

## **Analysis of Legal Problems of Police Policy in the Implementation of the Restorative Justice Concept**

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**Abstract.** *The purpose of this research is to knowing and analyzing legal problems in the police's efforts to implement the concept of restorative justice in this paper, the author uses a normative juridical method with descriptive analysis as the research specification. The Indonesian National Police (Polri) has adopted strategic policies to bridge and accommodate the concept of restorative justice in law enforcement, which is based on the application of progressive forms of law. The Police's efforts in actualizing the concept of restorative justice are not without problems; the development of restorative justice in Indonesia is very slow in terms of legal certainty. The problem of the concept of restorative justice will never be sufficient if it is only regulated in technical police regulations without legal legitimacy in a hierarchy at the level of law. There has been no comprehensive explanation at the level of law regarding the definition, principles, and application of criminal settlement based on restorative justice. This problem is a serious problem that raises concerns about the failure to achieve the goal of upholding justice (miscarriage of justice) for victims and perpetrators of criminal acts, which has implications for the success of the Police's efforts in taking restorative justice steps.*

**Keywords:** *Enforcement; Justice Law Restorative.*

### **1. Introduction**

Indonesia is a state based on the rule of law, where the administration of government is based on law. In a state based on the rule of law, the power to govern is based on the rule of law (the supremacy of law) and aims to maintain legal order.<sup>1</sup> Another opinion states that in a state governed by the rule of law, law as a basis is embodied in legislation that culminates in a constitution, or the state's

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<sup>1</sup>Haris Wahyu Sunarno and Akhmad Khisni, (2020). Analysis of Criminal Liability as Doer of Preening Criminal (Case Study in the Blora State Court), Jurnal Daulat Hukum, 3 (1) March. p. 223

basic law. A state constitution must also contain the concept of constitutionalism, namely, the limitation of power and the guarantee of citizens' basic rights.<sup>2</sup>

As this nation approaches its first century, law enforcement practices remain grounded in a retributive and explanatory philosophy, focusing solely on quantitative output—namely, the number of cases processed and the number of perpetrators imprisoned by law enforcement. This paradigm of the Indonesian Criminal Justice System is considered successful if law enforcement officers are capable and able to bring criminals to justice. This retributive philosophy-based law enforcement paradigm not only feels unfair but can also disrupt the sense of peace and justice in society. The idea that criminal cases can only be handled through the courts and the retributive theory of punishment have in fact given rise to numerous problems and negative impacts.

One of the strategies in Indonesia's National Medium-Term Development Plan is law enforcement through a restorative justice approach. This is because restorative justice is a form of law enforcement that leads to a humanistic justice system. The concept of restorative justice is a response to the failure of the retributive justice paradigm, which has significantly influenced the Indonesian criminal justice system. Retributive justice focuses solely on punishing perpetrators while neglecting the rights of victims. Consequently, the criminal justice system fails to meet victims' expectations because it is perceived as failing to accommodate their interests. In other words, the current conventional justice system has led to considerable disappointment and dissatisfaction.<sup>3</sup>

The Indonesian National Police (Polri), as part of the Integrated Criminal Justice System, plays a crucial role in enforcing criminal law. The large number of cases reported to the police creates a backlog of cases in the investigation and prosecution stages. If all cases submitted to the police were to be transferred to the prosecutor's office, the backlog would inevitably be transferred to the prosecutor's office, and so on. This reality has undoubtedly accelerated the flow of cases through the courts (both at the District Court, High Court, and Supreme Court) resulting in a backlog.<sup>4</sup>

In this regard, the Indonesian National Police (Polri) has essentially adopted strategic policies to bridge and accommodate the concept of restorative justice in law enforcement, which is based on the application of progressive forms of law. The police's efforts to actualize the concept of restorative justice have not been

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<sup>2</sup>Muhammad Adiel Aristo, (2020). Criminal Law Policy against Actors of Criminal Performance Persecution, *Jurnal Daulat Hukum*, 3 (1) March. p. 140

<sup>3</sup>Eriyanto Wahid, (2009). Restorative Justice and Conventional Justice in Criminal Law, Trisakti University, Jakarta, p 43.

<sup>4</sup>Kristian & Christine Tanuwijaya, (2015). Settlement of Criminal Cases with the Concept of Restorative Justice in the Integrated Criminal Justice System in Indonesia, *Jurnal Mimbar Justitia*, I (02), July-December. (p 593.

without problems; the development of restorative justice in Indonesia has been very slow in terms of legal certainty. The problem of the concept of restorative justice will never be sufficiently regulated only in technical police regulations without legal legitimacy hierarchically at the level of law.

Based on the description above, the author conducted research with the aim of knowing and analyzing legal problems in the police's efforts to implement the concept of restorative justice.

## 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) The Concept of Restorative Justice

Restorative justice consists of two words in English, namely, "restorative" which means to restore, heal, or strengthen and "justice" which means justice.<sup>5</sup> The linguistic definition of restorative justice is justice related to restoration or improvement. The term "restorative justice" was first introduced by psychologist Albert Eglash in 1958.<sup>6</sup>, then widely used in 1977 in his writings which classified three types of criminal justice systems: retributive, distributive, and restorative.<sup>7</sup> There are various terms used to describe the restorative justice approach. These include reparative justice, positive justice, community justice, relational justice, communitarian justice, and so on.<sup>8</sup>

Restorative justice, according to many people, is defined as an approach, theory, idea, process, philosophy, or intervention. The Handbook of Restorative Justice Programmes, published by the United Nations (UN), defines restorative justice as a variety of problem-solving approaches involving judicial institutions,

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<sup>5</sup>M Echols John and Shadily Hassan, (2005). An English-Indonesian Dictionary, Jakarta, Gramedia, Jakarta: Gramedia Pustaka Utama

<sup>6</sup>Joe Hudson, Burt Galaway, and Eds, (1977). Restitution in Criminal Justice, Lexington: MA; DC Health, p 92

<sup>7</sup>Shadd Maruna, (2014). The Role of Wounded Healing in Restorative Justice: An Appreciation of Albert Eglash, Restorative Justice: An International Journal, 2 (1), p 10

<sup>8</sup>Yvon Dandurand and Curt Taylor Griffiths, (2006). Handbook on Restorative Justice Programmes, New York: United Nations, p. 6.

communities, social networks, victims, and perpetrators. According to Howard Zehr,<sup>9</sup> A person known worldwide as "the Father of Restorative Justice" in his book *Changing Lenses* explains that restorative justice is a process that emphasizes recovery by involving interested parties to collectively identify how to handle impacts, needs, and obligations by placing everything as fairly as possible.

## 2) Legal Problems in Police Efforts to Implement the Concept of Restorative Justice

Currently, the main basis as a legal umbrella for the implementation of restorative justice within the Indonesian National Police (POLRI) is the Republic of Indonesia National Police Regulation Number 08 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice without disregarding other internal POLRI regulations.

The following sections of the Republic of Indonesia National Police Regulation Number 08 of 2021 concerning Handling of Criminal Acts based on Restorative Justice are as follows:

<b>PIG</b>	General requirements	Article 1- Article 2
<b>CHAPTER II</b>	Condition	Article 3- Article 10
<b>CHAPTER III</b>	Procedures	
<b>Part One</b>	Settlement of Minor Crimes	Article 11- Article 14
<b>Part Two</b>	Termination of Investigation or Probe	Article 15-Article 19
<b>CHAPTER IV</b>	Supervision	Articles 19-20
<b>CHAPTER V</b>	Closing	Article 21

### Legal Construction of Police Regulation 8 of 2021

The benefits of implementing restorative justice by the police include not only realizing the speedy handling of cases where suspects who commit crimes can be handled with restorative justice, but also benefiting both parties, namely suspects and victims, and also minimizing prison overcrowding in order to contribute to addressing the problems of criminalization in Indonesia that currently still shackle the state. One common problem in every prison in Indonesia is overcapacity.<sup>10</sup> Prisons, which are supposed to function as correctional facilities, naturally require sufficient capacity to accommodate inmates so that they can be optimally rehabilitated. Increasing the number of inmates beyond capacity will disrupt the balance between prison capacity and the number of inmates. This imbalance between the number of officers and the inmate population also results in crimes occurring in prisons, such as inter-inmate abuse, drug trafficking, fires, riots, and other crimes, making them difficult to control.

<sup>9</sup>Howard Zehr, (1990). *Changing Lenses: A New Focus For Crime and Justice*, Scottdale: Herald Press, p 181.

<sup>10</sup>R. Rahaditya, et al. (2023). Analysis of the Pros and Cons of Restorative Justice in the Implementation of the Justice System in Indonesia, *Journal of Citizenship*, 7 (2) December. p. 2163

Historically, the beginning of the polemic of the problem of Indonesian criminalization became a hot issue for the State with a lot of urgency to prioritize the principle of restorative justice in dealing with the problem and the Police Agency is actively trying to take legal policies through the Chief of Police General Tito Karnavian issued a Circular Letter (SE) regarding restorative justice namely in letter number SE / 8 / VII / 2018 signed on July 27, 2018 which was then followed by Article 12 letters a and b of Perkap Number 6 of 2019 concerning Criminal Investigation which then currently the Regulation of the Republic of Indonesia National Police (Perpol) Number 08 of 2021 becomes a guideline or basic reference in resolving cases with the criminal case investigation process which will be useful in terms of providing legal certainty, as regulated regarding the termination of investigation (SPP-Lidik) and termination of investigation (SP3) for legal reasons based on restorative justice.

In terms of legal force, the Police's procedural technical efforts through Perpol 8 of 2021 in implementing restorative justice are not yet strong enough in the regulatory hierarchy. The systematic intentional efforts of the Police are very helpful in realizing restorative justice through strategic policies in the form of internal Polri juridical, but the procedural substance formulated in Perpol 8 of 2021 covers criminal procedure procedures where the Police require a legal product that hierarchically has legal force as a primary reference in the form of a formal source of criminal law. This means that the Police urgently need legal reconstruction in the Criminal Procedure Code to substantially accommodate the stages of restorative justice within the scope of the Police's duties and functions in carrying out its legal procedures, where the Criminal Procedure Code needs to accommodate the investigative stages that are implied in the use of restorative justice in that stage (investigation).

Another substantial legal issue is that Article 2 paragraphs (1), (3), and (5) of Police Regulation 8/2021 stipulates that the handling of criminal acts based on restorative justice can be implemented by National Police investigators during investigative activities, with the result being the termination of the investigation. The Criminal Procedure Code defines an investigation as a series of actions aimed at finding and identifying an event suspected of being a crime. This means that it is not yet clear whether a crime has occurred when the police conduct an investigation, and it is not even known who the perpetrator is, which will only be determined later during the investigation stage.

This investigative concept is what makes restorative justice inappropriate to apply at the investigative stage. This is inseparable from the principle of restorative justice expressed by Zehr, one of the founders of restorative justice: that a crime is a violation of a person's rights, where such violation creates responsibility or

obligation.<sup>11</sup>This is in line with Marshall's opinion, which states that restorative justice is a way of responding to crime that focuses on repairing the damage caused by the crime and repairing it as much as possible, which is also done with respect for the parties involved in the act.<sup>12</sup>Thus, it can be concluded that restorative justice is a way of responding to crime by repairing relationships and empowering the parties, with the principle of respecting the improvement, equality and dignity of the parties.

Based on this analysis, it appears that restorative justice can, in principle, only be applied when a crime has clearly occurred and the parties responsible and responsible for the consequences of the crime are known. These requirements cannot be met during the investigation process, as there is no clarity as to whether a crime has occurred and who the perpetrators should be held accountable for, particularly for the sake of victim recovery, during the investigation stage. Therefore, it can be concluded that the provisions of Police Regulation 8/2021, which allow for the application of restorative justice during the investigation stage, are inappropriate.

The implementation of the termination of criminal case handling based on restorative justice certainly also requires legal order and legal certainty, however, from a legal normative perspective, legal certainty has not been realized, due to the disharmony between the Regulation of the Republic of Indonesia National Police Number 08 of 2021 concerning the Handling of Criminal Acts based on Restorative Justice and the formal source of criminal law, namely the Criminal Procedure Code.

If analyzed based on the legal principle, namely *lex superior derogat legi inferior*, which means that higher regulations override lower ones (the principle of hierarchy).<sup>13</sup>This means that in principle, Police Regulation 8 of 2021 actually conflicts with higher-level regulations in practice. A conflict in the regulations has the potential to invalidate the lower-level legal regulations. However, in practice, disharmony in the regulations does not automatically invalidate the lower-level regulations until they are overturned by a court authorized to conduct judicial review.

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<sup>11</sup>Howard Zehr with Ali Gohar, (2002). *The Little Book of Restorative Justice*, Published by Good Books, Intercourse, Pennsylvania, USA.

<sup>12</sup>Christian Gade, (2018). "Restorative Justice": History of the Term's International and Danish Use. Aarhus University, In book: *Nordic Mediation Research*, April.

<sup>13</sup>The theory of legal hierarchy, which states that legal norms are structured in a layered and tiered structure, has had a significant influence on legal thought in Indonesia. This approach allows for a clearer understanding of the principle of *lex superior derogat legi inferiori*, namely that norms higher in the hierarchy will override lower norms in the event of a legal conflict. See Sri Warjiyati et al. (2024). *Conflict of Norms in the Implementation of the Principle of Lex Superior Derogate Legi Inferiori in Circulars and Laws, Legal Reform*, 28 (3) December. p. 235

Therefore, Police Regulation No. 8 of 2021 remains in effect as stipulated in the current laws and regulations until a judicial review decision is issued by the Supreme Court. Furthermore, other negative impacts of conflicting laws and regulations at the implementation level can be explained. This can lead to various legal and social problems, ultimately leading to legal system chaos, legal uncertainty, and injustice for the public. The negative impacts of disharmony and conflicting laws and regulations in criminal law enforcement require a government solution to prevent this disharmony from becoming perpetual.

From the author's independent perspective, the police's efforts through internal legal policies are not contradictory, but rather require a more fundamental, hierarchical regulatory support system. In fact, the police policy, through Police Regulation No. 8 of 2021, represents an institutional paradigm that demonstrates the Indonesian National Police's commitment to systematically and legally transforming the criminal justice paradigm toward a justice-oriented approach, specifically one that accommodates victims to obtain greater justice within the criminal law framework, a situation where criminal law has traditionally served only as a means of condemning, retribution, and punishment. The police are directly involved in shifting the paradigm by positioning victims as the focal point for restoring the victims' losses to their original state after a crime by the perpetrator.

#### 4. Conclusion

In terms of legal force, the Police's procedural technical efforts through Perpol 8 of 2021 in implementing restorative justice are not yet strong enough in the regulatory hierarchy. The systematic intentional efforts of the Police are very helpful in realizing restorative justice through strategic policies in the form of internal Polri juridical, but the procedural substance formulated in Perpol 8 of 2021 covers criminal procedure procedures where the Police require a legal product that hierarchically has legal force as a primary reference in the form of a formal source of criminal law. This means that the Police urgently need legal reconstruction in the Criminal Procedure Code to substantially accommodate the stages of restorative justice within the scope of the Police's duties and functions in carrying out its legal procedures, where the Criminal Procedure Code needs to accommodate the investigative stages that are implied in the use of restorative justice in that stage (investigation).

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