

Political and Legal Construction of Restorative Justice Efforts in the Indonesian Criminal Justice System

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Abstract: *The aim of this research is to examine and analyze the legal political authority of restorative justice efforts in the Indonesian criminal justice system. In this writing the author uses a normative juridical method with research specifications in the form of descriptive analysis. The criminal justice system must be seen as a special punishment regime, and can limit people's freedom so that they can then be sentenced to prison and corporate law, and can also impose life sentences. Punishments in criminal justice can also be found in other legal regulations. Legal events in Indonesia are now increasingly rapid. In other words, increasingly rapid developments give rise to injustice in the handling of criminal cases. In the explanation of Indonesian legal politics that facilitates the concept of restorative justice, it can be seen from the internal regulations of each State law enforcement agency from the hierarchical order of the Indonesian criminal justice system, namely the Judiciary, Prosecutor's Office and Police. Restorative justice has become a very popular discourse amidst the boredom of society which sees that formal law is dominated by the positivist school of thought and cannot optimally accommodate society's sense of justice because it prioritizes legal certainty (Rechtssicherheit).*

Keywords: *Crime; Justice; Politics; Restorative.*

1. Introduction

Law is not just to create order, more than that, law must provide a sense of justice for society. Law will not by itself produce justice, but to achieve justice, law must be enforced.¹A legal enforcement system that has good values is concerned with the harmonization of values with rules and with real human behavior. In essence, the law has an interest in guaranteeing the social life of society, because law and society have an interrelation.

¹Anton Susanto, Ira Alia Maerani, and Maryanto. (2020), Legal Enforcement by the Police against Child of Criminal Doer of a Traffic Accident Who Caused Death (Case Study in Traffic Accident of Police Traffic Unit of Cirebon City Police Jurisdiction), Jurnal Daulat Hukum, 3 (1), p 21.

The supremacy of law is the foundation of Indonesian society, not on the basis of power. This is written in the 1945 Constitution of the Republic of Indonesia, so the Indonesian government must be able to handle every legal issue that arises.²When you hear the word “criminal,” you may think of something evil, scary, or even dangerous. This is true because the word “crime” comes from the Latin word “crima,” which means “sorrow” or “grief.” It also means being physically and mentally bound. But this sadness is not caused by what the other person did. It is caused by what the person did. Evil is the things you do that hurt others.³Rules about what is and is not required can be found in criminal law. Those who do not follow these rules or rules against them are exposed to physical pain.⁴

Restorative justice is a way to deal with violations of the law where the victim and the person who violated the law (the suspect) sit down and talk. There is a referee at the meeting who does his job to give orders to the perpetrator (the suspect) to provide a clear description of what the perpetrator (the suspect) has done and the reasons for the actions he has taken, after the perpetrator explains all his actions to the victim, therefore the victim has an obligation to listen carefully to the explanation from the perpetrator. A response aimed at the perpetrator of a crime with the aim of restoring compensation and facilitating peace between the parties is called Restorative justice.⁵

Restorative justice has become a very popular discourse amidst the saturation of society that sees formal law dominated by positivist thought and cannot optimally accommodate the sense of justice of society because it prioritizes legal certainty (*Rechtssicherheit*). Restorative Justice comes by offering a non-formalistic solution that merely emphasizes the formal legalistic side, but cannot be done through mediation between the perpetrator and the victim, reparation (the perpetrator repairs everything that was damaged), victim-perpetrator conferences (involving the families of both parties and community leaders), victim awareness work (an effort by the perpetrator to be more concerned about the impact of his actions). In addition, the current criminal justice system is considered no longer able to provide protection for human rights and transparency towards the public interest which is increasingly not felt.

The reality shows that many people prefer to resolve their criminal cases outside the system. Settlement outside the system is either carried out by the parties (the perpetrator and the victim independently) or by involving law enforcement officers. Dissatisfaction with the Criminal Justice System is thus related not only

²Adhe Ismail Ananda. (2021), *Constitutionalism Concept in Implementation of Indonesian State Administration*. *Journal of Legal Sovereignty*, 4(2), p 124

³Abdul Khaliq. (2019). *Islamic Criminal Law Perspective on Reconciliation of Crime Problems*: *Journal of Law*. 10 (24), p 26.

⁴Ismu Gunadi, (2014), *Quick and Easy Understanding of Criminal Law*. Jakarta: Kencana, p 8.

⁵Kevin I. Minor and J Morrison. (1996), *A Theoretical Study and Critique of Restorative Justice*, in Burt Galaway and Joe Hudson, eds., *Restorative Justice: International Perspectives*, p 102

to the case handling and administration mechanisms, but also to the final results of the ongoing process.

Legal policy needs to realize the resolution of criminal acts by prioritizing restorative justice which emphasizes the restoration of the original state, and the balance of protection and interests of victims and perpetrators of criminal acts which is not oriented towards criminal punishment for criminal acts which is a legal need of society.

Legal understanding is one of the indicators of the realization of legal awareness, as stated by Soerjono Soekanto, that the indicators of legal awareness consist of four, namely, first legal knowledge, namely a person knows the provisions of the law; second legal understanding, namely a person knows and understands well the existence of a legal provision; third, legal attitude, namely a person's assessment of the provisions of the law, whether they accept it as something good from the bottom of their heart; and fourth legal behavior patterns, namely a person's behavior/actions that comply with the applicable provisions.⁶

Researchers determine a theme and form a title to be continued in conducting a scientific study in the form of systematic and basic research. The purpose of the research is to examine and analyze the legal political authority of restorative justice efforts in the Indonesian criminal justice system.

2. Research Methods

The approach used in this study is normative juridical or written legal approach (statute approach). The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this study. This approach is also known as the literature approach, namely by studying books, laws and other documents related to this study.

3. Results and Discussion

3.1. Legal Politics

Legal policy is "legal policy or official policy lines on laws that will be enforced either by making new laws or by replacing old laws, in order to achieve state goals." Thus, legal policy is a choice of laws to be enforced as well as a choice of laws to be revoked or not enforced, all of which are intended to achieve state goals as stated in the Preamble to the 1945 Constitution of the Republic of Indonesia.

Padmo Wahjono said that legal policy is a basic policy that determines the direction, form, and content of the law to be formed.⁷ In his other writings, Padmo Wahjono clarifies this definition by saying that legal policy is the policy of

⁶Muhaimin, (2006), Restorative Justice in Resolving Minor Crimes, De Jure Research Journal, 19 (2), p 195

⁷Padmo Wahjono, (1986), Indonesia: A State Based on Law. Jakarta: Ghalia Indonesia, 2nd ed., p. 160

state administrators regarding what is used as the criteria for punishing something, which includes the formation, application and enforcement of law.⁸Teuku Mohammad Radhie defines legal policy as a statement of the will of the state ruler regarding the laws applicable in its territory and regarding the direction of legal development that is being built.

3.2. Restorative Justice

According to BE Morrison, Restorative justice is a form of conflict resolution and seeks to make it clear to the offender that the behavior is not condoned, at the same time as being supportive and respectful of the individual.⁹

In the process, restorative justice is closely related to the application of Empowerment, which has several meanings, including according to Barton: "the action of meeting, discussing and resolving criminal justice matters in order to meet material and emotional needs. To him, empowerment is the power for people to choose between the different alternatives that are available to resolve one's own matter. The option to make such decisions should be present during the whole process" (Empowerment as an action to conduct meetings, discuss and resolve criminal justice issues in order to meet material and emotional needs. Empowerment is the power for people to choose between the various alternatives available to resolve their own problems, and the decision to choose is available in the Restorative Justice process). According to Van Ness and Strong: The genuine opportunity to participate in and effectively influence the response of the offense. (Empowerment is a real / genuine opportunity to participate and effectively influence in dealing with crime).

3.3. Legal Politics Restorative Justice Efforts in the Indonesian Criminal Justice System

Related to the reform of national criminal law, the concept of restorative justice is known. The concept of restorative justice is relatively new in the process of criminal execution and treatment of perpetrators of criminal acts. In the concept of restorative justice, it offers a form of resolution of various legal acts that occur outside the existing criminal justice process, so that it does not only rely on the ongoing legal process. However, it still obtains justice and resolves problems, especially for victims as the most disadvantaged party (suffering), as well as for the responsibility of the perpetrator. One of the solutions offered is the restorative justice resolution process.

Indonesian law enforcement is considered to have violated general justice and is considered far from the values of Pancasila, through the concept of restorative justice in resolving disputes or cases is seen as a kind of settlement that fulfills

⁸Padmo Wahjono, (1991), Examining the Process of Forming Legislation, Justice Forum magazine, No. 29, April, p 65

⁹BE Morrison, (2001), The School System : Developing its capacity in the regulation of a civil society, in J. Braithwaite & H. Strang (Eds.), Restorative Justice and Civil Society, Cambridge University Press, p 195

the values of Pancasila, especially regarding the values of the fourth principle of Pancasila (deliberation). However, it does not reduce or protect the interests of the victim, but also undermines the values of justice and benefits for the parties.

The draft of the Criminal Code Bill is a material legal reform which is an effort to realize the ideals of a state of law. So that the Criminal Code Bill can be said to be a manifestation of the personality of the Indonesian nation which not only adheres to the rule of law, but also prioritizes the protection of individual interests (individualistic), as well as the socialist legality model which prioritizes the interests of the state. Legal reform does not only focus on improving the law, but also revolutionizes the law for the better. The emergence of the Criminal Code Bill is an effort to create a nationalist law, besides that it can be interpreted as a manifestation of the true sovereignty of the nation. In essence, legal reform can determine the direction of the formation of the nation's character, so that the Criminal Code Bill is a tool for planned social and cultural transformation of society.¹⁰

The concept of restorative justice is actually a form of customary law as local wisdom that already exists and develops in Indonesian society. So it can be said that the Criminal Code Bill recognizes customary law (the living law) with the aim of fulfilling a sense of justice in society. The concept of restorative justice in handling criminal acts prioritizes moral, religious, social, economic aspects, and various other considerations. So that restorative justice can restore conditions that have been damaged.

Muladi in his book entitled "Selected Chapters of the Criminal Justice System" states that the criminal justice system is a network of justice that uses material criminal law, formal criminal law and criminal enforcement law. However, this institution must be seen in a social context.¹¹The criminal justice system in Indonesia is strictly regulated in the Criminal Procedure Code (KUHAP) or Law No. of 1981. It is said so because Law No. 8 of 1981 or the Criminal Procedure Code (KUHAP) is actually identical to criminal law enforcement which is a system of power or authority given to the state in enforcing criminal law, namely the police, prosecutors, judges and correctional institutions. The definition of the criminal justice system is also called the law enforcement system because it contains an understanding that basically what is done by these institutions is a concrete effort to enforce abstract legal rules.¹²

In the elaboration of Indonesian legal policy that facilitates the concept of restorative justice, it is seen in the internal regulations of each state law

¹⁰Septa Chandra, (2014), Legal Politics of Adopting Restorative Justice in Criminal Law Reform, *Fiat Justisia Journal of Legal Studies*, 8 (2), p 271-278

¹¹Muladi, (1996), *Selected Chapters on the Criminal Justice System*, Semarang: UNDIP Publishing Agency, p. 2

¹²Bryan A. Garner, (2004), *Black's Law Dictionary*, Eighth Edition, West Publishing CO, United States, p 901

enforcement agency from the hierarchy of the order of the Indonesian criminal justice system, namely the Judiciary, the Prosecutor's Office, and the Police. The implementation of the concept of restorative justice in Indonesia can start from the Supreme Court (MA). This is because the Supreme Court (MA) is a state institution that exercises judicial power and is the peak of the judiciary. This is expressly regulated in various laws and regulations, for example the 1945 Constitution of the Republic of Indonesia; Law Number 48 of 2009 concerning Judicial Power, Law Number 14 of 1985 as amended by Law Number 5 of 2004 as last amended by Law Number 3 of 2009 concerning the Supreme Court.

Supreme Court (MA) because the Supreme Court (MA) is the peak so that if the Supreme Court (MA) adopts or adheres to and applies the concept of restorative justice, then the courts below it will also adopt, adhere to and apply the concept of restorative justice. In this way, it is hoped that the concept of restorative justice can be applied in the entire judicial system in Indonesia from the District Court, High Court and the Supreme Court itself. In addition, the Law on Judicial Power, namely Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power, precisely in Article 5, firmly states that judges are required to explore the values that live in society (the living law or local wisdom). Thus, in essence, judges must or are required to apply the approach or concept of restorative justice in resolving cases because the approach or concept of restorative justice is in accordance with the soul of the Indonesian nation, namely Pancasila, in accordance with the values of customary law and also in accordance with religious values. It should also be stated that the concept of restorative justice cannot only be applied to the Supreme Court (MA).

In the criminal justice process in general and the criminal justice process in Indonesia in particular, there are several stages or processes that must be passed by those seeking justice, both at the level of investigation, inquiry, prosecution, examination in court up to the stage of the judge's decision.¹³

The Supreme Court of the Republic of Indonesia issued guidelines for the implementation of restorative justice in handling and resolving criminal cases in general courts throughout Indonesia for victim recovery efforts. Issued guidelines for the implementation of restorative justice in handling and resolving criminal cases in general courts throughout Indonesia for victim recovery efforts. This is stated in the Decree (SK) of the Director General of the General Courts (Dirjen Badilum) MA Number: 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice. This SK consists of five pages with 15 attachments signed by the Director General of Badilum Prim Haryadi in Jakarta on December 22, 2020. This SK was enacted by considering two things. First, to encourage the optimization of the

¹³Kristian, Christine Tanuwijaya, (2015), Settlement of Criminal Cases with the Concept of Restorative Justice in the Integrated Criminal Justice System in Indonesia, *Mimbar Justia Journal*, I (02) July-December Edition, p 199

implementation of MA Regulations, MA Circulars, and Decisions of the Chief Justice of the MA which regulate the implementation of restorative justice in court, it is necessary to prepare guidelines on restorative justice. Second, the development of the criminal justice system is no longer based on the perpetrator but has moved towards aligning the interests of victim recovery and the accountability of perpetrators of criminal acts. Director General of Badilum MA Prim Haryadi stated that there are four dictums in the Decree of the Director General of Badilum Number: 1691/DJU/SK/PS.00/12/2020. First, implementing guidelines for the implementation of restorative justice as in the attachment which is an integral part of this Decree.

Second, to order all district court judges to implement these guidelines in an orderly and responsible manner. Third, the chairman of the high court is required to supervise, monitor, and evaluate and report on the implementation of restorative justice in the jurisdiction of the relevant high court. Fourth: This decision shall come into effect as of the date of its stipulation, with the note that if in the future there is an error in this decision, then corrections will be made as appropriate.

In the Appendix to the Guidelines for the Implementation of Restorative Justice in the General Courts, it is divided into three CHAPTERS. For CHAPTER II, there are four criminal acts regulated for restorative justice. Each is restorative justice in cases of minor crimes, in cases of children, in cases of women in conflict with the law, and in narcotics cases. In each criminal act, among others, the legal basis and application are listed in detail according to the criminal act in question.

The law enforcement process through a restorative justice approach in resolving criminal cases carried out by the Prosecutor's Office refers to Perja No. 15 of 2020. The Restorative Justice Policy Through the Attorney General's Regulation (Perja) No. 15 of 2020 which was promulgated on July 22, 2021 is expected to be able to resolve minor criminal cases (Tipiring) without going to court. Since the issuance of the Perja, 300 cases have been stopped by prosecutors throughout the country. The issuance of this Perja is to restore conditions to their original condition before the "damage" caused by the behavior of a person (the suspect). The requirements for people who are "entitled" to receive Restorative Justice are:

- 1) Criminal acts committed for the first time;
- 2) Losses below IDR 2.5 million;
- 3) There is an agreement between the perpetrator and the victim.

This regulation also tries to minimize the overcapacity of prisons which has become a problem for prisons in Indonesia. In addition, the contents of this regulation also contain the aim of minimizing the abuse of prosecutorial power and directly restoring social conditions in the community. This is also one of the policies in responding to public concerns about the law being sharp downwards, but blunt upwards which has so far seemed to be the norm. This regulation is

one of the innovations of Attorney General ST Burhanuddin to provide legal certainty for ordinary people. This policy was echoed by ST Burhanuddin at the international level. In an event themed "Integrated Approaches to Challenges Facing the Criminal Justice System".¹⁴Burhanuddin said that the restorative justice method in Indonesian criminal justice is an integrated approach from investigation, inquiry, prosecution, to the imposition of court decisions. Burhanuddin said that restorative justice can shorten the lengthy trial process and resolve the issue of overcapacity of prisoners in correctional institutions. Seeing these achievements, the pillars of reform in the Attorney General's Office have been re-established. However, the participation of the community is needed to oversee the return of the dignity of the Attorney General's Office.

Specifically in the Polri environment, provisions on restorative justice are regulated in Polri Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice, Article 1 number 3 states that restorative justice is the resolution of criminal acts by 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 to the original state.

Then according to Article 2 of the Police Regulation Number 8 of 2021, that the handling of criminal acts based on restorative justice is carried out in the implementation of the Criminal Investigation function carried out by the Community Development and Samapta Polri function holders in accordance with their duties and authorities in minor criminal cases; investigation and inquiry activities carried out by Polri Investigators through the termination of investigations and inquiries.

The Regulation of the Republic of Indonesia National Police or often referred to as the Regulation of the Chief of Police or Perkap concerning Handling of Criminal Acts based on Restorative Justice is a step by the Police in realizing the resolution of criminal acts by prioritizing Restorative Justice which emphasizes the restoration of the original state and the balance of protection and interests of victims and perpetrators of criminal acts that are not oriented towards punishment is a legal necessity in society.

The Indonesian National Police Regulation on Handling Criminal Acts Based on Restorative Justice is a new concept in criminal law enforcement that accommodates norms and values that apply in society as a solution while providing legal certainty, especially the benefits and sense of justice of the community, in order to answer the development of legal needs of the community that fulfills the sense of justice of all parties, which is a manifestation of the authority of the Indonesian National Police in accordance with Article 16

¹⁴Salsabila, Slamet Tri Wahyudi, (2022), The Role of the Prosecutor's Office in Resolving Corruption Cases Using the Restorative Justice Approach, Journal of Legal Issues, 51 (1), January, p 64

and Article 18 of Law Number 02 of 2002 concerning the Indonesian National Police.

In every criminal law enforcement there are public and private dimensions. Every crime has public and private dimensions. The public dimension is in the criminal justice process against the perpetrator and the private dimension is in the fulfillment of the Victim's Rights. The practice of restorative justice balances the two and does not replace the current criminal justice system. Rather, it is present as part of an effort to realize a fair, effective, and efficient process in responding to criminal acts.¹⁵ Therefore, the principle of restorative justice is a complementary component in the criminal justice system. However, Restorative Justice is not fully implemented in the criminal justice system. This is based on various weaknesses.

4. Conclusion

In the elaboration of Indonesian legal policy that facilitates the concept of restorative justice, it is seen in the internal regulations of each State law enforcement agency from the hierarchy of the order of the Indonesian criminal justice system, namely the Judiciary, the Prosecutor's Office, and the Police. The Supreme Court of the Republic of Indonesia issued guidelines for the implementation of restorative justice in handling and resolving criminal cases in the general court environment throughout Indonesia for victim recovery efforts. This is stated in the Decree (SK) of the Director General of the General Court (Dirjen Badilum) MA Number: 1691 / DJU / SK / PS.00 / 12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice. The law enforcement process through the restorative justice approach in resolving criminal cases carried out by the Prosecutor's Office refers to Perja No. 15 of 2020. The Restorative Justice Policy Through the Attorney General's Regulation (Perja) No. 15 of 2020 which was promulgated on July 22, 2021, is expected to be able to resolve minor criminal cases (Tipiring) without going to court. Specifically within the Police, provisions regarding restorative justice are regulated in Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice.

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