



UDC 332

UNCOVERING THE CONCEPT OF RESTORATIVE JUSTICE IN INDONESIAN CRIMINAL LAW: A COMPARATIVE STUDY OF PLEA BARGAINING IN THE UNITED STATES

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ABSTRACT

The solution of a crime is still oriented towards retribution, where revenge on the perpetrator is the ultimate goal for his actions. There is no doubt in the course of time that renewables, such as restorative justice and inequality. Criminal justice systems in Britain and other countries that practice the common law model USES the "ensure system." Consistent with the characteristics of the imperfect system, the prosecuting system model in the United States was essentially a negotiation between the prosecutor and the accused or defenders. "Negotiation of the least resistance" is essentially a negotiation between the prosecutor and his accused or defender. The primary purpose of this negotiation is to accelerate the penal proceedings, and it must be based on "habitual" for the accused to acknowledge his guilt and the willingness of the public prosecutor to make the threat of the desired punishment for him or his defences, as well as on the involvement of the judge as a lawyer.

KEY WORDS

Felony, retribution, restoration, law, regulation.

Seeing the real life of society is certainly inseparable from the existence of criminal behaviour or criminal offences. Therefore, there is a need for a law that can be used as a basis, moral, and foundation in realizing the purpose of the life of the community that has been aspired to. In addition, of course the law plays an important role in deterring and preventing criminal offences. In order to fulfil this, it is necessary to resolve criminal cases through law enforcement. Moreover, Indonesia, which is a law country, will certainly pay attention to the values of the law itself.

Peace in law includes protecting the lawful interests of the community such as the right to freedom, honour, life, and property from those who want to take it away (Suherman and Maman, 2004). In ensuring that it runs properly, it is necessary to have a legal justice institution as the holder of power in carrying out supervision and enforcement of the law or better known as the criminal justice system. The criminal justice system, which is derived from the criminal procedure law or the criminal procedure law, is defined by Hazew Inkel, which means that the state has the right to determine the punishment, the state has the right to impose the punishment, and the state has the right to carry out the punishment (Hamzah, 2012). Every country has its own criminal justice mecca to protect the interests of society. Each country's criminal justice mecca is determined by its laws, which include criminal justice instruments, regulations, and law enforcement regulations. The current enforcement of the law focuses on the theory of retributive justice, which states that the award of punishment to the perpetrator of a criminal offence must be based on the crime that caused the violation of the law. This theory is expected to reward offenders according to their guilt. Any punishment given to criminal offenders will not increase the sense of security and welfare of the community because the community feels that it will not have a deterrent effect on the offender. Retributive justice only focuses on the behaviour of the perpetrator; there are no victims or other parties who are harmed by the perpetrator's actions. No amount of punishment given to the perpetrator can assuage the grief of the victim. In short, the idea of retributive justice has lost its relevance in society. Thus, the concept of criminal offence resolution must be changed. As a state of law, it is important that the enforcement of law through the criminal justice system can realize a sense of justice and be able to create harmony, order and prosperity in the life of the community (Nasution et al, 2022).



The necessity of criminal law lies in the problem and the goals to be achieved, in achieving these goals it cannot be denied that there will be coercion and that is something that is prohibited by Roeslan Saleh. Seeing the purpose of punishment itself is not only to provide a deterrent effect to the perpetrators of crime, but furthermore to be able to influence people who are not evil and can fulfil all existing regulations (Nawawi & Barda, 2010)

The concept of restorative justice has been around for a long time, but can only be applied in small areas such as resolving family, customary, or neighbourhood problems without a judicial institution to resolve them. This concept is an alternative to resolving criminal offences through mediation conducted by the parties involved in the process, such as victims, perpetrators, their families, and other interested parties. By prioritising the humility of the victim, this justice aims to repair the damaged relationship caused by the offence, so that the victim can forgive the offender for his or her wrongdoing. Restorative justice emphasises that the victim must be repaired from the harm caused by the perpetrator's actions. It also emphasises that the offender must fulfil his obligations towards the victim in lieu of the harm suffered by the victim. The requirements of restorative justice are very simple: it only requires the victim's sense of humility to forgive the offender. In other words, it requires an agreement between the offender and the victim to prevent the criminal case from being brought to court. The conditions that must be fulfilled by the perpetrator in order to compensate for the damage suffered by the victim will be determined after both parties reach an agreement.

A justice system called plea bargaining originated in the United States (US) and has been adopted by many other countries. It is based on the practice of guilty pleas that existed in England in the 18th century and the United States in the 19th century. In this system, the defendant pleads guilty to all offences charged in the indictment. In plea bargaining, the parties involved in a criminal case simultaneously reach an agreement that is approved by the court. In this process, the parties admit their liability or culpability for the acts they have committed and accept a lesser sanction than would normally be imposed in a criminal case. Plea bargaining is a practice that has been recognised by many countries, including the United States of America (Ziyad, 2018). Plea bargaining is based on the principle of reducing court costs and time, reducing the risk of aggravation, and assisting in court proceedings. Plea bargaining in the United States can be applied to all criminal offences, including felonies, but only California and Mississippi prohibit it for sexually violent and physically violent offences (extortion, torture, and murder), as well as coercive cases.

The relationship between restorative justice and plea bargaining certainly has similarities in the stages of the criminal justice system in each country. Restorative justice with its characteristic of forgiving the perpetrator by compensating the damage suffered by the victim, while plea bargaining with its characteristic of the defendant admitting that he was wrong certainly has the same goal, namely, to obtain and resolve a criminal offence in a fast, simple, and affordable manner. However, of course there are some differences such as plea bargaining which focuses on negotiations to reduce the length of the sentence, while restorative justice focuses on rehabilitation for victims and perpetrators. Therefore, the researcher is interested in analyzing the relationship between restorative justice and plea bargaining. Based on the description in the background section above, the problem formulation is: How is the concept of restorative justice? And how does the concept of restorative justice in Indonesia relate to plea bargaining in the United States?

METHODS OF RESEARCH

The research method employed in this study is a comparative legal analysis, focusing on the concept of restorative justice in Indonesian criminal law and plea bargaining in the United States. The research adopts a qualitative approach, utilizing doctrinal research by analyzing legal texts, statutes, and scholarly articles related to both systems. Data is collected through a thorough literature review and document analysis, including Indonesian criminal law provisions and case law, as well as American plea-bargaining practices.



RESULTS AND DISCUSSION

Indonesia is a country that uses the civil law system as its legal system, this comes from the former Dutch colony where at that time the Netherlands implemented a civil law system, and therefore, Indonesia implemented the results of Dutch thinking at that time. This system provides for the existence of a codified constitution. As a member of the Romano-Germanic family of law, the Romano-Germanic Family, which prioritizes a set of laws that are customized and compiled into a *Kitab Undang-Undang* that can be distributed throughout the world (Atmasasmita & Romli, 2000).

The civil law legal system adopted by Indonesia is basically based on the non-advisory model which does not recognize the concept of Plea Bargaining System. The concept was introduced by the United States as a "fast track" in resolving criminal matters, but Indonesia does not clearly apply the "fast track" in the KUHAP (Maulana, 2015). As the country adheres to the non-advisory model, there are principles in the law as follows (Husin et al, 2022):

- The investigation process must be thorough and continuous and conducted on the basis of a presumption that a crime has been committed (presumption of guilt);
- The main purpose of the above proceedings is to establish whether the offence constitutes a crime and whether the imposition of criminal penalties is justified;
- The research into the facts put forward by the parties (the plaintiff and the defendant) by the judge can take place indefinitely and is not dependent upon or does not require authorization;
- The parties are no longer equal;
- All reliable sources of information may be used for the purposes of preliminary examination or trial.

In this model, the truth of a case can only be established through an impartial court. So that the proof in the trial of material truth can be prioritised. As a suspect or accused person in this case, there is no limit to the number of times a defence can be put forward. In addition, this method gives the judge the right to play an active role in determining the truth of the facts presented by the suspect or victim. But there is a settlement process outside of court which can be described as "fast-tracking", subject to certain conditions.

Justice in Indonesia is portrayed through Pancasila as the foundation of the state, in the fifth principle of social justice for all Indonesian people contains the goal of the Indonesian state to be able to live together. The values of justice should be the initial foundation of the state in order to realise the welfare of all its citizens. The value of justice is also the basis and principle in creating order in living together in association based on a principle of independence for every nation, eternal peace, and justice in living together (social justice) (Santoso, 2014).

The theory of justice according to philosophers such as Aristotle explained in his work entitled Ethics that obedience to both written and unwritten laws is justice. In another case, it is said that justice is a virtue and this is general. Justice as a special moral virtue that relates to one's relationship both between people and the balance between two parties. In addition, according to Thomas Hobbes, justice is an act based on an agreed agreement. Justice or a sense of fairness can be achieved if there is an agreement between the two parties who promise to do something.

Restorative justice is a way of solving problems and crimes without resorting to the courts. This method has been used for a long time, but is mostly used to resolve small issues in families and communities. Instead of having the judge decide what happened, the people involved in the problem or crime talk and try to make things right. This means that the person who did wrong, the person who was harmed, and their families are brought together to seek redress. The goal is to repair the relationship between the people involved and ensure that the offended person gets what they deserve so that they feel better.

The concept of restorative justice is an approach to criminal resolution that involves the parties, whether the victim, the perpetrator, or related parties, for the purpose of restitution (restore). This is implied in the sentence "crime is "more than simply lawbreaking, an offence



against the governmental authority... it causes multiple injuries to the victims, the community, and even the offender". There is also a vision for the implementation of restorative justice, which is the achievement of the social balance of society as before the crime occurred by involving victims, perpetrators, or other affected parties.

The requirements in carrying out restorative justice can be fairly simple, because it only requires a sense of humility from the victim in forgiving the perpetrator of the crime, in other words, it requires an agreement between the perpetrator and the victim not to continue the criminal case to the court. If both parties agree, then the conditions under which the perpetrator can compensate for the harm suffered by the victim will be determined. When someone makes a mistake, they need to be punished in a way that helps them learn from their mistake and also helps the person they hurt and the community. It is not just about punishing them, but also about helping them and others to return to society in a more beneficial way.

Restorative justice is a way of dealing with crime by making sure you listen to and help those who are affected by the crime, such as victims and survivors. In fact, the current practice only focuses on punishing the perpetrators of crimes, but this concept focuses on helping the victims of such crimes. In restorative justice, victims have more rights to have a say in what happens than in the usual ways of dealing with crime (Hobson, et al, 2022). Restorative justice is a way of helping people who have been hurt by others. Rather than just punishing the person who made the mistake, this concept helps them learn from their mistakes and improve the situation of the victims they hurt.

The implementation of restorative justice is in accordance with the local wisdom of Indonesian society, where each region has its own way of resolving criminal acts without having to go through the courts, in other words, the implementation of restorative justice has been implemented in several regions such as Celebes, Borneo, East Nusa Tenggara, the concept used is through dialogue between the disputing parties, with the closure of mutual forgiveness. It can be seen that the philosophy of forgiveness promotes the highest recovery of both victims and perpetrators, it is best to forgive when we are in a position of power. This concept in its wisdom upholds the existence of justice wrapped in the wisdom of community values that tend to forgive each other, with a peace agreement that reflects the rebalancing of the system or the restoration of the three pillars.

Undang-undang Nomor 1 Tahun 2023 on Kitab Undang-Undang Hukum Pidana articles 51 to 54 and article 70 become the bukti of Indonesia's efforts in the application of restorative justice, in article 51 letters c states "resolving conflicts caused by criminal offences, maintaining balance, and approaching a sense of security and peace in society." Article 70 paragraph 1, "By continuing to consider the provisions as referred to in Article 51 up to Article 54, imprisonment shall not be imposed wherever possible if the circumstances are met: the accused has more than 75 years of age; the defendant is a first time offender; the damage and suffering of the victim is not too great; the defendant has paid compensation to the victim; the damage and suffering of the victim is not too great; the defendant has paid compensation to the victim.

Although the scope of the application of restorative justice in Indonesia is still limited to minor offences, juvenile offences, women's offences, and other minor offences. Namuen, this is certainly a settlement of criminal offences in court or said to be "fast track" because it only requires mediation between the victim and the perpetrator together with the family and the facilitation of law enforcement officials, then the settlement of criminal offences can be resolved, without having to litigate at the green table. This is sometimes used as a loophole for the perpetrators of criminal offences, because the perpetrators feel that there is a "fast track" in the settlement of the crime, so that the perpetrators do not get a deterrent effect. Such "fast breaks" are also used in the United States of America, which is called "plea bargaining".

The United States as a country that adheres to the common law system which is different from the civil law system which is included in The Common Law Family is formed by judges to resolve disputes through court proceedings. The United States as a country adheres to the "adversary system" in which the truth is discovered by countering the



arguments of the parties in court with concrete evidence presented by the parties (Rahayu, 2015). The United States as an adherent of the Anglo-Saxon legal system has already implemented plea bargaining practices in its judicial system, which in the process requires a statement of guilt or known as plea bargaining, which means that if the defendant admits guilt, a sentence can be imposed.

The adversary system of justice essentially involves several parties, namely the state as the aggressor representing the victim, the public interest in the case represented by the legal determinant (prosecuting attorney), as well as the defendant as the aggrieved party represented by the defender (defence attorney), and neutral judges in order to find the truth of the facts established in court. In this case the judge is obliged to apply the law that applies in his/her area, and to be neutral, as well as to explore the truth that is presented in court if the defendant resists being tried by the judges (Kerper, et al, 1979).

The process of plea bargaining in the determination of the case where the defendant together with the determination of the case conducted negotiations which resulted in the agreement of both parties and finally requested by the court. In the statement where the defendant will declare or give a statement that the defendant admits that he has made a mistake, with the benefit for the defendant to be given a leniency in the form of a debt settlement. This process is very popular in the United States because of the density of cases that must be resolved immediately, so as to provide fast, low-cost, and simple justice.

Negotiation in the plea-bargaining process is important, where the court determiner and the defendant negotiate on the type of crime to be charged and what threats will be made to the defendant during court proceedings. This system is believed by the United States to be inseparable from the process of enforcing the law. Some types of plea bargaining includes:

- Charge Bargaining, where the accused and the prosecutor agree to reduce the level of guilt of the charges that have been brought;
- Sentence Bargaining, in which the defendant agrees to make a statement admitting guilt and the prosecutor assures the defendant that the sentence will be less than the sentence he or she would have received;
- Fact Bargaining, where the defendant is granted leniency in his/her sentence if he/she admits certain facts and provides important information to the prosecutor. In return, the prosecutor provides the defendant with a reduced sentence;
- Sentence Recommendation Bargaining, where the prosecutor provides a recommendation to the judge regarding the sentence the prosecutor wants if the defendant pleads guilty.

In practice, plea bargaining is usually conducted by telephone, either at the prosecutor's office or in the courtroom, without the presence of the judge. The plea bargaining process is usually carried out at the arraignment and preliminary hearing stages or before the examination agenda in the trial. If during the trial process, the defendant admits his/her guilt then, there is no need for a plea bargaining agreement (Fratama & Rezky, 2020). The next stage is referred to as the arraignment on information or indictment stage, which briefly informs the accused of the opportunity to answer the charges, whether the charges are admitted or not. If the allegations are not admitted, the case will proceed to trial, but if the allegations are admitted, the case can be continued to trial (Hermawati, 2023).

Before doing so, the judge must first speak to the defendant in open court to ascertain whether the defendant has knowingly, without coercion, threats, or promises, confessed to the offence. The defendant must voluntarily make a statement so that there is no coercion in accepting the statement issued by the judge.

The relationship between the concept of restorative justice and plea bargaining can be seen in the way the defendant negotiates. When looking at the concept of restorative justice where the defendant must pay attention to the victim as the injured party, that is where the role of negotiation will take place, the defendant determines how much damage will be paid by the perpetrator to the victim, and how the perpetrator will pay the damage to the victim. Meanwhile, plea bargaining also applies the concept of negotiation, where between the prosecutor and the defendant negotiate on the amount of the fine, if the defendant admits the guilt committed then the amount of the fine will be lower, but if the defendant does not admit



the guilt committed then the fine will still be set in accordance with the charges made in court. In addition, the similarity between the two can be seen from the voluntary nature of each party. If in the concept of restorative justice where the victim must be voluntary with all humility forgive the victim, by not continuing to the trial table.

Whereas in plea bargaining voluntary nature must be owned by the defendant, because all the actions carried out by the perpetrator will have an impact and consideration of the prosecutor in making a sentence, if the perpetrator does not do it voluntarily in the sense that it is under the control of another party, threatened, or promised something else, then the loss will be on the defendant's side. The two settlements above encourage law enforcement officials to be able to carry out negotiations and reconciliation, in this case realising a method that is effective, simple, and low cost. So that there is no more justice based on revenge, but the justice that is guaranteed is rehabilitative justice, and every party involved in the settlement of the criminal offence. Although the use of restorative justice in Indonesia and plea bargaining in the United States is not entirely the same, it is necessary to look deeper into the implementation of the concept of restorative justice with the implementation of plea bargaining.

CONCLUSION

The restorative justice concept is an approach to criminal resolution that involves the parties, either the victim, the perpetrator, or related parties, for the purpose of restitution (restore). Which is intended to provide a win situation between the perpetrator and the victim, with the aim of preventing overcrowding in correctional institutions. In addition, due to the change in orientation from retribution to restorative, it is hoped that every crime can be restorative so as to reduce the settlement of criminal offences in court.

Plea bargaining as one of the "fast tracks" which can reduce the period of sentencing for the defendant if he makes an admission before the examination at trial. In this concept, if the defendant admits his/her guilt, the prosecutor will give a favour because the defendant dares to admit his/her wrongdoing, by reducing the penalty until the penalty is removed. Meanwhile, for defendants who do not admit their wrongdoing, it will be continued to the trial examination, where the arguments will determine the penalty for the defendant there.

The comparison between restorative justice and plea bargaining will be used as an example in the criminal law reform. Indonesia currently only recognizes restorative justice without recognizing plea bargaining, authors feels that it should be planned to be included in the plan for reforming criminal law in Indonesia. There is a connection between the two things, where each strives for the case to be resolved in a way that is fast, simple, and low cost. In addition, the two concepts also have similarities where both the victim in restorative justice and the defendant in plea bargaining must have a voluntary nature, in this case must forgive the perpetrator for the crime committed in the restorative justice concept, and must admit the defendant's guilt in the plea-bargaining concept. Therefore, the two concepts are related.

The suggestion that can be given is that in order to reform the criminal law in this case the criminal justice system, an in-depth study is needed by comparing the concepts owned by other countries. In realizing a law that is oriented towards the life of the community, it is interesting to study more about the relationship between restorative justice and plea bargaining because in Indonesia itself does not clearly use plea bargaining as one of the "fast tracks", but Indonesia applies restorative justice as an effort to improve the process of resolving criminal offences without going through the court.

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