

Restorative Justice for Corruptors in Indonesia; Why and How?

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Article	Abstract
<p>Keywords: Criminal Law, Corruptors, Restorative Justice.</p> <p>Artikel History Received: Oct 24, 2024; Reviewed: Oct 25, 2024; Accepted: Oct 27, 2024; Published: Oct 31, 2024.</p> <p>DOI: 10.20961/jolsic.v12i2.944 35</p>	<p>Corruption is always considered a major sin in Indonesia. In fact, it is not necessarily so. There need to be minimum requirements so that it can be said that corruption is indeed a major sin. For example, seen from the amount of corruption committed, there is good faith to return state money or not, to whether someone is the main perpetrator or not. Such things should be the basis for the implementation of restorative justice for corruptors. As a relatively new concept, the presence of restorative justice provides a breath of fresh air for the law enforcement system in Indonesia. Restorative justice strives to create conditions like before the crime occurred. Restorative justice can certainly realize qualified social welfare. Therefore, implementing restorative justice for corruptors is not something impossible. This study uses normative juridical research, with a legislative approach and a conceptual approach. The results of the research, corruptors should indeed be given the rights to be processed based on restorative justice. However, there are requirements that must be met, so that corruptors can be processed with restorative justice. In addition, this article also discusses how the concept of restorative justice is implemented in Indonesia.</p>

INTRODUCTION

As written by various criminal justice experts, the concept of restorative justice is a concept that emphasizes the balance of justice between the perpetrator and the victim (Firdaus, Dwilaksana, dan Onielda, 2023: 23). This concept is based on the idea that the court is not the only institution that has laws and can handle cases. The court should be the last party in resolving cases. Additional efforts must be made to find a "middle ground" in resolving each case before it is brought to court. It is in this context that restorative justice was born, practiced, and facilitated in the concept of resolving criminal acts (Rochaeti, Prasetyo, dan Park, 2023:4). The concept of restorative justice has actually been around for a long time. It could be said that it ended more than 20 to 30 years ago (Garcia, Disemadi, dan Arief, 2020: 29). This concept emerged as an alternative to resolving criminal cases, especially those involving children. John Breithwath said that the concept of restorative justice is a new direction in the concept of justice, which occupies an intermediary position between 'justice' and the 'welfare model' (Braithwaite, 2020: 284). In addition, this concept is also in the middle between "retribution" and "rehabilitation" (Olson, Sarver, dan Killian, 2023: 15). This means that the concept of restorative justice is a concept that seeks to benefit from all criminal charges. Historically, criminal law views criminal prosecution as a form of punishment for a mistake. However, the right party does not gain any benefit unless the wrong party is punished. Therefore, with the introduction of this concept of restorative justice, it is hoped that society can benefit from resolving criminal cases. On the other hand, in addition to ensuring the implementation of the law (because it is certain who is wrong and who is right), there are certain actions that allow the return of the right party. This concept is supported by the United Nations (UN) in its development. At the Fifth Five-Year Conference held in Geneva in 1975, the UN and many other countries began to try to provide compensation to victims of crime. The provision of reparations is certainly a form of restorative justice that must be achieved. The concept of justice concerning the provision of compensation to victims of crime does not end with the concept of state law enforcement (retribution) or the restoration of the perpetrator's good name (rehabilitation) (A. Madjid dan Istiqomah, 2023: 69).

Although the concept of restorative justice is important, it has also changed the face of law enforcement in Indonesia for the worse. There is a general perception in society that law enforcement agencies in Indonesia are increasingly strict at the lower levels, but too slow at the upper levels. A concept that is certainly seen as contradictory to Pancasila, especially social justice for all Indonesian people. Real evidence in concrete cases cannot be denied. For example, the public is always reminded that grandmothers who steal bowls or watermelons will be imprisoned. There are even punishments for crimes against small children who steal flip-flops, cases of children suing their mothers, and even other criminal cases that may seem trivial. On the other hand, many cases of criminal prosecution involving more serious crimes such as corruption and abuse of power actually run smoothly in the criminal prosecution process. Therefore, restorative justice can actually be used to change the negative image of law enforcement officers. The concept of restorative justice has also been implemented since the enactment of Law Number 1 of 2023

concerning the Criminal Code (hereinafter referred to as the National Criminal Code). Article 51 of the National Criminal Code stipulates that punishment aims to:

1. Preventing criminal acts by enforcing legal norms to protect and regulate society;
2. Socializing prisoners through training and guidance to become good and useful people;
3. Resolving conflicts resulting from criminal acts, restoring social balance and creating a sense of security and peace.
4. Increasing remorse and alleviating feelings of guilt of prisoners.

This article further strengthens that Restorative Justice is indeed recognized and implemented in the Indonesian criminal justice system. However, the problem is that restorative justice is always considered a pattern of case resolution that focuses on minor crimes. In cases with a high level of sensitivity, it is never resolved with restorative justice. Corruption for example. Every perpetrator suspected of committing a criminal act of corruption always gets negative sentiment from the public. In fact, someone who is suspected of committing a criminal act of corruption does not necessarily do it. There is no valid and legally binding court decision, then a person cannot be considered to have made a mistake. One of the most well-known and most widely used legal principles in modern law enforcement today. Based on this construction, the author wants to initiate the enforcement of restorative justice for perpetrators of corruption. Of course, not all perpetrators of corruption can be examined and tried based on the concept of restorative justice. There needs to be strict limitations and requirements, regarding what and who, corruptors can be examined using the concept of restorative justice. It is hoped that the use of restorative justice for perpetrators of corruption can provide new ideas in national criminal law enforcement. In addition, by implementing this concept, it can improve social justice, especially for perpetrators of corruption who have always received a negative label from society.

RESEARCH METHODS

This research uses a normative legal research. Normative legal research is basically research by examining principles, doctrines, principles, and laws and regulations that are adjusted to the theme or topic of the research (Nurhayati, Ifrani, dan Said, 2021: 52). Therefore, normative legal research always uses secondary legal materials in the form of laws and regulations or court decisions as the main reference source (Benus dan Azhar, 2020: 18). This research is the same. It will examine all doctrines, laws and regulations, principles, concepts, and court decisions related to restorative justice and corruption in Indonesia. This research will use a statue and a conceptual approach in analyzing all legal materials that have been found and collected.

ANALYSIS AND DISCUSSION

1. The Concept Of Restorative Justice In The National Legal System

As is the case with legal experts in general, the debate on restorative justice is never-ending. Especially in relation to its definition. Restorative justice is often interpreted solely as the concept of compensation. There is also an opinion that states that restorative justice is the transfer of criminal case resolution into civil cases. Even restorative justice is often considered as merely a mediation process. In addition to these terms, there are also other terms known in

several languages in the world such as mediation in criminal cases or mediation in penal matters which in Dutch is called *strafbemiddeling*, in German is called *Der Außergerichtliche Tatausgleich* (abbreviated ATA), and in French is called *de médiation pénale* (Vooren et al., 2023: 103).

All the definitions of the term mediation that have been put forward refer to one definition in criminal law, namely bringing together the perpetrator of a crime with the victim to resolve the case being faced through deliberation to reach a consensus. Due to its nature, the term penal mediation is also known as Victim Offender Mediation (VOM), *Täter Opfer Ausgleich* (TOA), or Offender-victim Arrangement (OVA) (Garcia, Disemadi, dan Arief, 2020: 44). Then because of its nature of seeking a middle way (alternative) for a criminal case resolution, the term the third way or the third path is also known in the efforts of crime control and the criminal justice system to refer to this penal mediation (Sulistiani dan Fakhriah, 2023: 27).

According to the author, restorative justice is an effort to realize peace between the perpetrator and the victim. Every effort to resolve a legal case must always be oriented towards achieving peace and benefit. So, if the law enforcement process is always associated with efforts for revenge from the victim to the perpetrator, peace can never be realized. There is always anger in every process, because they want the perpetrator to receive an appropriate punishment. This concept should not appear in modern law enforcement.

Modern law enforcement must be directed at a law enforcement process that prioritizes dialogue and mediation. All parties must reach a solution that is mutually beneficial and does not harm either party. It is true that with the occurrence of a crime, it has damaged the peaceful order in the community that has been created so far. However, efforts to improve the situation are much more important than efforts to take revenge. Instead of seeking revenge, the national law enforcement system must aim at efforts to repair the losses caused. So that peace in the community can be realized (Kasim, Rimi, dan Purnamasari, 2023: 6).

This concept is reflected in the national legal system, including through various applicable laws and regulations. The National Criminal Code for example. It regulates how the application of restorative justice must be implemented in Indonesia. Article 54 paragraph (1) of the National Criminal Code states:

“In sentencing, it is mandatory to consider:

1. Form of the perpetrator's mistake;
2. Motive and purpose of committing the crime;
3. The perpetrator's mental attitude;
4. The crime was committed with or without planning;
5. How to commit the crime;
6. The perpetrator's attitude and actions after committing the crime;
7. Life history, social conditions, and economic conditions of the perpetrator of the crime;
8. The influence of the crime on the future of the perpetrator of the crime;
9. The influence of the crime on the victim or the victim's family;
10. Forgiveness from the victim and/or the victim's family; and/or
11. Legal values and justice that exist in society”.

In addition, there is also a formulation of Article 70 paragraph (1) of the National Criminal Code which states:

“While still considering the provisions as referred to in Article 51 to Article 54, imprisonment should not be imposed if the following conditions are found:

- a. the defendant is a child;
- b. the defendant is over 75 (seventy five) years old;
- c. the defendant has committed a crime for the first time;
- d. the victim's losses and suffering are not too great;
- e. the defendant has paid compensation to the victim;
- f. the defendant is not aware that the crime committed will cause great losses;
- g. the crime occurred due to very strong incitement from another person;
- h. the victim of the crime encouraged or motivated the crime to occur;
- i. the crime is the result of a situation that is unlikely to be repeated;
- j. the defendant's personality and behavior convince him that he will not commit another crime;
- k. imprisonment will cause great suffering for the defendant or his family;
- l. Guidance outside of correctional institutions is expected to be successful for the defendant;
- m. The imposition of a lighter sentence will not reduce the serious nature of the Criminal Act committed by the defendant;
- n. The Criminal Act occurred within the family; and/or
- o. The Criminal Act occurred due to negligence”.

Several bold prints contained in several articles above show that the National Criminal Code system does mandate efforts to achieve restorative justice in enforcing criminal law in Indonesia. In addition to the National Criminal Code, there are several other laws and regulations that mandate that the resolution of criminal cases be carried out with restorative justice. Letter of the Chief of Police Letter of the Chief of Police Number Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 concerning Handling Cases Through Alternative Dispute Resolution (ADR) for example. In essence, this Letter of the Chief of Police emphasizes that the resolution of criminal cases using ADR must be agreed upon by the parties to the case, but if there is no agreement, it will be resolved in accordance with applicable legal procedures in a professional and proportional manner. This is at least the understanding of penal mediation that is currently known in Indonesia (Kirkwood, 2022: 19). In addition, there is also the Attorney General's Regulation Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice. According to this regulation, criminal cases that can be resolved with restorative justice are minor criminal cases as regulated in Articles 364, 373, 379, 384, 407 and 483 of the Criminal Code (KUHP). In this case, the law given is a maximum of 3 months imprisonment or a fine of Rp. 2.5 million.

Based on all the descriptions above, restorative justice has indeed been recognized in the national legal system. However, restorative justice focuses more on minor criminal acts. Restorative justice has not touched on criminal acts that are threatened with heavier penalties. This concept is also regulated in the National Criminal Code Article 70 paragraph (2) which states:

- “The provisions referred to in paragraph (1) do not apply to:
- a. Criminal acts that are subject to a prison sentence of 5 (five) years or more;
 - b. Criminal acts that are subject to a special minimum sentence;
 - c. Certain criminal acts that are very dangerous or detrimental to society; or
 - d. Criminal acts that are detrimental to the state's finances or economy”.

In fact, conceptually, restorative justice never separates between handling cases for minor crimes and serious crimes. The concept that restorative justice wants to achieve, as stated in the previous section, is an effort to resolve the conflict between the victim and the perpetrator, and to try to restore the balance of the situation as before the crime occurred. So, if restorative justice is only intended for minor crimes, it will negate the purpose of restorative justice itself.

2. Restorative Justice For Corruptors

Maqashid sharia or al-Maqashid al-Syar'iyah has a synonymous meaning, which refers to the objectives that the Sharia seeks to achieve. Maqashid sharia is a phrase formed from the murakkab idhafi . Etymologically, maqashid is a plural form, more specifically jam' al-takhsir which has the form of shîghat muntaha al-jumû'. The singular word (mufrad) of the term is maqshad, which comes from the root qasada-yaqsidu-qasdan, which means intending, intending, or wanting. Maqashid Sharia is a new trend in Ushul Fiqh studies that developed in the contemporary era. The development of Islamic law in the contemporary era is considered more promising when the methods contained in maqashid sharia are applied. As a branch of science that developed from ushul fiqh, maqashid sharia is now in great demand by Islamic jurists to be studied more deeply.

Before talking much about restorative justice for corruptors, the author would like to first explain the concept of legal politics. Like the concept of restorative justice, the definition of legal politics has also been widely conveyed by legal experts and political experts. Some say that legal politics is a matter of policy (M. A. S. W. Madjid, 2022: 77). There are also experts who state that legal politics is a process of tug-of-war of interests in the process of making laws.(Prabowo et al. 2020: 81) Therefore, legal politics is not included in the study of legal science. It is more appropriate if legal politics is included in the scientific realm of political science (Honig, 2023: 159). There are also experts who define legal politics as the government's efforts to determine the direction of policy and the substance of the law.

In this article, the author considers that legal politics is a policy choice that can be chosen by the government together with the legislature to formulate improvements to the law in the future. For example, the executive and legislative as lawmakers have a desire to improve the criminal system in environmental law. What things must be regulated in environmental crime, who the actors are, how the law enforcement mechanism is, and so on, are part of the concept of legal politics. Strictly speaking, legal politics is an effort by lawmakers to formulate laws (Felisiano & Paripurna, 2023: 9).

In this section, the legal policy of using restorative justice for perpetrators of corruption will be explained. According to the author, the important point of the regulation regarding this matter is related to the limitations. Who are the corruptors who can be investigated with restorative justice, the object of the corruption crime, how is the mechanism for handling the crime, and who are the parties has been involved. The author needs to emphasize further that this article is not intended to protect corruptors. Instead of protecting, corruptors who do not meet the limitations as intended in this article must still be punished as severely as possible. This article is intended to go further than that. This article aims to make corruptors merely

ordinary citizens who can certainly make mistakes. And as ordinary humans, the forgiveness process can certainly be given to anyone who admits and wants to change. Some important points in the regulation of restorative justice for corruptors include:

1) The corruptor in question is not the main actor

The concept of criminal law recognizes a principle known as participation (Pratiwi, 2022: 72). Participation occurs when a crime is not committed by one person. At least it is committed by at least 2 people. Each perpetrator has their own duties and functions to support the occurrence of the crime. Among the many perpetrators who participate in committing a crime, the perpetrator who is given the heaviest punishment is the intellectual actor. An intellectual actor is someone who has an idea, orders to do, and plans a crime (Pangaribuan, 2023: 20). An intellectual actor does not have to participate in the process of the crime. The most important part is that this perpetrator proposes and provides ideas so that the crime committed can occur. Corruption, as an organized crime, is very difficult if it is done by only one person. It requires coordination from many parties so that this prohibited act can be realized. In addition to coordination, the perpetrators who are coordinated must also be willing to carry out the prohibited act. If there is one or some perpetrators who are not willing to do it, then the crime of corruption sometimes fails to be carried out.

By looking at this fact, corruption is very likely to be included in the category of participation in criminal law (Herring, 2021: 26). So, among these perpetrators, there is one main perpetrator who is the intellectual actor of the crime of corruption. Among the recommendations given by the author, restorative justice can be given to perpetrators who are not intellectual actors. Restorative justice can be given to perpetrators who only help the occurrence of criminal acts. Moreover, for example, the perpetrator has a power relationship with the intellectual actor. Such as a driver, aide, housemaid, gardener, etc. These types of perpetrators certainly cannot be given the same punishment as the intellectual actor who formulated the occurrence of the criminal act. In order to protect the legal interests of perpetrators of such criminal acts, restorative justice should be implemented. This use can certainly be complemented, for example, with the concept of whistle blower and justice collaborator. With this combination, justice for the perpetrator can be achieved properly.

2) There is a return of state losses

In addition to being intended for perpetrators who are not intellectual actors, the use of the concept of restorative justice can also be given to perpetrators who have returned state losses. The process of returning state losses is indeed not included in the reasons for forgiveness and justification in the concept of criminal law. However, at least with the return of state losses, it shows that there is good faith from the perpetrators of corruption to correct the mistakes they have made. Returning state losses is also intended as an effort to restore conditions as before the crime occurred. This concept is in accordance with restorative justice, the spirit of which is to restore the atmosphere and conditions as before

the crime occurred. If the perpetrator is willing to return, then the concept of restorative justice has been achieved. Thus, the perpetrator must also be processed based on this concept.

3) The value of state losses is no more than 1 billion Rupiah

The limit of 1 billion rupiah is often used as a reference in the context of handling corruption cases in Indonesia. Some of the reasons used include (Abbas, 2021: 91):

- a. Economic impact. If the state loss incurred exceeds 1 billion rupiah, then it is usually considered to have a significant impact on the country's economy. If the value of the state loss does not exceed 1 billion rupiah, then it is considered not to have much impact on the economy, both locally and nationally;
- b. Risk analysis. If the state loss reaches 1 billion rupiah or more, then there needs to be more complicated coordination in carrying out criminal acts of corruption. If the coordination carried out is more complicated, then of course the corrupt practices carried out are increasingly vulnerable to abuse of power, influence, and the involvement of more parties. And vice versa. When the corruption committed is less than 1 billion rupiah, the influence and involvement of the parties are also less;
- c. Regulation and policy. Many laws and regulations have set certain limits for handling corruption cases.

Based on the description above, if the criminal act of corruption committed is less than 1 billion rupiah, this can be a reason to use the concept of restorative justice in handling the case.

4) Corruptors are not recidivists

Recidivism in criminal law refers to an individual who commits crimes repeatedly (Lewis, 2020: 35). A person can be considered a recidivist if he is identified as having committed repeated acts within a certain time frequency. If a person has become a recidivist, then that person's sentence cannot be reduced. Especially for the second, third and subsequent crimes. Psychologically, the behavior of a recidivist has shown that the crime he committed is no longer an intentional crime (Bowers, 2021: 64). Moreover, the crime committed shows a pattern of behavior that is a hobby or preference (Loeffler & Nagin, 2022: 102). Such a psychological pattern cannot be justified, so it must be punished severely. In other ways, for perpetrators of corruption who are not recidivists, according to the author, it is necessary to resolve it using the concept of restorative justice.

All the points indicate the fact that corruptors deserve to be prosecuted using the concept of restorative justice. All the requirements should apply cumulatively. Not alternatively. This aims to provide clear limitations for which corruptors can be subject to the concept of restorative justice. If one of the above requirements is not met, then the perpetrator of the crime of corruption must be punished and processed properly. Corruptors who can be subject to legal proceedings based on restorative justice are corruptors who are not intellectual actors, do not cause state losses of more than 1 billion rupiah, are willing to return the resulting state losses, and are not recidivists. In order to follow up on the

findings of this study, several changes to the rules need to be made. Among them are changes to Article 70 paragraph (2) of the National Criminal Code and Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. In addition, investigators of corruption crimes, both from the KPK, Police, and Prosecutors, must also begin to consider terminating the investigation of the case if the above facts are found. This means that if a criminal act of corruption occurs and it is possible to process it based on restorative justice, then every effort is made to resolve it without entering the realm of trial. This is certainly because the factor of stopping the investigation and prosecution is the spirit of the implementation of restorative justice itself.

CONCLUSIONS

This article finds several important findings in the development of thinking about restorative justice and handling of corruption. In the national legal system, restorative justice has been recognized and practiced in handling criminal law. However, restorative justice only touches on cases that are considered minor cases. Criminal cases that are considered major and extraordinary such as corruption have not been touched by the concept of restorative justice. The author found that corruptors have the right to receive criminal treatment based on the concept of restorative justice. This is the basis for why we must rethink that corruptors can be given the right to be investigated based on restorative justice. This concept is not merely to free corruptors from criminal law. More than that, it is precisely to guarantee that the rights of every citizen to receive equal treatment before the law can be fulfilled. In this article, the limitations of corruptors who can be punished based on the concept of restorative justice are determined. Corruptors who can be subject to legal proceedings based on restorative justice are corruptors who are not intellectual actors, do not cause state losses of more than 1 billion rupiah, are willing to return the resulting state losses, and are not recidivists.

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