Discussion

1. The Concept of Restorative Justice and Transformative Justice

A. Restorative Justice Concept

The term restorative justice originated with Albert Elgash in 1977 who tried to distinguish three forms of criminal justice. Each of them is retributive justice, distributive justice and restorative justice. According to Elgash, the focus of retributive justice is to punish the perpetrator for the crime he has committed. Meanwhile, distributive justice has the goal of rehabilitation for the offender. While the main objective of restorative justice is to create a fair trial with the principle of restitution by involving victims and perpetrators in a process that aims to secure reparations for victims and rehabilitation for perpetrators.

According to Marshall, restorative justice is a process of the parties involved in a crime, both victims and perpetrators jointly solving it by overcoming these actions and their implications in the future. Restorative justice can be pursued by five approaches, namely:

1. Court-based Restitutive and Reparative Measures Approach.

Some early reforms to the victim-oriented criminal justice system have involved offenders being required to provide financial restitution or other material forms of damages as part of reparations to victims.

The aim of this approach is:

2. Mediation Programmers' Victim-Offender Approach

- a. Support the recovery process by giving the victim the opportunity to meet with the perpetrator and discuss with him how to deal with the violations that have been committed by the perpetrator.
- b. Support the perpetrators to be directly responsible by requiring them to listen to the victim's explanation about how the impact on the victim was as a result of the perpetrator's violation and giving the perpetrator the opportunity to talk about how to overcome the violations he has committed.
- c. Facilitate and encourage a process that is emotionally empowering and fulfilling for both parties.
- d. Balancing between the public interest (which is at the core of the ordinary criminal justice system) and the private interests of those affected by the violations that have been committed.
- e. Enabling the parties so that they can agree on a way out of the violation that has occurred.

3. Approach restorative conferencing boards initiatives

Conferencing consists of two principle models, namely:

B. *Family group conferencing*, one important factor is the reduction in the criminal justice and family welfare system in terms of the treatment of underage offenders.

4. Approach to community repair boards and citizen panels.

B. *Police led community conferencing* namely the conference conducted by the police with the community who received the impact of a crime and violation.

The panel here consists of people from the local community and those tasked with deciding how to deal with children who break the law and those who need care and protection as an alternative to court decisions.

5. Approach to healing and sentencing circles

Philosophically, healing aims to restore those directly affected by a crime or violation. The main goal is to uphold local community values to reintegrate those who have violated these values. Sentence circle is a process on the initiative of the community that works together with the criminal justice system to reach a consensus regarding sentencing plans.

Meanwhile in Indonesia, actually the concept of restorative justice has long been practiced in Indonesian society, such as people in Papua, Bali, Toraja, Minangkabau, Kalimantan, Central Java, and other communities that still hold strong culture. If a criminal act occurs by someone (including unlawful acts committed by children). In practice, the settlement is carried out in a consensus meeting or deliberation attended by community leaders, the perpetrator, the victim (if desired), and the perpetrator's parents to reach an agreement to correct the mistake. This is actually a value and characteristic of the philosophy of the Indonesian nation which is contained in the fourth principle of Pancasila, namely deliberation for consensus. Thus, restorative justice is actually not a new thing for the people of Indonesia. In deliberation the consensus aims to achieve peace, so that between the perpetrator and the victim there is no "revenge" and the victim can be restored (restored). Deliberation for consensus in the context of restorative justice can be carried out by means of, among others: mediation, payment of compensation, or other methods agreed upon between the victim/victim's family and the perpetrator. Other parties can participate in this matter, for example the police, lawyers or community leaders as intermediaries. If there is no agreement in this settlement between the victim/victim's family and the perpetrator, then the settlement of the problem will be processed through the existing court mechanism (litigation).

B. The Concept of Transformational Justice

Transformative justice was first pioneered by a Canadian law reformer named Ruth Morris in the 1990s, as a critique of restorative justice. Morris argues that although restorative justice is better than a retributive justice system and creates peace between individuals in it, restorative justice has not been able to reach socio-political and economic issues in society. In this case, the settlement of a non-criminal case is solely resolved in a legal perspective, but also always pays attention to political, economic and social aspects.

Although there is no fixed definition of the concept of transformative justice that is mutually agreed upon, the Canadian Law Commission defines transformative justice as a way to deal with conflict by recognizing and responding to the various consequences caused by conflict and taking advantage of the opportunities offered by the conflict by bringing together related individuals collectively. together into a process that promotes recovery and growth (transformative justice is a way of handling conflict that

recognizes and responds to the variety of harm caused by conflict and capitalizes on the opportunities offered by conflict by bringing individuals together in a process that encourages healing and growth)

True transformative justice has the same background as restorative justice. However, the concept of transformative justice has a deeper approach, not only analyzing a person's crime from real actions, but also exploring it from the economic and social dimensions as a whole.

As an illustration, Granny Minah (55 years) stole 3 (three) cocoa pods from the plantation owned by PT Rumpun Sari Antan IV, in Ajibarang District, Banyumas, Central Java. Based on this illustration, transformative justice does not only see the incident as a crime of *ansich* theft, but also looks at it from other social dimensions which are considered to be the cause of the incident, including: why did a 55-year-old grandmother commit the theft, did the grandmother he did so because of evil intentions within himself or was it driven by economic pressure in order to fulfill his life needs both for himself and his family or it could also be due to ignorance of applicable legal provisions.

Observing the above cases, the perspective of restorative justice only discusses specific conflicts between victims and perpetrators, namely between Grandma Minah as the perpetrator of the theft and PT Rumpun Sari Antan IV as the owner of the cocoa tree and who becomes a victim of theft. Meanwhile, the perspective of transformative justice seeks to use this conflict as an opportunity to overcome greater socio-political injustice. In addition, transformative justice is intended to overcome problems where the restorative justice process tends to create a criminal justice process that is "too privatized" which focuses only on the relationship between the victim and the perpetrator so that it covers up the problem of social oppression in the wider society.

As a response to these problems, Donna Coker argues that conflicts must be handled using a public interest approach, and not just an inter-actor mediation or interpersonal mediation approach. Further explained by Wozniak, transformative justice has the goal of changing the broader social structure and the individual structures involved in it. Transformative justice is not only looking for ways to recover the actors of a crime (offender-victim), but also looking for ways to change the individuals involved for the better. Transformative justice aims to provide answers to victims regarding several issues, including:

1. Why are they victims
2. What's the problem,
3. Compensation, and
4. Restoration of peace and security.

The concept of transformative justice is also in line with Richard Quinney's thoughts on critical criminology and security criminology, where according to Quinney in studying the problem of crime it no longer focuses on crime and on the criminal himself alone, but also on the social structure of society. Meanwhile, according to the opinion expressed by Braithwaite, that in order to prevent greater evil from occurring, gentleness is needed which can change human life to the path of love. Therefore, transformative justice exists as a philosophy that aims to create social peace in society, which does not focus only on restoring interpersonal relationships as restorative justice does, but on broader and more comprehensive social change.

Howard Zehr argues that restorative justice and transformative justice are essentially the same concepts, although the differences in terms can lead to some differences in practice. Zehr views that restorative justice and transformative justice both aim at positive social transformation." However, according to the author's opinion, briefly there is a difference between restorative justice and transformative justice, in which transformative justice explicitly aims to achieve social level changes. and changes at the individual level, while restorative justice still questions what things to restore.

2. The Concept of Restorative Justice and Transformative Justice in the Indonesian Criminal Justice System

The criminal justice system in Indonesia that uses a form of restorative justice approach is the juvenile justice system. Its initiators have succeeded in incorporating a new paradigm in the thinking of the criminal justice system which has been conventionally maintained for years. Looking at the history of its formation, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (Government of the Republic of Indonesia, 2012), appears to be a product of legislation initiated by people who are in accordance with their competence. The Draft Law on the Juvenile Criminal Justice System only needs to wait no more than 1 (one) year to be discussed in the Working Meeting of Commission III and was even born in the same year since it was first submitted by the President to the Leaders of the DPR RI with Letter Number R12/Presiden/02/2011 February 16, 2011 (Government of the Republic of Indonesia, 2011). At that time the President assigned the Minister of Law and Human Rights, the Minister of Social Affairs, the State Minister for Women's Empowerment and Child Protection and the State Minister for Administrative Reform and Bureaucratic Reform to represent the President both individually and jointly in discussions with the DPR. The figure who gave birth to this law seems to be no stranger to the struggles of the Indonesian child protection movement, such as Mrs. Linda Agum Gumelar, the Minister of Women's Empowerment and Child Protection at that time, Professor Harkristuti Harkrisnowo as the leading sector representing the Government in working committee meetings (Panja) SPPA Bill and Apong Herlina who was then a commissioner of the Indonesian Child Protection Commission (KPAI). This means that the SPPA Law was born at the right government time. The SPPA Law was born with norms that incorporate more principles and values in the Convention on the Rights of the Child (KHA) as well as other instruments in the development of thinking about human rights, especially with regard to children's rights. What is most special is that the SPPA Law dares to incorporate a law enforcement paradigm with a new approach to justice, which inevitably requires the full commitment of law enforcers to be actively involved in resolving children's problems. The SPPA Law also uses a double-track system of punishment while the Criminal Code just implemented the same system but until now it is still in draft form, so the SPPA Law is already several steps ahead. The forms of criminal sanctions and measures used in the SPPA Law reflect the goals of punishment which follow penal reform by adhering to the neo-classical school, recognizing principles or circumstances that mitigate punishment, based on objective circumstances and taking into account the need for individual coaching. from criminals. The new type of justice promoted by the SPPA Law is a model of justice that will always face a retributive justice model. Restorative justice was born out of the reaction of the Abolitionists who considered that penal means contained structural problems or defects, and did not encourage criminals to become good people again. based on objective circumstances and considering the need for individual guidance from perpetrators of criminal acts. The new type of justice promoted by the SPPA Law is a model of justice that will always face a retributive justice model. Restorative justice was born out of the reaction of the Abolitionists who considered that penal means contained structural problems or defects, and did not encourage criminals to become good people again. based on objective circumstances and considering the need for individual guidance from perpetrators of criminal acts. The new type of justice promoted by the SPPA Law is a model of justice that will always face a retributive justice model. Restorative justice was born out of the reaction of the Abolitionists who considered that penal means contained structural problems or defects, and did not encourage criminals to become good people again.

Restorative justice makes the Indonesian criminal law system enter a new chapter in its development. Restorative justice in the SPPA Law is contained in article 5 of the SPPA Law. Paragraph (1) stipulates that the Juvenile Criminal Justice System must prioritize the Restorative Justice approach. Paragraph (2) provides an explanation of the juvenile justice system regulated in paragraph (1) including: a. criminal investigation and prosecution of children carried out in accordance with the provisions of laws and regulations, unless otherwise stipulated in this law; b. trials of children conducted by courts within the general court environment; and c. guidance, guidance, supervision, and/or assistance during the

process of executing a crime or action and after serving a crime or action. Then paragraph (3) stipulates that in the Juvenile Criminal Justice System as referred to in paragraph (2) at the stage of investigation up to trial it is mandatory to seek diversion (Government of the Republic of Indonesia, 2012). Even though the restorative justice approach is considered a new justice approach that can be accepted in the modern criminal justice system which refers to the modern justice system, of course the concept will be questioned considering that the method is not well known in the criminal justice system which is accepted in criminal procedural law in Indonesia. The SPPA Law has adopted a restorative justice approach as stated in article 5 of the law in question. Where based on the provisions of the article referred to as a restorative justice approach is carried out in every stage of examination from investigation, prosecution,

a. Legal Substance

Meanwhile, regarding the concept of transformative justice in the criminal justice system in Indonesia, it seems that there are still obstacles and obstacles in its application. Because seeing this concept is also new, of course it is not easy if you want to apply it in Indonesia. These constraints come from legal substance, legal structure and legal culture, the following is an explanation:

At present there is no regulatory product that regulates rigidly and comprehensively related to transformative justice, even the principles of restorative justice are still partially regulated in certain articles in the laws and regulations that apply in Indonesia. Only in the juvenile justice system that regulates quite completely the application of restorative justice by law enforcement agencies is only the provisions contained in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which regulates the existence of a diversion mechanism. Namely through the transfer of settlements from the criminal justice process to processes outside the criminal justice.

In fact, in Law Number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia, in particular the provisions of Article 8 paragraph (4), it implicitly contains the spirit of transformative justice, namely encouraging prosecutors to always act based on the law by heeding religious norms, decency, decency, and must explore and uphold human values that live in society, and always maintain the honor and dignity of their profession, in carrying out their duties and authorities. However, due to the absence of clearer and technical implementing regulations, has created difficulties for law enforcement officials to apply this transformative justice. Therefore,

b. Legal Structure

One of the biggest obstacles for law enforcement officials and law enforcement institutions to be able to implement transformative-based justice is the tradition of the civil law system which is still a reference in law enforcement practice. In the tradition of the civil law system, written legal rules are the main basis for the implementation of the justice system. Moreover, in doctrine, the prosecutor's office together with the police are known as the strong arm of law (*desterkearm van dewet*). Unlike the case with judges, who do not absolutely adhere to the doctrine of judges as mouthpieces of law, where judges have shifted to being the mouthpiece of justice. Therefore,

c. Legal Culture

In terms of legal culture, the public actually prefers the settlement of criminal cases peacefully, without going through a formal court institution. However, the public, apart from the parties directly involved in a criminal case, generally still lacks confidence in the professionalism and integrity of law enforcement officials. It is even possible if the parties involved in a criminal case also object to the settlement of criminal cases outside the court mediated by law enforcement officials. It is time to think about these various obstacles and obstacles together. This is important so that the settlement of criminal cases is not always resolved through formal channels which are more deterrent in nature. It is time for law

enforcement officials to implement transformative justice mechanisms in resolving criminal cases. With the application of transformative justice mechanisms, it is expected to have a positive impact that can be directly felt by the perpetrators and their families, victims and their families, the community of perpetrators or victims, and the general public. In addition, the application of this concept can also have a positive impact on each component of the criminal justice system, so that law enforcement officials can focus more on criminal offenses that really require attention and thought and pose a threat to society at large. Thus, the purpose of law enforcement, namely legal certainty, justice and benefits can be properly realized. With the application of transformative justice mechanisms, it is expected to have a positive impact that can be directly felt by the perpetrators and their families, victims and their families, the community of perpetrators or victims, and the general public. In addition, the application of this concept can also have a positive impact on each component of the criminal justice system, so that law enforcement officials can focus more on criminal offenses that really require attention and thought and pose a threat to society at large. Thus, the purpose of law enforcement, namely legal certainty, justice and benefits can be properly realized. With the application of transformative justice mechanisms, it is expected to have a positive impact that can be directly felt by the perpetrators and their families, victims and their families, the community of perpetrators or victims, and the general public. In addition, the application of this concept can also have a positive impact on each component of the criminal justice system, so that law enforcement officials can focus more on criminal offenses that really require attention and thought and pose a threat to society at large. Thus, the purpose of law enforcement, namely legal certainty, justice and benefits can be properly realized. community of perpetrators or victims, and the general public. In addition, the application of this concept can also have a positive impact on each component of the criminal justice system, so that law enforcement officials can focus more on criminal offenses that really require attention and thought and pose a threat to society at large. Thus, the purpose of law enforcement, namely legal certainty, justice and benefits can be properly realized. community of perpetrators or victims, and the general public. In addition, the application of this concept can also have a positive impact on each component of the criminal justice system, so that law enforcement officials can focus more on criminal offenses that really require attention and thought and pose a threat to society at large. Thus, the purpose of law enforcement, namely legal certainty, justice and benefits can be properly realized.

Conclusion

The concept of restorative justice and transformative justice is an effort of renewal in the context of criminal law enforcement. The renewal is an effort to overcome justice that is oriented toward modern law. Regarding the criminal justice system in Indonesia, which is still oriented towards retributive justice, it must undergo renewal towards a restorative, more transformative concept. Even though this transformative justice is something new in the justice system in the world, especially in Indonesia.

The concept of transformative justice is a concept that seeks to expand restorative justice. When restorative justice only focuses on recovering perpetrators, victims and other related parties, transformative justice seeks to solve problems using an approach outside the law, such as from a political, economic, social and cultural perspective. Thus, in an integral and holistic manner, there is a need to reform laws and regulations so that law enforcement officials do not only apply the concept of restorative justice, but also transformative justice.

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