

Restorative Justice Regulations in Reforming Criminal Procedure Law

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Abstract

The aim of this research is to determine restorative justice regulations in reforming criminal procedure law. This research is legal research with juridical-normative characteristics to gain an understanding of law at a normative level and its implementation at a practical level using Roscoe Pound's legal theory approach where law is a tool of social engineering. Various questions that arise in this research will be analyzed from the perspective of Roscoe Pound's theories. The practice of dispute resolution involving the affected parties and the community has actually been widely implemented in Indonesia. In fact, dispute resolution outside the formal judicial process was carried out long before the Indonesian state was formed.

Keywords: restorative justice; reforming criminal; procedure law

1. Introduction

Throughout the history of reform of the criminal justice system, the issue of strengthening the rights of victims of criminal acts continues to be raised, where in the criminal justice system, the presence of suspect/accused actors and public prosecutors results in the victim's role being minimal. This is indeed reflected in the Criminal Code and Criminal Procedure Code which are currently being reformed. In the Criminal Code, as a product of the legacy of the Dutch East Indies colonial government, there was no special attention to victims. Meanwhile, in the Criminal Procedure Code, when it was drafted, the Indonesian government was still focused on efforts to build an accountable criminal justice system, so that attention was not given to victims, there were no special regulations regarding victims' rights in the criminal justice process. It was only later that attention to victims was echoed explicitly with the enactment of Law Number 13 of 2006 concerning Protection of Witnesses and Victims. The importance of the role of victims was not necessarily about the availability of assistance for victims as introduced in the Law concerning Protection of Witnesses and Victims, but also There must be a substantial role for victims to ensure that the criminal response has a positive impact on victims of criminal acts. This is the background for the birth of the restorative justice approach, which typically guarantees the active role of perpetrators and victims in handling cases, and clearly also for seeking recovery.

Restorative justice is a concept that is experiencing rapid development and plays an important role in legal reform in various countries. The concept of restorative justice comes with a paradigm that is always contrasted with retributive justice or a justice model that solely aims to repay or punish perpetrators of criminal acts. This problem of minimal role and involvement of victims also occurs in the current Indonesian criminal justice system. In the concept of criminal acts and criminal procedures as regulated in the Criminal Code (hereinafter referred to as the Criminal Code) and Law no. 8 of 1981 concerning Criminal Procedure Law (hereinafter referred to as KUHAP), a criminal act is considered a violation of state interests; and the state then forms parties to carry it out enforcement, namely that the public prosecutor has the authority to prosecute a criminal act. The orientation is aimed at punishing the perpetrator while the rights of the victim are neglected.

In the concept of criminal procedural law regulated by the Criminal Procedure Code, for example, victims of criminal acts are only positioned as witnesses whose position is to help the public prosecutor to prove their claims. The outcome of this situation also depends on the concept of punishment applied. The most frequently used punishment is imprisonment, which ultimately creates a situation of high dependence on the use of imprisonment instruments without considering the interests of the victim. This, in the end, causes the problem of overcrowding in State

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Detention Centers (hereinafter referred to as Detention Centers) and Correctional Institutions (hereinafter referred to as Prisons).

Imprisonment trends show that the numbers tend to increase every year and the existing forms of punishment are not in line with the importance of providing recovery for victims. When viewed in the Indonesian context, the 2020 Supreme Court Report states that the criminal offenses most frequently prosecuted are narcotics crimes, theft and assault (MA, 2020).

The implementation of RJ as a fundamental change in the orientation of punishment in Indonesia was then included in the 2020-2024 Medium Term Development Plan (RPJMN). In its development, several law enforcement institutions began to take the initiative to formulate regulations regarding the implementation of RJ, for example in the National Police Chief's Regulation Number 6 of 2019 which explains the implementation of RJ in the investigation stage, Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, to the Directorate 's Decree General Badilum Supreme Court No. 1691/DJUSK/PS.00/12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice and Prosecutor 's Guidelines Number 18 of 2021 concerning Settlement of Handling of Crime Cases of Narcotics Abuse Through Rehabilitation with a Restorative Justice Approach as Implementation of the Prosecutor 's Dominus Litis Principle.

In the Indonesian context, there is no comprehensive explanation from a policy perspective that provides the definition and principles of RJ, especially in the criminal justice system in Indonesia. Definitions and principles are needed to provide answers regarding the orientation or purpose of implementing RJ and in what situations law enforcement officials can implement RJ. Regarding the opportunities in the available laws and regulations, what is also noteworthy is that law enforcement officials do not fully understand the existence of these laws and regulations. Based on the literature above, this research, which is intended as an analysis of policy, is expected to be a reference for developing a definition of the implementation of RJ in the criminal justice system in Indonesia.

2. Research Method and Materials

This research is legal research with juridical-normative characteristics, to gain an understanding of law at a normative level and its application at a practical level using Roscoe Pound's legal theory approach where law is a tool of social engineering. Various questions that arise in this research will be analyzed from the perspective of Roscoe's theory.

3. Results and Discussion

3.1. History of the Development of Restorative Justice Policy

In criminal law enforcement, the issue of criminal acts is a matter between the state represented by the public prosecutor and the suspect or defendant. The same thing also happens in the Indonesian legal system, where criminal acts are defined as violations of the provisions regulated in criminal law. In the process, the suspect or convict will be prosecuted by the public prosecutor and decided by a judge. The orientation of criminal law enforcement emphasizes the punishment of perpetrators. With this framework, gradually the victim's position in the criminal law enforcement process begins to be neglected. The aim of punishment ultimately only focuses on the reintegration of the perpetrator of the crime and there is no special consideration for the victim. It was only in the mid-1970s that the issue of the importance of paying attention to the role of victims emerged. One of the first calls for reform of the position of these victims came from Margery Fry in England and Northern Ireland in 1950 who called for the need for safe homes for women victims of violence, the demand for a state compensation scheme, and the need for reconciliation of perpetrators and victims. The first compensation scheme for victims of violence was adopted by New Zealand in 1963. Apart from that, there are also examples of this legal reform in England as well as in the 1970s establishing safe houses for victims of domestic violence and crisis centers for victims of sexual violence.

In 1977, it is known that Albert Eglash was the first to mention the RJ terminology. Eglash stated that there are 3 (three) types of criminal justice systems, namely retributive, distributive and restorative.

In the first 2 (two) types (retributive and distributive), the criminal justice process ignores the participation of the victim and requires passive participation from the perpetrator of the crime. Meanwhile, for the last type, namely restorative, the focus is given to recovering or restoring the detrimental effects of an action and actively involving all parties in the justice process. Eglash states that RJ is an opportunity intended for the perpetrator and victim to restore

their relationship, with the opportunity for the perpetrator to find a way to repair the damage done to the victim (Gavrielides, 2007) .

3.2. Development of the Concept of the Purpose of Punishment

Development of the concept of criminal objectives. In general, there are two major groups of criminal objectives :

- 1) to prevent crimes from occurring again in the future; And
- 2) to punish crimes that are being committed or have already occurred

Theories of the purpose of punishment which see the purpose of punishment as preventing future crime are sometimes referred to as utilitarian theories because they originate from Utilitarian political-moral philosophy; or consequentialist because it justifies punishment in order to prevent future consequences; or reductionist because it aims to reduce crime (Willday, 1999) .

Meanwhile, the aim of punishment to punish crimes that have already occurred is often referred to as retributive because it aims to "repay" the perpetrators for their crimes. At the heart of the retributivist perspective is the idea that the purpose of punishment is aimed at placing moral blame on the perpetrator for the crime committed. The future actions of the perpetrator or other members of society are not a concern of punishment (Willday, 1999) .

Public deterrence functions by showing others who are considering committing a crime that they will suffer miserable consequences if they commit that crime. Ian Marsh (2004) The method of prevention by applying cruel punishments that are so severe that people will abandon their intention to commit a crime cannot be called utilitarian because there is no attempt to limit pain in the absence of limits on the level of punishment. The focus of the deterrent philosophy is to give fear to other people so they do not commit crimes.

Publicity is also very necessary so that potential perpetrators are aware of the penalties imposed. On the other hand, publicity about the large number of unsolved crimes or leading to an increasing number of light sentences can have a negative effect on the effectiveness of the deterrent effect.

Offenses or crimes that cause the strongest condemnation from society deserve the harshest punishment. Although punishment cannot reverse the perpetrator's crime, it has the potential to provide solace to victims, including indirect victims such as family and those around the victim and can enable people to "make sense of the absurd" (in cases such as child abuse, for example). Ian Marsh (2004) Retributive emphasizes the aspect of criticism in the form of punishment. Punishment acts to condemn a particular offense and can be seen as a statement of public disapproval, with the severity of the punishment reflecting the degree of that disapproval.

Many believe that punishment based on retribution will at least ensure that the perpetrator gets the punishment they deserve. However, there are several problems with this approach. Starting from the harm caused by an action is considered a key factor in determining the severity of punishment. Apart from that, the intention of the perpetrator is also a variable that influences the severity of the sentence. In reality, there are offenses that may only cause minimal harm, but should be punished severely, for example attempted murder or a failed terrorist attack where both may not have resulted in casualties, but may be considered offenses that deserve the harshest punishment possible when the murder or attack has occurred. Retribution is a kind of revenge, but tied to the principles of proportionality and individual rights. Retribution must also be impartial and not have a personal element like retaliation

Rehabilitation is related and similar to reform although both have differences. Reform is concerned with individual actors being given the opportunity and space to change themselves and being persuaded to do so. Meanwhile, rehabilitation involves more planned, regulated and enforced treatment, perhaps in the form of a supervisor who supervises the offender undergoing training or an employment program and monitors his or her progress. Thus, reform has some similarities with prevention, in that it works on the will of the individual offender, whereas rehabilitation implies that the offender does not act of his own free will, but is expected to respond to external efforts to change himself. The difference between these two approaches is that reform and rehabilitation aim to make the offender a more useful, productive and better member of society, while prevention is mainly concerned with whether the offender will repeat the act or commit another offense (Ian Marsh, 2004) .

In recent years, there has been a resurgence of rehabilitation approaches. The idea that punishment methods can work independently of the offender has been replaced with an emphasis on how specific punishments can be used to help offenders improve their behavior.

These ideas characterize the idea of restorative justice. Restorative justice is closely related to the principle of reparation, which is based on the assumption that crime affects society and victims, who therefore must play a role in upholding justice. This approach usually involves the perpetrator being brought face to face with someone they have hurt and thereby confronting what they have done. Most criminal justice systems do not yet have a mechanism where someone can apologize for their actions and that apology must be the first and foremost in reparation. Likewise with restoration, it is appropriate for the victim to receive restoration from the perpetrator and when there are no victims who can be clearly identified, then the community can be compensated in the form of community work carried out by the perpetrator or by paying a fine that is channeled into public funds. However, compensation or reparations are not always easy to achieve because the perpetrator is often unable to pay the victim and the extent to which parents should bear the compensation that is their child's responsibility is also still debated. This approach is however worth trying when the perpetrator and victim know each other and when they can reach an agreement to settle the case out of court, which will reduce the court's workload. This, at least, can be done in mild cases, but it is of course possible that this approach will be unpopular with the public or the media who see this approach as a soft response to crime (Ian Marsh, 2004) .

3.3. The value of restorative justice in the history of community dispute resolution in Indonesia

Affected parties and the community has actually been widely implemented in the archipelago and Indonesia. In fact, dispute resolution outside the formal judicial process was carried out long before the Indonesian state was formed. This is because the majority of Indonesia's population does not come from urban areas and is not secular, so the social values that are prioritized tend to focus on personal relationships with the characteristics of tolerance, communal solidarity and avoidance of disputes (Lev, 2011) .

Affected parties is known as deliberation. Dispute resolution can be done through customary courts or individually. Customary justice itself is carried out by individual communities, families, neighbors, traditional heads, village heads, or by administrators of organizational associations. The main characteristic of settlement through customary justice mechanisms is resolving a dispute peacefully to restore the disturbed balance of society.

In principle, usually when the community has a legal problem, a deliberation process will be carried out first, before the problem is reported to law enforcement officials. This can be seen as an effort to restore balance to the cosmos in society. This is in line with the concept of a restorative justice mechanism as presented in the Preliminary Draft Elements of a Declaration of Basic Principles on The Use of Restorative justice Programs in Criminal Matters. Where the application of restorative justice is a process of restoration or the aim of achieving results that return to the original state

Daniel S. Lev (1990) in his writing stated that the majority of Indonesian people, especially those living in Java and Bali, prioritize the process of solving problems in a family manner (Lev, 2011) . In a historical context, Javanese and Balinese people have a tendency to choose conciliatory methods in resolving disputes. According to C. Geertz (1960), this culture is also motivated by the condition of the Javanese population, which tends to be a densely populated village community. So the main value put forward is creating surface harmony in society (Lev, 2011) .

This was also conveyed by Benedict Anderson (1965), where he stated that Javanese people have the characteristics of being very careful in personal relationships, paying attention to other people, being diplomatic, restrained, and respectful of social position. (Lev, 2011) . The approach taken to avoid personal disputes is through subtle means by seeking a resolution that is least detrimental and does not embarrass (Lev, 2011) .

In general, the customary case resolution mechanism is resolved through 4 (four) mechanisms, namely (Erwin, Zulkifli, & Melanie, 2021) : (1) settlement mechanism between individuals, families and neighbors, (2) settlement mechanism through the traditional head, (3) settlement mechanism through the village head, (4) settlement mechanism through organization

3.4. Legislation which means Restorative Justice

In the current context of laws and regulations, circulars, decrees, and agreements between law enforcers in Indonesia, there are various laws and regulations that use RJ terminology, which generally uses the words " Restorative Justice ". This definition will be explained chronologically according to the time the regulation appeared:

- (i) Article 1 number 6 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, ratified on July 30 2012.

“Restorative Justice is the resolution of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to the original condition, and not retaliation.”

- (ii) Article 1 number 2 Joint Memorandum of Understanding with the Chief Justice, Minister of Law and Human Rights, Attorney General, and Chief of Police regarding the Implementation of Adjustments to the Limits of Light Crimes and the Number of Fines, Quick Examination Procedures, and the Implementation of Restorative Justice, ratified on 17 October 2012

“Restorative Justice is the resolution of minor criminal cases carried out by investigators at the investigation stage or judges from the start of the trial by involving the perpetrator, victim, family of the perpetrator/victim, and related community figures to jointly seek a fair resolution by emphasizing restoration back to its original state.”

- (iii) Number 2 letter b Chief of Police Circular No. SE/8/2018 concerning the Implementation of Restorative Justice in Resolving Criminal Cases, ratified on 27 July 2018. This Circular does not provide a specific definition regarding RJ, but states that:

“...reflects justice as a form of balance in human life, so that deviant behavior from criminals is assessed as behavior that throws off balance...the case resolution model adopted is an effort to restore this balance, by imposing obligations on criminals with their awareness of committing a crime, apologizing, and restore the victim's damage and losses to their original state or at least resemble their original condition, which can fulfill the victim's sense of justice.”

- (iv) Article 1 number 27 Chief of Police Regulation no. 6 of 2019 concerning Criminal Investigation, ratified on 4 October 2019.

“Restorative justice is the resolution of criminal cases involving perpetrators, victims and/or their families and related parties, with the aim of achieving justice for all parties”

- (v) Article 1 point 1 of the Attorney General's Regulation concerning Termination of Prosecution based on Restorative Justice, ratified on July 21 2020.

“Restorative Justice is the resolution of criminal cases by involving the perpetrator, victim, family of the perpetrator/victim, and other related parties to jointly seek a fair solution by emphasizing restoration to the original condition, and not retaliation.”

- (vi) Decree of the Director General of the General Judicial Body of the Supreme Court of the Republic of Indonesia No. 1691/DJU/SK/PS.00/12/2020 concerning the Implementation of Guidelines for the Implementation of Restorative Justice, ratified on 22 December 2020.

“... is an alternative resolution of criminal cases which in the criminal justice procedure mechanism focuses on punishment which is transformed into a dialogue and mediation process involving the perpetrator, victim, family, perpetrator/victim and other related parties to jointly create an agreement on resolving the case punishment that is fair and balanced for both the victim and the perpetrator by prioritizing restoration to its original state, and restoring patterns of good relations in society.”

- (vii) Article 1 number 3 Republic of Indonesia State Police Regulation No. 8 of 2021 concerning Handling Crime Based on Restorative Justice, ratified on August 19 2021.

“Restorative Justice is the resolution of criminal acts by involving the perpetrator, victim, victim's family, community leaders, religious leaders, traditional leaders or stakeholders to jointly seek a just resolution through peace by emphasizing restoration back to its original state”

3.5. Restorative Justice Regulations in Reforming Indonesian Criminal Procedure Law

Restorative justice was raised, which is still referred to as a solution outside of court justice (PUBLIK Academic Paper.Pdf, 2012) . This is accommodated in the substance of the RKUHAP regarding stopping cases by public prosecutors based on the principle of opportunity, which is accommodated by Article 42 paragraph (3) which states that public prosecutors also have the authority to stop prosecutions in the public interest and/or for certain reasons.

This is accommodated in the substance of the RKUHAP regarding stopping cases by public prosecutors based on the principle of opportunity, which is accommodated by Article 42 paragraph (3) which states that public prosecutors also have the authority to stop prosecutions in the public interest and/or for certain reasons. The authority of the public prosecutor can be exercised under certain conditions, namely that the criminal offense committed is of a minor nature, the criminal offense committed is punishable by a maximum imprisonment of 4 (four years); criminal acts committed are only punishable by a fine; the age of the suspect at the time of committing the crime was over 70 (seventy) years; and/or losses have been reimbursed

The provisions for terminating prosecution on the basis of compensation for losses in accordance with Article 42 paragraph (4) do not apply to criminal acts that are punishable by imprisonment for more than 5 years. The provisions in Article 42 of the RKUHAP, in accordance with Andi Hamzah's opinion, are regulations that implicitly also prioritize the principle of restorative justice (Effendi, 2012). If the provisions of Article 1 number 2 in conjunction with Article 42 of the Draft Criminal Procedure Code (2008 version) are ratified, then the prosecution system in Indonesia will shift towards opportunity, where prosecution is the authority of the public prosecutor to determine whether a case can be prosecuted or not. This authority has so far been the domain of the public prosecutor. Conceptually, there has not been much mainstreaming of RJ in the preparation of the RKUHAP academic text, but several aspects of strengthening victims' rights have been accommodated in the development of the RKUHAP. This is in line with the presence of RJ values. For example, regarding the compensation mechanism, which has experienced a number of substantive strengthening of what is currently regulated by the Criminal Procedure Code. Good things are also tried to be regulated with a compensation mechanism that is related to the punishment mechanism, in this case conditional punishment

Another form of mechanism introduced by the RKUHAP which has the potential to support RJ is a special route mechanism or settlement outside the event (*afdoening buiten proces*). This provision was introduced in Article 199 RKUHAP that when the public prosecutor reads the indictment, the defendant admits all the acts charged and pleads guilty to committing a criminal offense for which the sentence charged does not exceed 7 (seven) years, the public prosecutor can transfer the case to a trial court brief inspection. The defendant's confession is stated in an official report signed by the defendant and the public prosecutor. In this process, the judge is obliged to inform the defendant of the rights he is giving up by providing the confession as intended; inform the defendant about the length of the sentence that may be imposed; and asked whether the confession was voluntary. The judge can reject the confession if the judge has doubts about the truth of the defendant's confession. In this case, the criminal sentence against the defendant may not exceed 2/3 of the maximum criminal offense charged.

4. Conclusion

Affected parties and the community has actually been widely implemented in the archipelago and Indonesia. In fact, dispute resolution outside the formal judicial process was carried out long before the Indonesian state was formed. This is because the majority of Indonesia's population does not come from urban areas and is not secular, so the social values that are prioritized tend to emphasize personal relationships with the characteristics of tolerance, communal solidarity and avoidance of disputes. In the academic text of the Draft KUHAP (RKUHAP), in discussing the scope of reform of the KUHAP, restorative justice has been raised, which is still referred to as a solution outside court justice.

The implication of this research is that it is hoped that this study can facilitate the work of law enforcement officials to welcome a paradigm shift from retributive to restorative justice. Future research can conduct in-depth studies related to restorative justice.

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