Restorative Justice as a Law Renewal in Indonesia: A Concept or Theory?

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Abstract. Restorative justice is a hot issue, especially at the level of practitioners and academics in Indonesia at the present day. It starts from its application in several laws and regulations to being discussed in the Draft Criminal Code. Therefore, it deserves to be analyzed because its application will have legal consequences in criminal law discussions and punishments and criminal procedural law, which we know as a criminal justice system. On this occasion, the researcher is interested in analyzing the current existence of restorative justice as a criminal law reform in Indonesia. Is it a concept or a theory? Furthermore, how is the application of restorative justice in Indonesia today? In this study, the researcher uses a normative method (apart from legal research methods' dichotomy into normative and empirical). Based on the results, restorative justice is not a theory but only a concept that has been shifted into an approach poured into several laws and regulations in Indonesia today. Restorative justice as a legal reform in Indonesia in the field of punishment is currently stated in several statutes and regulations which, if examined, there are still differences in their definitions, so it is appropriate to be regulated in the form of law so that there is no ambiguous understanding, as well as its implementation in Indonesia.

Keywords: Restorative justice · Legal renewal · and Legal theory

1 Introduction

Discussing restorative justice is not a new issue in Indonesia. However, its existence and applicability still raise many questions as we know that the development of national criminal law has reached a point where a new entity is known as restorative justice. Of course, it is not a new thing for some people, or it can be said it has been implemented in a few years in Indonesia. In general, restorative justice has been integrated into the criminal justice system in Indonesia. It can be observed from several settings, such as the juvenile criminal justice system, arrangements for efforts to restore victims and narcotics addicts through rehabilitation. Or the emergence of the Indonesian National Police Regulation Number 8 of 2021 concerning the Handling of Crimes based on Restorative Justice.

This is in line with the Attachment to the Decree of the Director General of the General Judiciary Agency Number: 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts. In fact, in recent

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times, it has become a heated discourse with one of the law enforcement agencies of the Prosecutor's Office bringing up a Regulation of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice which was followed by the promulgation of Law of the Republic of Indonesia Number 11 of 202l concerning Amendments to Laws number 16 of 2004 concerning the Prosecutor's Office of the Republic of Indonesia. Of course, this has become a new color in the criminal justice system in Indonesia as an effort to advance the national legal order in Indonesia. If it is analogous that in a different house, namely the Supreme Court in 2020, the Director General of the General Judiciary Body of the Supreme Court of the Republic of Indonesia issued Decree Number 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice.

Judging from the spirit and legal politics of enactment of regulations in each of these institutions can be understood that the spirit underlying the issuance of the regulations on restorative justice is the same. However, if we think about it deeply, is the term restorative justice in each of these regulations the same? Or is restorative justice not just a concept but a theory that can be applied in solving normatively and empirically problems? Because different explanations of an essence (restorative justice) can pose risks in understanding and implementing it. Likewise, if it turns out that restorative justice is a theory that can be used as an analytical tool or model deviation in practice. Still, on the contrary, it is interpreted as just a concept.

Again, look at the inter-institutions that become a unified system in enforcing criminal law as a unit of authority and inter-agency duties in enforcing criminal law, better known as the criminal justice system. Of course, there are inter-institutional linkages and synchronization so that its implementation does not create ambiguity or unclear conditions. If we look closely, there are no similarities in the regulation or several legal regulations that give rise to the entity "restorative justice." Therefore, in terms of definition, there is no consistency in the meaning of restorative justice.

Quoted from several expert opinions on restorative justice, such as Miller and Blacker, who say:

Most pactices which are not defined as retributive are often included in the realm of restorative justice and it has been argued that the scope of restorative justice has become so wide that it has been used to address virtually any harmful opr morally reprehensible actions (Cunningham 2006).

Jim Consedine, one of the pioneers of Restorative justice, argued that "the concepts of retributive and restitutive justice based on punishment, revenge against perpetrators, exile, and destruction must be replaced by restorative justice based on reconciliation, victim recovery, integration in society, and forgiveness. Tony Marshall also expresses a similar understanding: a generally accepted definition of restorative justice is a process whereby the parties with a stake in a particular offense come together to collectively resolve how to deal with the aftermath of the crime and its implications for the future (Marshall, 1999) (Mansyur, 2008).

Hypothetically-theoretically, the urgency of considering restorative justice as a means of responding to crime includes (Komisi Hukum Nasional Republik Indnesia, 2012):

a. Criminal justice, which has been the sole response to crime, has proven to be unable to reduce crime rates, and even tends to be a criminogenic factor that triggers an increase in crime rates.
b. The criminal justice mechanism as a single response to the occurrence of a crime is considered to be able to provide a balance of protection, especially between perpetrators, victims and the community. Its orientation which is only aimed at the perpetrators makes the criminal justice mechanism a one-sided tool that tends to produce injustice.
c. The failure of the Criminal Justice System to suppress the rate of crime, both residive and crimes committed by novice actors, indicates that the judiciary is not functioning properly as a means of crime prevention.

As quoted from Ridwan Mansyur that the implementation of restorative justice in the criminal justice system is in line with the 2000 UN declaration on the fundamental principles regarding the use of restorative justice programs in criminal matters. This suggests utilizing the concept of restorative justice more broadly in a criminal justice system. Then, it was confirmed by the Vienna Declaration on crime and justice (Viena Declaration on Crime and Justice: "Meeting the challenges of the Twenty-First Century) in points 27 and 28.

If examined more deeply, there still needs to be more clarity regarding the application of restorative justice in Indonesia, whether it is an approach, concept, or theory alone. Therefore, it needs to be studied more deeply to obtain the same vision for academics, lawmakers, enforcers, and the community as parties who are oriented toward their welfare by enacting laws and regulations that contain restorative justice in Indonesia.

Based on the description above, this research aims to review new innovations regarding "restorative justice" and whether it is an approach, concept, or theory in legal science. This series of thoughts are outlined in a study entitled "Restorative Justice as Legal Reform in Indonesia: A Concept or Theory?" So, there are two formulations of the problem to be discussed: 1) is restorative justice a theory in legal science? 2) What is the current regulation of restorative justice in Indonesia?

2 Method

This research is a type of normative research. The research approach used is the statutory approach and the concept analysis approach. The sources of legal materials used are primary legal materials, secondary legal materials, and tertiary legal materials.

3 Result and Discussion

3.1 A Brief Overview of Legal Science Theory

In this discussion, the researcher does not address the question, "is law a science?" However, it cannot be separated from the analysis and views that are undoubtedly related to the philosophy of law and the philosophy of science as the root of science. The researcher will

start by understanding legal science first by quoting the opinion of Mochtar Kusumaatmadja (in Shidarta, 2013) that "legal science is the science of law that applies in a particular country or society at a time." In other words, the law is an awareness of society or human groups at a particular place and time or in a country. In this view, we can also understand that law is dynamic following critical human thoughts regarding the nature of law itself for its existence to be needed in providing order in society. In speculative philosophical thought, questions will always arise as a starting point for a shift so that the applicable regulations will run coherently with the development of society and the development of human thought

In the same discussion, Shidarta (2013) stated that:

"The object of study of legal science is the applicable legal system, namely the conceptual system of legal rules and legal decisions whose important parts are favorable by the bearer of legal authority in the society or country in which the science of law is carried out. So, the authoritative text contains legal rules consisting of legislation products, treaties, bureaucratic decrees, judges' decisions, unwritten laws, and the work of traditional legal scientists in their fields called doctrines."

At first glance, we can observe that this statement is in line with the philosophy of positivism which has several teachings:

a. Positivism originated from the view that the philosophy of positivism is only based on reality (fact) and evidence first;
b. Positivism will not be metaphysical, and does not explain the essence;
c. Positivism no longer describes natural phenomena as abstract ideas. Natural phenomena are explained based on causal relationships and from that, we get the postulates of laws that are independent of space and time;
d. Positivism places the phenomenon under study as an object that can be generalized so that in the future it can be predicted;
e. Positivism believes that a reality (symptom) can be reduced to elements that are interrelated to form an observable system (Samekto 2015).

Of course, we can observe that the schools of thought or thought in this era tend to lead to a reality that assumes that only what is the reality obtained from natural phenomena (actual events) is considered valid. But, then, this thought was continued by one of its adherents, Hans Kelsen, who revealed that "legal norms are always created through the will. These norms will bind the community if the norms are desired to become law and must be stated in written form, issued by the authorized institution and contain orders." (Samekto 2015). In other words, a law must: be in written form, made by the authorities, and its enforcement does not pay attention to the essence of the norm.

Apart from the legal definition above, what is no less important is the term of the legal theory itself. In the Black Law Dictionary, it is clearly stated that "theory of law" is defined as "the legal premise or set of principles on which a case rests"(Garner, 1616). The above definition is too narrow and only considers that the theory of law is only used to examine reality (cases) and does not reach the realm of norms. Furthermore, Meuwissen, as quoted by Salim MS (2012), defines legal theory as follows:

"being at a higher level of abstraction than jurisprudence, it embodies the transition to legal philosophy. Legal theory reflects the objects and methods of various forms of

legal science. Therefore, legal theory can be viewed as a kind of philosophy of science from the science of law. Legal theory questions whether the sociology of law or legal dogmatics should be considered as an empirical legal science that is descriptive or not."

Meuwissen (2009) also added that legal theory is preoccupied with tri-tasks, namely:

a. Provide an analysis of the legal meaning and other meanings that are relevant;
b. Focuses on the relationship between law and logic; and
c. Provide a philosophy of science from the science of law and a teaching method for the practice of law.

Furthermore, the definition of legal theory according to Jan Gijssels and Mark van Hoccke (Meuwissen 2009) is as follows:

"a branch of law that in an interdisciplinary perspective critically analyzes various aspects of legal phenomena individually and in their overall relation, both in terms of their theoretical concepts and their practical elaboration, leading to a better understanding of, and a clear explanation of, on juridical materials."

Based on the above definitions, the researcher agrees with Meuwissen's opinion. However, the phrase "Legal theory reflects the objects and methods of various forms of legal science" has ambiguity, especially the statement that legal theory will reflect or understand the nature of objects and methods. The method can be understood as a systematic and massive process or series of activities with a specific orientation. At the same time, the word "object" here is intended as a result of orientation referred to in a running process or an object that is the starting point for a process to move. So, this description needs a more detailed explanation.

Relating to "object" of legal theory, Scholten also gave some opinions as follows (quoted from Salim MS):

1. The object of legal science is the positive law of a certain people that applies at a certain time. The object of legal theory is its form in positive law, which causes it to become law;
2. Legal science questions diversity (*veelvuldigheid*), while legal theory questions unity (*eenheid*);
3. The theory of law examines a part of the human soul, in its historical expressions, and not for the sake of the expressions in themselves, but for the sake of the unity which characterizes it (which identifies it), it is for the sake of the soul itself that is his business;
4. Legal science asks what applies as law. Legal theory asks what the law is;
5. The legal science seeks systematics from a particular law, for example the present Dutch constitutional law. Legal theory will be able to show the limits to that possibility;
6. Legal theory deals with the question of the meaning of existence as a system. Legal science cannot exist without the logical control of legal theory;
7. Legal theory derives its material from Legal Science; and
8. Legal theory does not form law. Legal Studies do regularly.

Referring to Scholten's opinion that "The object of legal science is positive law," the discussion becomes narrow. The following explanation is the existence of the term restorative justice which has so far been contained in several laws and regulations. Bruggink, in his book, discusses the definition, which is defined as: "an understanding with special properties. In a definition of a term, the contents of a word or a term are usually expressed. With this explanation, it can be assumed that the definition can be equated with the concept in law because it refers to its purpose or use to describe the characteristics of the essence so that when spoken, it becomes clear to the recipient of the utterance and also what object is meant by the definition or concept. It can be concluded that the theory is a collection of statements or prepositions which contain one or more concepts that must provide meaning so that the object and orientation of the legal theory become clear.

3.2 Restorative Justice in the Perspective of Legal Science Theory

The theory of legal science cannot be separated from the development or shift of thought from time to time. The legal theory will continue to develop as long as humans think and seek the essence. However, first, we need to understand and recognize what is meant by restorative justice. According to Dignan (in Eva Achzani Zulfa, 2009) that:

"Restorative Justice is a new framework for responding to wrongdoing and conflict that is rapidly gaining acceptance and support by educational, legal, social work, and couseling professionals and community groups."

The researcher assumes that restorative justice is defined as a process or framework that aims to solve problems involving many parties, the parties involved here depend on the problem being processed. This statement shows that restorative justice is more directed to a process, so orientation as a product of restorative justice has not been included in it. However, the researcher considers this opinion as needs to be more holistic to look at the restorative situation itself.

In addition, the researcher also analyzes the views of Mark Umbreit (in Rofinus Hotmaulana Hutahuruk) as follows:

"Restorative Justice is a "victim-centered response to crime that allows the victim, the offender, their families, and representative of the community to address the harm caused by the crime"

If we look more closely, Mark Umbreit's opinion above is more oriented towards the victim's satisfaction or the fulfillment of the victim's will as the party the perpetrator harms in a conflict. However, if the researcher takes a broader view, including criminal disputes, the perpetrators' actions that have caused harm to the victims need to be recovered.

Based on the thoughts of the two figures, the researcher assumes that restorative justice in the context of criminal law is justice that gives satisfaction to all parties, both perpetrators and victims so that there is an "agreement" between the perpetrator and the victim for restoration efforts for each party which affected by the legal event.

We need to understand that in the term restorative justice, there are two essential words, namely "just" and "restor" (to restore). The researcher assumes this is a concept related to feelings (value). Feelings can only be measured by those who feel and can

be measured by others if told to those who feel. In line with that, Shidarta (2016) also stated the following:

"If the concept's quality refers to color, taste, or the impressions we infer based on our observations of concrete objects, then we are dealing with secondary qualities. That is, the properties or characteristics of this group are not attached to the material concept of the object or thing in question. Instead, the secondary quality of the concept is obtained from our relationship with the object or concrete thing; the result is our perception of the object or thing."

So, it is very difficult to measure "fair" and "recovery" if it is not judged by the disputing or conflicting parties or parties involved in it. Thus, the researcher assumes that restorative justice is still a "concept." Then, the concept was developed into a comprehensive concept."

The researcher also asserts that restorative justice is a concept that is then approached (making it an existential concept). In other words, if the perpetrator and the victim are brought together using various methods, based on the applicable written regulations, and there is an agreement on the part of the parties to make efforts to recover as a result of the criminal event without proceeding to litigation. Then, it is considered that restorative justice has occurred.

Furthermore, is restorative justice a theory? Referring to Scholten's opinion that "Legal theory does not form law. Law Science does it regularly". Scholten's opinion focuses on legal theory analysis in terms of objects. So, if restorative justice is a theory, it will not immediately appear as a concept in several laws and regulations in Indonesia. That is why researchers tend to assume that restorative justice is not a theory but only a concept outlined in the rule of law to be implemented in several methods.

3.3 Restorative Justice in the Aspect of Criminal Law and Its Applicability in Indonesia

Before discussing the issue of the application of restorative justice in Indonesia, the researcher invites the reader first to examine the theoretical sources that are the source of the emergence of restorative justice in Indonesia. While restorative justice is not a theory, there is a theory that underlies the emergence of the concept, which has been shifted into an approach in Indonesia today.

In each era, a lot of literature tries to explain shifts of thought in each era. Still, because the object discussed in this study is restorative justice as a new view in solving criminal problems in Indonesia, the researcher will invite readers to understand the purpose of the criminal that has been in effect. Quoted from Eddy O.S. Hiariej (2014) that criminal purposes can be separated as follows:

1. The absolute theory, appears in the classical flow of criminal law. This theory of retaliation is the legitimacy of punishment.
2. Relative theory, looking for the basis for punishment is the enforcement of public order and the purpose of crime is to prevent crime.
3. Combined theory, adherents of this theory focus more on protecting the community than retaliation

4. Contemporary theory, as a modification of the three theories above. Then, several experts emerged, including contemporary theories such as Lafave which revealed that the purpose of crime is to restore justice, known as restorative justice.

Understanding contemporary theory or from some experts referred to as this transitional period, and there is a responsive legal theory with the character of Nonet-Zelznick. The law is considered a social institution. Therefore, the law is seen as more than a mere regulatory system, but also how the law carries out social functions in and for the community. The characteristic of responsive law is looking for the implied values contained in regulations and policies (Nonet dan Philip Selznick, 2015).This theory is in line with the progressive legal theory developed in Indonesia by Satjipto Rahardjo with progressive law (Rahardjo 2010).

When brought into the realm of criminal law, this idea is a breakthrough in material criminal law as a goal of criminal law and also in the scope of formal criminal law as a settlement of criminal cases with consideration of effectiveness in various ways when compared to taking the criminal justice system.

Suppose it is observed that the definition of the term restorative justice in the Regulation of the Indonesian National Police Number 8 of 2021 concerning the Handling of Crimes based on Restorative Justice and the Regulation of the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, there are still differences. Likewise, the regulations are still internal.

Nevertheless, this idea is an advancement for material criminal law, but it should be considered for formal criminal law, namely the criminal justice system. Researcher think that it is necessary to make a rule that is equivalent to the law in defining restorative justice so that in its application, it does not interfere with the synchronization of the criminal justice system in Indonesia. This is important because the term restorative justice is only a concept outlined in several regulations as an idea that must be implemented as a process. So that the process or method used does not confuse, as soon as possible, a special regulation that is comprehensive for all institutions is made.

4 Conclusion

1. Analysis from the point of view of legal theory, it can be concluded that restorative justice is not a theory. However, because it has been applied in several methods as outlined in several laws and regulations in Indonesia, it can be said that restorative justice is a "concept shifted into an approach" that grew out of progressive legal theory thought inspired by the school of thought as outlined by Philip Nonnet and Zelnik in Responsive Legal Theory.
2. So far, restorative justice has been used as an approach inspired to become the goal of applying contemporary criminal law, carried out in several forms or models, such as diversion and penal mediation. However, it will be a risky area if the notion of restorative justice, which has been regulated, spreads in several laws and regulations is not immediately held in regulation at the legal level so that it can provide the same perspective on restorative justice and what methods can be applied as a non-litigation effort in solving criminal law problems in Indonesia.

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