

Human Rights in Enforcing Restorative Justice in Indonesia as a Constitutional Law State

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ABSTRACT

The upholding of the constitution in a country basically depends on the commitment of every citizen to the rules of the state rule (rechtsstaat) that have been compiled and determined, as well as public awareness to comply with them. Theoretically, the existence of legal structures (legal institutions), and legal substance/legal material (statutory regulations), have been fulfilled and sufficient, but this does not necessarily guarantee that the law and constitution will be upright. The dimension of legal development or legal culture is something that cannot be separated if the law is expected to be the commander-in-chief in a country based on the principle of the rule of law (rechtsstaat). Legal awareness is not only related to awareness of the fulfillment of rights and obligations in accordance with existing provisions but also includes respect for and/or protection of human rights. Indonesia has been in the process of becoming a legal state that is more democratic as well as growing with a better civilization of human rights after the authoritarian regime of the New Order. Indonesia's process in the development of human rights can be seen from the integration of human rights values in our constitution, especially as stated in Chapter X of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). The articles that regulate Human Rights actually indicate the direction of change in our civilization which is more appreciative of human rights values in the life of the nation and state. As the basic law (grundwet) for the Indonesian state, the UUD NRI 1945 must be guided and implemented by all elements, both state administrators and citizens in carrying out their respective duties, and in this case, the constitution must be enforced and functioned as a frame of reference (reference). The use of the UUD NRI 1945 as a guideline to find solutions in solving state and national problems that come and go as if they are never-ending. The constitution can live and be reflected in the administration of the state and the daily life of citizens so that an effort or legal breakthrough is needed in resolving various problems or disputes that exist in society through the realization of restorative justice. Enforcement of the protection of human rights and legal justice is an important matter and these two closely related entities cannot be separated and for that, all citizens must have a commitment in order to draw closer and make constitutional thoughts fill the pulses of the life of the nation and state.

Keywords: *Indonesia, corruption, human rights, interception.*

1. INTRODUCTION

Ubi societas ibi ius, where there is society there is law, this expression was introduced by Marcus Tullius Cicero (106-43 BC), a philosopher of law and politician born in Rome. Cicero's view is based on the flow of interaction in society and the formation of a legal structure that every society absolutely adheres to and obeys the law [1]. Humans without the law will cause disorder in their lives while law without humans will never exist because it functions to create order,

order, and justice. Law means creating peace and justice in society is achieved if the legal order has been functioning effectively.

The importance of the legal function shows that the constitution in a country is basically very dependent on the commitment of every citizen to the rules of the rule of law that have been prepared and stipulated, as well as public awareness to comply with them. The law is the highest rule that must be followed in social interaction. The law develops along with the civilization of a nation that is influenced by social and philosophical conditions, therefore, the law requires

renewal that is based on the moral and cultural values of the Indonesian nation.

It is hoped that legal reform will later enrich Indonesian legal and constitutional civilization. Building a legal civilization needs to prepare the necessary legal tools, one of which is social and cultural which is outside the legal system. Social and cultural factors outside the legal system are very influential and urgent for the continuity of life in society, especially as the Indonesian nation has repeatedly experienced/faced multi-dimensional crises.

Fukuyama on the other hand emphasizes that those who see that the key to a revival lies in the strength of the social spirit of a nation. If the social spirit dies, the nation also dies. The spirit of social life is: (1) a sense of obligation to others, a sense of being called to do something for others, (2) The honesty or sincerity of the social forces that exist in the nation is selfless for the progress of the nation, (3) cooperativeness or cooperation for common interests, and (4) reliability, social forces that exist in society in interacting are not colored by lies and deceit for certain interests[2].

Talcott Parsons (1951) [3] shares this view, where he is a world-renowned sociologist whose thoughts in the field of sociology have been so influential from the 1950s to the present. In his book *The social system* he gives another perspective that the level of progress of a society, a nation, a civilization is determined by the ability of a nation to adapt to changes that exist for the progress and welfare of the nation. Referring to the thoughts of the Persons, by trying to view various current realities into the future while still relying on the development of legal culture or culture, it is unavoidable if the law is expected to be the commander in chief in a country based on the principle of the rule of law (*rechstaat*).

Legal awareness is not only related to awareness of the fulfillment of rights and obligations following existing provisions but also includes compliance and participation of all citizens of the nation in complying with existing legal norms and playing a role in overseeing the implementation or operationalization of the rules contained in the law. In this context of thinking, it is hoped that the legal system will always place itself behind social facts. Laws can also play a role in changing society. Roscoe Pound writes about the function of law as a tool of social engineering.

Functionally, the law also promotes the goal of certainty in society. Certainty shows that there is a

similarity in the application of the law because it departs from the similarity of the structure of the applicable rules. It is hoped that the public will not object to the social control function of this law because the public already knows the law well. Including the development and application of the law, such as the concept of restorative justice.

Restorative Justice in the legal system in Indonesia is now increasingly prominent and feels already thick in people's understanding that there is a legal settlement with human considerations which is a universal value or as a universally applicable human rights value. Therefore, the settlement of a case through restorative justice has been widely applied. Let's say a case involving a young child, he stole sandals or clothesline. This case is considered to be resolved through the concept of restorative justice considering the future of the child and the consideration of protecting the human rights of the child. Moreover, the child protection system is oriented towards legal restoration of children, not with a paradigm of retaliation or punishment. So, once again, the concept of restorative justice is very appropriate to be applied to victims, perpetrators, community groups, and law enforcement officers.

2. METHOD

This research uses a normative research method with a statutory approach, namely the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) which prioritizes legal materials in the form of statutory regulations as the basic material in conducting research. In the context of this research, it can be emphasized that the upholding of the constitution in a country is basically very dependent on the commitment of every citizen to the main rules of the state that have been drawn up and stipulated, as well as public awareness to obey them. Therefore, the law is the highest rule that must be followed in social interaction. Law develops along with the civilization of a nation which is influenced by social and philosophical conditions. Therefore, the law requires reform that is rooted in the moral and cultural values of the Indonesian nation.

Restorative Justice or often used as restoration justice, is a model approach that appears in the settlement of criminal cases. This approach emphasizes the direct participation of perpetrators, victims, and the community in the process of resolving criminal cases. Liebmann simply defines restorative justice as a system that aims to restore the welfare of victims, perpetrators and society. The concept of restorative justice is not only responsive but also in the

application of a very progressive legal approach, so that it can be used as a model to actualize the law in society facing today's legal conditions whose problems are increasingly complex. The main challenge is about legal justice which often clashes with formal (procedural) justice, namely law enforcement officers who only follow "rigidly" the sound of the articles in the Criminal Code.

3. RESULT AND DISCUSSION

I. CONSTITUTIONAL ASPECT

Since Indonesia's independence, the founders of the state have been committed to forming a state by realizing the concept of a rule of law. The manifestation of the commitment to the establishment of a State based on law is contained in the fourth paragraph of the Preamble to the UUD NRI 1945 which reads, "...then the independence of Indonesia shall be formulated in a Constitution of the State of Indonesia. ...". The formulation shows that the State of Indonesia must be carried out based on the constitution as the basic law of the State.

Starting from the above, in the theoretical perspective, it is emphasized that the rule of law is a translation of *rechstaat* or the rule of law. However, even though *rechstaat* or the rule of law is defined as a state of law, the two terms have different legal backgrounds and traditions, as well as different institutionalizations. However, both of them also have something in common, namely they both recognize the principle of protecting human rights through the institution of an independent and impartial judiciary.

As we commonly know, *rechtstaat* is embraced by many Continental European countries that adhere to a civil law system. Meanwhile, the rule of law is more widely adopted by countries with Anglo-Saxon legal traditions based on the common law system. In actualization, civil law focuses more on administration and the system of norms, while common law focuses on judicial activities. Furthermore, the concept of *rechstaat* prioritizes the principle of *wetmatigheid* (written law) which later becomes *rechmatigheid* (action based on law). While the rule of law prioritizes the principle of equality before the law which gives freedom to judges to create laws for the sake of justice.

Examining this, in the Indonesian context, before the Amendment to the 1945 Constitution of the Republic of Indonesia in 1999-2002. The explanation of the 1945 Constitution mentions the term *rechstaats* explicitly. This is what makes Indonesia seem to adhere to the concept of

a *rechtstaat* law state as civil law country. However, after the amendment to the 1945 Constitution, Article 1 paragraph (3) of the 1945 Constitution stated that "the State of Indonesia is a state of law". With the formulation of this provision, the conception of the rule of law which used to be synonymous with *rechtsstaat*, is neutralized to become a state of law only. The conception of the rule of law adopted by the 1945 Constitution is obtained from both the *rechstaat* and the rule of law. It is even obtained from other legal systems that are integrative and their implementation is adjusted to the demands of existing needs and developments.

Referring to the amendments to the 1945 Constitution of the Republic of Indonesia that occurred in Indonesia which inspired many things that contained human rights as regulated in the constitution (UUD NRI 1945) as a constitutional norm. In a holistic understanding of constitutionalism, the fulfillment of human rights in the life of society and the state is the responsibility of the state.

The amendment is therefore the right momentum to build Indonesian civilization and state administration towards a constitutional state of law. The constitution as the basic law of the state (the supreme law of the land) must be the basis and guideline for all elements of the state, in running the wheels of state organization. There should be no assumptions or reasons whatsoever in complying with the constitution. Because, if the constitution is not obeyed, then the foundation of the state will be fragile, considering that the constitution is the basic law of the state. On the other hand, if the constitution becomes a firm grip in the administration of the state, it will further strengthen the existence of the state itself. A constitutional expert named Otto Kirchheimer who came from Germany said: the success of a revolution or change in society cannot be separated from the constitution. Because the constitution is the rule of the game for the administration of the state.

II. ASPECTS OF THE DYNAMICS OF HUMAN RIGHTS

At the legislative level, the enactment of Law Number 39 of 1999 concerning Human Rights (UU HAM) reflects the debate on how Indonesia can build a human rights legal system that is more secure for its citizens. In addition, some ratifications of international legal treaties in the field of human rights were carried out, including two important covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and

Political Rights (ICCPR), in 2015 through Laws Number 11 and 12. In 2015. Previously, the government and the DPR had ratified two important conventions, namely The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified through Law Number 5 of 1998) and The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was ratified through Law Number 29 of 1999. Of course, such legislation will oversee the legal reform process that pays more respect to human rights.

Legal developments and updates will continue to occur. The dynamics of justice-based human rights to resolve a problem or criminal case are now a part of developments and/or changes in the legal sector [4]. The situation and conditions in the operation of the law as an effort to uphold human rights, which pays attention to the speed of case settlement, cannot be denied, has become a new trend of changes in existing enforcement. Human rights and restorative justice are effective/efficient solutions in the settlement of a criminal case.

III. ASPECTS OF RESTORATIVE JUSTICE

To find a responsive law, it must be admitted that modern legal theory is very recent. As Jerome Frank put it, the main goal of legal realists is to make the law more responsive to social needs [3]. For this purpose, they urge the expansion of relevant areas to reach the law, so that the legal mindset can include knowledge of the social context and the impact of government policies or actions. Pound's theory of social interest is a more explicit attempt to create a responsive legal model. In this perspective, good law must offer something more than procedural justice. The law must show its neutrality (fair, provide equal opportunities) the law must help determine the interests of the community and be committed to achieving substantial (essential) justice[5].

To be responsive, the legal system must be open. This shows that there is always a connection here and there. That is, it must be able to generate participation and must be able to understand and accept new socio-economic needs. This will be greatly supported by economic, social, and political developments.[6] These three parts have a central role. Therefore, the characteristic of responsive law is the search for implicit values that exist in rules and policies. Say the use of Restorative Justice instruments in solving a problem or in the criminal realm. In the current legal developments, this option has become a choice for

resolving cases that are mostly carried out while disputing communities [7].

Restorative justice is the settlement of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation [8]. Thus, restorative justice becomes an approach that seeks to reduce crime by holding meetings or opening up spaces for dialogue between victims and defendants, and sometimes also involving representatives of the general public. The goal is to tell each other or tell the truth about what happened. Or discuss in detail who is harmed by their crime, and how they can discuss what the perpetrator must do to atone for his crime. Things that can be done as an effort or step to resolve a problem include providing compensation to victims, apologizing, or taking preventive measures so that similar incidents do not happen again.

The essence of restorative justice is a victim-centered criminal response that allows victims, criminals, their families, and community representatives.[9] Thus, restorative justice efforts are considered as a legal breakthrough that can break the "freeze of procedural" law which has been stigmatized as something rigid, convoluted, and time consuming. Thus, the emergence of modern legal science which is strongly influenced by the emergence of the positivism paradigm in modern science. The main character of modern law is its rational nature. This rationality is characterized by the procedural nature of legal regulations. However, in practice, the use of the modern legal paradigm also causes a lot of rigidities in such a way that the search for justice cannot be achieved because it is blocked by procedural walls. In this case, Satjipto Rahardjo [3] said that modern law is at a bifurcation.

In this bifurcation, a critical question arises, what are justice seekers in the rule of law looking for? Society wants another substance from the term rule of law. It doesn't feel like the law is being chased by society, but the substantial thing is justice. According to Satjipto Rahardjo [10] the rule of law is a forum to express what is actually desired, namely justice. In realizing the value of justice, modern law is correlated with formal justice, while substantial justice has been neglected. Law in a formal form is needed because indeed it is a characteristic of real law. However, the formal form should not omit the substantial. Because, the way of thinking formalism like it

or not has ignored and discriminated against poverty, powerlessness, and physical weakness.

Formal forms like this appear in our criminal procedural law. Practice in the Court is more concerned with the rules than the substance of the rules. The amount of discrimination is undeniable. Examination of criminal cases in the Court is formal. The attitude of discrimination is prominent, full of partiality and usually favors those who are more capable. Usually, this behavior is "spoofed" on the attitude of the Criminal Code (giving money after the case). According to Achmad Ali [11], this is due to the use of positivistic glasses that you use in interpreting various laws. Therefore, substantial sales failed to be obtained.

At this point, there is a need for legal breakthrough steps from law enforcement officers in realizing/implementing restorative justice in the practice of the criminal law system. As a solution to this legal downturn, an effort is indeed needed, our nation needs a progressive type of law enforcement by actualizing restorative justice. In progressive law enforcement, a critical approach to the law is needed, one of which is the human rights-based "Restorative Justice" approach.

4. CONCLUSION

In its journey, the Indonesian state has been in the process of becoming a more democratic legal state and is growing with a better civilization of human rights. This journey can be seen in our constitution which has accommodated the values of human rights. The meaning is that there is respect for the values of human rights in the life of the nation and state, even though the development of the world and current social changes depict critical and contextual issues related to human rights that are developing very rapidly. One of the developments is a legal approach with the concept of restorative justice, which is currently discussing and/or implementing restorative justice or commonly known as restorative justice, which is becoming increasingly prominent and is increasingly becoming an option in solving problems in the community. In Indonesian law, the restorative justice system has developed and is even widely applied as a comprehensive (comprehensive) solution in solving criminal law problems in society.

The concept of restorative justice is not only responsive but also in practice a very progressive legal

approach so that it can be used as a model to actualize the law in society, especially in the face of today's legal conditions whose problems are increasingly complex. The main challenge is the matter of legal justice which often clashes with formal justice (procedural), namely law enforcement officers who only follow "rigidly" the sound of the articles in the Criminal Code, even though the elements of the article contradict the existing values of justice. For example, a grandmother passing by in the garden picks fruit to eat, but the owner of the garden immediately reports the grandmother as theft. The elements in Article 362 are fulfilled, but it must be taken into account that the grandmother had no intention of enriching herself. The reporter who is actually a rich person and the reported person (grandmother) is poor, the solution to the case that remains is to apply the concept of restorative justice.

REFERENCES

- [1] A. Abustan, *Filsafat Hukum (Konsepsi & Implementasi)*, Cetakan 1. Jakarta: Raja Grafindo, 2020.
- [2] Universitas Islam Jakarta, "Hukum Konstitusi (Negara & Demokrasi), Buku Ajar Mahasiswa Magister Ilmu Hukum UID." Universitas Islam Jakarta.
- [3] R. Satjipto, *Sosiologi Hukum Perkembangan Metode dan Pilihan Masalah*. Genta Publishing. Jakarta: Genta Publishing, 2010.
- [4] S. Musdah Mulia, *Potret HAM di Indonesia*. Universitas Paramadina, 2007.
- [5] S. Rahardjo, "Hukum dan Birokrasi," in *Makalah pada diskusi panel Hukum dan Pembangunan*, 1998.
- [6] D. R. I. Hapsari, "Hukum Dalam Mendorong Dinamika Pembangunan Perekonomian Nasional Ditinjau Dari Prinsip Ekonomi Kerakyatan," *Leg. J. Ilm. Huk.*, vol. 26, no. 2, p. 238, 2019.
- [7] Rumadi, "Secara Normatif dalam Perspektif Hak Asasi Manusia (HAM)," *Kompas*, 2004.
- [8] M. Liebmann, *Restorative Justice, How it Work*. London and Philadelphia: Jessica Kingsley Publishers, 2007.
- [9] Y. A. Fajrin and A. F. Triwijaya, "the Concept of Penal Mediation for Defamation Delict in the Indonesia Law As a Manifestation of Restorative Justice," *Yust. J. Huk.*, vol. 9, no. 3, p. 363, 2020.
- [10] R. Satjipto, *Hukum dan Perilaku Hidup Baik adalah Dasar Hukum yang Baik*, PT Kompas. Jakarta: Media Nusantara, 2009.
- [11] A. Achmad, "Sosiologis Hukum: Kajian Empiris Terhadap Pengadilan," Jakarta.