

The Implementation of Restorative Justice by the Indonesian Police: An Overview of Legal Philosophy

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ABSTRACT

Restorative justice is a new concept of resolving criminal cases in Indonesia. The application of restorative justice should ideally start from the beginning of the criminal justice procedure, namely at the investigation stage (in Indonesian criminal procedure law it is divided into two stages, namely “penyelidikan” and “penyidikan”) by the police. In implementation, the term “discretion” known as one of the manifestations of restorative justice that must be pursued by the Indonesian National Police. This paper discusses the form of implementation of restorative justice by the police, by analyzing it from the perspective of legal philosophy in order to find the ideal concept of restorative justice. The legal research method used is normative research by analyzing data sources in the form of laws and regulations, norms, and doctrines of legal philosophy, as well as various articles or scientific journals related to the topic. Result shows that restorative justice can be done and supported by applying its values, processes, and restorative outcomes. So at the investigation level, it is needed for investigators or the Police to make the maximum effort in achieving those values. The Police are the main point in succeeding the effectiveness of restorative justice in the misdemeanor prosecution. In its application, it must consider the restorative justice that has not been implemented optimally.

Keywords: Restorative Justice, Investigation, Police, Philosophy of law.

1. INTRODUCTION

Every person who commits a crime must be accountable for their actions through a legal process. This provision emerged from the Indonesian state concept as a state of law (rechstaats). The function of law is to ensure the social life of the community. It is due to the law and society are interrelated. The purpose of the law, according to Gustav Radbruch that the law must use the priority principle of fundamental values such as legal justice, legal certainty, and legal benefits as the objectives of the law [1]. Therefore, justice is a top priority in implementing law enforcement, especially in criminal law.

The functions of criminal law and law enforcement are essentially the same; namely, they identic with the operation or concretization of criminal law. This functionalization there are three stages of policy is the formulative policy stage as a stage of criminal law formulation by the legislator. the applicative policy stage as the stage of enforcement of criminal law by law enforcement, the administrative policy stage, which is the implementation stage by the legal execution apparatus [2]. In one of the stages, namely applicative policies, the Police

have the discretionary authority to resolve criminal cases at the investigation level through the approach and strengthening of restorative justice. The investigation level is the initial stage of prosecution, where peace is still available before the case escalates to the trial level. Then in the court, it will determine the guilt or innocence of a person and further imposing a crime.

Article 14 paragraph (1) letter g of Law Number 2 of 2002 concerning the Indonesian National Police. It regulates that: “In carrying out the main tasks as referred in Article 13, the Indonesia National Police has responsibility in conducting initial investigation and investigation of all criminal acts following the criminal procedure law and other statutory regulations.” These provisions Police are obliged to take action such as arrests if there is a report from the public based on the evidence found and the reporter's testimony. If there is sufficient evidence, then proceed with the initial investigation process.

The handling of criminal acts is closely related to the rules of the Dutch colonial heritage *Wetboek van Strafrechtvoor Nederlandsch Indie* (WVS NI). These rules affect the retributive pattern of the criminal justice system in Indonesia. In retributive theory, criminal sanctions

emphasize the element of retaliation, which is reactive to an act [3]. The current punishment mechanism is unsatisfactory. The public reacts and triggers some thoughts to make alternative efforts to solve the problems related to handling criminal acts in a country.[4] The development of the criminal system in Indonesia is initiated by applying the restorative justice concept in the criminal proceedings of a case. The measure of justice is not based on retributive justice in revenge or imprisonment but conviction and forgiveness. The development of the criminal system in Indonesia is initiated by applying the restorative justice concept in the criminal proceedings of a case. The measure of justice is not based on retributive justice in revenge or imprisonment but conviction and forgiveness.

Case data from general crimes, theft, embezzlement, persecution using restorative justice in 2020 for the termination of prosecution based on restorative justice have been carried out by the prosecutor's office as many as 101. Those are 97 cases with individual victims and 4 cases with companies or state institutions spread over 27 provinces and 70 regencies/cities. Compared with the overall figure in the same crime type, the rate of restorative justice application, especially in Indonesia, is relatively low, and many are still being processed up to the prosecution stage. This condition initiates the urgency of implementing restorative justice, which is more leverage, especially at the investigation stage. Restorative justice that is not implemented optimally can cause legal goals or ideals not to be achieved and restorative justice to be ineffective.

In study of justice phrase, the philosophy of law takes the proper role. It is due to the justice is the essence and philosophy law. It also talks about the nature of the law. Therefore, there is a need for a review of restorative justice in legal philosophy, especially at the level of investigation. It is due to the investigation is an early and important stage in the criminal proceedings. This stage determines whether the value of justice can be achieved in the investigation process and accordance with the nature of law in Indonesia.

Based on the description above, the researcher is interested in applying the restorative justice concept at the level of ideal investigation to achieve justice for the community. Then, it also discussed how the condition of the criminal law system in Indonesia after applying the concept of restorative justice as an alternative settlement of criminal acts, especially at the investigation level.

2. METHOD

This paper used a normative legal research method. This method based its analysis on applicable laws and regulations and was relevant to the legal issues explained in the research [5]. This research was conducted to provide legal arguments as a basis for determining whether an event was right or wrong and how the event should be according to the law. This article emphasized data sources in legal norms and philosophy (doctrine) and various recent scientific articles or journals related to issues discussed to provide a valid argument.

3. RESULT AND DISCUSSION

I. THE APPLICATION OF THE RESTORATIVE JUSTICE IDEAL CONCEPT AT THE INVESTIGATION LEVEL

It is necessary to pay attention to the objectives and functions of the law in carrying out law enforcement efforts, as stated by Gustav Radbruch. The most important goal of law compared to others is justice. The philosopher who first formulated the meaning of justice was Aristotle. He argues that justice is giving a right that should be obtained by everyone (*fiat Justitia pereat Mundus*) [6]. Aristotle's thinking resulted in a corrective justice definition that guarantees, controls, and sanctions against illegal attacks. Justice can be ideal if all elements of society have got an equal share in all-natural objects. They get the rights that they should get. In addition, there is also justice according to Sociological Jurisprudence. It is stated by Roscoe Pound where justice is based on the law that lives in society, both in the form of written and customary law. The law must be seen as a social institution to meet social needs to the fullest [7]. Therefore, the law must resolve social conflicts in society.

Today, the aim of criminal law enforcement has been limited to imposing criminal charges and sending convicts to prisons. As a result, there is disappointment and negative judgment from the community towards the law enforcement department. Then, ironically, the community is forced to take their ways to obtain justice[8]. A person who is considered a crime often experiences mental decline and self-esteem due to society's stigma towards ex-convicts, even if the crimes committed are minor. The impact of these retributive criminal sanctions often injures the sense of justice for the convicts, especially after the criminal period. Responding to this phenomenon, the legislators brought up a breakthrough in interpreting justice, namely the idea of restorative justice application. It emerged due to criticism of applying the retributive criminal justice system, which was considered ineffective

in resolving social conflicts. This restorative justice is generally practiced with deliberation between the suspect and the victim. It also provides protection for both parties or with fair problem-solving.

Implementing restorative justice as a state of law guarantees the value of justice. It ensures legal certainty to protect the public interest as the main function of law enforcement in society. The certainty in the law will increase public confidence in the authorities in a country (the government). The government can make a rule of law that can provide legal certainty. As a state of law, it is proper to make laws that can give welfare to citizens so that the law can also be obeyed by the people and creating obedience in society. According to Fence M. Wantu, "Law without the legal value certainty will lose its meaning because it is no longer be used as a behavioral guide for everyone" [9].

The rule of law regarding the restorative justice application in criminals has been clearly stated in the Regulation of the Police General of the Indonesian Republic Number 6 of 2009 concerning Investigation of Criminal Acts (PERKAP-PTP). Implementing these regulations is usually seen from diversion efforts at the investigation level of child criminal cases. However, until now, the implementation has also increased to the level of ordinary criminal investigations. Article 12 of PERKAP-PTP stipulates the formal and material requirements that must be met in implementing restorative justice efforts. Material requirements include conditions that refer to acceptance by the community and the litigants. On the other hand, formal requirements refer to the documents needed to apply for Restorative Justice[10]. In essence, according to these rules, investigators can carry out restorative justice if it is related to minor crimes and fulfills the elements of the criteria for criminal acts. Then, it also can be sought for peace between the parties (perpetrators and victims).

Wright stated that the ideal implementation of restorative justice should pay attention to two aspects: the restorative process and the restorative outcome[11]. These two values should not be considered as competing but as complementary to each other, because in order to achieve the successful realization of restorative justice objectives, they must act in chronological succession. In short, restorative outcomes cannot exist without a restorative process. On the other hand, if only the restorative process is realized, without any restorative results, restorative justice can be said to have failed. Restorative justice can operate and be supported by applying its values, processes,

and restorative outcomes. So at the level of investigation, it is appropriate for investigators or the Police to make maximum to achieve those values. The investigator is obliged to understand the meaning of the guilty, the sentence purpose, and the qualifications of the crime to achieve restorative justice. With discretionary authority, it makes the investigators or Police take a role as the main key to the success of the implementation of restorative justice and directly playing a role in the effectiveness of law enforcement with the restorative justice approach.

The discretionary authority has been regulated in Article 18 of the Indonesia Law Number 2 year 2002 concerning the Indonesian National Police, namely: *first*, The Indonesian National Police may act according to their judgment in carrying out their duties and authorities in the public interest; and *second*, as referred to in paragraph (1), in carrying out its provisions, it is carried out by taking into account the laws and regulations and the Professional Code of Ethics of the Indonesian National Police. Discretion requires the conditions that should be met in its implementation. It can be done as long as it does not contradict the rule of law. It is following reasonable legal obligations included in their work environment; and human rights.

The justice value that restorative justice wants to achieve is when all parties can solve a criminal case. The Police, as investigators, can provide opportunities for criminals, victims, and the community to produce a fair settlement for all parties. Based on Aristotle's view, justice is identical to "equality." It will be in line with the notion of restorative justice, according to Tony Marshall where all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future[12]. Corrective justice focuses on correcting something that went wrong. Corrective justice seeks to provide adequate compensation for the injured party if a rule is violated or a guilty is committed. Then, if a crime has been committed, the appropriate punishment should be given to the perpetrator[13].

The application of restorative justice to resolve a criminal act can also be in harmony with the *Ultimum Remedium* principle. Criminal law is considered a last resort or the last sanction if the administrative sanctions and civil sanctions are not deemed sufficient. As a last resort, it is expected that law enforcement can play a vital role upfront in determining reported cases. This principle was realized by the Circular Letter of the Chief of Indonesia Police Number: SE/8/VII/2018 Concerning the

Application of Restorative Justice in settlement of Criminal Cases. It emphasizes that it is necessary to establish a new concept within the authority of initial investigators, investigators, coordinators, and supervisors of criminal investigations, namely restorative justice.

II. THE CRIMINAL JUSTICE SYSTEM IN INDONESIA AFTER IMPLEMENTING THE CONCEPT OF RESTORATIVE JUSTICE

The existence of the law creates justice as not only the goal of the law itself but also the law must also bring benefits that can be used for everyone. The benefit of the law is if the law can bring happiness or prosperity to humans. An action in law must be based on rational reasons and consider the good and bad consequences. It is due to the law principle aims to protect both individual's and communities' interests [14]. Restorative justice is expected to be an option in dealing with criminal acts or crimes that prioritize restoring relations between perpetrators, victims, and the surrounding community. The restoration of the relationship between the perpetrators, victims, and the community gives legal certainty to law enforcement. There is also legal benefit with a sense of happiness and peace between the parties [15].

The Indonesian National Police carry out their duties in criminal law enforcement placed between two interests. Those are social goals and fulfill the legal objectives of creating legal certainty. Law in the context of public order requires a means to achieve certainty and pay attention to society's obedience. The implementation of legal certainty and public order carried out by the National Police may trigger a conflict, especially in controversial cases noticed by the public. Founded as a movement to counter our criminal justice system's retributivist mentality, restorative justice, as established, relies on community members to come together, offer a solution to a crime, and inject a sense of obligation and redemption into society [16].

The implementation of Restorative Justice has various burdensome that affect the effectiveness of restorative justice at the investigation level. First, community participation in viewing the law and punishing application is very important in implementing restorative justice. The goal of restorative justice is for community welfare. As the theory of Sociological Jurisprudence says that the reality of law is the public will. However, it is questionable whether public members will be willing to participate in the success of this effort, given that individualistic culture is already rife in our society.

Second, restorative justice efforts require the cooperation of all parties and law enforcement officials. Restorative Justice offers something different because the judicial mechanisms focused on proving criminal cases are transformed into a process of dialogue and mediation. In addition, the ultimate goal of the system runs within the criminal justice system is to prove the offender's mistake and sentence is changed to seek agreement on a favorable criminal case settlement. The purpose of punishment is directed to improving the social relations of the parties [2]. However, empirical evidence relating to the effect of restorative justice practices on crime victims is inconsistent and raises doubts about its reliability and validity. These limitations create uncertainty that restorative justice practices can restore victims. It is due to law enforcement officers who still seem hesitant in implementing restorative justice. The doubts arise because of the different understandings of law enforcement officers regarding existing norms and rules of restorative justice practices. The Police in several regions in Indonesia has a different application in taking action on minor crimes cases, although the Police already have the National Police Chief Regulation (*PERKAP*) [17].

It was previously mentioned that the application of restorative justice must meet the material and formal requirements as stipulated in the *PERKAP-PTP*. One of the obscurations of norms seen from the requirements for applying restorative justice is the phrase "guilty," as stated in Article 12 letter a number 4 *PERKAP-PTP*. The phrase guilty in Indonesian criminal law are measured by the intentional element or negligence of the perpetrator and the presence or absence of justification and forgiving reasons attached to the perpetrator's personality. However, the regulation does not explain the reasons for justification and forgiveness that can be used to implement restorative justice. In this case, it is necessary to have a strong legal basis that accommodates legal needs. It makes the investigator's movement unlimited and the implementation of restorative justice efforts harmonious and consistent.

The third is regarding the Indonesian criminal system, which still needs to be evaluated, especially on its compatibility with the application of restorative justice. In sentencing, Sahetapy states the criminal theory "liberation," which stems from Pancasila [18]. The criminal aspect of acquittal emphasizes that the government and the people need to feel partly responsible for liberating the perpetrators of criminal acts from the chaos and cruelty of society when the perpetrators are paroled. The restorative justice process encourages perpetrators to take responsibility for their harmful

behavior in a meaningful way, understand the causes and effects, change that behavior, and be accepted by society. However, the historical context explains that the Indonesian criminal system is strongly influenced by the retributive pattern of the criminal system. Even the national criminal law still uses criminal provisions that see someone who commits a crime as an 'evil' person who needs sorrow to avenge his actions. In such a system, it is difficult to engage community participation to enforce the goals of punishment and justice that should be achieved. Therefore, the concept of restorative justice will be difficult to determine its position in the Indonesian criminal system.

Based on the explanation above, since restorative justice has been implemented in Indonesia, it shows that there are still some shortcomings and ambiguities related to its implementation, especially at the investigation level. The Police are the main key in the success and effectiveness of restorative justice in the sentencing process. It has succeeded in implementing restorative justice, especially in minor crimes, but its application has not been used correctly and has not been harmonious.

4. CONCLUSION

Restorative Justice as a settlement of criminal acts at the investigation level in Indonesia is an alternative to the legal process in general, which still seems formal and has a retributive pattern. The authority of investigators or Police in seeking restorative justice has been implemented since the issuance of PERKAP-PTP. The concept of justice has slowly changed following the development of the community. The ideal application of restorative justice at the investigation level is that investigators and the community can play a maximum role. It implies that the formal sentencing process will be the last resort if restorative justice does not work. The Indonesian criminal system, since the implementation of restorative justice, has continuously developed. The stakeholder has paid attention to the sense of injustice in the community who are dissatisfied with the previous criminal system. The last criminal procedure is still inclined to formal punishment in court. However, several aspects still need to be evaluated because there is a discrepancy between restorative justice and several criminal concepts and rules in Indonesia. It includes community readiness, doubts that investigators still experience, and problems with the Indonesian criminal system, which are still thick with retributivism.

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