



UDC 34

APPLICATION OF RESTORATIVE JUSTICE IN LEGAL COMPARISON: A COMPARATIVE STUDY OF INDONESIA AND THE UNITED STATES OF AMERICA

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ABSTRACT

It is not yet true that many countries have used this restorative concept as an alternative cause of settlement. It is dependent on the laws and policies of every country. Indonesia as a civil law and American civil law arbiter would indirectly see the difference in both material and formal applications in criminal justice. However, the rupiah still had a chance to strengthen to Rp 9,100 per dollar, he said. The approach involves the statue approach (statue approach), and using a comparative approach (approach approach). Additionally, the author USES primary and secondary legal material as a guide in outlining problems. The difference between the implementation of active justice in Indonesia and America can be seen from the implementation of restorative justice itself, whereas in America only certain states apply restorative justice, and so far only 45 states apply restorative justice. The implementation of restorative justice between Indonesia and America however different the legal system certainly has similarities and differences.

KEY WORDS

Restorative justice, United States, Indonesia, comparison, laws.

Looking at the real life of society is certainly inseparable from the existence of a criminal act or criminal offence. Therefore, a rule of law is needed that can be used as a basis, moral, and foundation in realizing the goals of community life that have been aspired to. In addition, the law plays an important role in reducing and preventing criminal offences. In supporting this, it is certainly necessary to resolve criminal cases through law enforcement. Moreover, Indonesia, which is a state of law, will certainly pay attention to the values of the purpose of the law itself. The purpose of the law is to regulate human life in peace according to L.J. Van Apeldoorn. Peace in law includes protecting the legal interests of the community such as the rights of independence, honor, life, and property from those who want to deprive them.¹ In ensuring that it runs properly, a legal justice institution is needed as the holder of power in conducting supervision and law enforcement better known as the criminal justice system. The criminal justice system originates from criminal procedural law or formal law according to Hazew Inkel Suringa as *jus puniendi* which means that the state's right to prosecute punishment, the right to be able to impose punishment, and the right to be able to carry out punishment.²

Each country certainly has its own rules and ways of protecting the interests of society by conducting one of them, namely the settlement of a criminal offence. This is supported by each country that has a criminal justice that is different from one country to another, this is determined by the laws in a country, which contains legal instruments, legal regulations, and rules related to law enforcement. Nevertheless, the ultimate goal to be achieved by other countries is the same goal, namely protecting the interests of society by achieving justice that is adjusted to the conditions of society in the field.

Looking further into the concept of the criminal justice system, of course, reminds us of a concept put forward by Hobert L. Packer which divides the two concepts of the criminal justice system, namely the due process model (DPM) or the pattern of rights protection and

¹ Ade Maman Suherman, *Pengantar Perbandingan Sistem Hukum, Civil Law, Common Law, Hukum Islam, Jakarta: (PT Raja Grafindo Persada, 2004). hlm 9.*

² Hamzah, Andi, "Asas-Asas Hukum Pidana di Indonesia & Perkembangannya", (Jakarta:PT Sofmedia. 2012), hlm. 4.



the crime control model (CCM) or the pattern of crime control.³ Looking at the two concepts will find that one will have advantages and disadvantages in its implementation, such as DPM which prioritizes humanity, but it cannot be denied that there will be resistance to the state legal system, while CCM criminal enforcement is characterized by the emergence of arbitrariness against human rights. As a state of law, law enforcement through the criminal justice system should be able to realize a sense of justice and be able to create harmony, order and prosperity in the order of community life.⁴

Currently, law enforcement still focuses on the theory of retributive justice, which is based on crimes that cause violations of the law and must focus on the provision of law for the perpetrators of criminal acts. The retributive concept is expected to reward the perpetrators of criminal offences for the crimes committed. In short, the existence of this concept will increasingly doubt the effectiveness of the settlement of criminal cases with the concept of revenge. Providing the perpetrator with the heaviest punishment will not provide a sense of security and welfare for the community, because the community feels that it will not have a deterrent effect on the perpetrator of the crime. Retributive justice only focuses on punishment for the perpetrator without the involvement of the victim of the party harmed by the perpetrator's actions, no matter how heavy the punishment of the perpetrator will not be able to restore the suffering of the victim himself. In short, the concept of retributive justice is no longer relevant in social life. Therefore, a renewal of the concept of criminal offence resolution is needed.

Howard Zehr, a pioneer of the reform of criminal settlement outside the court currently known as restorative justice, where according to him not only punishment for the perpetrator must be considered, but further restoration of the damage to collective life and human dignity is needed because of the offence or crime committed by the perpetrator, not by giving punishment to the perpetrator of the crime, but by restoring personal relationships between victims and perpetrators and restoring a harmonious relationship together, then it is called restorative justice.⁵

The concept of restorative justice has been encountered since long ago, but in its application, it is only limited to a small scope, such as resolving customary, community and family problems without a judicial institution to resolve these problems. This concept is an alternative to the settlement of criminal offences through mediation conducted by the parties involved, such as victims, perpetrators, families of victims and families of perpetrators, and other interested parties. This justice aims to repair a relationship as a result of an unlawful act by prioritizing the humility of the victim so that the victim can forgive the perpetrator for the criminal act he committed. Restorative justice emphasizes the recovery of losses suffered by the victim as a result of the perpetrator's actions and emphasizes the fulfillment of the perpetrator's obligations to the victim as a substitute for the losses suffered by the victim.

The requirements in conducting restorative justice can be fairly simple, because it only requires a sense of humility from the victim in forgiving the perpetrator's actions, in other words, an agreement between the perpetrator and the victim is needed not to continue the criminal case to the green table.⁶ If both parties agree, then the conditions for the perpetrator to be able to compensate for the losses suffered by the victim will be regulated.

The United States is one of the countries that implement restorative justice. However, in 1970 the restorative process was called victim-offender mediation (VOM). In this process where the victim is given the space and opportunity to be able to ask the reason why the perpetrator committed a criminal offence and hold the perpetrator accountable for returning the victim's rights that have been deprived by the perpetrator. However, in terms of the application of restorative justice, the United States gives more discretion to apply it to judicial institutions in each state.

³ Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana", (*Jurnal Media Hukum* 25, no. 1, 2018): hlm 115.

⁴ Nasution, Nurul Putri Awaliah, Jubair Jubair, and Abdul Wahid. "The Restorative Justice: Ideality, Reality, and Problems in The Indonesian Criminal Justice System." (*Rechtsidee* 11, 2022): 10-21070. hlm. 9.

⁵ Agus Tridiatno, Yoachim. *Keadilan Restoratif*. Yogyakarta: (Cahaya Atma Pusaka, 2015). hlm. 6.

⁶ Sahabuddin, S. "Peradilan Restoratif sebagai Alternatif dalam Sistem Peradilan Pidana (Pendekatan Analisis Komparatif Sistem)." (*Legalitas: Jurnal Hukum* 3, no. 2 2017): 113-143. hlm. 4.



In addition to the United States, Indonesia applies the same thing, where Restorative Justice is used as an alternative in resolving cases outside of court, which was established in 2012, marked by a memorandum of agreement between the Chief Justice of the Supreme Court, the Minister of Law and Human Rights, the Attorney General, and the Indonesian National Police Number 131/KMA/SKB/X/2012, Number M.HH-07.HM.03.02/2012, Number KEP-06/E/EPJ/10/2012, Number B/39/X/2012 dated 17 October 2012 concerning the Implementation of Adjustments to the Limits of Minor Crimes and the Number of Fines, Rapid Examination Procedures and the Application of Restorative Justice. Restorative Justice in its implementation depends on criminal law enforcement laws.

Looking further, there are not many countries that use this restorative concept as an alternative to case settlement. This depends on the legal rules and policies in each country. Indonesia as a civil law adherent and the United States as a common law adherent will indirectly see differences in material and formal applications in the application of criminal justice. Therefore, the author is interested in further discussing the comparison of the application of restorative justice in the United States and Indonesia.

The criminal justice system is a series of judicial activities in which some sub-systems or components are interrelated, aiming to ensure that resolving a criminal case is by the flow of the criminal justice system. In its components, there are police, prosecutors, courts, and correctional institutions. Looking at these components, of course, when talking about an integrated system, it is necessary to have the same goal in each component, because when a system runs but one of the components does not work, then indirectly the system will not work either.

Each country certainly has a different criminal justice system, Indonesia as a country that was once colonized by the Netherlands will indirectly adopt the legal style of the Dutch State with a civil law system, while America, which is a former colony of Britain, adheres to the common law system or Anglo-Saxon system. The civil law legal system uses more written legal rules that have been passed by parliament in the form of legislation that must be obeyed by all citizens, while the common law legal system is sourced from judges' decisions or called jurisprudence, it can be interpreted that this legal system in the judge decides a decision then the judge will make a decision based on the decisions of previous judges.

Law enforcement in the civil law system uses a procedural law approach system, while in the common law system enforcing the law uses an administrative approach, otherwise known as the administration of justice. The Unitary State of the Republic of Indonesia does not fully use the civil law system because there are laws that have been recognized by the community such as customary law, religious law, and laws from other countries, but as long as they do not conflict with the foundation of the Indonesian state.

The application of restorative justice in the United States can be considered progressive because the existence of financial restitution to victims will have an impact on reducing recidivism in America. Financial restitution to the victim is financial compensation to the victim made by the criminal offender as a result of the actions that have been committed. Restorative Justice is a way for law enforcement to help the person who did wrong and the person who was harmed. It helps them both to feel better and learn from what happened. It was talked about by Albert Eglash in 1977, and it is different from other types of justice such as retributive justice, or distributive justice.⁷

Restorative justice is defined by Burt Galaway and Joe Hudson as, "A definition of restorative justice includes the following fundamental elements: first, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves; second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute; third, the criminal justice process should facilitate active participation by the victims, offenders, and their communities to find solutions to the conflict".⁸ This means that criminal behaviour harms not only the perpetrators but also the victims and the community itself. Law

⁷ Hariman Satria, "Restorative Justice: Paradigma Baru Peradilan Pidana", (Jurnal Media Hukum 25, no. 1 2018). hlm 116.

⁸ Burt. Galway. and. Joe. Hudson, "Criminal. Justice, Restitution. and. Reconciliation", (Monsey, NY: Criminal Justice Press, 1990). hlm.2.



enforcement is when people who break the law are stopped and punished. But it's not just about punishment; it's also about making things right for the people who were harmed. Law enforcement works by bringing together the harmed people, the people who harmed them, and the people around them to find ways to solve problems and create peace. The United States does not apply the concept of restorative justice to all states, this is because each state in the United States has the authority to make and apply its laws. In the concept of the common law system, restorative justice is seen as a crime that is not a state offence, in the sense that the offence relates to individuals, therefore it is not included in federal legislation.⁹

Indonesia has recently implemented the concept of restorative justice which was first enacted in Law No. 11/2012 on the Juvenile Criminal Justice System (SPPA). It aims to provide victims with recovery in the sense that it does not only emphasize punishment to the perpetrator of the crime but the victim as an individual who has suffered harm should also be considered. In addition, the purpose of its implementation is to be able to reduce the number of prisoners in correctional institutions, considering that correctional institutions are already said to be overcrowded.¹⁰ Furthermore, it is regulated in the Memorandum of Understanding between the Chairman of the Supreme Court, the Minister of Law and Human Rights, the Attorney General, and the Indonesian National Police Number 131/KMA/SKB/X/2012, Number M.HH07.HM.03.02/2012, Number KEP-06/E/EPJ/10/2012, Number B/39/X/2012 dated 17 October 2012 on the Implementation of the Adjustment of the Limitation of Minor Crimes and the Number of Fines, Rapid Examination Procedures and the Application of Restorative Justice. Furthermore, each component of the criminal justice system made its organic rules such as Regulation of the National Police of the Republic of Indonesia Number 8 of 2021 concerning Handling Crimes Based on Restorative Justice, Regulation of the Public Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice and Decree of the Director General of Public Justice Agency Number: 1691/DJU/SKPS.00/12/2020.¹¹ Currently, restorative justice alternative solutions have also been regulated in Law Number 1 of 2023 concerning the Criminal Code in Articles 51 to 54, and Article 70. This is an achievement desired by the government to suppress the balance between perpetrators and victims.

The implementation of restorative justice in Indonesia is still limited to several criminal offences such as minor offences, narcotics offences, juvenile offences, and offences involving women. Similarly, in the United States, there are restrictions on the scope of criminal offences that can be resolved with restorative justice such as minor offences and juvenile delinquency. In addition, both Indonesia and America do not allow sexual violence to be resolved using restorative justice. The American states of Florida, Montana, Vermont, and Wisconsin do not allow restorative justice settlements in crimes of violence.¹² While some such as Alabama, Alaska, Colorado, California, and Florida apply restorative justice only to juvenile offenders.

The difference in the application of restorative justice between Indonesia and America can be seen from the applicability of restorative justice itself, when looking at Indonesia where all regions equally apply restorative justice, while in America only certain states apply restorative justice, so far only 45 states have implemented restorative justice in America. Its implementation in Indonesia is still quite limited, which only involves parties such as perpetrators, victims, families, and law enforcement officials as facilitators. In America, the implementation of restorative justice can be through various programs, such as mediation for perpetrators and victims, family group meetings, sentencing, the use of impact statements to victims and the community, restitution, victim awareness education, expulsion of perpetrators

⁹ Mukti, Andika Ramadhani Wibowo, and Rahtami Susanti. "STUDI KOMPARATIF PENERAPAN RESTORATIVE JUSTICE DI NEGARA INDONESIA DAN AMERIKA SERIKAT." (*Wijayakusuma Law Review* 5, no. 1 2023). hlm. 78.

¹⁰ Manting, Lollong. "Pengelola Overcrowding di Penjara Indonesia: Sebuah Kajian Literatur." *Aufklarung: (Jurnal Pendidikan, Sosial dan Humaniora* 2, no. 4 2022): 504-509. hlm. 505.

¹¹ Tri Wibowo, Kurniawan, and Erri Gunrahti Yuni Utaminingrum. *Implementasi Keadilan Restoratif Dalam Sistem Peradilan Pidana Di Indonesia*. (Jakarta: Papan Sinar Sinanti, 2022). hlm. 8.

¹² Shannon M. Sliva and Carolyn G. Lambert, "Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine", (*Journal of Policy Practice* 2, no. 14 2015). hlm 88.



from school and so on.¹³ In Indonesia, the concept of restorative justice is included in the Criminal Code, while in the United States private facilitators can be involved in the implementation of restorative justice. Indonesia has incorporated restorative justice into its Criminal Code, whereas in the US the concept of justice is not incorporated into federal law so states are not obliged to implement restorative justice.¹⁴

The similarity between the two countries in the application of restorative justice lies in the subject of the offender, where its application can only be carried out in juvenile and adult courts, with minor criminal offences, cases of children dealing with the law, not recidivists, besides that the purpose of applying restorative justice from both countries has the same goal of reducing overcrowded correctional institutions, as well as considering the losses received by victims as a result of criminal acts.

CONCLUSION

The concept of restorative justice is an alternative to solving criminal offences outside of court, where the focus is on restoring the losses suffered by victims, in solving criminal offences with this concept, the theory of revenge against the perpetrator no longer applies, but rather rehabilitation. The application of this concept is different in each country, depending on the legal system adopted, as well as the criminal justice system in each country. Indonesia and the United States have different legal systems, Indonesia with a civil law system while America with a common law system.

The application of restorative justice between Indonesia and the United States despite the different legal systems certainly has similarities and differences. The similarities between the two countries are that there are limitations in the application of the concept, such as only in cases of juvenile offences, crimes involving women, narcotics offences, minor crimes, and juvenile offences. In addition, the similarity is that it has the same goal to be able to recover losses to victims as a result of criminal offences committed by criminals.

The difference in the application of the concept of restorative justice from the two countries can be seen from its implementation, if Indonesia implements the concept of restorative justice into the Criminal Code which indirectly requires all regions in Indonesia to apply the concept. Whereas in the United States, there are only 45 states to date that implement restorative justice, because the country is divided into states, America does not include the concept in the Federal Law so all regions do not have an obligation to apply the concept.

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¹³ Sandra Pavelka, *Restorative Justice in the states: An Analysis of Statutory Legislation and Policy*, (Justice Policy Journal 2, no. 13 2016). hlm 8.

¹⁴ Mukti, Andika Ramadhani Wibowo, and Rahtami Susanti, *op. cit.* hlm. 79.



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