

Optimizing Police Action in Handling Criminalization by Prioritizing the Ultimum Remedium Principle

Sandi Wijaya

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA) Semarang, Indonesia,
E-mail: sandwijaya84@gmail.com

Abstract. *The purpose of this research is to knowing and analyzing the implementation of the ultimum remedium principle by the Police in handling criminalization. In this writing, the author uses a normative juridical method with research specifications in the form of descriptive analysis. The application of the principle of ultimum remedium is a middle way that benefits all parties, both as victims, as perpetrators, and for the benefit of the wider community. However, in its current development, the content of material containing criminal sanctions related to imprisonment sanctions is almost always included in every law. Therefore, there is a shift in legal policy regarding the application of criminal law from being a last resort/method (Ultimum Remedium) to a first resort/method (Primum Remedium). Through the introduction of the Police institution, it is not absurd to implement it with consideration of legal reasoning from the Police apparatus in viewing a criminalization of whether or not a case's weight needs to be continued in the criminal procedure process.*

Keywords: Consideration; Criminal; Procedure; Reasoning.

1. Introduction

Based on Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia which states "The State of Indonesia is a state of law", this means that Indonesia as a state has regulations, namely laws, which must be obeyed and the regulations must be respected.¹ by all Indonesian citizens and foreign citizens currently residing in Indonesia.

Law can be said to regulate all aspects of life, and if a law is violated, legal consequences will follow. For example, in criminal law, criminal law is the law that regulates criminal acts, and violations of these provisions result in sanctions. The

¹Nuryanto & Umar Ma'ruf, (2020), Dynamics of the Community in the Implementation of Complete Systematics Land Registration Program in the Land Office of Blora Regency, Journal of Daulat Hukum, 3 (1) March. p 163

primary purpose of criminal law is to protect individual rights and the interests of society. The purpose of criminal law in Indonesia must align with the Pancasila doctrine, which ensures fairness for all citizens.

In Indonesia, criminal law seems to be a law that carries severe sanctions. This means that Indonesia, as a country with a very close relationship between people in life, with citizens or a society that upholds Eastern culture and has a strong sense of sympathy and empathy, when faced with the reality of a close relative being threatened with criminal punishment, will bring disappointment in the form of alienation or separation from family and society. Moreover, those who are threatened with criminal penalties due to their criminal acts, even their families in Indonesia, generally face a stigma or negative "label" in society.

The consequences of a criminal act can have far-reaching effects, not only on the individual but also on their surroundings. Furthermore, issues of overcrowding in correctional facilities are frequently raised. This is a result of overcriminalization.² When it comes to the concept of punishment, a crime is an independent event and must be accounted for.

The effectiveness of criminal law seems to be eroded, as it is essentially possible to find alternative solutions to social problems other than criminal sanctions. Considering the fact that the imposition of criminal sanctions under criminal law is quite severe for society and its application does not necessarily produce effective and efficient outcomes, criminal law, in this case, is only permitted to be used when there is truly no other way to resolve a problem in society.

Given the functions and characteristics of criminal law, the existence of new criminal law norms is necessary when other legal norms cannot or do not function to protect the interests of society. Criminal law norms are seen as a last resort or means to protect the common interest. This function of criminal law is referred to as "ultimum remedium."

The principle of ultimum remedium in criminal law emphasizes that the use of criminal sanctions should be a last resort, after other legal remedies, such as administrative and civil sanctions, are deemed ineffective. This principle aims to limit the excessive use of criminal sanctions and to maintain a balance between the needs of law enforcement and the protection of human rights.

Through the introduction of the Police, it is not absurd to implement it, taking into account the legal reasoning of the police apparatus in assessing the criminalization of a case and determining whether or not a particular case needs to be pursued in the criminal procedure process. Furthermore, one of the police's powers is discretionary authority to assess a case and take policies outside the law,

²M Dafa Pansya Dila, et al. 2024), Implementation of Restorative Justice as an Effort to Reduce Prison Overcapacity, Journal of Law, Humanities and Politics (JIHHP), 4 (5) July. (p. 1851

accompanied by legal logic and rationality that exist in a case that is also in accordance with the legal corridor.

Based on the description above, the author conducted research with the aim of knowing and analyzing the implementation of the ultimum remedium principle by the Police in handling criminalization.

2. Research Methods

The approach used in this research is a normative juridical or written legal approach (statutory/statutory approach). Considering that the problems being researched and examined adhere to the juridical aspect, namely based on norms, regulations, legislation, legal theories, and the opinions of legal experts. In normative legal research, law is conceptualized as a rule or norm that is the basis for human behavior that is considered appropriate. This research is categorized as normative research because it examines library materials against secondary data sourced from library materials.

3. Results and Discussion

1) Ultimum Remedium

The Indonesian Criminal Law System recognizes the principles of Ultimum Remedium and Primum Remedium in relation to the imposition of criminal sanctions. So what exactly do these two principles mean? Primum Remedium in criminal law cases can be said to be the only thing that can be done except by applying the criminal law, there is no other alternative as a basis or foundation for enforcing a law. An example of this Primum Remedium is when someone commits a crime of terrorism, then based on the Primum Remedium principle there are no other alternatives such as administrative sanctions or civil sanctions but will be given direct criminal punishment in accordance with the Law on Terrorism.

Ultimum Remedium is the opposite of Primum Remedium, according to Sudikno Mertokusumo in his book "Penemuan Hukum Sebuah Pengantar", Ultimum Remedium is one of the principles contained in Indonesian criminal law, which states that criminal law should be used as a last resort in law enforcement and it is considered that there is still an alternative solution other than applying a criminal law rule.³ For example, when someone uses illegal drugs or narcotics, they can request rehabilitation and not be charged with a drug offense, provided they are only a user, who can be categorized as a victim, but with various considerations and applicable procedures.

³Sudikno Mertokusumo, (2010), *Discovery of Law: An Introduction*, Yogyakarta: Atma Jaya University Yogyakarta, p. 128

The characteristics of criminal law in the context of Ultimum Remedium can be interpreted as the existence of criminal sanctions as a last resort. This means that the imposition of sanctions is prioritized over administrative or civil sanctions. If administrative and civil sanctions are insufficient to achieve the goal of restoring balance in society, then criminal sanctions can be considered as a last resort, or Ultimum Remedium.

2) Implementation of the Ultimum Remedium Principle by the Police in Handling Criminalization

The principle of ultimum remedium must be considered simultaneously in two policy aspects: legislative policy and law enforcement. At the legislative level, the state must not criminalize behavior too easily without rational consideration. Criminalization must be positioned within a framework of balance between the interests to be protected and the interests potentially violated by the criminalization policy itself.

Criminal law as the ultimum remedium should not only be a theory that law enforcement officers, in particular, must understand. It should also be understood as a principle and its implementation in real life, namely the criminalization process. The current impression is that criminal law is no longer the ultimum remedium. As seen in recent media reports, even relatively minor crimes, with relatively light penalties, are being prosecuted in court. This reflects the implementation of criminal law in Indonesia and the law enforcement officers who handle such cases.

The image of law enforcement officials plays a significant role in criminal law enforcement. Regarding the implementation of ultimum remedium, law enforcement officials, the frontline, namely the police, play a role in determining the outcome of reported cases.

Based on the legal guidelines for the duties and functions of the police within the scope of implementing the principle of ultimum remedium in the corridor of criminal law enforcement, if the police themselves immediately accept a report and process it, because it is possible that sufficient evidence to process the case without considering social aspects, for example, it will certainly end up resulting in a backlog of cases in court. Although, a crime can be said to be "fixed price," which cannot be covered up, there are still non-legal considerations. Non-legal aspects are considerations from other aspects of the case. For example, considerations from the social perspective, namely in terms of the intent or intention of the act committed. Police officers, in this case, related to determining the continuation of the reported case, whether the report will be processed or the police will provide guidance so that it can be resolved amicably, have an urgent role. This urgent role should be understood by all police officers so they can clarify the case, while also considering the non-legal aspects of the case.

In describing the role of the Police in implementing the principle of ultimum remedium in the process that the Police function in the investigation stage, this has implications for the essence of the form of the principle of ultimum remedium in essence into several concepts that can be represented in the aspects that exist in the concept as a representation of ultimum remedium. The specific concept that fulfills the representation of the principle of ultimum remedium is the concept of restorative justice as a concept that is being intensively applied in the paradigm of every law enforcement agency to achieve the goals of punishment in the form of restoring the suffering of victims, the effectiveness of punishment, and the efficiency of punishment.

Furthermore, the concept of ultimum remedium also stems from the principle of subsidiarity, which states that criminal penalties can only be imposed if non-criminal measures are proven ineffective; administrative approaches are often prioritized before imposing penalties. Thus, ultimum remedium serves to maintain a balance between the effectiveness of criminal law in protecting the public interest and protecting citizens' rights from potential excessive criminalization.⁴

The dynamics of the application of the ultimum remedium principle in criminal law enforcement demonstrate conceptual and practical tensions. On the one hand, criminalization is treated as a representation of criminal responsibility for mens rea.⁵ and actus reus⁶ A criminal act that requires repressive measures as the primary instrument. However, on the other hand, there is a need to uphold the principle of ultimum remedium to prevent excessive use of criminal law and to ensure that not all criminal acts can be criminalized.

In Indonesia, the concept of restorative justice has begun to gain ground through various regulations, including within the police. To accommodate the principle of

⁴Brian Kukuh Mediarto, (2024). Dynamics of the Ultimum Remedium Principle in Eradicating Criminal Acts of Corruption in Indonesia and Its Relevance to the Principle of Restorative Justice, JISPENDIORA: Journal of Social Sciences, Education and Humanities, 3(3) December. p. 188

⁵In criminal law, mens rea is an element that refers to the mental state or intention of the perpetrator when committing a crime. The term mens rea comes from Latin, meaning "guilty mind," and is an important element in determining a person's criminal responsibility. In Indonesia, this principle states that a criminal act is considered complete not only because of the physical act (actus reus), but also because of the perpetrator's intention or awareness. Thus, mens rea serves to distinguish between acts committed intentionally or with bad intentions and acts that are unintentional. See: Aris Munandar Ar, et al. (2024). The Role of Intention (Mens rea) in Criminal Responsibility in Indonesia, JIMMI: Multidisciplinary Student Scientific Journal, 1 (3) October. p. 244

⁶According to criminal law, actus reus is often used as an equivalent to conduct for deviant behavior. Actus reus consists of act and omission, so the definition of actus reus does not only include an act or commission, but also includes omission. E. Utrecht argues that actus reus is the essence of the crime itself or the unlawful act committed. Actus reus itself is an act resulting from mens rea. See: Rocky Marbun and Maisha Ariani, (2022). Tracking Mens Rea in the Spread of Fake News Through WhatsApp Groups: A Glimpse of Psycholinguistics in Criminal Law, Journal of Criminal Law & Criminology, 03 (02) October. p 77-78

restorative justice in criminalization during the police investigation stage as an implementation of the principle of ultimum remedium, the Indonesian National Police (Polri) issued an internal regulation specifically addressing the concept of restorative justice, namely Police Regulation Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice. Under the leadership of National Police Chief Listyo Sigit Prabowo, Police Regulation Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice was established. This Restorative Justice-based handling excludes crimes that threaten public order, terrorism, state security, corruption, re-offending, and crimes against human life.

The enactment of Police Regulation No. 8 of 2021 concerning Restorative Justice provides space for police officers in the Criminal Investigation Unit to resolve cases more quickly and provides normative guidelines for resolving criminal cases using restorative justice methods. Regarding case handling, as stipulated by Police Regulation No. 8 of 2021, it is clear that restorative justice is pursued when a complaint is received. However, in practice, restorative justice is implemented at all initial stages of criminal proceedings, from the preliminary investigation to the prosecution.⁷

In the provisions of Police Regulation No. 8 of 2021, there are several requirements that must be met as parameters in the validity of implementing handling based on restorative justice at the police stage, namely as follows:

1. Material Requirements	As stated in Article 5 of Police Regulation No. 8 of 2021, the material requirements include: a. does not cause rejection and fear in society b. does not influence conflict in society; c. it is not possible for there to be division of the nation; d. not a criminal act of a radical or separatist nature; e. not a repeat crime by the perpetrator based on a court decision; and f. not a crime against state security, a crime against human life, a crime of terrorism, or a crime of corruption.
2. Formal Requirements	As stated in Article 6 of Police Regulation No. 8 of 2021, formal requirements include: a. Peace between parties with a signed agreement except in the case of drug crimes; b. To fulfill the rights and obligations of the victim as the perpetrator's responsibility, this can be done in the form of confiscation of goods, compensation, reimbursement of costs arising

⁷Sudigdo, (2023). Police Efforts to Implement Restorative Justice in the Investigation Process, Thesis: Master of Law, Unissula, p. 113

from the crime, and reimbursement of losses resulting from the crime as evidenced by a statement signed by the victim.

Information and electronic transaction crimes

As stipulated in Article 8 of Police Regulation No. 8 of 2021, the specific requirements for information and electronic transaction crimes based on restorative justice include:

- a) Perpetrators of information and electronic transaction crimes who spread illegal content;
- b) The perpetrator is willing to delete the content that has been/is being uploaded, submitted in hard copy/soft copy form to the investigator;
- c) The perpetrator apologized via video for the content uploaded along with a request to delete the content that had been distributed, which was then submitted in hard copy/soft copy form to investigators;
- d) The perpetrator is willing to cooperate in conducting further investigations with police investigators.

Drug crimes

As stipulated in Article 9 of Police Regulation No. 8 of 2021, the specific requirements for handling drug crimes based on restorative justice include:

- a) Drug addicts and victims of drug abuse who apply for rehabilitation;
- b) At the time of the arrest, the perpetrator was found to have evidence of narcotics and psychotropic drugs with 1 day's use or no evidence was found but the urine test results were positive for narcotics;
- c) Not as a distributor and/or dealer in a drug crime network;
- d) The evaluation is carried out by an integrated evaluation team;
- e) In further investigations, the perpetrator is willing to cooperate with police investigators.

Traffic crimes

As stated in Article 10 of Police Regulation No. 8 of 2021, the specific requirements for handling traffic crimes based on restorative justice include:

- a) Driving a vehicle in a dangerous manner and under dangerous conditions resulting in a traffic accident that causes material loss and/or minor injuries; or

b) Traffic accidents on the road caused by negligence resulting in human casualties and/or property losses.

The benefits obtained from the application of restorative justice at the police investigation stage include:

- 1) Opening the way for the rights of the parties to the case because they can be directly involved and work together to resolve the problem;
- 2) No backlog of cases;
- 3) Cases can be resolved simply, quickly and at low cost because there is no need to go through the court process;
- 4) Reducing capacity in correctional institutions;
- 5) Avoid pre-trial lawsuits, compensation, or rehabilitation;
- 6) Reflecting the justice desired by society;
- 7) Creating security and order in society;
- 8) Prevent vigilantism;
- 9) Prevent future crimes from occurring;
- 10) Increase public trust in the police institution;
- 11) Avoiding corrupt practices by law enforcement officers;
- 12) Prevent crimes from occurring from perpetrators who are dissatisfied with the punishment imposed on them.⁸

According to Bonarsius Saragih, there are 4 (four) main values that a police investigator who acts as a mediator must pay attention to in implementing the Restorative Justice approach method in efforts to resolve criminal cases, namely:

- 1) *Encounter* (meeting each other), namely creating an opportunity for the parties involved and having the intention of holding a meeting to discuss problems that have occurred and after the incident.
- 2) *Amends* (repair), where it is highly expected that the perpetrator will take steps to repair the losses that occurred as a result of his actions.

⁸Suryanto, (2023). Police Authority to Terminate Investigations into Minor Crimes with Restorative Justice Considerations, Thesis: Master of Law, Unissula, p. 120

- 3) *Reintegration*(rejoining society), namely seeking steps to restore the parties as a whole to contribute to society; and
- 4) *Inclusion*(open), namely providing an opportunity for all related parties to participate in handling the problem.⁹

Criminal law policy must also begin to reorient and reform, not only protecting the victim but also implementing a balanced pattern, namely protecting the interests of the perpetrator, so that both parties can engage in dialogue and re-agreement in good faith and with a strong commitment based on a sense of responsibility and full awareness from the perpetrator, in order to provide the rights that are due to the victim. Thus, a peace construction will be built and ultimately realized that will be beneficial for both perpetrator and victim.

When applied, there is a common ground between the principle of *ultimum remedium* and the principle of restorative justice. Both emphasize that criminal punishment should not be the sole instrument for resolving cases. *Ultimum remedium* emphasizes limiting the use of punishment, while restorative justice emphasizes prioritizing the restoration of victims' losses, both material and immaterial. The principle of *ultimum remedium* and the principle of restorative justice both essentially emphasize that criminal law should not be used excessively, but rather directed towards restitution of losses and the achievement of more substantive justice.

The restorative perspective views crime as a violation of criminal law. The more important aspect is not the actual act of committing the crime, but the process of inflicting harm on the victim, society, and, in fact, the offender's own interests. These crucial aspects have largely been overlooked by the retributive criminal justice system.¹⁰

4. Conclusion

A specific concept that fulfills the representation of the *ultimum remedium* principle is the concept of restorative justice, a concept that is being intensively applied in the paradigm of every law enforcement agency to achieve the goals of punishment, namely restoring the suffering of victims, the effectiveness of punishment, and the efficiency of punishment. In Indonesia, the concept of restorative justice is beginning to gain space through various regulations, including within the scope of the Police. To accommodate the principle of restorative justice in a criminalization during the Police investigation stage as an implementation of the *ultimum remedium* principle, the National Police issued an internal regulation

⁹Bonarsius Saragih, (2009), Restorative Justice, Bandung Law College, p 37.

¹⁰Bambang Hartono, (2016). Analysis of Restorative Justice in the Context of *Ultimum Remedium* as a Solution to Child Criminal Offenses, Legal Institution, 10 (2) July. p. 93

specifically on the concept of restorative justice, namely Police Regulation Number 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice.

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