

Juridical Study of the Expansion of Criminal Settlement Through a Restorative Justice Approach

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Abstract

This research aims to analyze the expansion of the resolution of criminal acts through a restorative approach and analyze efforts to prevent restorative justice trading practices. While the urgency of carrying out this research is to examine the implementation of restorative efforts that have provided peace and recovery for victims. The restorative justice cannot be implemented because it is hampered by the requirements contained in the police and prosecutor's regulations. The type of research used in this research is empirical legal research with an interdisciplinary approach. The results of this research state that efforts must be made to harmonize police regulations regarding Handling Crimes Based on Restorative Justice and Prosecutor's Regulations regarding Terminating Prosecution Through Restorative Justice. This is because the police regulations regarding restorative justice are broader than the prosecutor's regulations regarding restorative justice. The novelty found in this research is the need to expand the resolution of criminal acts through restorative justice which is oriented towards restoring the rights of victims and preventing the occurrence of criminal acts in the future by perpetrators and society in general.

Keywords: *Expansion, Resolving Crimes, Restorative Justice.*

1. Introduction

The history of punishment has been around for a long time. The beginnings of punishment refer more to the absolute theory or the theory of retribution. According to Hugo Grotius, the theory of absolute or retaliatory punishment has the meaning of *malum passionis (quod inglitor) propter malum actionis*. (Mujib and Muchlas 2023) The meaning of the term mentioned by Huga Gratius is that evil suffering is inflicted because of the evil deeds he commits. In line with that, Johannes Andenaes also stated that crime is a means of satisfying justice and it would be fair for the victim if the perpetrator was also given appropriate punishment (Syarif Saddam Rivanie, 2022). The theory of punishment then developed into a relative theory or goal theory. According to Muladi and Barda Nawawi Arief, the relative or objective theory states that punishment is not just about providing retribution for the actions of criminals (*quia peccatum est*), but rather so that other people do not commit crimes (*neppectur*) (Usman, 2011).

Discussions related to the theory of punishment after the emergence of the relative theory or the purpose of punishment developed again into a combined theory. The figure who first advocated the existence of this theory was Pellegrino Rossi who emphasized that although retribution is part of realizing justice, punishment efforts have many

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implications, including in this case building repairs to something that is damaged in the realm of society. (Made and Jenvitchuwong 2023) So G. Peter Hoefnages stated that the purpose of crime is none other than an effort to resolve conflict. In line with this, in principle the combined theory has a double feature, considering that apart from punishment it contains an absolute character as a moral criticism in responding to wrong actions. It turns out that punishment must also have a relative character which aims to change the behavior of society and the convict to be better in the future (Anugrah, 2019).

Based on the theoretical developments mentioned, in practice the Criminal Code in Indonesia regulates the types of punishment in Article 10 of the Criminal Code (Potabuga, 2020). In this article, it is stated that the types of punishment are divided into basic crimes and additional crimes. The main penalties include the death penalty, imprisonment, imprisonment, fines and closure. Meanwhile additional penalties include revocation of certain rights, confiscation of certain items, and announcement of the judge's decision (Tambulang, 2020). Even though the Criminal Code mentions many types of punishment, in practice the dominant punishment, whether regulated in statutory regulations or court decisions, is imprisonment and fines. (Rosidah, Karjoko, and Palil 2023)

The dominance of the implementation of prison sentences, in fact, causes a financial burden on the state. This is because although the aim of punishment is as a means of recovery for prisoners as well as prevention so that people do not repeat the same crimes. (Saputra et al. 2023) However, the burden of implementing prison sentences is very high, thereby placing a financial burden on the state. Based on this reality, the resolution of criminal acts was developed using a restorative justice approach. Provisions regarding the resolution of criminal acts through restorative justice have been regulated in several provisions both at the investigation and prosecution levels. Provisions governing criminal resolution through restorative justice at the investigator level. (Sain et al. 2023)

Based on this reality, the resolution of criminal acts was developed using a restorative justice approach. Provisions regarding the resolution of criminal acts through restorative justice have been regulated in several provisions both at the investigation and prosecution levels. The provisions governing criminal resolution through restorative justice at the investigative level are regulated in the Republic of Indonesia Police Regulation No. 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice (Gemilang, 2019). Meanwhile, at the prosecution level, the rules regarding restorative justice are regulated in Attorney General Regulation no. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Sahat Benny Risman Girsang, 2021).

With the provisions regarding the resolution of criminal acts through restorative justice, the Prosecutor's Office and the Police finally have the authority to resolve criminal acts as long as they fulfill the requirements as intended in Republic of Indonesia Police Regulation No. 8 of 2021 concerning Handling of Criminal Acts Based on Restorative Justice and Attorney General Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. (Ratnawati et al. 2023)

The problem arises, there are provisions for resolving criminal acts through restorative justice which can only be applied to criminal acts (Ali, 2023). Furthermore, even with the existence of these two regulations, there is no harmonization, considering that the prosecutor's regulations state that criminal acts that can be terminated are only criminal acts that carry a maximum penalty of imprisonment of 5 years and a maximum value of evidence or loss of IDR. 2,500,000.00 (Kristanto, 2022). This is of course different from the requirements contained in the Police Regulations because the aspects of the requirements are much broader than those in the Prosecutor's Regulations. (Supanto et al. 2023)

In this regard, in principle, efforts to resolve restorative justice aim to restore the punishment system as an *ultimum remedium* and attempt to restore victims. Hence,

efforts to realize a settlement through restorative justice certainly need to be expanded, considering that there are several cases where in the settlement effort an agreement has been reached between the parties to make peace, but formally it cannot be done because it is contrary to the conditions as stated in in the Police Regulations concerning Handling Crimes Based on Restorative Justice and the Prosecutor's Regulations concerning Termination of Prosecution Based on Restorative Justice.(Masyhar and Emovwodo 2023) In line with this, efforts to expand the resolution of restorative justice will of course give rise to its own problems, considering that when the expansion of the resolution of criminal acts through restorative justice is carried out, it will later lead to restorative justice buying and selling. Based on this reality, this research aims to examine the expansion of the resolution of criminal acts through restorative justice and efforts to resolve the occurrence of buying and selling of criminal acts through restorative justice.v

2. Research Methods

The type of research used in this research is empirical legal research with an interdisciplinary approach. An interdisciplinary approach aims to research a topic/issue, where communication, collaboration and integration occur starting from definition, objectives, processes, data collection to analysis and conclusions (Irwansyah, 2021).

3. Results and Discussion

1. Expanding the Resolution of Crimes Through a Restorative Approach

The history of the establishment of resolving criminal acts through restorative justice has been around since the 1970s in Canada. In relation to resolving criminal acts through restorative justice, it was initially carried out with victim offender mediation in the form of a settlement program outside of traditional justice carried out by the community (Lidya Rahmadani Hasibuan, 2015).

The original concept of implementing restorative justice was basically created through peacekeeping practices used by the Maori tribe. The Maori ethnic group is the indigenous population of New Zealand and when a conflict arises it will be handled and resolved by summoning the perpetrator, victim and stakeholders. With this concept, Jeff Christian then stated that in fact restorative justice had been practiced by thousands of previous societies long before the existence of formal law which is now referred to as modern law (Chandra, 2013).

Efforts to resolve things like this have actually also been carried out by customary law communities in Indonesia. This is because customary case resolution in Indonesia is carried out by involving the perpetrator, victim, community and community leaders by providing a sense of justice for the community. This emphasis on resolving criminal acts encourages the re-establishment of communication in society and repairs the harmony of damaged community relations through forgiveness (Herlina, 2004).

The concept of resolving criminal acts through restorative justice increasingly received attention among the public when it received support from the United Nations Congress in 1975. In this case, the United Nations began to pay attention to the concept of providing compensation and restoration to victims as an alternative to retributive criminal justice. For this reason, the Ceracas Declaration states that preventing criminal acts must take into account the economic, political system, social and cultural values, as well as social changes (Muhaimin, 2019).

The implementation of resolving criminal acts through a restorative justice approach in Indonesia began to emerge in 2020 after the enactment of Republic of Indonesia Police Regulation No. 8 of 2021 concerning Handling Criminal Acts Based on Restorative

Justice and Attorney General Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Muhamad Aksan Akbar, 2023). The existence of such provisions gives the authority to the Police and Prosecutor's Office to implement policies to stop criminal acts as long as they fulfill the requirements contained in the Regulation. (Torodji et al. 2023)

Efforts to implement the resolution of criminal acts through restorative justice are basically due to the many weaknesses of the justice system which is implemented in a retributive manner. Problems that arise in the formal justice system often give rise to feelings of disappointment for the parties, considering that the nature of the implementation of justice is a win lose solution. Satjipto Rahardjo, in this case, stated that efforts to resolve cases through the judicial system are slow enforcement of the law, considering that the procedures followed are very long, starting from the police level to the court or ending in the Supreme Court when the parties are not satisfied with the decision determined by the court (Fernando, 20202).

On the other hand, efforts to resolve criminal acts through the procedural criminal system also require a lot of costs, and attempts at punishment in the form of imprisonment actually result in a financial burden on the state. The existence of these conditions makes it necessary to reform efforts to resolve criminal acts through restorative justice. Resolving criminal acts through restorative justice through Police Regulations and Prosecutor's Regulations is implemented considering that Tony F. Marshall stated that restorative justice is a process where all parties involved in a particular criminal act work together to solve problems to deal with the consequences of a criminal act in the future. will come (Sultoni, 2020).

The concept of restorative justice in the last 20 years has experienced rapid development, considering that in several countries such as Canada, Australia, New Zealand, Wales and several other countries. In this case, there are four practice groups that have developed as pioneers in the application of restorative justice. The four methods are Family Group Conferencing, Restorative Boards, Circles, and Victim Offender Mediation (Edyanto, 2017).

Even though there are four groups in the practice of developing restorative justice, Liebman states that the principles of restorative justice are as follows (Habibul Umam Taquiuddin, 2022):

- a. Prioritize support and healing for victims.
- b. Violators must be responsible for their actions.
- c. Conduct dialogue between victims, perpetrators, families and certain parties to reach a joint agreement
- d. There are calculations and efforts to recover the losses caused by the perpetrator.
- e. Perpetrators of criminal acts must understand and be aware of how to avoid crime in the future.
- f. The community helps in integrating victims and perpetrators.

Although the application of resolving criminal acts through restorative justice already contains such principles. However, in reality, the Police Regulations regarding Handling Crimes through Restorative Justice and the Prosecutor's Regulations regarding Termination of Prosecution through Restorative Justice have not been properly harmonized. (Al Fatih and Nur 2023) This can be seen from the requirements outlined in the Police Regulations and Prosecutor's Regulations relating to restorative justice. In this context, the requirements that must be met so that a criminal act can be handled through restorative justice by the police must meet general and specific requirements, both material and formal. (Syapriallah, Zein, and Malloy 2023) Meanwhile, in terminating the

prosecution of criminal acts through restorative justice through the prosecutor's office, one of the conditions is a criminal act with a threat of less than 5 years and a criminal act that has evidence or a loss value of no more than Rp. 2,500,000.00. Furthermore, even efforts to resolve restorative justice cannot be carried out for criminal acts related to a person's life.(Riwanto, Suryaningsih, and Putri 2023)

Based on this reality, efforts to resolve criminal acts through restorative justice should be expanded, so that they can be implemented for every criminal act related to victims, which is not only limited to threats under 5 years and the value of losses or evidence of 2,500,000. 00, including those related to criminal acts affecting a person's life (Edi Setio Budi Santoso, 2020). This is because philosophically there is a resolution of criminal acts based on restorative justice as long as the parties can resolve it peacefully and the perpetrator is responsible for making amends by providing fulfillment of rights to the victim, then the implementation of restorative justice can be carried out. However, in relation to efforts to fulfill victims' rights, they should also have their own standard rules so that they can make perpetrators aware and unlikely to commit criminal acts in the future.(Mukti and Sobirov 2023)

The expansion of criminal acts that can be resolved through restorative justice, including crimes related to life, is basically based on criminal sanctions against perpetrators of intentional murder from an Islamic perspective. According to Fiqh Ulama, criminal sanctions against perpetrators of the crime of intentional murder are divided into principal and substitute criminal sanctions.(Budiono et al. 2023) The main criminal sanction for the crime of intentional murder is qishas. The meaning of Qishas is to provide equal treatment to the perpetrator of a criminal act for the actions committed against the victim. The legal basis related to the implementation of Qishas is regulated in Qs. al-Baqarah verse 178 which means: "O you who believe, qishas is prescribed for you regarding those who are killed; freeman with freeman, slave with slave, woman with woman...." (Yusuf, 2013).

For the crime of intentional murder, a substitute punishment can be given in the form of diyat, when the victim forgives the perpetrator of the crime of intentional murder (Rokhmadi, 2016). According to Sayid Sabiq, diyat is the gift of a certain amount of property that is charged to the perpetrator, because of a criminal act of murder or abuse and given to the victim or his guardian (Aksamawanti, 2016). In the context of giving such a diyat, the perpetrator of the crime of deliberate murder is Kabir's diyat with a detailed fine of 100 camels, divided into 30 female camels aged three years to four years, 30 female camels aged four years to five years, and 40 female camels aged four years to five years. pregnant females ((Sudarti, 2021). Included as one of the conditions for payment is that the assets given to the victim truly belong to the perpetrator of the crime (Hamzah, 2019).

Referring to the criminal sanctions for intentional murder from an Islamic perspective, it can be concluded that the implementation of restorative justice should be expanded, so that it does not only apply to crimes with a maximum imprisonment of 5 years or crimes with a maximum loss value of 2,500,000.00. This is because the highest resolution effort is *islah* or peace between the parties.(Amnesti et al. 2023) Furthermore, efforts to implement restorative justice must also prioritize the recovery of victims and prevent perpetrators from committing criminal acts, because victims are given the right to restore elements of control over themselves while perpetrators are encouraged to assume responsibility as a step to correct mistakes ((Prayogo Kurnia, 2014). This is important to do as an effort to show that the court is the *ultimum remedium* or final remedy for seeking justice.(Hasanah and Driss 2023)v

2. Efforts to prevent buying and selling to resolve criminal acts through restorative justice

One of the important things that must be watched out for in expanding the resolution of handling criminal acts through restorative justice is the practice of buying and selling restorative justice. There is vigilance regarding the issue of buying and selling restorative justice because the Police and Prosecutor's Office have attribution authority originating from statutory regulations to resolve criminal acts. (Ulfatun and Abrar 2023) This is based on an increase in the resolution of restorative justice in the Republic of Indonesia Police in 2022, which initially in 2021 was 14,317 cases, but in 2022 it increased to 15,809 cases (Rahmawati, 2023). In line with this, at the beginning of 2023 there were also widespread issues related to the alleged practice of buying and selling restorative justice in resolving criminal acts (Indonesia, 2023).

Efforts to implement restorative justice in the police are in principle carried out through the police's discretionary rights. Meanwhile, the authority of the prosecutor's office to terminate a prosecution through restorative justice is based on the principle of *dominus litis*. The discretionary right that the police have is the police's action to provide its own assessment to determine whether a case will be delegated to the prosecutor's office or resolved amicably based on its freedom to take action based on its considerations and beliefs (Ramadhan, 2021). Meanwhile, the *dominus litis* principle is a principle that gives absolute and monopolistic prosecution rights, because the Public Prosecutor is the only institution that has and monopolizes the prosecution and resolution of criminal acts. This principle has basically been accommodated in Article 2 of Law no. 11 of 2021 concerning Amendments to Law no. 16 of 2004 concerning the Prosecutor's Office (Riyanto, 2021). Even judges cannot request that criminal cases be immediately submitted to them, because judges in resolving cases are only passive and wait for demands from the public prosecutor (Gede Putera Perbawa, 2014).

The issue rises, in relation to the implementation of restorative justice through discretion by the police and the principle of *dominus litis* by the prosecutor's office, it can create new problems, considering that referring to one's own judgment can certainly give rise to legal uncertainty. This is because members have different levels of self-assessment. This refers to Utilitarianism which emphasizes that the aim of law is to guarantee happiness to individuals and to society at large (Wibowo, 2019). Referring to the measure of happiness that a person has with another, according to John Stuart Mill, there are certainly differences, depending on the social status, education, character and so on that an individual has with another individual (Pratiwi, 2022).

Based on this reality, the authority to be able to carry out restorative justice should be given a categorization for parties who can carry out restorative justice. On the other hand, in the context of expanding the resolution of criminal acts through restorative justice, it will also give rise to new legal probes, considering that the law will only be purchased by people who have property and power, so there is no deterrent effect for perpetrators of criminal acts. This certainly contradicts the aim of punishment as an effort to achieve prosperity and to protect society from crime (Noveria Devy Irmawanti, 2021).

Based on this reality, it is necessary to impose restrictions on perpetrators of criminal acts by completing restorative justice, so that perpetrators of criminal acts only get one opportunity in their life to resolve criminal acts through restorative justice. The purpose of these restrictions is because criminal law must show its teeth as a preventive measure so that other people cannot commit criminal acts. Furthermore, in the concept of implementing restorative justice, optimal supervision must be carried out to prevent the practice of buying and selling restorative justice. (Gunawan and Hazyar 2023)

4. Conclusion

Efforts to resolve criminal acts through restorative justice should require harmonization between police regulations regarding handling criminal acts based on restorative justice and prosecutor's regulations regarding terminating prosecutions based on restorative justice. This is because the regulations regarding handling cases through restorative justice for the police are broader than for the prosecutor's office. On the other hand, it is also necessary to expand the resolution of criminal acts through restorative means, not only related to criminal acts with a maximum prison sentence of five years and the value of evidence or losses of 2,500,000.00. This expansion is due to efforts to resolve criminal acts through restorative justice to provide more legal protection for victims and provide guarantees that the court is the final remedy for seeking justice.

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