

Use of Police Discretion in Manifestation of the Concept of Restorative Justice

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Abstract. *The purpose of this research is to know and analyze the implications of police discretionary powers in the manifestation of the concept of restorative justice. In this writing, the author uses a normative juridical method with research specifications in the form of descriptive analysis. The existence of discretionary authority by the police, the police have the authority to break through a form of legal rigidity that emphasizes the side of legalism alone, without paying attention to the social systems that exist in society in achieving a form of real benefit and justice. From this, the form of discretion given to the Police is a form of breakthrough towards real law enforcement while still providing a form of real justice by paying attention to the risk and benefit aspects of an action carried out. When faced with problems that include the condition of law enforcement in Indonesia with all its shortcomings, Police policies based on restorative justice through discretion and the existence of legitimacy as a formative effort of the Police reflect the accommodation of law enforcement steps based on a progressive idea.*

Keywords: Accommodation; Formative; Justice; Law.

1. Introduction

The Indonesian criminal law enforcement system is a modern justice system that has been implemented since the Indonesian nation determined its own destiny in playing its role in the international world by basing its country as a State of Law (*state law*) and not a power state (*macht staat*) as aspired to by the Indonesian people in establishing the Unitary State of the Republic of Indonesia (NKRI).¹ This is as stated in the provisions of Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states that the Republic of Indonesia is a state based on law.¹

¹M. Al Faruq. (2018), Implementation of Islamic Sharia in the Nation State in Indonesia. El-Faqih: Journal of Islamic Thought and Law, 4 (2), p 86–98.

Universally, if a crime or criminal act occurs, the steps taken are through legal channels in the criminal justice system, both for minor and serious cases (*extraordinary crime*). This is an interesting topic to discuss, given the nature of criminal law, which is *ultimum remedium*, meaning a last resort if no other means are found to resolve a criminal case. However, in its development, criminalization (trials) has been used as a first resort to resolve a case. This change in the function of criminal law indicates that society is gradually abandoning the legal culture in the context of criminalization.

Satjipto Rahardjo stated that resolving cases through litigation with the final result being a verdict is a slow law enforcement, because this can result in a backlog of cases due to the lengthy process in the criminal justice system. Moreover, the current (conventional) criminal justice system mechanisms are unable to fulfill the desired sense of justice. This situation has given rise to the concept of finding various alternative approaches to address these issues. One such approach is resolving criminal cases by prioritizing a restorative justice approach, which is completely different from the conventional justice system.

Restorative justice arises from the criminal justice system's inadequacy in meeting the expected values of justice. Every time a crime occurs, the case doesn't always have to be brought to court. Restorative justice is one approach that can be used as a solution to resolve criminal cases. If the victim and perpetrator can resolve their case through restorative justice, justice can be achieved together.

Of course, in this condition, the law enforcement process should not be carried out entirely or forever using formal justice methods, one of which is repressive police action followed by a litigative legal process (*law enforcement process*). Even today's law enforcers still tend to think positivistically and formally. As is well known, these formal litigation actions rely heavily on coercive efforts and the authority of the law enforcers who carry them out.² Furthermore, even if a result appears, it will generally end in a "lose-lose" or "win-lose" situation.¹

When faced with the problematic conditions surrounding law enforcement in Indonesia with all its shortcomings, the Police's policy based on restorative justice through discretion and legitimacy as a formulaic effort of the Police reflects the accommodation of law enforcement measures based on a progressive idea. However, within the framework of a state of law, all actions, including law enforcement aimed at realizing just legal certainty, including but not limited to the policy of handling criminal acts based on restorative justice by the Police, must remain based on legal rules whose validity can be tested through a process of legal thinking. Theoretically, the validity of a legal action based on legal thinking is when

²E. Sulaiman, (2020). The Function of Advocates in Resolving Disputes Outside the Court. Ash-Shahabiah: Journal of Islamic Education and Studies, 6 (1), p. 98

the action is in accordance with legal rules, legal concepts and ultimately legal philosophy.

Based on this topic, to research further and include it in writing legal work with purpose of writing for knowing and analyzing the implications of the police's discretionary authority in the manifestation of the concept of restorative justice.

2. Research Methods

In the research carried out, the writing uses a Normative Juridical approach, namely research that uses an approach method to problems by looking at the norms or laws that apply as positive provisions, the following are theories that are relevant to this paper by linking its implementation to the facts found in the field.

3. Results and Discussion

1) Police Discretion

From a legal perspective, the police's discretionary authority is generally explained in Law No. 2 of 2002 concerning the Police. Meanwhile, the enforcement of criminal law is regulated separately through Law No. 8 of 1981 concerning Criminal Procedure, or commonly known as the Criminal Procedure Code (KUHP). Discretionary authority is a responsibility or power exercised according to law based on trust and consideration, prioritizing consideration over legal considerations. This discretion is exercised not independently of legal provisions, but this discretion is always carried out within a legal framework. Various criminal laws so far have not regulated and clarified in detail the qualifications and types of criminal acts, including articles that may require discretionary action, because this relates to the responsibilities and duties of the police based on personal beliefs. As stated in Article 18 of Law No. 2 of 2002 concerning the Indonesian National Police, it states:

- a. For general purposes, officials of the Republic of Indonesia National Police in carrying out their responsibilities can take action according to their personal judgment.
- b. The implementation of the provisions as explained in paragraph (1) can only be implemented in very urgent conditions through consideration of statutory policies and the professional code of ethics of the Republic of Indonesia National Police.³

The legal explanation of the law states that what is explained by 'acting in accordance with one's personal judgment' is an act that can be carried out by

³Article 18 of Law Number 2 of 2002 concerning the Republic of Indonesia National Police

police officers who, when carrying out the action, are obliged to consider the risks and benefits of their actions and are serious about the common good.

2) Definition of Restorative Justice

Umbreit in his writing explains that "Restorative justice is a "victim-centered response to crime that allows the victim, the offender, their families, and representatives of the community to address the harm caused by the crime."¹

Regarding this view, Daly⁴said that the Umbreit concept focuses on "repairing the damage and losses caused by criminal acts" which must be supported by the concept of restitution, namely "striving to restore the damage and losses suffered by pre-victims of criminal acts and facilitating the creation of peace".¹

Thus, what Tony Marshall said is correct, that restorative justice is actually a concept for resolving a particular crime that involves all interested parties to work together to find a solution and at the same time find a solution in dealing with events after the crime occurs and how to overcome its implications in the future.⁵

3) Implications of Police Discretionary Authority in the Manifestation of the Restorative Justice Concept

A police investigator who is on duty in the midst of the community in conducting an investigation into a criminal case must be able to make decisions based on his own assessment, if in carrying out his duties a case is found that is considered light or less effective when processed and a negative impact arises, among these impacts is negative stigmatization from the community which results in the difficulty of a perpetrator reintegrating into society, due to detention in the Criminal Justice Process, so that a perpetrator of a crime cannot provide for his family and so on. In such circumstances, it is appropriate for an investigator to use discretionary authority in a particular criminal case that is light in nature and in the form of a complaint offense.

In this case, another form of discretionary authority of the Indonesian National Police is to terminate criminal investigations based on restorative justice. The rules for implementing restorative justice are stipulated in Indonesian National Police Regulation Number 8 of 2021 concerning Handling Criminal Acts Based on Restorative Justice. In practice, discretion regarding terminating criminal investigations based on restorative justice applies.

Legal provisions regarding restorative justice within the police force are stipulated in Police Regulation No. 8 of 2021. This regulation has material and formal requirements that must be met for its implementation. The introduction of Police

⁴Kathleen Daly, (2000). *Restorative Justice in Diverse and Unequal Societies*, Law in Context, p 174

⁵Tony Marshall, (1999), *Restorative Justice: An Overview*, London: Home Office Research Development and Statistics Directorate, p. 5

Regulation No. 8 of 2021 represents a breakthrough for the Indonesian National Police, allowing any criminal case handled by the Indonesian National Police to be legally terminated by reason of an out-of-court settlement.¹

Examining the substance of Police Regulation 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice, in terms of the legal definition set out in the regulation, based on Article 1 paragraph (3) of the Chief of Police Regulation Number 08 of 2021, Restorative Justice is the resolution of criminal acts by involving the perpetrator, victim, the perpetrator's family, the 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.⁶

Based on 3 Articles in Law Number 2 of 2002 concerning the Indonesian National Police related to discretionary authority, namely Article 15 paragraph (2) point (k), namely, "exercising other authorities included in the scope of police duties"; Article 16 paragraph (1) point (l), namely, "carrying out other actions according to responsible law"; Article 18 paragraph (1), namely, "for the public interest, officials of the Indonesian National Police in carrying out their duties and authorities can act according to their own judgment". In Article 18 paragraph (2) then included Limitations in carrying out actions according to their own judgment, namely, "Implementation of the provisions as referred to in paragraph (1) can only be carried out in circumstances that are very necessary by paying attention to statutory regulations, as well as the Code of Professional Ethics of the Indonesian National Police". The words 'other actions' and 'in circumstances that are very necessary', are interpreted as discretionary authority held by the police (called police discretion).

Based on these legal provisions, the implications of the Police's discretionary authority regarding the implementation of the principle of restorative justice through Police Regulation Number 8 of 2021 include 3 (three) provisions as an analysis of the implications of the two aspects (discretion and restorative justice), including:

a. A state of extreme necessity

The essential task of the Police is an act of law enforcement itself or in optima forma, meaning that the 'Police' as an organ is a living law. The police are a bridge between the objectives of law enforcement and the objectives of society, namely the creation of justice, security, and public order to achieve a safe and prosperous society (welfare). Conditions of extreme necessity can be said to be the principle of necessity, namely conditions that require the police to take actions that are absolutely necessary; solely so that the objectives of the law itself can be achieved.

⁶Article 1 paragraph (3) of the Republic of Indonesia National Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice

According to van Apeldoorn, the purpose of law is to regulate social interaction so that social interaction becomes peaceful.¹ According to him, law is something that requires peace, and that peace must be maintained. This is done by protecting "human" interests, so that a person's freedom, honor, life, and property are protected from other people who would harm them.

Based on this, the police, as in *optima forma*, must act as intermediaries who can maintain a peace. The method that must be done is based on the principle of necessity, the police must be able to weigh the conflicting interests to achieve a balance between the two. Understanding this, it can be said that the goal of Restorative Justice is in line with the principle of necessity, where the police as individuals (investigators) and as an organ (represented in/by the Head of Police's Decision when determining Restorative Justice in a case), have gone through truly fair considerations.

b. *Legal reasoning* on the application of positive law

Police Regulation No. 8 of 2021 serves as a guideline for the police in implementing Restorative Justice. However, when using it, investigators must still consider other related regulations, both police regulations and other laws. This legal interpretation capability is implied by a legal principle, namely:

a. The principle of *Lex Superior Derogat Legi Inferior*. This principle states that a lower-level regulation may not contradict a higher-level regulation. Therefore, a higher-level regulation overrides a lower-level regulation. This principle only applies to two regulations that are hierarchically unequal and contradict each other. Determining whether one norm has a higher status than another is certainly not difficult because states governed by the rule of law generally have a written legal system structured hierarchically.⁷

b. The principle of *Lex Specialis Derogat Legi Generali*. This principle states that a more specific regulation overrides a more general regulation. The principle of *lex specialis derogat legi generali* only applies to two regulations that are hierarchically equal and regulate the same matter.¹ Specificity takes precedence over general regulations, and it is undisputed that everything related to specific matters is of utmost importance. The rationale for prioritizing specific laws is that specific legal rules are certainly more relevant, compatible, and more tailored to the needs of specific laws and subjects that general legal rules cannot address.⁸

⁷Nurfaqih Irfani, (2020). The Principles of *Lex Superior*, *Lex Specialis*, and *Lex Pesterior*: Meaning, Problems, and Their Use in Legal Reasoning and Argumentation, *Indonesian Legislation Journal*, 17 (3), p. 311

⁸Joel P. Trachtman. (2013). *The Tools of Argument: How the Best Lawyers Think, Argue, and Win*. South Carolina: Createspace Independent Publishing, p 57

c. The principle of *Lex Posterior Derogat Legi Priori* explains that new regulations override older regulations. This principle aims to prevent legal uncertainty that may arise when two regulations are equal based on hierarchy. This principle can only be applied in conditions where the new legal norm has an equal or higher status than the old legal norm. This relates to the relationship between norms, which is a relationship of "superordination" and "subordination," where the validity of the lower norm always stems from the higher norm. Therefore, it is impossible for a lower regulation to negate a higher regulation, even if the lower regulation is a regulation that is enacted later.¹

In the context of police discretionary authority, decisions issued should also not conflict with the aforementioned legal principles. This is where the urgency of legal reasoning within the hierarchy of positive law, along with a substantive interpretation of the law, lies, which every investigator must possess to implement Restorative Justice through holding special case conferences to discuss cases submitted for resolution through Restorative Justice.

c. Based on the Indonesian National Police's code of professional ethics

The latest police regulation governing the Indonesian National Police Professional Code of Ethics is the Republic of Indonesia National Police Regulation (Perpol) Number 7 of 2022 concerning the Professional Code of Ethics and the Indonesian National Police Code of Ethics Commission. Article 1 states, "In this police regulation, the meaning of the Indonesian National Police Professional Code of Ethics, hereinafter abbreviated as KEPP, is a moral norm or rule, both written and unwritten, which serves as a guideline for the attitudes, behavior, and actions of Indonesian National Police officials in carrying out their duties, authorities, responsibilities, and daily lives."⁹ There are 4 (four) categories of ethics in the KEPP, namely: (1) State Ethics; (2) Institutional Ethics; (3) Community Ethics; and (4) Personality Ethics. These four categories of ethics cover all the values contained in the provisions for implementing police discretion.

Interpretatively, this means that the investigator's first decision regarding whether a case can be resolved through restorative justice rests with the investigator. Only then, if the investigator approves, can the formal application process proceed to the supervisor. Therefore, the investigator's discretionary authority has a significant impact on determining whether a case can be resolved through restorative justice.¹

Sporadically, in certain situations where there are differences of opinion, investigators may differ from their superiors, especially if the parties have direct access to the police leadership personally outside the structure. For example, an

⁹Article 1 of the Regulation of the Republic of Indonesia National Police Number 7 of 2022 concerning the Code of Professional Ethics and the Code of Ethics Commission of the Republic of Indonesia National Police.

investigator may believe a case cannot be resolved through restorative justice. However, the superior believes it can be implemented through restorative justice. Therefore, the superior's decision is the final decision, implemented by the investigator as a subordinate.¹⁰

In implementing the discretion to stop the investigation of a criminal act based on justice Restorative justice as stipulated in the Republic of Indonesia National Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice must avoid things that cause the discretion to be legally flawed, including:

- 1) Avoid asking for something, a reward or a promise in the form of money or goods from the perpetrator of a crime whose criminal investigation will be stopped based on restorative justice;
- 2) Avoid accepting anything, a reward or promise in the form of money or goods from a perpetrator of a crime whose criminal investigation will be stopped based on restorative justice;
- 3) Avoiding conflicts of interest both internally and externally before making decisions regarding the discretion to terminate criminal investigations based on restorative justice;
- 4) Sorting and selecting the types of criminal acts that are still relevant and worthy of implementing discretion to stop the investigation of the criminal act based on restorative justice.¹

Discretion and restorative justice are aspects and concepts that are inherent in the Police in an absolute manner, but absolute in this case is not merely a limitation in terms of juridical aspects but in terms of a philosophical perspective to reflect on the implementation that is full of reasoning about the values of justice without looking at the essence of the form of a Police Institution as a tool of legal positivism that is integrally stigmatized, but discretion and restorative justice in the body of the Police is a form of integration of law and morals by becoming a bridge between law and reason and conscience.

4. Conclusion

The correlation between legal reasoning and the Police's position in the functional discretionary authority to apply restorative justice to a criminal case is absolute. The demand for fulfilling this capability cannot be separated from the demands of professionalism of a Police investigator in combining his discretionary authority

¹⁰Subordinate, meaning that within its authority, the lower one may not exceed the authority of the higher one and the higher one has the authority to regulate and command the lower one. See: Sadjijono, (2008), Police Law Series, Polri and Good Governance, Laksbang Mediatama, Surabaya, p. 337

with the application of the concept of restorative justice. The main points that can be taken in forming an integrative concept of Police discretion to optimize the application of restorative justice based on the researcher's thinking pattern in the analysis study above are that basically, from a legal perspective, the position of Police discretion and restorative justice is not a concrete problem because between Police discretion and restorative justice has been accommodated in every regulatory hierarchy. Consideration of fulfilling legal reasoning is very influential for Police investigators in handling criminal cases that meet the requirements for restoration by using discretion to achieve optimization.

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