

Restorative Justice Approach To Victimless Crime

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Abstract

Restorative Justice (RJ) involves the victim, perpetrator, victim/perpetrator's family and other parties that are resolved out of court. The parties, namely the perpetrator's family and the victim's family, agreed to resolve the problem by providing compensation. The crime of drug abuse has no victims or a victimless crime. Handling drug abuse, there is a common view and perception of law enforcers from the BNN, Police, Attorney General's Office and District Court, as victims and not criminals. In fact, there are still many law enforcement officials who treat drug users and abusers as criminals and not as victims. The existence of these differences in perception, makes the existence of confusion in handling using the RJ approach. The research uses normative juridical methods. The results of the research concluded that: There needs to be a guarantee of legal certainty in the handling of narcotics abusers, in the form of guidelines in the form of cooperation between the Supreme Court, the Attorney General's Office and the Police as law enforcers so that there is a common perception. The guidelines for handling narcotics abuse in handling RJ are expected to be a solution to the situation of prisons in Indonesia which are over capacity, with the rehabilitation of addicts expected to be free from dependence and for the community not to be restless.

Keywords: *Restorative Justice, Drug Crime, Victimless*

INTRODUCTION

Indonesia is a state of law as Article 1 paragraph (3) of the 1945 Constitution, meaning that all aspects of life in the territory of the Republic of Indonesia must be subject to the norms and all legislation products and their incorporation in the territory of the Republic of Indonesia. The legal product in question must have existed before a legal event occurs and is examined, especially the examination of criminal cases commonly referred to as the principle of legality normatively regulated in Article 1 paragraph (1) of the Criminal Code, "every criminal event must be formulated in a pre-existing law that stipulates clear elements related to the act in question.". The principle of legality in criminal law is formulated in various terms, such as *nullum delictum nulla poena sine praevea lege poenali* (no crime, no punishment, without prior criminal law). An act cannot be said to be a criminal offense if it is not declared as a criminal act by the criminal law. Criminal acts prohibited by the criminal law are known as *mala prohibita*, which are *strafbaar* (punishable) acts.

Criminal rules have been available before the act is committed, to ensnare the perpetrator of a criminal offense based on the principle of responsibility in criminal law is not punished if there is no mistake (*geen straf zonder schuld*), this means that to be punished a person must fulfill the element of guilt, but if he does not fulfill the element of guilt even though he has committed a reprehensible or prohibited act, a person cannot be punished. Therefore, in criminal law, guilt is one of the basic elements in addition to the unlawful nature of the act, which must be fulfilled so that a legal subject can be sentenced to punishment, meaning that to convict the perpetrator, it is not enough if only based on the perpetrator has acted contrary to the law or has an unlawful nature, but it must be proven that the perpetrator who committed the act has a mistake or is guilty.

The principle of no punishment without guilt as a manifestation of the provisions of Article 6 paragraph (2) of Law No. 4 of 2004 concerning Judicial Power, explicitly states "no one can

be sentenced to punishment, unless the court can prove according to the law, and the judge's belief that the perpetrator who is considered responsible, is guilty of the act charged against him". The principle of guilt is one of the foundational principles, so it is an absolute principle in criminal law, namely as a basis for imposing punishment.

The imposition of punishment is only imposed on the perpetrator who can be held criminally responsible for his mistake. Criminal responsibility as quoted from Roeslan Saleh defines as the continuation of objective reproach and subjective reproach. Objective reproach leads to an act that is prohibited from being committed, because the act is contrary to or prohibited by law, both the law on the examination of criminal cases as formal criminal law and material criminal law. Formal criminal law is the law used as the basis for law enforcement. In a simple sense, formal criminal law regulates how the state addresses equipment to carry out the obligation to investigate, impose, prosecute and carry out punishment. The rules of formal law regulate the procedures that must be taken in maintaining or enforcing the rules of material law, especially efforts to resolve disputes through the courts, often also referred to as procedural law or procedural law as regulated in Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP).

Subjective culpability refers to perpetrators who commit acts prohibited by law, or who commit acts that are prohibited or contrary to the law. The perpetrator commits a reprehensible act or an act that is prohibited does not necessarily mean that the perpetrator will be convicted on the basis of his guilt, even though the person is guilty, his unlawful nature is erased making him irresponsible so that criminal liability cannot exist. The elimination of guilt occurs due to the existence of justification or excuse. Justification, which is a reason that negates the unlawful nature of the perpetrator's actions, makes what the perpetrator does a proper and correct action. Excuse, which is a reason that negates the guilt of the perpetrator. The act committed by the perpetrator actually has an unlawful nature, and is a criminal act, but the perpetrator is not punished, because his guilt does not exist.

Regarding the element of fault, it is classified into two types, namely intentionality or negligence / negligence. Intentionality by Moeljatno that the perpetrator "wants and knows" what is done violates the law, but still takes action, so that the action is intentional, the perpetrator really wants and realizes the action and / or its consequences. By Moeljatno, it is divided into three patterns, namely: 1) intentionality as intention, the perpetrator commits the act and the act has occurred, and the act is indeed the intended one. The act is really intended and to achieve the goal becomes the main reason for the threat of criminal punishment. 2) Intentionality as certainty, the perpetrator of the act does not aim to achieve the result that is the basis of the criminal act, but rather suspects or should suspect that the result will certainly follow the act. 3) Intentionality as a possibility, what the perpetrator does or the occurrence of an intended result is realized that there is a possibility that another result will arise.

The perpetrator with at least two valid evidence is guilty of committing a criminal act, the perpetrator can be held criminally responsible with the imposition of criminal sanctions being examined as a perpetrator of a criminal offense. Regarding the examination of criminal cases, it can be through penal and non-penal channels. Barda Nawawi Arief argues that efforts to deal with criminal acts through penal and non-penal channels. Handling through the penal route focuses more on the nature of the action after the crime occurs, using the means of criminal law, and the results achieved as desired by criminal legislation in the sense of fulfilling the requirements of justice and effectiveness. Handling through non-punitive channels focuses more on prevention efforts before a crime occurs. The nature of the countermeasures in question is prevention without punishment and influencing people's views on crime and punishment through the mass media.

The settlement of criminal cases through non-punitive channels, developed with the

settlement of criminal cases outside the court session known as the concept or approach of restorative justice (RJ), which emphasizes the direct participation of perpetrators, Victims and the community by interpreting criminal acts as basically an attack on individuals and society and community relations, then justice is interpreted as a process of finding problem solving that occurs in a minor criminal case with the involvement of Victims, the community and perpetrators being important in efforts to repair, reconcile and ensure the sustainability of these repair efforts.

Handling crimes using the RJ approach involves the perpetrator of the crime, the Victim, the family of the perpetrator/Victim, and other related parties to jointly seek a fair solution by emphasizing recovery to the original state, and not retaliation. The crime of drug abuse is essentially a victimless crime, the solution using the RJ approach is the Victim, the perpetrator, the family of the Victim / perpetrator and other parties. What is at issue regarding the implementation of the RJ approach in victimless crime.

RESEARCH METHODS

The research used is normative legal research or library research, examining laws and regulations, court decisions, legal theories, and legal experts. The approach used is legislation and concept approach, namely legal research seen from the legal aspect seen from the values contained in the norming of a regulation in relation to the concepts used.

RESULT AND DISCUSSION

Criminal Justice System

The criminal justice system is defined as a sequence of activities among interrelated stages to achieve certain goals. Etymologically, a system is defined as a set of (inter)parts or components (subsystems) interrelated in an orderly manner and constitutes a whole.

The criminal justice system is a process of examining criminal cases that has the aim of convicting or acquitting a person from the charges of the public prosecutor of committing a criminal offense. The system, according to Muladi's view, must be viewed in context, both as a physical system, namely a set of factors that are integrated to carry out work to achieve goals. The system is viewed in terms of normative, management and social approaches, although the three perspectives are different, but between the three are an inseparable unit and between the three influence each other in determining the benchmark for success in winning against crime.

The normative approach views the law enforcement apparatus (police, prosecutors, courts, and correctional institutions) as an implementing agency of the applicable laws and regulations so that the apparatus is an integral part of the law enforcement system alone.

The administrative approach views the law enforcement apparatus as a management organization that has a process of keRJa both relationships that have a fundamental nature and those that have a perpendicular nature in accordance with the structured or built organization in force, the system used is the administrative system while the social approach views the four law enforcement apparatus as an inseparable part of a social system so that society as a whole also bears the success or unsuccessfulness of law enforcement officers carrying out their duties, the system used is the social system.

RJ Approach

In the practice of criminal law enforcement, we often hear the term RJ, or Restoration Justice, which in Indonesian translation is called restorative justice. a. According to Howard Zehr: restorative justice is a process to involve, using all possibilities, all parties involved and

certain offenses and to identify and explain threats, needs and obligations in order to heal and place them as far as possible in their place. b. According to Tony Marshall: Restorative justice is a process in which all parties to a particular offense come together to collectively problem solve how to make agreements about the (adverse) consequences of an offense and its future implications).

Restorative justice or RJ means: "a restoration of relations and atonement that the perpetrator of the crime (his family) wants to make to the Victim of the crime (his family) (peace efforts) outside the court with the intention and purpose that the legal problems arising from the criminal act can be resolved properly by reaching an agreement and agreement between the parties". Justice that has been taking place in the criminal justice system in Indonesia is retributive justice. What is expected is restorative justice, which is a process where all parties involved in a particular criminal offense together solve the problem of how to deal with the consequences in the future. Restorative justice is a model of criminal case resolution that prioritizes the recovery of victims, perpetrators, and society. The main principle of RJ is the participation of victims and perpetrators, the participation of citizens as facilitators in case resolution, so that there is a guarantee that the child or perpetrator will no longer disturb the harmony that has been created in the community. Criminal offenses, in the eyes of restorative justice, are violations of human beings and human relationships. Restorative justice can be implemented through: Victim-offender mediation; family group deliberations; community services that are restorative for both victims and offenders. The application of the principle of restorative justice depends on the legal system adopted by a country. If the legal system does not require it, then the application of RJ cannot be forced. So it can be concluded that the RJ principle is an option in designing a country's legal system. Even if a country does not adhere to it, it does not rule out the possibility of applying the principle of restorative justice in order to provide justice, certainty and legal benefits. The sense of justice expected from law enforcement has not been enjoyed by the people in this country. Moreover, as is known, the criminal justice system in Indonesia does not regulate much about Victims of Crime. Thus sometimes the existence of Victims tends to be ignored or "forgotten", considering that this system is more focused on the perpetrators of crimes. The protection of victims' rights is essentially part of the protection of human rights. Victims need protection to ensure their rights are fulfilled. Because so far in the criminal justice system in Indonesia, the rights of victims are less protected than the rights of suspects. In this problem, RJ can be a solution for these circumstances or conditions, a requirement for RJ settlement is needed, namely:

Here are the RJ Requirements

1. Willingness of All Parties
2. All parties involved in the criminal act or adverse event, i.e. Victims, perpetrators, and the community (where relevant), must agree to participate in the RJ process. Their involvement must be voluntary and consciously based on seeking solutions and reconciliation.
3. Safety and Freedom from Coercion
4. All parties must feel safe during the RJ process and there must be no coercion to participate. Involvement must be based on free will and without pressure from other parties.
5. Fair and Transparent Procedures. The RJ process must be conducted using fair and transparent procedures. Each party should have an equal opportunity to speak and be heard, and to give their views on the events.
6. Trained Mentors. The mediators, facilitators, or mentors overseeing the RJ process must have specialized training and skills in restorative approaches. They are responsible for ensuring that the process runs smoothly and in accordance with the principles of RJ.
7. Focus on Accountability and Restoration, the primary goal of RJ is to hold perpetrators accountable for their actions and seek Victim's healing and restoration of disrupted

relationships. The process should therefore focus on repairing the negative impacts of the criminal act.

8. Protection of Victims' Rights

The rights of Victims must remain respected and protected throughout the RJ process. They must feel heard and respected in expressing their needs and wishes.

9. Handling of Specific Cases

Not all criminal cases are suitable for RJ. This approach is more appropriate for cases of lesser severity, where healing and reconciliation between the Victim and the offender is considered possible.

10. Collaboration with the Conventional Criminal Justice System

RJ can be an alternative or complement to the traditional criminal justice system. In some cases, court decisions may refer cases to restorative processes or incorporate restorative elements in the sentence imposed.

Restorative handling of victimless drug crimes

RJ is a new concept of thought that developed from the community as a pattern of modern criminal law thinking. This concept developed as a response to the retributive justice approach and the criminal justice system which was deemed unsatisfactory to the public's sense of justice.

The retributive approach emphasizes 3 (three) system needs, namely: 1) imposing sanctions on the perpetrator, 2) assisting the rehabilitation of the perpetrator and 3) strengthening the security and safety of the community and does not pay attention to need 4), namely the need to repair and restore losses to victims of criminal acts and the community as much as possible. The Criminal Justice System approach is a system approach to the mechanism of criminal justice administration as a system is the result of interaction between legislation, administrative practices and social attitudes or behavior.

RJ approaches, or restorative justice in Bahasa Indonesia, have been accommodated in a small portion of national law. The only regulation at the statutory level that regulates the RJ approach in handling criminal offenses is Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, which is referred to as diversion. Regulations regarding the RJ approach in handling criminal offenses can now also be found in the Prosecutor's Regulation Number 15 of 2020 and the National Police Regulation Number 08 of 2021. In general, the practice of using the RJ approach is carried out by bringing together the perpetrator and the Victim to agree on forgiveness and the amount of compensation for the Victim to restore the original situation. In narcotics crimes, there are no harmed parties (Victims), of course, if this RJ approach is faced with narcotics abuse crimes which are essentially a victimless crime.

The basic concept of drug abuse. Article 1 point 15 of the Law on Narcotics (No. 35 of 2009) defines drug abusers as people who use narcotics without the right or against the law. Narcotics abusers themselves can be divided into self-abuse, victims of narcotics abuse, and drug addicts who do not report. Self-abuse is a person who uses narcotics without the right or against the law, for their own consumption and not for sale in accordance with the provisions of Article 127 of the Narcotics Law.

A Victim of Narcotics Abuse is someone who accidentally uses Narcotics because they are persuaded, tricked, cheated, forced, and/or threatened to use Narcotics as stated in the explanation of Article 54 of the Narcotics Law. As for Narcotics Addicts who do not report are people who use or abuse Narcotics and are in a state of dependence on Narcotics, both physically and psychologically in accordance with the provisions of Article 1 number 13 and Article 134 of the Narcotics Law. Astutik mentioned that rehabilitation is only possible for those who are proven addicts and victims of drug abuse. As for those who own and control, it is possible to undergo rehabilitation. The irony is that those who abuse drugs must also own and control them. This results in confusion for law enforcers to implement the right article.

In 2012, the Chief Justice of the Supreme Court, the Minister of Law and Human Rights, the Attorney General, and the Chief of Police of the Republic of Indonesia made a Memorandum of Understanding on the Implementation of Adjustments to the Limits of Minor Crimes and the Amount of Fines, Rapid Examination Procedures, and the Application of Restorative Justice (RJ Memorandum of Understanding). One of the scopes of this Memorandum of Understanding is the settlement of cases through restorative justice, which is contained in Article 3. Restorative Justice here is limited to minor crimes considering that the purpose of this Memorandum of Understanding is to implement Supreme Court Regulation No. 2/2012 on the Adjustment of the Limitation of Minor Crimes and the Amount of Fines in the Criminal Code to all law enforcement officials. Considering that the scope of this MoU is limited to minor crimes, the settlement of minor crimes that are resolved with restorative justice in this MoU is only carried out by the Police or Judges. Court decisions in speedy examination procedures examined by a single judge are carried out by the prosecutor at the district court. Therefore, there is still a void regarding the coordination and division of roles of the police, prosecutors and judges in restorative justice:

- 1) ordinary criminal offenses (non-major); and
- 2) the role of the prosecutor in misdemeanor offenses that do not go through a speedy examination procedure.

In addition, although Article 8 of the Memorandum of Understanding has mentioned the existence of a Joint Secretariat of Mahkumjakpol located at the Ministry of Law and Human Rights, but based on the information of each institution it appears that its function has not been running. The Mahkumjakpol Secretariat has not functioned in bridging or coordinating the institutions involved in implementing RJ. In addition, one of the opinions expressed by the Chairman of the Criminal Chamber of the Supreme Court, is the need for regulation of RJ at the statutory level considering the implementation of RJ is related to criminal procedure law while the Criminal Procedure Code does not yet contain it. The discourse to implement RJ in Indonesia will certainly involve various law enforcement agencies and their personnel. This makes the discussion of the opportunities and challenges of implementing RJ cannot be separated from the management of human resources within each institution. Some things that need to be considered to prepare adequate human resources in each institution in the future include the adequacy of insight and the distribution of workload.

Circular Letter of the Indonesian National Police Number SE/ 8/VII/2018 of 2018 on the Application of Restorative Justice (RJ) in Criminal Case Resolution has been enacted. The police have also issued Perkapolri No. 6 of 2019 concerning Criminal Investigation which also contains a discussion of restorative justice. Then, in August 2021, Regulation of the Indonesian National Police No. 8 of 2021 on Handling Crimes Based on Restorative Justice was also passed. According to the Police Regulation, restorative justice is the resolution of criminal acts by involving perpetrators, victims, victims' families, community leaders, religious leaders, traditional leaders or stakeholders to jointly seek a fair settlement through peace by emphasizing restoration to the original state. The Regulation of the Indonesian National Police No. 8 of 2021 is a follow-up to Perkapolri No. 6 of 2019 and Circular Letter No. SE/8/VII/2018 on the Application of Restorative Justice in Criminal Case Resolution. Based on the Circular Letter, it can be seen that the background of the restorative justice policy at the Investigation stage is due to the development of law enforcement systems and methods in Indonesia, especially by following the development of community justice, especially the development of restorative justice principles. Perkapolri No. 6 of 2019 unfortunately does not contain the more technical aspects of how to apply restorative justice in his role as an investigator and the expected results in this process. Instead, the process is regulated in Circular Letter No. 8/2018 on the Application of Restorative Justice, which states that the following conditions exist:

- For the application of RJ in the investigation of the results, the investigator issues a stop

investigation order and a Notice of Discontinuation of Investigation.

- For the application of RJ in Investigation for these outcomes, the investigator issues an Order to Discontinue Investigation and a Decree to Discontinue Investigation.
- The results of both options are recorded in register B-19 as restorative justice cases that are counted as case completions.

Then the regulation regarding the termination of the investigation, the technical aspects of which are attempted to be regulated by the Chief of Police through Circular Letter No.7 / VII / 2018 concerning the termination of the investigation. In terms of definition, both the Circular Letter and Perkapolri have accommodated the important essence of RJ that it is not only a method of stopping cases peacefully, but is related to the fulfillment of a sense of justice. This should be appreciated because the inclusion of this discussion is an effort to encourage the application of RJ.

RJ can be understood not only as an effort to reconcile or as a result-oriented problem solving, but also on the process. Additional matters are then regulated in the Regulation of the Indonesian National Police No. 8 of 2021, which contains the novelty of special conditions for the application of RJ for criminal offenses of electronic information and transactions, narcotics, and traffic, which include certain conditions according to the criminal offense, for example, for the crime of spreading illegal content, the perpetrator is willing to delete the uploaded content. However, the actual regulation and application of RJ in the police in these three regulations raises several notes. There is a problem of confusion in the process of RJ programs that can be carried out at the investigation and investigation stage. This is actually unjustified. Investigation is a series of actions to seek and find an event whether it is a criminal offense or not, while what is meant by Investigation has the aim of finding evidence to make light of a criminal offense that occurred in order to find the suspect. In this process, RJ should not be applied in the investigation process, because in the RJ process the parties, perpetrators, victims and the community should have the same understanding of an event that is a form of injustice. Meanwhile, in the investigation process, it is still unclear whether a criminal offense has occurred. This has implications for the guarantee of the rights of the relevant parties involved in the RJ process. If RJ occurs in the judicial process, in accordance with the Chief of Police Circular No. 7/VII/2018 and Chief of Police Circular No. 8/VII/2018, the investigator issues an Order to Stop the Investigation and a Decree to Stop the Investigation. The issuance of this cessation of investigation letter in the framework of criminal procedure law has no regulation, there is no clarity on the issuance process in the Criminal Procedure Code, the police with their own authority can issue the letter, there is no process of checks and balances with other institutions, for example with the public prosecutor related to the issuance, and also the issuance of this cessation of investigation has no clear test process. This is contrary to the stages of Investigation.

CONCLUSION

Narcotics crime is a victimless crime. The resolution of criminal offenses using the RJ approach involves the perpetrators, victims and their families and other parties. Drug abuse as a perpetrator or victim of crime, the existence of an agreement between law enforcers in this case the Supreme Court, the Attorney General's Office and the National Police in the form of cooperation is expected to be used as a guideline in handling drug abuse so that there is legal certainty.

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