



Application Retorative Justice in the Investigation Process to Achieve Justice

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ABSTRACT

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Retributive justice is not fully capable of providing a sense of justice because it uses the principle of a quality before the law. Restorative justice provides a sense of justice rather than certainty in the criminal justice system. This paper aims to discuss the application of the concept of restorative justice in the handling of certain crimes to realize the value of justice and legal benefits in the investigation process for the future. This research method is normative juridical and qualitative analysis. The research result found that the application of the concept of restorative justice in the criminal justice system aims to realize justice for victims, criminals, family, society, and the country. Investigation as an early stage of the criminal justice system process is a strategic position in implementing restorative justice. For certain criminal cases, if there has been peace between the criminals and the victim during the investigation, then according to the principle of appropriateness, the principle of ultimum remedium, the principle of efficiency and discretion, then the case has legal grounds to be stopped in the prosecution process and court proceedings. It is hoped that the role of investigators will be more in implementing restorative justice by exercising discretion to create a sense of justice and benefit. In order to set an appropriate term for termination of a case on the basis of restorative justice so as not to cause doubts for investigators and become official guidelines for the administration of investigations for investigators.



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Introduction

Justice is never endlessly discussed and is always the focus of debate, when someone says a decision is fair, but not necessarily fair to others. No one can provide a standard definition of true justice to be a guide for everyone because justice is relative depending on the perspective of people in seeing justice (Utrecht, 1958).

Even though the principle of legality is the standard to determine whether someone has violated the law or not, but on the other hand is not able to guarantee real justice. Many cases show deep concern and make the public question the enforcement of criminal law. If all the perpetrators of criminal acts are legally processed according to the criminal law and

tried through a court hearing, then a child who steals a loaf of bread should be imprisoned. Including a grandmother who is in a state of hunger stealing cassava to eat also has to be imprisoned (Admin, 2010; Marbun, 2013).

Enforcing criminal law does not have to be seen in written law in the form of statutory texts, but must also be seen from the facts. If you see it with "one eye" then the criminal law has no conscience, vile, sadistic and cruel. Enforcing material criminal law does not necessarily have to carry out formal procedures that have been neatly arranged in the format of criminal procedural law, but it must also be seen from the point of view of the objective of material criminal law itself to create a sense of comfort, order, benefit, justice, and welfare (Farid & Hamzah, 2002; Nasution, 2003).

Utilitarianism emphasizes this in that the goal of law enforcement is measured by the greatest benefit to the greatest group. Making decisions based on ethics with consideration of the benefits for many people as the result will make a decision more useful. Good deeds are measured by useful results, if the result is not useful, then it does not deserve to be called good (Bertens, 2000; R.Ernawan, 2002).

The legal adage "*fiat justitia et pereat mundus*" does not have to be viewed with one eye but must also be balanced with "*fiat justitia ruat coelum*". This means that the law does not have to be enforced even though the sky will fall, but justice must be served even though the sky will fall. Enforcing justice is the most important thing than enforcing the law, because legal justice is not necessarily able to provide a sense of justice to every justice seeker (Anderson, 2001; Wibowo, 2012).

The principle of legal certainty does not have to be seen as a fixed norm with a fixed price. If the principle of legal certainty becomes a fixed price, then the law becomes a dead law. In certain cases, criminal law enforcement does not have soul and conscience if it always has the principle of a quality before the law. Although this general principle is recognized, but it does not have to be viewed rigidly by always equating everyone before the law. Therefore, in certain cases it must be seen from the point of view of the legal objectives through the application of restorative justice in the criminal justice system.

Based on the description above, then the problems discussed in this paper are formulated is how the application of the concept of restorative justice has been carried out by investigators so far especially in handling certain crimes in realizing the value of justice and the benefits of law in the investigation process as well as expectations for the implementation of restorative justice in the future.

Methodology

This type of research method is normative juridical with qualitative analysis. Analyzing the primary legal material in Constitution of the Republic of Indonesia 1945, Law No. 8 of 1981 concerning the Criminal Procedure Code (KUHP), Law No. 39 of 1999 concerning Human Rights (UUHAM), Law No. 13 of 2006 concerning the Protection of Witnesses and Victims (UUPSK), Law No. 48 of 2009 concerning Judicial Power (UUKK), Law No. 30 of 2014 concerning Government Administration, and Law No. 2 of 2002 concerning the Police.

These legal materials are used to analyze the application of the concept of restorative justice in the investigation process to achieve justice.

Results and Discussion

Restorative Justice

Restorative justice (restorative justice) emerged since the era of the 1960 as a form of protest retributive justice which prioritizes retaliation against all criminals. In restorative justice, all those involved in certain crimes jointly participate in solving problems, how to deal more fairly and consider the consequences in the future.

The criminal law paradigm of justice has shifted from retributive justice to restorative justice. Retributive justice views all perpetrators of crimes must be punished by a criminal. Retributive justice sees justice by way of retaliation for the criminal wrongdoing of the perpetrator. Patterned in the past and the goal is to determine who is to blame and what is the criminal article that must be imposed on the perpetrator. Restorative justice sees justice in the aspect of repair / restoration to its original state, victim oriented, give the offender an opportunity to express his regret, at the same time be responsible bring together and reconcile victims and perpetrators to reduce hostility and hatred, restore balance in society, and involve the community.

Recover losses due to criminal acts by involving stakeholders. Using the principle of empowerment, namely the approach of integrating perpetrators, victims, families, and communities to find the best solution. Each of them is active in conveying the will to find a meeting point for solutions to problems. Focuses on the needs of perpetrators, victims, families, and communities in overcoming criminal problems. Using the deliberation method to restore damaged relationships between victims, perpetrators, and their respective families, including involving the community.

Empowering victims, perpetrators, families, and communities to correct an unlawful act by using conviction as a basis for repairing relationships. The measure of justice is no longer based on commensurate punishment from the victim to the perpetrator through the state, but rather by providing support to the victim on the condition that the perpetrator must take responsibility with the help of his family and community. Perpetrators who regret their actions are given the opportunity to repair the losses incurred because of their mistakes. Rebuild relationships between victims, perpetrators, their respective families, friends, and the community. Indeed, on the one hand it is recognized that the possibility of concern does not cause a deterrent effect. Therefore, its application must be casuistic.

After all, the purpose of holding prisons as a place to serve criminals for inmates is intended to be a deterrent, but it has a negative side. The prison system also does not bring effective results to minimize prisoners. The effectiveness of imprisonment must be seen from the aspect of the extent to which the imprisonment can protect the interests of the victim or the community and can provide improvements to the perpetrator himself. What matters is not the punishment, but how the punishment was agreed upon by penal mediation with a continuous monitoring process. The focus of the approach is to form the perpetrator's

awareness to be responsible for his actions, and the ability to control future behavior, so that the law becomes more just and beneficial for perpetrators, victims, and society.

Restorative justice orientation is forward looking, trying to find the value of justice and the benefits of law, because it is not certainty (legality) as the only goal. In practice, it is also called penal mediation. Resolve criminal acts by means of mediation. The first possibility is that the criminal case will not proceed to the prosecution process or the second possibility that the two cases will continue to the prosecution process. but the peace that has been formed is a condition to reduce the punishment for the perpetrator.

While the retributive view is oriented backwards (backward looking). Punishment orientation backwards sees criminal wrongdoing must be repaid with a criminal. Restoring a relationship that has been damaged due to the occurrence of a crime is one of the forward-oriented efforts, namely considering the good and bad impacts in the future that are more just and beneficial for all, without imposing a penalty on the perpetrator.

Application of Restorative Justice in the Investigation Process

Investigation as the initial stage of the criminal justice process, occupies a strategic position in implementing restorative justice. If there has been peace between the perpetrator and the victim, then according to the principle of propriety, ultimum remedium principle, and the principle of police discretion, the case should not be continued in the prosecution and trial process. Here the role of the investigator is expected to exercise discretion for the sake of a sense of justice and expediency.

In principle, peace does not eliminate the criminal aspect, but on the basis of a sense of justice and the principle of expediency, it is considered quite reasonable, and the legal process should be terminated. Aren't justice and expediency also part of the purpose of law in addition to certainty? Settlement of criminal cases by restorative justice in the practice of investigation gives a message, that the criminal law must indeed be the last means (ultimum remedium).

Certain, not all types of general crimes can be resolved by restorative justice. Usually only applies to certain crimes, such as robbery, theft, embezzlement, rape, persecution, and others. It does not include crimes that are classified as extraordinary and not criminal acts that cause social impacts. Upholding justice is the most important thing than upholding legal certainty, because legal certainty is not necessarily able to provide a sense of justice to every justice seeker. In certain crimes, the law does not have to be enforced even though the sky will fall, but justice must be served even though the sky will fall. Prioritizing a sense of justice over certainty is one manifestation of the concept of restorative justice, the principle of propriety, ultimum remedium principle, and the principle of discretion.

The following case studies related to allegations of fraud and/or embezzlement have been resolved by restorative justice at the investigative level: First, Police Report (LP) Number LP/1588/VII/2019/SPKT Restabes Medan Dated July 25, 2019, Whistleblower Endang Sulistiana and Whistleblower Nadya Ba'ayesh. The reported party is a buyer who asks the complainant (Head of Store Alfamidi Rajawali) to make a shopping payment transaction using a verification code. When the complainant enters the code for a shopping payment of

Rp. 1.000.000, - with three transactions, then the amount to be paid by the reported party is Rp. 3,000,000, -, but the reported party does not want to pay for it because the code given is a fraud. The complainant and the reported party have reconciled, on the basis of considerations in restorative justice, the complainant withdraws the report and investigators stopped the case.

Second, cases of fraud and/or embezzlement in LP No: LP/15/K/I/2018/SPKT Restabes Medan Dated January 4, 2018. Whistleblower Kindy Kurniawan and Whistleblower Fachry Adrian. Initially, the reported party requested financial assistance from the complainant for the pickup car procurement project at PT. Jasamarga Kualanamu Toll (JKT) of Rp. 18.650.000, -. When the complainant asks for the money as promised, the reported party did not return the money and again promised to return it, but the reported party did not return the money belonging to the complainant. On the consideration of restorative justice, Investigators stopped this case because the complainant and the reported party had reconciled.

Third, cases of fraud and/or embezzlement in LP No: LP/1018/VIII/2018/SPKT/III Restabes Medan on August 4, 2018. Whistleblower Reyza Fahlevy Lubis and Whistleblower Benny Nasution. Whistleblower received information from Arie Pribadi Nasution that there is a shophouse to be sold by the reported party. The Reported Party by telephone asked the complainant to pay for the shophouse because the certificate was at Bank BRI. The Reporting Party sends a down payment of Rp. 80.500.000, - to the reported party via transfer. Furthermore, the reported party notifies the complainant that the shophouse to be purchased has been sold to someone else and promises to return the down payment. But the reported party does not keep his promise to return the down payment to the complainant. The complainant and the reported party have made peace amicably. Investigators considered the aspect of restorative justice so as to stop this case.

Fourth, cases of fraud and/or embezzlement in LP No: LP/1875/K/VIII/2016/SPKT Restabes Medan Dated August 2, 2016. Whistleblower Heul Wen Aslili and Whistleblower Mery Chris Foria. The Reported Party purchased agricultural equipment and techniques in stages from the Reporter with a total price of Rp. 787,972,150, -. The Reported Party only paid Rp. 36,249,650, -. The Reported Party paid the remainder through three checks and four Bank Mega bilyed giro sheets, and seven CIMB Niaga bureau bilyed sheets with a total of Rp. 622,198,000, -. When the bilyed giro is due and the check is cleared by the complainant and the bank refuses on the grounds that the balance is insufficient. The complainant requests payment, but the reported party did not want to pay it. The complainant and the reported person in the case have reconciled so that the investigator stops the case.

Fifth, cases of fraud and/or embezzlement in LP No: LP/516/K/III/2017/SPKT Restabes Medan Dated March 9, 2017. Reporting Party Muhammad Fauzi Nasution and Reporting Party Luyan Suharto. The Reported Party and the Reporting Party initially agreed to buy and sell a house for Rp. 1.8500.000.000, -. The Reporting Party as a buyer submits a down payment of Rp. 10,000,000, - via BCA account transfer to the reported party. Then the reported party asked for a DP of 30%, which is worth 190,000,000, - and the reporting party transferred another Rp. 180,000,000, - so the total has been paid Rp. 380,000,000, -. The remaining Rp. 1,470,000,000, - will be paid by credit (KPR) with the agreement if the sale and purchase is canceled then the DP is returned by the reported party. But when the reported

pays off their obligations, it turns out that the house has been occupied by someone else. On the consideration of restorative justice, Investigators stopped this case because the complainant and the reported party had agreed to make peace.

All of these cases were stopped by investigators on the basis of considerations because the complainant and the reported party had reconciled based on considerations of restorative justice. In police administration, the termination of this case is included in the SP3 (Warrant for Termination of Investigation). On one side, can fulfill a sense of justice for perpetrators and victims, but on the other hand, investigators may continue the investigation process to fulfill the principles of legal certainty and legality.

There is no juridical term in the law to state that a case has been terminated for the reason that the perpetrator and the victim have reconciled. The term SP3 is incorrect, let alone the term deponeering. There are also those who call it SP3 on the grounds that there is not enough evidence, when in fact the case in question has met the minimum requirements for evidence, but on the basis of justice considerations so the process was stopped. There are no official guidelines for the administration of investigations for investigators to do so. The terms in the Criminal Procedure Code are still in the form of SP3 and deponeering. As a result, investigators often hesitate in implementing restorative justice although the crime is not too dangerous and does not cause a wide social impact. Hope, it is necessary to reform the criminal procedure law to accommodate the restorative justice approach in the Criminal Procedure Code and in the Regulation of the National Police Chief.

In practice, not a few general crimes that are resolved or stopped at the investigation stage. There are so many cases that are not continued in the investigation process to the prosecution and trial stages. If only all criminal acts that have been reconciled at the investigation stage are still processed to the next stage until a judge decides in a court session, there will be an increase in the number of cases sent by each Polri investigator to the prosecutor's office and the court which will eventually lead to a buildup of cases. This is certainly a problem in law enforcement in Indonesia. Certainly, there are many costs that must be paid by the state for each case that is continued from the process of investigation, prosecution, and trial to the cassation. Not to mention the cost for inmates serving their criminal period in Correctional Institutions (Lapas), even in fact, the ability of prisons to accommodate prisoners is generally over capacity.

In addition, time, thought, and energy, also a lot of wasted in handling these crimes that investigators should have focused more on handling serious crimes, special crime, and the extraordinary impact that becomes the priority scale. When the investigator says the delegation of the case is to fulfill justice, but not necessarily fair to perpetrators and victims, nor other people. In principle, it is unfair for the perpetrators and victims if investigators continue to force their case to continue with the prosecution process, even though they have reconciled, and the perpetrator is truly sorry.

The principle of legality as the basis for determining criminal guilt on the one hand cannot guarantee true justice. But from the division of types of justice proposed by Aristotle which includes distributive justice, commutative justice, and legal justice, at least it can be obtained answers to questions about the justice that wants to be generated from the application of

restorative justice at the investigation stage, because the victim and the perpetrator have reconciled. Punishment does not have to be applied rigidly and absolutely on the principle of legal certainty and the principle of legality. How can the police be able to reduce disputes and conflicts in society so as not to always choose the court route in resolving cases to seek justice, but opting for another approach based on customary norms, benefit and family, such as the application of restorative justice in penal mediation.

This penal mediation is a new practice in resolving certain criminal cases by involving the perpetrator, victims, families, and related parties to jointly seek a more just method by emphasizing restoration to its original state, not retaliation. Restoring relationships and repairing rifts after the occurrence of a crime is better than aggravating the rift between perpetrators, victims and society as well as characterize the modern criminal justice system. The application of this restorative justice prioritizes mediation which must be accommodated in a positive legal system. So it is also called penal mediation. The aim is to create restorative justice whose regulation in Indonesian positive law is not yet comprehensive, but in practice it has often happened, especially in certain cases.

The Application of Restorative Justice is Widespread in Various Cases

Not only for complaint offenses such as family theft, rape crime, and others, even for ordinary offenses, it is possible to apply a restorative justice approach. Both at the level of investigation, prosecution, as well as during court proceedings.

At the court level, many criminal cases have been resolved by a restorative justice approach. The restorative approach does not only apply to ordinary and minor offenses, but also applied to special offenses, including cases of Domestic Violence (KDRT), narcotics, and even corruption. After all, the Supreme Court has been implementing restorative justice for a long time although not as complete as the theory of restorative justice as proposed by experts (Dewi, 2013; Prayitno, 2012). MA has considered withdrawing the complaint even though the time limit specified in the Criminal Procedure Code has passed, the reason is because the victim and perpetrator are still family.

This has also been applied to a husband who abandoned his wife and child. The husband was charged with Article 49 letter a Jo Article 9 paragraph (1) of Law Number 23 of 2004 concerning the Elimination of Domestic Violence, but the Supreme Court imposed a suspended sentence on the condition that the husband must provide for his wife and children and not be fired as a Civil Servant (PNS).

Restorative justice has also been applied by the Supreme Court in narcotics cases where the perpetrator was charged with a single charge, namely Article 112 of Law Number 35 of 2009 concerning Narcotics found in possession of narcotics. In fact, the perpetrators actually consumed very small amounts of narcotics so it should be charged with Article 127. However, the court handed down a medical rehabilitation decision.

There have been cases of corruption in which this approach has been applied. The defendant was indeed proven to have violated Article 2 of Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, but

because the state losses incurred were only Rp. 2,900,000, - then the Supreme Court sentenced him to one year in prison, even though the minimum penalty in that article is four years in prison.

In general, the concept of law in Indonesia still emphasizes repressive and retributive approaches, while the restorative approach is still an alternative or complementary. The restorative justice approach in corporate crimes has also been practiced in Indonesia. There are four cases that have occurred, namely cases of alleged violations of the Capital Market Law by PT. Bank Lippo Tbk, the case of Bank Indonesia Liquidity Assistance (BLBI), Merrill Lynch case, and the Monsanto case which was resolved with a restorative justice approach.

There is no legal umbrella for all general crimes but only for certain crimes. A new concept is needed as a breakthrough in criminal procedural law to apply this restorative justice in the settlement of criminal acts. This is part of the mandate of the *ultimum remedium* principle as the last tool and is in line with the Pancasila philosophy. Although restorative justice has been regulated in Law No. 11 of 2012 concerning the Juvenile Justice System and has been applied to certain cases in Indonesia, however, it is still deemed necessary to make improvements and developments. In addition to its application still raises doubts, also still the opposite with in other countries as in the Netherlands around 60% of criminal cases are settled out of court with compensation and fines, then in Norway it is even higher at around 74%.

The Netherlands applies restorative justice by settling cases out of court. Whereas in Indonesia, with the principle of legality, prisons are increasingly crowded because there are many criminal cases including the case of "little people" who are delegated to the court and become a prisoner, while prison conditions in almost all prisons show concern, because of overcapacity so that it makes prisoners more inhumane. Punishment does not necessarily have a deterrent effect. even lead to negative learning for prisoners. As the adage "too short for rehabilitation, too long for corruption" (in prison, too short for recovery and too long for decay). Not infrequently prisoners become narcotics couriers in prisons, and some even become recidivist. It's time to reform the criminal procedure law *acara* to regulate this provision regarding restorative justice, because it is not only sufficiently regulated by regulations at the Perma level but must be by law.

For general crimes, The Supreme Court has issued Regulation (Perma) Number 2 of 2012 concerning Adjusting the Limits of Minor Crimes and the number of fines in the Criminal Code, one example is for minor theft, although restorative justice does not necessarily apply. Exceptions can be made if the thief does not have the money/property to pay the fine because the stolen money has been spent to buy a loaf of bread. However, this Perma is not objective because the losses incurred are below Rp. 2.500.000, - does not always occur for minor crimes, but also for crimes of robbery, theft, embezzlement, and others. To fill the void in the law, investigator policies are needed in handling certain crimes related to the application of restorative justice for penal mediation and criminal policies are required by investigators to exercise their discretionary powers. Law enforcer, especially the police, it's time to change its paradigm as modern police. A rigid paradigm that always refers to the Criminal Procedure Code and the Criminal Procedure Code must be viewed dynamically according to the demands of the law and a sense of justice and legal expediency.

Conclusion

The application of the concept of restorative justice in the criminal justice system aims to create justice for victims, perpetrators, families, communities, and the state. Investigation as the initial stage of the criminal justice system process occupies a strategic position in implementing restorative justice. For certain crimes, if there has been peace between the perpetrator and the victim during the investigation, then according to the principle of propriety, ultimum remedium principle, efficiency principle, and the principle of police discretion, then the case is very reasonable not to proceed to the prosecution process and court trial. It is hoped that the role of investigators will be more in implementing restorative justice by exercising discretion to create a sense of justice and expediency. So that it is also regulated in the legislation regarding the appropriate term for the termination of cases on the basis of restorative justice so as not to cause doubts for investigators and provide solutions for official guidelines for administrative investigations for Police investigators.

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