



RESEARCH ARTICLE

Antinomy between Case Discontinuation and Restoration of Victim Rights in Restorative Justice Arrangements in Indonesia

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ABSTRACT

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Restorative Justice is a scheme for resolving criminal cases by bringing together the perpetrator and victim of the crime, the perpetrator's family and the victim's family as well as other parties related to the crime that occurred. In Indonesia, currently each law enforcement officer in the criminal system, from the Police, Prosecutor's Office to the Court, each has regulations regarding Restorative Justice which are regulated individually according to the policies of each law enforcement officer. Things like this will of course reduce the meaning of Restorative Justice itself. For example, the Prosecutor's Office regulates the Restorative Justice scheme in Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, the contents of which focus on justifying cases so that they do not reach the conference stage, instead of accommodating and maximizing things that are beneficial for victims of criminal acts. This research is normative legal research that uses a statutory and regulatory approach and a contextual approach to answer legal issues regarding the regulation of Restorative Justice in the criminal justice system, and regarding the main objectives of implementing the Restorative Justice scheme itself.

INTRODUCTION

Mechanisms for resolving cases (disputes) involving many affected parties and the community have actually been widely implemented in Indonesia using the Customary Law scheme. This indicates that the handling of cases outside the state (formal) court process was carried out long before the Unitary State of the Republic of Indonesia was formed. This is because the majority of Indonesia's population does not come from urban areas and is not secular, so the social values and moral values that are prioritized tend to focus on personal relationships with the characteristics of tolerance, communal solidarity and avoidance of disputes.

At the beginning of the formation of the Unitary State of the Republic of Indonesia, based on the principle of concordance, the criminal law system in Indonesia still had a "Dutch" form and flavor, regulated in the Criminal Code (KUHP) which was a derivative of the Wetboek van Strafrecht voor Nederlandsch Indie (WvSNI) which in the colonial period was regulated based on Besluit 33 in 1915 and came into effect in 1918. Because the Wetboek van Strafrecht voor Nederlandsch Indie (WvSNI) was a regulation made by the Dutch for its colonized territory, criminal and sentencing regulations focused on retributive schemes. This retributive punishment adheres to the Absolute Theory or also known as the Theory of Retribution which

emerged in the 17th century and was supported by figures such as Immanuel Kant, Hegel, Leo Polak and Julius Stahl. Punishment is solely to provide retribution for the actions committed by the perpetrator, as Hugo Gratius said "Malum passionis (quod inglitur) propter malum actionis", meaning that evil suffering befalls due to evil actions.¹

In the criminal law enforcement process, the issue of criminal acts becomes a matter between the state, represented by the public prosecutor, and the suspect/defendant. The same thing also happens in the legal system in Indonesia, where criminal acts are defined as violations of the provisions regulated in criminal law. In the process the suspect/defendant will be charged by the public prosecutor and decided by a judge through a verdict. The orientation of criminal law enforcement is focused on punishing perpetrators of criminal acts, if this is the case, gradually the position of victims in the process of criminal law enforcement will begin to be neglected. In addition, the criminal justice system can also cause victims to become victims again in criminal law enforcement (secondary victimization). This can be caused by the actions of the police or other parties which can actually interfere with the victim in the criminal justice process. More subtly, the entire criminal investigation and trial process can cause secondary victimization starting from the investigation, through the decision whether the criminal act will be prosecuted or not, the trial process itself, as well as determining the punishment for the perpetrator until the judge's decision. Secondary victimization in the criminal justice system can occur because of difficulties in balancing the rights of victims with the rights of perpetrators. More normally, however, this is because those responsible for administering criminal justice processes and procedures do so without considering the victim's perspective.²

Along with the development of society towards modernity and globalization, the view of the "consequences" that should be imposed on perpetrators of criminal acts has also begun to shift. In the extreme, Hulsman said that "The criminal justice system as a social problem". Among other things, his criticism was directed at the application of criminal sanctions which only leaves suffering, economic problems, family and community stigma.³ What is ironic is that almost all criminal acts handled by the Criminal Justice System always end in the imprisonment of the criminal. Even though prison is not the best solution in solving crime problems, especially criminal acts where the "damage" caused to victims and society can still be restored (repaired) and returned to its original state.⁴

The history of the development of criminal law in the world shows that there is increasing attention to the interests of victims in enforcing criminal law which goes hand in hand with the emergence of new approaches regarding the purpose of punishment, from mere deterrence and retribution to rehabilitation. In the midst of these developments, the idea of Restorative Justice was also born, a terminology first introduced by Albert Eglash, who in his writings identified 3 (three) types of criminal justice systems, namely retributive, distributive and restorative. The development of Restorative Justice in the criminal law system shows similarities in practice and thinking in implementing Restorative Justice programs starting from the national and international levels.⁵

The principles of Restorative Justice have been recognized in the criminal justice system in Indonesia through Law Number 11 of 2012 concerning the Juvenile Criminal Justice System (UU 11/2012/UU SPPA). Article 1 number 6 of the SPPA Law states the definition of Restorative Justice as the resolution of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to

Syarif Saddam Rivanie, Syamsuddin Muchtar, Audyna Mayasari Muin, A.M. Djaelani Prasetya, Ali Rizky, ¹ "Perkembangan Teori-Teori Pidana", *Halu Oleo Law Review*, Vol. 6, No. 2, September 2022, h.179.

United Nations Office for Drug Control and Crime Prevention (UN ODCCP), *Handbook on Justice for Victims: On The Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, New York, 1999, h. 9.

Kuat Puji Prayitno, "Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis Dalam Penegakan Hukum In Concreto)", *Jurnal Dinamika Hukum*, Vol. 12, No. 3, September 2012, h. 407.

*Ibid.*⁴

Maidina Rahmawati, et all, "Peluang dan Tantangan Penerapan Restorative Justice Dalam Sistem Peradilan Pidana di Indonesia", *Report*, Institute for Criminal Justice Reform (ICJR), Jakarta, Oktober 2022, h. 17.

jointly seek a fair solution by emphasizing restoration to the original condition and not encouraging retaliation. The implementation of Restorative Justice as a fundamental change in the orientation of punishment in Indonesia was then included in the 2020-2024 Medium Term Development Plan (RPJMN). During its development, several law enforcement institutions in the criminal justice system began to take the initiative to formulate regulations regarding the implementation of Restorative Justice.

The police regulate this through National Police Chief Regulation Number 6 of 2019 concerning Investigation of Criminal Acts (Perkap 6/2019)⁶ jo Republic of Indonesia State Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice (Perpol 8/2021). Furthermore, the Prosecutor's Office implements Restorative Justice through Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Perja 15/2020), as well as the Supreme Court through Supreme Court Regulation Number 2 of 2012 concerning Adjustments to the Limits of Minor Crimes and the Amount of Fines in the Criminal Code (Perma 2 /2012), Supreme Court Regulation Number 1 of 2022 concerning Procedures for Settlement of Applications and Providing Restitution and Compensation to Victims of Crime (Perma 1/2022), until the latest publication of Supreme Court Regulation Number 1 of 2024 concerning Guidelines for Trying Criminal Cases Based on Restorative Justice (Perma 1/2024).

Based on the things mentioned above, the application of restorative justice that has so far been carried out in the Criminal Justice System does not yet have standard rules regarding the institutions that have the authority to determine the parameters for applying restorative justice to a criminal case, each institution in the Criminal Justice System declares itself entitled to use restorative justice as a mechanism for examining and resolving a criminal case. This will of course give rise to uncertainty both substantively and procedurally regarding the application of restorative justice in criminal cases. It is not clear which should take priority in the application of Restorative Justice, whether terminating the case so that it does not reach the trial stage (efficiency), or maximizing and return losses to victims of criminal acts? This is the focus of discussion in this legal research.

Based on the background explanation that has been stated above, there is a problem formulation that functions as a legal issue whose solution is sought in the research: 1). Restorative Justice Arrangements in the Criminal Justice System; and 2). The essence of the Restorative Justice mechanism in resolving criminal cases.

RESEARCH METHOD

This research is normative legal research. which discusses the nature and scope of legal discipline regarding the regulation of Restorative Justice in the criminal justice system in Indonesia. Meanwhile, according to Soerjono Soekanto, normative legal research has a tendency to image law as a prescriptive discipline where it only looks at law from the perspective of its norms which are prescriptive in nature, the themes of which include research on legal principles, legal systematics, legal synchronization and legal history.⁷ Furthermore, Peter Mahmud Marzuki also stated that normative legal research is a scientific process to find solutions to legal issues that arise with the aim of providing prescriptions regarding what should be regarding these legal issues.⁸

Terbitnya Perkap Nomor 6 Tahun 2019 Tentang Penyidikan Tindak Pidana (Perkap 6/2019) merupakan ⁶ penyempurnaan dan penyesuaian dengan berkembangnya hukum, termasuk aturan yang berhubungan dengan Surat Pemberitahuan Dimulainya Penyidikan (SPDP) Pasca Putusan Mahkamah Konstitusi Nomor 130/PUU-XII/2015 sekaligus sebagai pengganti Perkap Nomor 14 Tahun 2012 Tentang Manajemen Penyidikan Tindak Pidana.

Soerjono Soekanto, Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta, Raja ⁷ Grafindo Persada, 2001, h.14.

Peter Mahmud Marzuki, "Penelitian Hukum", *Yuridika*, Vol. 16, No. 2, Maret, 2001, h. 103.⁸

This research uses several problem approaches, one of which is the statutory approach, which is carried out by examining all statutory regulations relating to the legal issue being researched.⁹ Normative legal research certainly uses a statutory approach because what will be researched are various legal regulations which are the focus of the research. Furthermore, this research uses a conceptual approach, which is carried out by using the views and concepts of several thinkers (experts) as well as doctrines that have developed in legal science as the basis for this research to build a legal argument in solving legal issues being researched¹⁰

DISCUSSION

Restorative Justice Arrangements in the Criminal Justice System in Indonesia As has been mentioned, the Restorative Justice approach has been used by several law enforcement agencies in the criminal justice system. The following will explain the settings:

Restorative Justice Arrangements in the National Police of the Republic of Indonesia The definition of Restorative Justice based on Perpol 8/2021 is the resolution of criminal acts involving the perpetrator, victim, perpetrator's family, victim's family, community leaders, religious leaders, traditional leaders or stakeholders to jointly seek a just resolution through peace by emphasizing restoration of original condition. The police use the Republic of Indonesia State Police Regulation Number 8/2021 to carry out Restorative Justice in the investigation stage of criminal acts. The Restorative Justice mechanism based on Perpol 8/2021 must fulfill several general requirements which include material requirements and formal requirements. The material requirements that must be met in resolving cases using the Restorative Justice scheme include: 1). Does not cause unrest and/or rejection from the community; 2). Does not impact social conflict; 3). Does not have the potential to divide the nation; 4). Not radicalism and separatism; 5). Not a repeat perpetrator of a criminal act based on a court decision; and 6). Not criminal acts of terrorism, criminal acts against state security, criminal acts of corruption and criminal acts against people's lives.

Meanwhile, the formal requirements that must be fulfilled include peace from both parties, except for drug crimes, this peace is proven by the existence of a peace agreement letter signed by the parties and the fulfillment of the rights of victims and the responsibilities of perpetrators, except for drug crimes. Fulfillment of this right can take the form of returning goods, compensating for losses, replacing costs incurred as a result of criminal acts and compensating for damage caused as a result of criminal acts. If the formal and material requirements have been fulfilled, then the investigation can be stopped, of course the investigation is stopped through a special case title mechanism and the reason for stopping the investigation is for the sake of law.¹¹

Restorative Justice Arrangements in the Prosecutor's Office of the Republic of Indonesia

The definition of Restorative Justice in the management of the Prosecutor's Office is regulated in Article 1 number 1 of Perja 15/2020, namely the resolution of criminal cases by involving the perpetrator, victim, the perpetrator's family, the victim's family and other related parties to jointly seek a fair resolution by emphasizing restoration. return to the original state and not retaliation.

The Prosecutor's Office in its authority to carry out prosecutions is carried out independently, meaning that it is free from the influence of Government power and the influence of other powers. This means that the State guarantees that the Prosecutor's Office can carry out its authority without intimidation, interference or inappropriate interference in civil, criminal and state administrative responsibilities. In the prosecution principles held by the Prosecutor's Office, there are 2 (two) types of principles that follow, namely the Legality Principle and the Opportunity Principle (Het legalities en het opportunities beginsel). The Principle

Peter Mahmud Marzuki, *Penelitian Hukum*, Edisi I, Cetakan V, Jakarta, Kencana Prenada Media Group, ⁹ 2009, h. 47.

Ibid, h. 133. ¹⁰

Armunanto Hutahaean, "Penerapan Restorative Justice Oleh Kepolisian Negara Republik Indonesia Untuk ¹¹ Mewujudkan Tujuan Hukum", *Jurnal Hukum To-Ra: Hukum Untuk Mengatur dan Melindungi Masyarakat*, Vol. 8, No. 2, 2022, h. 145.

of Opportunity states that the Public Prosecutor has the authority to prosecute or not prosecute a case based on the public interest. Meanwhile, the Principle of Opportunity is contrary to the Principle of Legality where the public prosecutor must prosecute criminal acts in accordance with existing and previously regulated regulations.

The existence of regulations through Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, aims to resolve cases of minor crimes or minor losses without trial. There is also the Attorney General's Guideline Number 18 of 2021 concerning Completion of Handling Crimes of Narcotics Abuse Through Rehabilitation Using a Restorative Justice Approach as an Implementation of the Prosecutor's Dominus Litis Principle. This was followed up with a Circular Letter from the Deputy Attorney General for General Crimes Number: 01/E/EJP/02/2022 concerning the Implementation of Termination of Prosecution Based on Restorative Justice as an embodiment of legal certainty. This circular provides the basis for an order for the District Attorney to issue a Decree on Termination of Prosecution (SKP2) based on restorative justice and legal certainty. The termination of the prosecution based on restorative justice can be carried out if several conditions are met as regulated as follows: 1). The suspect has committed a crime for the first time; 2). Criminal acts are only punishable by a fine or imprisonment of not more than 5 (five) years; 3). The value of the evidence or loss is not more than Rp. 2,500,000,- (two million five hundred thousand rupiah).

The Public Prosecutor offers peace efforts to victims and suspects without pressure, coercion or intimidation (this effort is carried out at the prosecution stage, namely when handing over responsibility for the suspect and evidence (second stage). During the peace process the Public Prosecutor acts as a facilitator (does not have interests or connections with the case, victim or suspect either personally or professionally, directly or indirectly).

Restorative Justice Arrangements at the Supreme Court of the Republic of Indonesia

Based on Article 2 of PERMA 1/2024, it is stated that judges judge criminal cases using restorative justice which is based on several principles, namely: restoration of circumstances; Strengthening the Rights, Needs and interests of Victims; Responsibility of the Defendant; Criminal law as a last resort (Ultimum Remedium); Consensuality and; Transparency and accountability. Furthermore, Article 3 PERMA 1/2024 aims to try criminal cases based on restorative justice to restore victims of criminal acts; restore relationships between the defendant, victim and/or community; encouraging accountability of the accused and preventing everyone, especially children, from deprivation of liberty. What is worth noting is that the application of restorative justice is not intended to eliminate criminal responsibility.

Judges apply PERMA 1/2024 guidelines to try criminal cases based on Restorative Justice if one of the criminal acts (alternative in nature) is fulfilled, namely: a). The crime committed is a minor crime or the victim's loss is worth no more than Rp. 2,500,000 (two million five hundred thousand rupiah) or no more than the local provincial minimum wage; b). A criminal act is a complaint offense; c). Criminal offenses that carry a maximum penalty of 5 (five) years in prison on any one charge include the crime of Jinayat according to the Qanun (Aceh); d). Crimes with child perpetrators whose diversion was unsuccessful; or e). Traffic crimes in the form of crimes.

Judges do not have the authority to apply restorative justice mechanisms to adjudicate criminal cases in the event that the victim or defendant refuses to make peace, there is a power relationship or the defendant repeats similar criminal acts within 3 (three) years after the defendant has completed serving a court decision which has permanent legal force. From this we can see that the Restorative Justice mechanism is optional, meaning that it is really desired by the victim, especially.

The Nature of Restorative Justice in Resolving Criminal Cases

The issue of crime has been discussed throughout the history of life and is said to be a classic problem, as old as human civilization itself. Crime must be studied through a multidisciplinary approach, considering that crime has a social and humanitarian dimension and is developing rapidly along with the development

of society.¹² The problem of criminal acts, whether serious or light in nature, is something that always exists and occurs in people's lives, and must be seen with balance for practical purposes, namely so that these cases can be tried quickly to avoid a buildup of cases at court level, because The number of cases of this type is greater than other types of criminal acts. Although initially the classification of minor crimes was the result of considerations regarding the lack of courts, currently the existence of these minor crimes can be seen in another connection, namely the aspect of the need for simple, fast and low-cost justice. *Restorative Justice is seen by many people as "as a philosophy, a process, an idea, a theory and an intervention". Restorative Justice is justice that emphasizes repairing losses caused or related to criminal acts. Restorative Justice involves all parties (stakeholders), so it is stated "Restorative Justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through a cooperative process that includes all stakeholders".*¹³

*Restorative Justice is an alternative or other method of criminal justice that prioritizes an integrated approach between perpetrators on the one hand and victims/society on the other hand as a unit to find solutions and return to patterns of good relations in society.*¹⁴ The keyword of Restorative Justice is "Empowerment", in fact this is the heart of Restorative Justice (the heart of the restorative ideology). Based on this, the success of implementing Restorative Justice is determined by this empowerment.¹⁵ In the traditional concept, victims are expected to remain silent, accept and not interfere in the criminal process. Fundamentally, the idea of Restorative Justice wants to reorganize the role of such victims, from being passive in waiting and seeing how the criminal justice system handles their crimes, to becoming empowered so that victims have the personal right to participate in the ongoing criminal process. In fact, the victim is the main key to the process of resolving a criminal case.

Furthermore, there are 3 (three) basic principles for establishing Restorative Justice, namely: "There is a restorative on those who have been injured, the offender has an opportunity to be involved in the restoration if they desire and the court system's role is to preserve the public order and the community's role is to preserve just peace." Based on this, the keywords for the three basic principles of Restorative Justice are: 1). There is reparation for those who have suffered losses due to crime; 2). The perpetrator has the opportunity to be involved in restoring the situation (restoration); and 3). The court's role is to preserve a just peace.¹⁶ Justice in Restorative Justice requires that efforts be made to restore or restore losses or consequences resulting from criminal acts, and that perpetrators in this case are given the opportunity to be involved in these recovery efforts. All of this is in order to maintain public order and maintain just peace.

Meanwhile, resolving cases using the Restorative Justice scheme is in accordance with the character of the Indonesian Nation itself which is reflected in the 4th principle of Pancasila which contains "People's people led by wisdom in Representative Deliberation". In line with this, Jarem Sawatsky also stated the following: "Needs of victims, offenders and communities are central for restorative justice. Justice is about participation. This has a huge implication for justice. If needs are central the justice is always ad hoc. Justice must respond and be experienced within a context. That means justice will look different and be arrived at differently dependent on the needs, the culture, the history, the future, and the people involved".¹⁷

Restoration of victims' rights must be the main goal of the Restorative Justice mechanism. The protection and fulfillment of victims' rights is based on Perma Number 1 of 2022 concerning Procedures for Settlement of Applications and Providing Restitution and Compensation to Victims of Crime, defining

Ribut Baidi Sulaiman, "Restorative Justice: Implementasi Kebijakan Pemidanaan Dalam Sistem Hukum Pidana Indonesia", *Indonesia Criminal Law Review*, Vol. 2, No. 1, Februari, 2023, h. 2.

Darrel Fox, "Social Welfare and Restorative Justice", *Journal Kriminologija Socijalna*, Vol. 17, No. 1, 2009, h. 57.

Kuat Puji Prayitno, *Loc. Cit.* h. 409. ¹⁴

H. Strong, J. Braitwaite, "Restorative Justice: Philosophy to Practice", *Journal TEMIDA*, March 2011, h. 55. ¹⁵
Ibid. ¹⁶

Jarem Sawatsky, "Restorative Value: Where Means And Ends Converge", *Restorative Justice Online Journal*, Vol. IX, 2010, h. 12. ¹⁷

restitution as compensation for losses given by the perpetrator of a crime or a third party to the victim or the victim's family. This is in line with what was conveyed by Andrew Ashworth who stated that the main violation of a criminal act is against the victim, the secondary violation is against society or the state more broadly.¹⁸

The importance of maximizing the protection and fulfillment of the rights of victims of criminal acts is because in the Criminal Procedure Code (KUHAP) as the juridical basis for procedural law used in enforcing criminal law, there are still few regulations that prioritize the fulfillment of victims' rights. Victims of criminal acts are actually the parties who suffer the greatest loss because they have borne the impact of a criminal act committed by the perpetrator. This is certainly not in line with the principles of Law Enforcement or law enforcement which always emphasizes the value of justice as the main shield of law enforcement. This is where integrity and professionalism are needed from law enforcement officials to guide the public to understand where to go and how to resolve a legal problem. Victims of criminal acts are legal subjects who have the right to restoration and respect for human rights inherent in their entity as a human being.¹⁹ This is not one-sided as the rights of suspects and/or defendants have been accommodated in the Criminal Procedure Code, and indeed the Criminal Procedure Code is designed to protect the rights of suspects and/or defendants from arbitrariness by law enforcement officials in processing a criminal case.

CONCLUSION

Restorative Justice is a process of resolving criminal cases by bringing together victims and perpetrators of crimes, families of victims and families of perpetrators of crimes, as well as parties related to resolving criminal cases that occur. As for each agency in the criminal justice system in Indonesia, starting from the Police, Prosecutor's Office, and Supreme Court (Judicial Court), each of them has internal rules for how the Restorative Justice process is carried out, of course arrangements that do not take the form of 1 (one) rule will be able to interpreted differently depending on each agency of the criminal justice system. This can reduce the nobility of Restorative Justice itself. Often Restorative Justice is only seen as a process that aims to set aside a case or even stop the progress of a criminal case so that it does not reach the court stage (avoiding a backlog of cases in court). However, the essence of Restorative Justice is much nobler than that. Besides that, the KUHAP as the center of criminal procedural law has very minimal regulations regarding the protection and restoration of victims' rights, which is why Restorative Justice is designed to fill this void. In the future, it is necessary to create uniform legal arrangements regarding Restorative Justice mechanisms both in the investigation, prosecution and trial stages (Police, Prosecutor's Office and Court).

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