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Harmonization of Legal Systems: Analysis of the Relationship between the Principle of Restorative Justice and Criminal Procedure Law (Kuhap) in Indonesia

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Abstract: ***Criminal law experts and researchers are currently still focused on the concept of implementing/applying restorative justice, not yet focusing on its relationship with the Criminal Procedure Code. This research aims to: 1. Find out to what extent the principles of Restorative Justice can be applied in the Indonesian legal system which is regulated by the Criminal Procedure Code, 2. Find out the authority of Investigators in implementing Restorative Justice according to the Indonesian Criminal Procedure Law, and 3. Propose efforts to harmonize or reform the system Indonesian law to integrate the principles of Restorative Justice in the criminal justice process. This research is qualitative with a sociological approach. Normatively, the analysis is based on statutory regulations and legal principles, while empirically, multiple interpretations of the rules are carried out. Data collection techniques used in - depth interviews and document analysis. The results of the research carried out are: 1. The application of Restorative Justice can be said to be relatively successful but the application of its principles is still limited and not fully integrated, 2. The application of restorative justice by investigators is mostly carried out based on discretion and internal police policies, especially for minor cases and does not refer to the Criminal Procedure Code, 3. Efforts to harmonize or reform the legal system, especially the Criminal Procedure Code to integrate the principles of Restorative Justice in the criminal justice process which needs to be carried out comprehensively and systematically.***

Keywords: restorative justice, KUHAP, harmonization

1. Introduction

The law enforcement in Indonesia has attracted a lot of criticism and attracted public attention because there is a sense of injustice that is still felt by the parties involved in the case. This tends to be due to the nature and characteristics of positivistic criminal law which is considered to contain substantial problems in the law enforcement process. The litigants, including the public, do not yet feel that there is balance in legal treatment. The principle of balance in law enforcement is a fundamental concept which explains that the principle of justice requires balanced legal treatment of all individuals. The Principle of Equality in the context of the principle of justice is a fundamental basis which underlines that every individual, regardless of factors such as social status, economics, religion, ethnicity, gender, or other background, has the same rights in the eyes of the law.

Apart from balance and equality, in law enforcement there is also a need for the principle of objectivity. The principle of objectivity also requires that the legal process must take place fairly. This means that every individual involved in a legal process has the same right to be respected, heard, and have equal access to the process. Apart from that, objectivity also avoids the influence of personal or external factors in making legal decisions. This objective attitude to realize equality and balance seems to have been answered with the implementation of the concept of restorative justice in the resolution of criminal cases in the Indonesian Criminal Justice.

This approach system involves resolving cases outside of court involving various parties, including the perpetrator, victim, families of both parties, law enforcement officials, and other related parties. Although the goal of this Restorative Justice model is to produce a decision that is to restore the original condition by prioritizing the principle of balance between all parties involved, this restorative justice pattern, model and system is considered to be able to answer the problems that exist in criminal law. This concept first appeared in Indonesian legislation, namely in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. Then, gradually the police internally implemented restorative justice starting from instructions via telegram letters, followed by circular letter number 7 of 2018, until most recently the Indonesian National Police regulated the implementation of restorative justice in Police Regulation (Perpol) Number 8 of 2021 concerning Handling Criminal Acts Based on Restorative Justice.

A similar legal product was also issued by the prosecutor's office through the Republic of Indonesia Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution based on restorative justice, which was stipulated on July 22, 2020. Then, within the Judiciary, Decree of the Director General of the General Judicial Body of the Supreme Court of the Republic of Indonesia was issued Number: 1691/DJU/SK/PS/00/12/2020 concerning The Implementation of Guidelines for The Implementation of Restorative Justice which were stipulated on 22 December 2020. The three legal instruments above which provide a legal

framework for the concept of Restorative Justice in the criminal justice system in Indonesia reflect the occurrence a change in views on punishment and law enforcement by emphasizing the importance of social improvement and prevention over punishment as a form of recovery. However, like any other approach, Restorative Justice also has its limitations and is not always suitable for all types of legal cases. Therefore, its use is usually applied selectively in modern legal systems.

The Indonesian National Police, as the entry point for handling criminal acts in society, has a very important role in portraying law enforcement through restorative justice that is fair both in the inquiry and investigation stages. In fact, referring to the concept of Restorative Justice as stated in the Republic of Indonesia Police Regulation Number 8 of 2021, the police have open legal space not to escalate criminal acts to the prosecution, on the legal grounds that the problem or criminal act has been resolved through Restorative Justice as per the Perpol Number 8 of 2021. Of course, this has the potential to cause disharmony in the rules with the Criminal Procedure Law, namely Law Number 8 of 1981 concerning the Criminal Procedure Code, especially in terminating cases. The Criminal Procedure Code does not yet explicitly regulate the process of resolving cases through restorative justice. This reflects that Restorative Justice has not yet become an integral part of the Indonesian criminal justice system and is still limited to more limited or voluntary implementation.

Therefore, there is a need to study and formulate a more comprehensive and clear legal framework governing Restorative Justice in the Indonesian legal system. This will help ensure that Restorative Justice is applied consistently and in accordance with applicable legal principles, while providing clear guidance to investigators, perpetrators, and victims regarding the legal status and implications of the process. Thus, termination through Restorative Justice can be properly regulated and accepted as a legitimate alternative in the Indonesian criminal justice system.

Based on the explanation outlined in the background of the problem, the problem is formulated as follows:

1) To what extent can the principles of restorative justice be applied in the Indonesian legal system regulated by the Criminal Procedure Code?
2) What is the authority of investigators in implementing restorative justice according to the Indonesian Criminal Procedure Law?
3) How can harmonization or reform of the Indonesian legal system be carried out to integrate the principles of restorative justice in the criminal justice process?

2. Method

This legal research uses a sociological qualitative approach which aims to understand the phenomena experienced by the research subjects. This method prioritizes research on secondary data, such as primary, secondary or tertiary legal materials.

3. Discussion

1) The Indonesian National Police (INP) Normative Response to Restorative Justice

The INP gave a positive response to the concept of Restorative Justice by issuing legal products that contain this concept, such as the issuance of Circular Letter from the Chief of Police Number: SE/8/VII/2018 dated 27 July 2018 concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases which was issued in a package with the Letter Circular of the Chief of Police Number: SE/7/VII/2018 dated 27 July 2018 concerning Termination of Investigation. Then in 2021, the National Police Chief issued Republic of Indonesia State Police Regulation Number 08 of 2021 concerning Handling of Criminal Acts based on Restorative Justice. These legal products are used as the basis for the police's authority to use Restorative Justice in resolving legal issues (criminal acts) presented to the National Police. However, this regulation raises other questions, considering that the main legal foundation for the Police in carrying out its duties, functions and authority as an investigative agency is the Criminal Procedure Code (UU No.8 of 1981), where the concept of Restorative Justice does not exist in it, so it needs to be harmonized between these two legal products.

The police are an institution that enforces the law and also protects the public from criminal acts that can disturb the sense of security, maintain social order, and ensure public justice in accordance with the law. One of the legal bases used in law enforcement is criminal law. Criminal law is considered as part of public law that regulates public interests. When someone commits a criminal act that harms other people, the legal consequences are not only the rights of the victim, but also the collective responsibility of the family, community, and ultimately, the responsibility of the state. The rule of law in a country is the only instrument for resolving criminal cases with established procedures and rules.

The search for justice in criminal cases depends entirely on the system built by the Police, Prosecutor's Office, Courts and Correctional Institutions. However, many criticisms of judicial institutions have been expressed, such as that judicial institutions do not always suit the wishes of justice seekers, because each person has different needs and levels of acceptance of a sense of justice. Other criticisms have also been expressed regarding the weaknesses of the judiciary, including that it takes a long time, is expensive, and often the root of the problem is not resolved properly. Dispute resolution through litigation takes a very long time. Second, the costs required to litigate in court are considered high. Third, the courts are considered less responsive to community needs. Fourth, it is considered that court decisions do not always resolve the root of the problem. Finally, the ability of judges is considered too general (generalist) in deciding cases.

Therefore, various criticisms of the criminal justice system have given rise to the desire of law enforcement agencies, especially the police, to look for alternative solutions to resolve cases outside the criminal justice system. One solution is through mediation as an implementation of restorative justice. The aim is to handle conflicts between

perpetrators and victims, overcome formalities that exist in the criminal justice system, and avoid the negative impacts of the current criminal justice system. One concept to realize this idea is to apply the Restorative Justice pattern to resolve criminal cases outside of court. In the context of the problems described above, mediation is considered a more appropriate approach to realizing the principles of simple, fast, and affordable justice. This is very important to protect the rights of victims and perpetrators.

In the period following the issuance of Perpol Number 8 of 2021, the implementation of restorative justice by investigators was quite significant. In 2021, 14, 137 cases were carried out, while in 2022 it increased by 11.8% to 15, 809 cases.

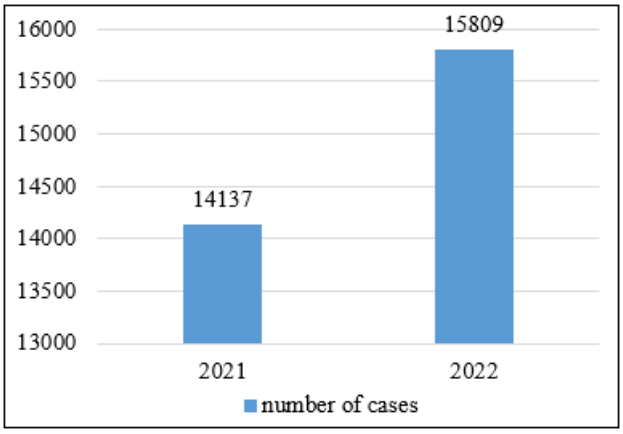

Figure 1

Increasing the implementation of Restorative Justice in the Indonesian National Police post Political Regulation Number 8 of 2021

This increase was also influenced by the push for operational transformation of the INP with one of the goals being to achieve a better sense of justice and increased trust in the INP. The flow of positivism is directed towards becoming a progressive flow so that it is hoped that it can fulfill society's sense of justice. Progressive law is an approach to the legal system that emphasizes the role of social change and the development of societal values as important factors in the interpretation and application of law. This approach recognizes that law is not static but must be able to adapt to the dynamics of society and the changes that occur. The concept of progressive law demands that legal decisions are not only based on legal texts, but also consider aspects such as social context, developing values, aspirations for justice, and long - term consequences for society. One figure who is often associated with progressive legal theory is Professor Satjipto Rahardjo from Indonesia. He emphasized the importance of law as an instrument for achieving social justice and viewed that law must be responsive to changes in society. In this case, courts and legal policy makers are expected to see law as a tool that can bring positive change in society. However, the interpretation of progressive law is often subjective and can give rise to debate regarding the limits of the legal decisions taken. Nevertheless, this approach remains an important part in the evolution of the legal system to respond to the demands of ever - changing times. One restriction that can answer this debate is the existence of INP regulation number 8 of 2021.

2) The need for harmonization of Restorative Justice with the Criminal Procedure Code in terminating cases

Legal reconciliation in relation to restorative justice refers to efforts to harmonize or coordinate differences between laws that apply in various jurisdictions or different legal systems. This can occur in the context of comparative law between countries, between religious law and secular law, or even in the combination of different legal principles in one legal system. The main goal of legal reconciliation is to identify similarities and differences between different legal systems and try to find ways to balance, harmonize, or resolve conflicts that may arise between them. This can be done through a process of interpretation, harmonization, or development of legal principles that can be applied consistently across various jurisdictions or legal systems.

In criminal procedural law (KUHAP), a mechanism that allows investigators to stop the case process for certain reasons, as regulated in article 109 of the Criminal Procedure Code. Article 109 of the Criminal Procedure Code gives investigators the authority to terminate cases for several reasons, namely:

a) Not Enough Evidence
The investigation can be stopped if there is not enough supporting evidence to continue the legal process. This means that if investigators cannot collect sufficient evidence to support the criminal act allegedly committed by the suspect, the investigation can be stopped due to lack of strong evidence.

b) Not a Criminal Offence.
If in the investigation process it is found that the alleged action does not fulfill the elements of a criminal act according to applicable law, then the investigation can be stopped. This means that the action may not violate the law or may not be subject to criminal action.

c) *For the Law* (Demi Hukum).
There are certain situations referred to as "by law" that can be grounds for stopping an investigation. These include when the suspect dies, when the criminal offense has passed the time limit for prosecution (statute of limitations), or when the case has been decided in the court process (ne bis in idem). In these cases, the investigation can be stopped for clear legal reasons.

The three reasons above are the grounds for termination of investigations regulated in the Criminal Procedure Code, but until now, the Criminal Procedure Code has not explicitly regulated the process of resolving cases through restorative justice. This reflects that Restorative Justice has not become an integral part of the Indonesian criminal justice system and is still limited to more limited or voluntary implementation.

The empirical issue that arises regarding the legal status of the termination of cases through Restorative Justice is still a problem that requires clarification in the Indonesian legal system. Because there is no regulation that specifically regulates Restorative Justice as an official mechanism in resolving cases, many parties including investigators and the public may feel confused about how the steps and processes of Restorative Justice should be interpreted in the context of

applicable law. This unclear legal status also means that the results of the Restorative Justice process may not have the same legal impact as a formal court decision. Questions arise, for example, whether the results of Restorative Justice can be considered an admission of guilt that is the same as a court decision or whether the results can be used in further judicial processes.

Therefore, in addition to legal reconciliation, it is also necessary to harmonize the law on the application of restorative justice in the police. Law Harmonization includes adjusting laws and regulations, government decisions, judges' decisions, legal systems, and legal principles. The goal is to improve legal unity, legal certainty, justice, balance, usefulness, and clarity of law, without eliminating legal diversity if necessary. Law harmonization is a scientific and planned activity with the aim of achieving a consistent regulatory process, which refers to various values including philosophical, sociological, and legal values. From a philosophical perspective, this harmonization must pay attention to philosophical values, namely the principles of ethics, morals, and justice that underlie the law. Adjustments must consider ethical aspects and community values that are reflected in the law. Meanwhile, from a normative perspective, legal harmonization that is carried out must involve the process of writing or compiling regulations, policies, or legal systems in a planned manner, which refers to existing legal principles, principles, and dogmas. Meanwhile, harmonization from a sociological perspective, legal harmonization must consider sociological aspects, namely values, norms, and social behavior that are part of a society, and ideally is carried out when planning the creation of laws and regulations.

One of the points in the harmonization of regulations related to restorative justice is in terms of stopping investigations, and even stopping in the investigation stage. In the draft Criminal Procedure Code (RUU KUHAP) article 14 paragraph (1) it is stated that investigators have the authority to stop investigations because:

a) Ne bis in idem
b) the suspect has died
c) The time has passed
d) There is no complaint in the criminal complaint
e) The law or article that is the basis for the claim has been revoked or declared to have no effect based on a court decision, or
f) Not a criminal act, or the defendant was under 8 (eight) years of age at the time of committing the crime.

Meanwhile, in paragraph (2) of the Draft Criminal Procedure Code it is stated that if an investigator stops an investigation, the investigator is obliged to notify the public prosecutor, victim and/or suspect no later than 2 (two) days from the date of termination of the investigation.

Then in the realm of termination of investigation, there is no regulation in the Criminal Procedure Code Bill. If we examine the termination in the investigation stage as regulated in Article 2 paragraph (5) of Perpol Number 8 of 2021, then it is necessary to carry out harmonization by considering the existence of the regulation on termination of investigation in the Criminal Procedure Code Bill, considering that this practice has often been carried out by the police in resolving cases. Article 2 paragraph (5) states that the handling of criminal acts as referred to in paragraph (1) letter b (investigation) and letter c (investigation), can be carried out by terminating the investigation and inquiry.

The attempt to test the Criminal Procedure Code (Law Number 8 of 1981) related to the termination of investigations has been carried out, but in the verdict, the applicant's request was rejected in its entirety. The request submitted by Anita Natalia Manafe was against Article 5 paragraph (1) letter a of the Criminal Procedure Code which does not include the investigator's authority not to terminate an investigation, thus causing harm and causing premature investigations where investigators have not examined witnesses can immediately terminate the investigation. According to the Applicant, the Criminal Procedure Code does not explain in detail how the investigation and inquiry process is, in this case according to the Applicant's opinion the investigation process must be carried out thoroughly first by collecting witness statements and evidence so that after the investigation process is complete, the next task is the investigator's authority to carry out the investigation process which will determine whether the reported criminal act has sufficient evidence or not as clearly stated in Article 7 of the Criminal Procedure Code. By not writing down the investigator's authority to terminate the investigation, the lawmakers clearly do not want there to be a termination of the investigation so that Article 5 paragraph (1) letter a of the Criminal Procedure Code does not include the investigator's authority to terminate the investigation.

The Court provided several considerations related to the application for a judicial review of Article 5 of the Criminal Procedure Code, namely:

a) The act of terminating an investigation by an investigator, even though it is not expressly stated in Article 5 paragraph (1) letter a of the Criminal Procedure Code, is not in conflict with the 1945 Constitution. Moreover, every report of an alleged criminal act after an investigation has been carried out does not contain sufficient evidence to be followed up to the investigation stage.
b) Regarding the investigation process that has been terminated, it is possible that a re - investigation can be carried out as long as new evidence is found regarding the report of the alleged criminal act in question. Thus, the termination of the investigation which is not specifically regulated in Article 5 paragraph (1) letter a of the Criminal Procedure Code does not hinder the constitutional rights of the Applicant as the reporter to obtain justice.
c) Doctrinally and when associated with the principles of state administrative law, in case even though the termination of investigations is not regulated in the Criminal Procedure Code, this still provides discretion to state administrative officials in this case the Chief of Police, namely using his policy to regulate matters that have not been regulated in applicable laws and regulations. Regarding the termination of investigations, the Chief of Police has issued a Circular Letter of the Chief of Police concerning the Termination of Investigations.

The polemic related to the lack of harmonization of restorative justice regulations in various law enforcement agencies, then the orientation of its implementation is still on "case resolution", not on the process and objectives. In the police there is no limit to criminal acts, except those that have been clearly excluded, namely not acts of terrorism, state security, corruption and against people's lives. Even if Restorative justice can be interpreted narrowly as the termination of a case. The termination of a case based on restorative justice must be appropriate in its use. Currently, the concept of restorative justice in Indonesia is not in accordance with its basic principles, which aim for all parties involved in a case to be able to find a way out of the imbalance caused by the criminal act that occurred. It must be underlined that implementing it is not the same as making peace and stopping the case, but rather prioritizing the rights of victims that are oriented towards recovery for all. An incomplete understanding of the concept of restorative justice by law enforcement officers makes its implementation something that is vulnerable to misuse.

4. Conclusion

1) The implementation of Restorative Justice can be said to be relatively successful, but the application of the principles of restorative justice is still limited and not fully integrated. The Criminal Procedure Code is still more focused on the retributive approach and has not fully accommodated the concepts of recovery, reconciliation, and active participation of all parties involved in the criminal justice process.
2) The implementation of Restorative Justice by Investigators is more often carried out based on discretion and internal police policies, especially for minor cases and does not refer to the Criminal Procedure Code. Meanwhile, the Criminal Procedure Code, which adheres to the principle of legality where every proven crime must be processed legally, creates a dilemma for investigators when facing cases that technically meet the elements of a crime, but some of them are more appropriately resolved through a restorative approach.
3) Harmonization is needed to improve the legal system to better support the implementation of Restorative Justice, and to create harmony between the various regulations that are currently scattered and not yet integrated. Harmonization also needs to be carried out on other related regulations to be in line with the revised Criminal Procedure Code. This includes adjusting the Police Law, the Prosecutor's Law, and the Judicial Power Law to ensure that all law enforcement agencies have a uniform understanding and approach in implementing Restorative Justice.

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