

RESTORATIVE JUSTICE PARADIGM SHIFT BASED ON PERMA NO. 1 OF 2024 TO REALIZE VICTIM RECOVERY AND CRIMINAL ACCOUNTABILITY

Siva Rizkia Adimu¹, Deny Guntara², Muhamad Abas³

Hk20.sivaadimu@mhs.ubpkarawang.ac.id

Faculty of Law, Universitas Buana Perjuangan Karawang, Indonesia

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Abstract

Restorative Justice is considered an appropriate formulation to take into account the circumstances of victims of criminal acts which in the criminal justice system are usually considered to be only oriented towards criminalizing the perpetrators of the crime. The problem in this article focuses on the restorative provisions in Perma No.1/2024 concerning guidelines for trying criminal cases according to restorative justice, and the shift in the paradigm of restorative justice in Indonesia. The method in the following research is to use normative legal research, by analyzing the provisions related to restorative justice. The results of the research and discussion explain that the idea of restorative justice in Perma No.1/2024 explains that restorative justice is carried out with the intention of restoring victims and does not aim to eliminate criminal responsibility carried out in the form of a judge's or court decision. The next research result is the shift in the paradigm of restorative justice in Indonesia, which was originally through Police Regulation No. 8/2021 concerning Handling of Criminal Acts Based on Restorative Justice and Prosecutor's Regulation Number 15 of 2021 concerning Termination of Prosecution Based on Restorative Justice, restorative justice is considered a mechanism for terminating cases, which according to the author can cause problems for both victims and for the interests of the law itself, so the implementation of restorative justice should be in accordance with Perma Number 1 of 2024 which has shifted its paradigm not only as a victim's recovery by not eliminating criminal liability through a decision, not terminating the case.

I. Introduction

Article 1 paragraph 3 of the 1945 Constitution states that "The State of Indonesia is a state of law". So that it emphasizes to all people that the State of Indonesia is a state of law where all people are required to obey the applicable regulations. Law is known to be coercive. Law is a set of rules of life that are mandatory, including prohibitions, orders and permissions to carry out or not carry out something, which aims to regulate the order of life of the general public. Especially criminal law as a law that is characterized by being firm, coercive and giving misery to anyone who commits a crime or criminal act. In the teachings of legal order and legal science, it is almost certain that all countries adhere to the teaching that criminal law is public law. Because of its public nature, if a violation occurs in the criminal realm, then the violation, apart from harming the victim personally, this loss is considered to be able to affect society so that the state needs to actively act or can be called law enforcement in the criminal justice system.¹

Wirjono Projodikoro explained that the Criminal Code is a legal regulation regarding crimes. The word "crime" means something that is punished by an institution that has the power to force something that is unacceptable to an individual.² Meanwhile, Sudarto defines criminal law as a legal norm that limits actions that result in criminal consequences if certain requirements are met. Through the definition of criminal law above, the core of criminal law is the uniqueness of the sanctions inherent in the nature of the law in the form of sanctions or criminal punishments, as in the Criminal Code has regulated criminal sanctions consisting of principal and additional penalties.

In criminal law, it actually presents a series of criminal procedures as the main stages of problem solving. Because criminal law is identical to the power of the state to punish people who oppose criminal law. This emphasizes that criminal law is the same as state authority or plays a crucial role in its enforcement and implementation. However, some parties argue that there must be another solution that has a vital role in the development of Indonesian criminal law. This is related to the concept of restorative justice which views punishment not only as retaliation for the perpetrator (*lex talionis*), but also the relationship between the victim and the perpetrator and the balance of society.

¹ Gamal Abdul Nasir, *Kekosongan Hukum & Percepatan Perkembangan Masyarakat*, Jurnal Hukum Replik Volume 5 No. 2, September 2017, Hlm.173

² Sudaryono, Natangsa Subakti, *Hukum Pidana Dasar-dasar Hukum Pidana Berdasarkan KUHP & RUU KUHP*, Muhammadiyah University Press, 2017, Hlm.19

³ *Ibid*, Hlm.21

⁴ Ida Made Oka Wijaya, *Restorative Justice dalam Tinjauan Hukum Progresif: Eksistensi dan Implikasi*, Jurnal UK Institute Indonesia berdaya Vol.3, No.3, 2022, Hlm.708

⁵ *Ibid*, Hlm.713

⁶ Kornelius Benuf, Muhamad Azhar, *Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer*, Jurnal Gema Keadilan Volume 7 Edisi I, Juni 2020, Hlm.23

⁷ Henni Muchtar, *Analisis Yuridis Normatif Sinkronisasi Peraturan Daerah Dengan Hak Asasi Manusia*, Jurnal Humanis Vol. XIV No.1, 2015, Hlm.84

Restorative justice is a principle that focuses on restoring conditions rather than demands for punishment. The practice of restorative justice has begun to exist in the resolution of criminal cases applied in law enforcement agencies in Indonesia. Restorative justice is generally considered to be a reaction to the development of the criminal justice system, with an emphasis on the involvement of victims in the procedures that run in the existing criminal justice system. Proponents of this understanding argue that the law is not only aimed at the perpetrator, but also at the victim and the general public. In this case, unlike the criminal justice system in general, the main victim is not the state. Therefore, restorative justice is an understanding of shared responsibility or increased cooperation to restore victims.

However, if we review several norms on restorative justice in Indonesia, both those contained in police and prosecutorial regulations, the restorative justice contained in both regulations tends to assume that restorative justice is an effort to stop the case process, or the end of the law enforcement process. This makes many people confused and perhaps pessimistic about restorative justice, because the view that the law must also side with the victim does not only ensnare the perpetrator of the crime, but in both norms restorative justice is considered an effort to resolve the case trial or without a judge's examination.⁴

The author is of the view that this can cause problems, both in terms of legal interests or efforts to optimize a criminal law enforcement process that is biased or fair to the victim. Because it makes the perception of restorative justice is the termination of the case. In writing this research, the author will focus on the discussion of restorative justice based on Perma Number 1 of 2024 and the shift in the restorative justice paradigm in Indonesia in order to realize victim recovery and criminal accountability.⁵

2. Research Method

In this study, the author uses the normative legal method (known as the doctrinal and normative legal methods).⁶ Legal studies with a normative legal approach are essentially a science that studies a number of legal aspects (in order to solve problems contained in positive law).⁷ The type of normative legal study is also interpreted as a legal study method that is carried out by reviewing library materials.

⁸ Dewi Setyowati, *Memahami Konsep Restorative Justice sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan*, Jurnal Pandecta Volume 15. Nomor 1. June 2020, Hlm.122

⁹ Alifianissa Puspaningtyas Nugroho, *Restorative Justice: Terwujudnya Asas Keadilan dan Asas Kepastian Hukum Pada Instansi Kepolisian*, Jurnal Recidive Volume 13 Issue 2, 2023, Hlm.219

¹⁰ Mario Julyano, Aditya Yuli Sulistyawan, *Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum*, Jurnal Crepido, Volume 1, Nomor 1, Juli 2019, Hlm.14

¹¹ Menikahkan korban dengan pelaku bukan solusi: Bagaimana pendekatan keadilan restoratif sangat merugikan korban kekerasan seksual (theconversation.com), Diakses Hari Senin 3 Juni, 2024, Pukul 13.59 WIB

¹² Direktorat Jenderal Pemasyarakatan (ditjenpas.go.id), Diakses Hari Senin 3 Juni 2024, Pukul 14.18 WIB

¹³ Ikama Dewi Setia Triana, Eti Mul Erowati, *Restorative Justice Sebagai Solusi Mengatasi Overkapasitas Lapas Di Indonesia*, Jurnal Locus Delicti, Volume 3 Nomor 2 Oktober 2022, Hlm.216

3. Results and Discussion

Restorative Justice in Perma Number 1 of 2024

Article 8 paragraph 1 of Law Number 12 of 2011 states that the position of Perma is equal to that of law. Therefore, Perma Number 1 of 2024 is considered to have the same legal force as statutory regulations. John Rawls views justice as a principle applied to the concept of welfare of a social group as a whole. Aristotle explained that justice consists in treating equally and unequally in proportion to their inequality, this means that those who are equal are given similar treatment and those who are unequal are given proportional treatment.

Referring to a number of definitions, it can be interpreted that justice includes everything related to behavior and attitudes in human relations, including the right to treat an individual with their obligations and rights. One of the tools to achieve legal justice so that individual obligations and rights can be fulfilled is by applying the concept of restorative justice.⁸

According to Margarita Zernova, restorative justice defines crime not only as a violation of state interests, but as a violation of justice that encompasses social and community relations. The focus of this solution is not on punishing the perpetrators of the crime because they violate the law in the country, but on efforts to restore justice and social relations that have been damaged by the crime.⁹

In essence, restorative justice is based on the principle that the interests of the victim must also be prioritized or at least become a consideration for the state, not only viewing criminal acts as a matter that violates state law so that it only focuses on the retaliation that will be received by the perpetrator of the crime, but also the criminal law mechanism must take into account the victim as an entity that suffers and must be restored or restored. If we look at several principles in Perma No. 1/2024 concerning guidelines for trying criminal cases according to restorative justice. According to Article 1 Paragraph (1) in this Perma, Restorative Justice is interpreted as an approach to resolving criminal cases that includes the parties being tried, including the victim, the accused/child, the victim's family, the accused/child's family, and other interested parties. Including goals aimed at recovery and restoration.

If we look at this Perma, there are several discussions that are fundamental topics related to restorative justice, as the author has mentioned before, that the criminal system has developed a lot along with the changing times, creating various ideas, theories and paradigms that have also developed, including in legal life. This regulation is the basis that the development of the criminal system is not solely based on the punishment of the accused, but through the application of restorative actions that refer to the adjustment of the accused's responsibility and the recovery of the victim through a restorative justice approach.

This fundamental thing is certainly related to a goal that is to be realized in this Perma, there is a goal of restorative justice, namely in Article 3 Paragraph (1) explaining that the purpose of trying criminal cases using Restorative Justice is to:

1. Restore the condition of victims of criminal acts.
2. Improve relations between victims, accused, and society.
3. Responsibility of the accused
4. Prevent people, especially children, from being deprived of their freedom.

The second paragraph of the same article clearly states that the application of the principle of restorative justice does not eliminate criminal liability. This Perma firmly assumes that if the victim and perpetrator agree to carry out restorative justice, then the perpetrator agrees to restore the victim's condition, but this cannot eliminate criminal liability to the perpetrator of the crime or crime that he has committed, meaning that he still receives sanctions or punishments, which are in the form of criminal penalties.¹⁰

This Perma also explains that restorative justice must be carried out through a trial mechanism, meaning that restorative justice is a path taken through the litigation process, as stated in Article 5 of this Perma which explains that, Judges who try cases must implement guidelines for trying criminal cases according to restorative justice, which seeks to restore the victim's losses and restore the relationship between the victim, the defendant, and the community through a decision. Based on the provisions above, this restorative justice takes the form of a judge's decision. In the author's opinion, this is very important in order to realize the protection of victims and clear accountability to perpetrators of criminal acts. With the existence of a restorative justice mechanism through a judge's decision, it can clarify its legal force, as the aim of the law that we know apart from justice is also certainty. law, which means that there are conditions where there is certainly law because there is concrete power for the related law.¹¹

With the presence of the existence of a judge's or court's decision as a restorative justice path, the author agrees that this also provides legal certainty. Restorative justice as proposed in the Perma also has clear requirements, stated in Article 6 Paragraph (1), that judges in implementing guidelines for trying criminal cases using Restorative Justice, must fulfill one of the following conditions of the crime:

1. The crime committed is a minor crime or the loss experienced by the victim is below Rp. 2,500,000.00 or below the local provincial minimum wage;
2. Complaint crime;
3. Crimes that are threatened with a maximum imprisonment of 5 years in the indictment, including violations regulated in the qanun;
4. Crimes involving child perpetrators whose diversion has failed; or
5. Traffic crimes as a crime.

Then in Article 6 paragraph (2), it provides conditions that according to the author are quite strict, In implementing restorative justice, the Judge is not authorized to apply guidelines for trying criminal cases according to Restorative Justice, if there are conditions:

1. The defendant or victim refuses to reconcile;
2. There is a power relationship; or

3. The defendant repeats the same crime within three years after receiving a court sentence that has permanent legal force.

Shifting the Restorative Justice Paradigm

The restorative justice paradigm is often seen as sufficient as a reconciliation between the perpetrator and the victim which is completed when the case is stopped, the restorative justice paradigm can certainly have the potential or cause problems in law enforcement practices, especially in the realm of the police and prosecutors who are potentially vulnerable to misuse because it is far from what is expected, namely law enforcement that can realize justice for victims. If we carefully observe Article 2 Paragraph (5) in Perpol No. 8/2021 Concerning Handling of Criminal Acts in Accordance with Restorative Justice, it can be understood that restorative justice in this regulation is by terminating the case, meaning that the peace referred to in this regulation is by terminating the case because the victim and perpetrator agree to have reached peace and in accordance with the requirements in the regulation by terminating the investigation or inquiry.¹² Likewise with restorative justice in the prosecutor's regulation No. 15/2020 Termination of Prosecution in Accordance with Restorative Justice, precisely in Article 3 Paragraph (3) letter b concerning the authority to terminate prosecution, there is a restoration of the original situation with a restorative justice approach. This article explains that a criminal case can be terminated, one of which is for reasons of restorative justice, in the author's opinion regarding this regulation, the prosecutor's office also views restorative justice as a peace between the perpetrator and victim of the crime with the mechanism of terminating the prosecution of the case. It is necessary for the author to mention again that this can potentially cause problems both immediately after the termination of the case occurs and problems in the future.¹³

The author is of the opinion that if restorative justice is carried out by the police and prosecutors, it can potentially cause problems, namely related to:

1. Freedom to make peace

If the police and prosecutors or law enforcement officers continue to maintain the paradigm of restorative justice as a settlement/closure of criminal cases carried out outside the trial, then in the author's opinion or assessment, this can actually cause various problems that can occur, especially in terms of the implementation of restorative justice or during the law enforcement process.

As was experienced when a female honorary employee at the Ministry of Cooperatives and SMEs was allegedly raped by four male employees at the ministry. In fact, the police closed the case after instructing or recommending the victim to marry one of the perpetrators. The actions of law enforcement officials to stop the criminal process through peace efforts are viewed by the police as restorative justice efforts. The marriage of the victim and perpetrator of a rape case is considered to be one of the solutions in the form of restorative justice. The police then stopped the criminal process because they were sure that the perpetrator and victim had reconciled. The settlement is prone to conflict and enforcement against the victim. The victim has the potential to be forced to marry, even though the principle in the Marriage Law or the Compilation of Islamic Law states that marriage

must be based on the agreement of the parties concerned (the prospective bride and groom). This is clearly detrimental to the victim, the freedom to make the peace that is expected and the justice that the victim wants. In the author's opinion, it is difficult to achieve if the police and other law enforcement officers continue to implement the paradigm of restorative justice, namely by stopping cases, not continuing them while still paying attention to victims.

2. Victim Recovery Function

Some parties argue that one of the problems in the legal world, especially criminal law, is the ability to handle prisoners in prisons, namely overcrowding. One way to overcome this density problem is to reduce the flow of prisoners to prisons. Reducing this burden can be achieved by implementing restorative justice, namely a criminalization policy that does not emphasize the use of imprisonment as the only form of punishment.

In the author's opinion, such an idea is wrong, considering that the basic function of restorative justice is for victim recovery. The author is concerned that such an idea will give the impression that restorative justice will be used solely to reduce the population in prisons, not intended for victim recovery. The idea of a solution to overcrowding by implementing restorative justice, is based on the understanding that the criminal justice system can no longer control the high crime rate that leads to population density.

The conventional criminal justice system is considered to only focus on punishing the perpetrator, without considering the needs of the victim and the party harmed by the crime of others. In fact, in the author's opinion, this idea is wrong, because not all prisoners in prisons are prisoners with relatively light criminal provisions, or not all prisoners who fulfill the prison are prisoners who meet the criminal provisions that can be carried out restorative justice, So in the author's opinion, the crime rate and solutions to overcome criminal acts to overcome overcrowding are not with restorative justice, but by optimizing other more strategic legal efforts outside criminal law, by addressing the root of the problem, such as poverty and lack of education.

In the author's opinion related to this point, restorative justice must be considered as a mechanism in criminal law as a law enforcement process that functions as victim recovery, not intended to reduce overcrowding in prisons, because if this idea is continued, it will have the potential to terminate the case on the grounds of restorative justice that is not oriented towards victim recovery, but only as a means to reduce overcrowding.

3. Legal certainty

Although in article 16 letter f of Perpol No.8/2021, restorative justice with termination of the case is considered as a settlement of the case, there is a problem if in the future the victim may feel dissatisfied and make a report or complaint again,

because in the author's opinion, the victim could do this, because in the author's opinion the results of the restorative justice agreement according to the paradigm of the Perpol cannot be categorized as *nebis in idem*, because it is not a decision of a judge or court, or the results of the restorative justice are not an existing court decision that has permanent legal force on someone for a similar case. This actually creates the potential for confusion in society and gives rise to new problems. In the author's opinion, the paradigm of restorative justice should shift its perspective in accordance with Perma No.1/2024 Concerning Guidelines for Trying Criminal Cases in Accordance with Restorative Justice, in this case the police and prosecutors must revoke sectoral regulations regarding restorative justice, because it raises other problems that have the potential to never end, because it views restorative justice as a termination of a case rather than focusing on realizing the recovery of victims who have certainty. The author believes that using the perspective of restorative justice that uses this case termination mechanism has not been fully successful or has not been optimal, as evidenced by the various problems that have occurred and the potential to occur as the author has discussed previously. In addition to the victims, the author also thinks so for the sake of the image of the police and prosecutors, the police and prosecutors as law enforcement institutions should not be increasingly considered institutions that are not trusted by the public, because with the existence of problematic restorative justice like this and it should not seem as if the police and prosecutors are being released from their responsibility to resolve cases by terminating cases on the grounds of restorative justice. In the author's opinion, restorative justice is also in accordance with Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. 45, namely "Everyone has the right to recognition, guarantee, protection and certainty of fair law and equal treatment before the law", because restorative justice in the regulation provides certainty of fair law.

4. Conclusion

Perma Number 1 of 2024 as a guideline for the implementation of restorative justice, has provided the right way to restore the condition of the victim and still provide criminal sanctions for perpetrators of criminal acts by implementing a restorative justice mechanism that is in the decision of a judge or court by restoring the condition of the victim and is not intended to eliminate criminal liability, so this Perma provides clarity for victims and the law itself and provides fair legal certainty. Based on the Perma, the author is of the view that there has been a shift in the paradigm of restorative justice, which in police and prosecutorial regulations is always interpreted that restorative justice is an effort to restore victims through peace and termination of cases, even though the restorative justice that is interpreted often causes problems and has the potential to add other problems. The author is of the opinion that restorative justice as interpreted in Perma Number 1 of 2024 is the right guideline for restorative justice, in order to realize recovery for victims and still provide criminal liability to perpetrators of criminal acts.

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