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The Role of Restorative Justice in Indonesian Progressive Law Viewed from the Perspective of Legislation

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Article

Abstract

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Polemik berkenaan dengan pelaksanaan restorative justice di Indonesia merupakan sesuatu hal yang sangat berkembang saat ini. Sejak ditetapkannya kesepakatan Bersama antara Lembaga Mahkamah Agung, Lembaga Kepolisian, Lembaga Kejaksaan serta Lembaga Kementerian Hukum dan HAM tentang pendekatan restorative justice dalam menyelesaikan tindak pidana ringan yang terjadi di masyarakat. Dalam penelitian ini menggunakan pendekatan peraturan perundang-undangan yang akan coba dikaji dalam memberikan pendalaman terhadap hal-hal yang berhubungan dengan pendekatan restorative justice dalam menyelesaikan tindak pidana ringan di masyarakat. Data yang dipergunakan adalah data sekunder yang terdiri dari bahan hukum primer yang terdiri dari peraturan perundang-undangan yang berhubungan dengan penelitian, bahan hukum sekunder yang terdiri dari referensi pandangan para ahli yang berhubungan dengan materi penelitian, serta bahan hukum sekunder yaitu data yang diperoleh dari internet, website, majalah. Hasil dari penelitian ini bahwa walaupun pendekatan restorative justice dalam menyelesaikan tindak pidana ringan yang terjadi dimasyarakat hanya didasarkan pada peraturan Kapolri, Peraturan Kejaksaan Agung RI, peraturan Mahkamah Agung RI serta peraturan Kementerian Hukum dan HAM RI, setidaknya dapat memberikan jalan dalam melakukan pendekatan restorative justice sebagai bagian dari hukum progressive.

Kata Kunci : Restorative, Justice, Pendekatan, Kesepakatan, Progressive.

The polemic regarding the implementation of restorative justice in Indonesia is something that is currently developing rapidly. Since the establishment of a Joint Agreement between the Supreme Court, the Police, the Prosecutor's Office and the Ministry of Law and Human Rights regarding the restorative justice approach in resolving minor crimes that occur in society. This study uses a statutory regulatory approach that will be examined in providing insight into matters related to the restorative justice approach in resolving minor crimes in society. The data used is secondary data consisting of primary legal materials consisting of statutory regulations related to the research, secondary legal materials consisting of references to expert views related to the research material, and secondary legal materials, namely data obtained from the internet, websites, magazines. The results of this study are that although the restorative justice approach in resolving minor crimes that occur in society is only based on the regulations of the Chief of Police, the Regulations of the Attorney General of the Republic of Indonesia, the regulations of the Supreme Court of the Republic of Indonesia and the regulations of the Ministry of Law and Human Rights of the Republic of Indonesia, at least it can provide a way to carry out a restorative justice approach as part of progressive law.

Keywords: Restorative, Justice, Approach, Agreement, Progressive

INTRODUCTION

Restorative justice, or restorative justice, is an approach that emphasizes the resolution of criminal acts through the restoration of relationships between perpetrators and victims, with the aim of achieving more holistic justice, not solely through punishment. This approach was first introduced in the 1960s and has grown in various countries, including Indonesia in efforts to resolve criminal acts that emphasize direct participation from perpetrators, victims, and the community in the process of resolving criminal cases. Currently, many criminal cases are resolved using the Restorative Justice approach, both at the police, prosecutors and court levels. This certainly shows a positive thing regarding law enforcement in Indonesia.

In modern times, the concept of the Rule of Law in Continental Europe was developed by Immanuel Kant, Fichte and others, using the German term "rechtstaat", while in Anglo America/Saxon, the concept of the Rule of Law was developed by A.V. Decey with "The Rule of Law". Indonesia as a country that adheres to a civil law legal system that prioritizes positive law in its law enforcement process. One of the characteristics of the civil law legal system is that the judge is the mouthpiece of the law. Thus, the judge only decides based on positive law or written rules in statutory regulations

However, the paradigm of the civil law system adopted in Indonesia has begun to shift with the concept of progressive law put forward by Satjipto Raharjdo that progressive law enforcement is implementing the law not only in black and white words of statutory regulations (according to the letter), but according to the spirit and deeper meaning (to very meaning) of the law or broader law. Law enforcement is not only intellectual intelligence, but also with spiritual intelligence. In other words, law enforcement is carried out with full determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to seek other ways than those usually done.¹

The concept of restorative justice is an approach that prioritizes the creation of justice through the restoration of relations between the perpetrator and the victim. This approach aims to achieve a balance between the parties involved, by emphasizing restitution or compensation for the victim as part of the case resolution process. Restorative justice does not only focus on punishing the perpetrator, but also on restoring the losses suffered by the victim and social reconciliation. This is in line with the broader objectives of the law, which include justice, legal

¹ Satjipto Raharjo, *Penegakan Hukum Suatu Tinjauan Sosiologis*, Genta Publishing, Yogyakarta, 2009 , Hlm XIII

certainty, and benefits. In this context, restorative justice prioritizes a process that actively involves the victim, perpetrator, and community to achieve a just and sustainable resolution

Restorative justice focuses on restoring the relationship between the victim and the perpetrator which can be realized through mutual agreement. In this agreement, the victim is given the opportunity to express the losses they have experienced, while the perpetrator is expected to provide compensation or restitution for the losses. This process prioritizes open communication and mediation to achieve a fair solution for both parties. However, the application of restorative justice in the conventional criminal justice system is not always easy, especially because of the principle of legality or legal positivism which requires that every crime that meets the elements of a crime must still go through a trial to be decided by a judge, even though peace has been reached between the victim and the perpetrator. In other words, the peace achieved between the victim and the perpetrator does not automatically eliminate the legal obligations that must be fulfilled in accordance with the provisions of applicable laws and regulations.

Along with the development of punishment theory, the initial focus that only emphasized the deterrent effect through imprisonment has now begun to shift. Punishment theory increasingly pays attention to the importance of the role of victims in the legal process. Restorative justice is one of the relevant approaches in a progressive legal system, which emphasizes the values of humanity, restoration, and balance in law enforcement. Through mediation between the perpetrator and the victim, restorative justice seeks to reduce the negative effects of the crime and provide an opportunity for both parties to reach a better and more positive resolution.

In Indonesia, although restorative justice has not been widely implemented in the legal system, several provisions of the law provide space for this approach. An example is Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, which provides the possibility of implementing diversion or mediation in resolving cases of children involved in criminal acts. Diversion allows child perpetrators and victims to reach an agreement that leads to the restoration of social relations without having to go through a formal trial process. In addition, although the Criminal Procedure Code (KUHAP) does not explicitly regulate restorative justice, there is potential for the application of restorative justice principles in existing mechanisms, such as through mediation policies in the process of resolving criminal cases outside formal trials

Thus, the implementation of restorative justice in Indonesia's progressive legal system needs to be further explored and reviewed, especially in terms of how laws and regulations can

support or limit its implementation. This study aims to critically analyze how restorative justice is implemented in Indonesian legal practice, as well as the extent to which laws and regulations can be adjusted to the concept of progressive law that emphasizes more on restoration, justice, and balance between perpetrators, victims, and society.

FOCUS OF PROBLEM

From the description as explained in the background, the problem is formulated as follows:

1. What is the role of restorative justice as a progressive law in the perspective of laws and regulations in Indonesia?
2. What are the obstacles in the implementation of restorative justice law enforcement in Indonesia

RESEARCH METHODS

. Law is a normative science, namely, a science that lays the foundations of norms and standards of human behavior in a particular situation that can be enforced through sanctions by the state. What distinguishes law from other social sciences is its normative character. This fact, coupled with the fact that legal stability and certainty are the goals and social values desired by law, makes this doctrinal legal research a major concern for legal researchers. The data used is secondary data consisting of primary legal materials, namely laws and regulations related to the object of research. Secondary legal materials are doctrinal references from legal experts and tertiary legal materials consisting of internet references, websites and others.²

FINDING & DISCUSSION

Literacy References

1. Restorative Justice Theory

The term Restorative was first put forward by Bernatt to resolve cases in the form of mediation between the victim and the perpetrator of the crime. The definition of restorative justice or restorative justice in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System in Article 1 states that "Restorative Justice is the resolution of criminal cases by involving the perpetrator, victim, the perpetrator/victim's family, and other related parties

² Tan, D. (2021). Metode penelitian hukum: Mengupas dan mengulas metodologi dalam menyelenggarakan penelitian hukum. *Nusantara: Jurnal Ilmu Pengetahuan Sosial*, 8(8), 2463-2478.

to jointly seek a fair resolution by emphasizing restoration to the original state, and not retaliation.

The concept of restorative justice or restorative justice is an alternative resolution of criminal cases which in the mechanism of criminal justice procedures focuses on punishment which is changed into a peace process through mediation between the perpetrator and victim by prioritizing restoration to the original state and restoring good relations in society.

In the Decree of the Director General of the General Courts Number 16191/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice, it provides a definition, namely the basic principle of restorative justice, namely the existence of recovery for victims who suffer from crimes by providing compensation to victims who suffer from crimes with. The perpetrator has the opportunity to be involved in restoring the situation (restorative) and the community plays a role in preserving peace, and the court plays a role in maintaining public order.³

In Article 1 paragraph 6 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, the definition of restorative justice is the resolution of criminal cases by involving the perpetrator, victim, the perpetrator/victim's family, and other related parties to jointly seek a just resolution by emphasizing restoration to the original state, and not retaliation.

Muladi defines restorative justice as an approach to justice based on the philosophy and values of responsibility, openness, trust, hope for healing, and has an impact on decision-making in criminal justice system policies and legal practitioners around the world and promises positive things in the future in the form of a justice system to resolve conflicts due to crime and law that can be accounted for and restorative justice can be implemented if the focus of attention is directed at losses due to criminal acts, equal attention and commitment to involving perpetrators and victims, encouraging perpetrators to be responsible, opportunities for dialogue between perpetrators and victims, involving communities affected by crime in the retroactive process, encouraging cooperation in reintegration. Bagir Manan defines restorative justice as the restructuring of a fairer criminal system, both for perpetrators, victims and the community.⁴

2. Progressive Law Theory

³ Surat Keputusan Direktur Jenderal Badan Peradilan Umum Nomor 1691/DJU/SK/PS.00/12/2020 Tentang Pedoman Penerapan Restorative Justice di Lingkungan Peradilan Umum.

⁴ Majalah Varia Peradilan, Tahun XX, No 247, Ikatan Hakim Indonesia, 2006, hlm, 3.

The progressive legal theory initiated by Satjipto Raharjo provides a definition that law is formed for humans, not humans for the law. According to Satjipto Rahardjo, law is an institution that aims to lead humans to a just and prosperous life and make humans happy. This view places law only as a "tool" to create justice, prosperity and happiness. So law is not the goal of humans but law is only a tool to create justice for humans.

According to Satjipto Raharjo, the progressive legal paradigm does not move on the legalistic-dogmatic principle or the positive legal school alone, but rather in a sociological direction. Law is not absolutely driven by the existence of positive law or written rules (statutory regulations), but law also moves in a non-formal direction. Progress in law requires support and enlightenment of legal thinking carried out by both practitioners and academics

According to Satjipto Raharjo, progressive law does not disregard the existence of positive law, but rather that in the paradigm of progressive law, law is not only a prisoner of the system and laws, but justice and the happiness of the people are above the law.⁵ Satjipto Raharjo that progressive law enforcement is implementing the law not only in black and white words of the legislation (according to the letter), but according to the spirit and deeper meaning (to the very meaning) of the law or broader law. Law enforcement is not only intellectual intelligence, but also with spiritual intelligence. In other words, law enforcement is carried out with full determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to seek other ways than those usually done.⁶

In progressive legal theory, humans become the core and goal of law. The role of humans in law is very important, because law is basically centered on humans. Humans with all their complexity are the center of law. According to Satjipto Raharjo, there are several factors in humans that are the driving force in implementing the law, namely empathy, sincerity, courage (compassion, empathy, sincerity, education, commitment, dare and determination).

Law enforcement is one of the links in the chain of law. Law enforcement is an effort to overcome crime rationally, fulfilling a sense of justice and being effective. In order to overcome criminal acts against various means as a reaction that can be given to perpetrators of crimes can be in the form of criminal or non-criminal law, which can be integrated with one another. If criminal law is an alternative to overcome crime, then what will be implemented is criminal law policy, namely making criminal legislation that is in accordance with the circumstances and situations at a time and for the future.⁷

⁵ Satjipto Rahardjo, *Membedah Hukum Progresif*, Buku Kompas, Jakarta, 2008, hlm 116.

⁶ Satjipto Raharjo, *Op.Cit.*

⁷ Barda Nawawi Arief, *Kebijakan Hukum Pidana*, Bandung: PT. Citra Aditya Bakti, 2002, hlm. 109

According to Soerjono Soekanto, law enforcement does not merely mean the implementation of legislation, although in reality it tends to be so. There is even a tendency to interpret law enforcement as the implementation of court decisions. This narrow understanding clearly contains weaknesses, because the implementation of legislation or court decisions can actually disrupt peace in social interactions.⁸

Law enforcement can guarantee legal certainty, order and legal protection in the current era of modernization and globalization can be implemented, if various dimensions of legal life always maintain harmony, balance and harmony between civil morality based on actual values in a civilized society. As a process of activities that include various parties including the community in order to achieve goals, it is a must to see criminal law enforcement as a criminal justice system

Law Number 11 of 2012 concerning the Juvenile Criminal Justice System.

Article 1 paragraph 6 of Law Number 11 of 2012 defines restorative justice as the settlement of criminal cases involving the perpetrator, victim, the perpetrator/victim's family, and other related parties to jointly seek a fair settlement by emphasizing restoration to the original state, and not retaliation. In the Law, the approach taken must prioritize the restorative justice approach through diversion, namely the settlement of children's cases from the beginning through the criminal justice process to a process outside the criminal justice process.

The objectives of diversion include:

- a. Achieving peace between the victim and the perpetrator
- b. Resolving criminal cases of children outside the conventional justice process
- c. Avoiding children from deprivation of liberty
- d. Encouraging the community to participate in resolving cases of children in conflict with the law
- e. Instilling a sense of responsibility in children

That the settlement of non-criminal cases carried out by children with diversion has certain criteria, namely:

- a. Threat of imprisonment of less than seven years
- b. Not a repetition of the crime

⁸ Soerjono Soekanto, *Op., Cit.*

The diversion process is carried out through deliberation involving the child and his/her parents/guardians, the victim and/or his/her parents/guardians, Community Guidance Officers and professional social workers based on a restorative justice approach

Decree of the Director General of the General Courts concerning Guidelines for the Implementation of Restorative Justice in the General Courts

The Decree of the Director General of the General Courts is a technical guideline to encourage the optimization of the implementation of restorative justice in the judicial environment. Then the enactment of the decree is also to reform the criminal justice system which still prioritizes prison law. That with the enactment of the decree as a development of the criminal justice system which has so far relied on the perpetrator but also leads to the alignment of the interests of victim recovery and accountability for criminal acts. The purpose of issuing the Decree is:

- 1) Facilitating the courts in the general court environment in implementing the application of restorative justice
- 2) Encouraging increased application of restorative justice in the judicial environment
- 3) Fulfillment of the principles of fast, simple and low-cost justice with balanced justice.

This decree regulates criminal acts that can be resolved by implementing restorative justice, namely minor crimes contained in Articles 364, 373, 379, 384, 407 and Article 482 of the Criminal Code which are threatened with a maximum imprisonment of three months or a fine of Rp. 2,500,000 (two million five hundred thousand rupiah), women's cases in conflict with the law, children's cases and narcotics cases

Attorney General Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

Article 2 of the Attorney General's Regulation Number 15 of 2020 regulates the implementation of the concept of settlement with a restorative justice approach based on the principles of justice, public interest, proportionality, criminal law as a last resort and the principle of fast, simple and low-cost justice.

This Attorney General's Regulation gives the public prosecutor the authority to stop prosecution in the interests of the law, one of which is because there has been a settlement of the case outside the court (afdoening biten process) as regulated in Article 3 paragraph (2)

letter e. Settlement through this restorative justice approach is carried out with the following provisions:

- a. For certain criminal acts, the maximum fine is paid voluntarily in accordance with the provisions of the laws and regulations, or;
- b. There has been a restoration of the original state using the Restorative Justice approach

Police Regulation Number 8 of 2021 Concerning Handling of Criminal Acts Based on Restorative Justice.

The purpose of issuing Police Regulation Number 8 of 2021 is as 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 which have so far been oriented towards punishment.

The Police Regulation is a new concept in criminal law enforcement which has so far been through a criminal approach which has changed to a restorative justice approach that accommodates the interests of victims, perpetrators of criminal acts, victims' families, perpetrators' families and the community to jointly seek a just solution through peace by emphasizing the restoration of the original state. The criminal acts that can be resolved with a restorative justice approach are Information and Electronic Transaction crimes, Narcotics crimes, and traffic crimes.

Aceh Regional Regulation/Qanun Number 9 of 2008 concerning the Development of Customary Life and Traditions.

Before several rules related to restorative justice that the Aceh Government has regulated regarding the settlement of minor criminal acts that can be resolved outside the court, namely Qanun/Regional Regulation Number 9 of 2008 concerning the Development of Adan Life and Customs which regulates 18 cases of minor criminal acts that occur in the community can be resolved through customary law by village officials.

The 18 cases that can be resolved through customary law by village officials are regulated in Article 13 paragraph (1), namely:

- 1) Domestic disputes
- 2) Disputes between families related to faraidh
- 3) Disputes between residents
- 4) Indecent khalwat
- 5) Disputes over property rights

- 6) Theft within the family (minor theft)
- 7) Property disputes
- 8) Minor theft
- 9) Theft of livestock
- 10) Violation of customs regarding livestock, agriculture, and forests
- 11) Disputes at sea
- 12) Disputes in the market
- 13) Minor abuse
- 14) Forest burning (on a small scale that harms the indigenous community)
- 15) Harassment, slander, incitement, and defamation
- 16) Environmental pollution (minor scale)
- 17) Threats (depending on the type of threat)
- 18) Other disputes that violate customs and traditions

That in its implementation, law enforcement officers provide the opportunity for disputes/conflicts to be resolved first in accordance with customary law by village officials as referred to in Article 13 paragraph (3)

CONCLUSION

The implementation of restorative justice has been regulated in various laws and technical regulations, such as Law Number 11 of 2012, Decree of the Director General of the General Courts, Attorney General Regulation Number 15 of 2020, Police Regulation Number 8 of 2021, and Aceh Qanun Number 9 of 2008. Restorative justice, with a diversion approach, emphasizes the resolution of cases outside the trial and focuses on restoring the original state, not retaliation. This approach is part of the reform of the criminal law system which previously focused on punishment, now seeks to align the interests of victim recovery and perpetrator accountability, as well as encourage community participation in the legal process. Suggestions for the implementation of restorative justice include expanding socialization and understanding to law enforcement officers, the community, and related parties so that it can be applied effectively in various cases, including minor crimes, customary violations, and children's cases, as well as strengthening the capacity of officers through training. In addition, it is necessary to prepare more detailed guidelines for implementation in the field, regular monitoring and evaluation, and empower the community to actively participate in resolving cases restoratively. It is hoped that the implementation of restorative justice will not only

achieve the goal of fair law for victims and perpetrators, but will also create efficiency in the costs of handling minor criminal cases that are resolved outside the courts

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