

Police Investigation Discretion Against Perpetrators of Crimes Based on Restorative

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Abstract

The public demands that Polri investigators be more professional in their authority as investigators and in carrying out the investigation process for various criminal acts in Indonesia, this includes exercising the authority to carry out discretionary actions in realizing the concept of restorative justice . Restorative Justice is a model of approach in efforts to resolve criminal cases, which emphasizes the direct participation of perpetrators, victims and the community in the process of resolving criminal cases. The conceptual legitimacy of the authority of Polri institutions, including Polri Investigators, aims to ensure order and uphold the law and the maintenance of public peace in order to realize public security and order in the context of maintaining domestic security and achieving national goals by upholding just human rights. The core issue is: Why do Indonesian National Police investigations of criminals based on restorative justice require discretion? And what is the discretionary strategy for Indonesian National Police investigations of criminals based on restorative justice?.

Keywords: Police Investigative Discretion, Criminal Perpetrators, Restorative Justice

1. INTRODUCTION

The variety of criminal acts in the form of crimes and violations in Indonesia, has implications for the implementation of the main duties and functions of the police, especially regarding the authority of Polri investigators as regulated in Law No. 2 of 2002 concerning the Republic of Indonesia National Police and Law No. 8 of 1981 concerning

the Criminal Procedure Code. The public demands that Polri investigators be more professional in their authority as investigators and in carrying out the investigation process for a crime, so in carrying out the investigation process against perpetrators of criminal acts, investigators are required to act carefully so as not to violate human rights, based on the principle of realizing justice. This is a form of a series of legal actions within the framework of law enforcement against perpetrators of criminal acts in the criminal justice system .

In carrying out their duties, Indonesian National Police investigators are given personal authority, based on Law Number 8 of 1981 concerning the Criminal Procedure Code, Article 7 Paragraph (1) point j and Law Number 2 of 2002 concerning the Republic of Indonesia National Police, Article 16 Paragraph (1) point 1 and Article 18, in the form of the authority to "take other actions", with "certain conditions", which is referred to as police discretion .

Based on Law Number 2 of 2002 concerning the National Police, Article 13 states: The main duties of the National Police of the Republic of Indonesia are:

- a. Maintaining public security and order.
- b. Enforcing the law and
- c. Providing protection, care and services to the community.

In carrying out their duties, police officers are morally guided by justice. When carrying out legal action, Indonesian National Police investigators are obligated to act non-discriminatorily, in accordance with the principle of equality before the law , and fairly, as required by law.

The task of National Police investigators is to uphold the rule of law and uphold human rights, and in its implementation, it forms an unbroken chain. According to Artidjo Alkostar , " In a modern society with a constitution and legal framework , the existence of the police institution not only enjoys moral legitimacy but, more clearly, a legal mandate to carry out legal actions. This legal mandate for the police is constitutionally based, as outlined in Law Number 2 of 2002 concerning the National Police. Upholding human rights remains the focal point of the police's primary duties. "

The conceptual legitimacy of the authority of the Indonesian National Police institution, including the Indonesian National Police Investigators, aims to guarantee order and uphold the law and maintain public peace in order to realize public security and order in the context of maintaining domestic security and achieving national goals by upholding just human rights.

According to Thomas Aquinas, law which is based on *iustum* (justice) is absolutely a product of reason, which consists of *justitia distributive* (distributive justice), *iustitia commutative* (commutative or exchange justice) and *iustitia legalis* (legal justice), which refers to obedience to the law.

Investigator Indonesian National Police in carry out task And Its authority is inseparable from the influence of the strategic environment, especially with the growing demand for the implementation of restorative justice . The concept of restorative justice in the international world is applied as a strategy to find solutions to the need to fulfill the sense of justice in society through the criminal justice system . According to Lukman Harun , " The implementation of restorative justice in the criminal justice system has developed, among others, in Japan, the Philippines, England, the United States, Australia, New Zealand, Italy, Scotland, and Saudi Arabia. Even the UN has facilitated the Restorative Justice and Probation Conference, in Warsaw on December 2, 2003. " In the five-yearly congress by the UN with the theme Congress on Crime Prevention and The Treatment of Offenders Which

aims to discuss the development of crime, its prevention and the handling of perpetrators of crime.

At congresses held in 1990 and 1995, several non-governmental organizations from several countries sponsored a number of meeting sessions to specifically discuss restorative justice . In 1995, at the UN Congress in Cairo, technical matters related to the use of a restorative justice approach in handling criminal cases were thoroughly and thoroughly discussed. The 2000 Congress resulted in the United Nations' Basic Principles on the Use of Restorative Justice Programs in Criminal Matters, which outlines a number of fundamental principles for the use of a restorative justice approach .

Restorative Justice is an approach to resolving criminal cases that emphasizes the direct participation of perpetrators, victims, and the community in the resolution process. While this approach remains theoretically debated, it is a growing perspective and has significantly influenced legal policy and practice in various countries. The restorative justice approach is assumed to be the model and mechanism that operates within the criminal justice system in handling criminal cases today. The restorative justice approach is an approach that can be used in a rational criminal justice system and represents a new framework for law enforcement and law enforcement officials to respond to criminal acts.

Based on the results of the Supreme Court's research on Penal Mediation in June-July 2011 in the jurisdiction of the High Courts of Palangkaraya, Mataram, Jambi, and Semarang, it was found that; " Restorative justice was accepted as one of the concepts for resolving criminal cases by the United Nations in 2000. After that recognition, more and more countries implemented it in handling criminal cases. Restorative justice is a model for resolving criminal cases that prioritizes the recovery of victims, perpetrators, and the community. The main principle of restorative justice is the participation of victims and perpetrators, the participation of citizens as volunteer mediators or case resolution facilitator.

In another aspect, if criminal law events are linked to their economic value, it is very possible that the Indonesian Police Investigators (as a component of the crimes justice system) in carrying out legal action against perpetrators of criminal acts can use discretionary authority through an approach based on restorative justice .

In terms of law enforcement related to the criminal justice system in Indonesia based on the Criminal Procedure Code, when the National Police Investigators exercise their authority to take discretionary action against perpetrators of criminal acts through an approach based on restorative justice , there are things that must be considered, including: the philosophical basis for the use of discretion, the sociological aspects of the approach based on restorative justice , the consequences of the use of restorative justice , and the possibility of the birth of legality for the application of restorative justice by the National Police Investigators through statutory regulations.

2. RESEARCH METHOD

In relation to the solution of this paper's problems, the approach method is carried out through a normative juridical research approach. This research method is carried out by reviewing scientific books, legal rules literature materials, legal doctrines and legal principles. Furthermore, the study is conducted through a descriptive approach.

3. RESULTS AND DISCUSSION

Theoretical Framework

a. Criminal Justice System Theory

The Criminal Justice System is a theory related to efforts to control crime through cooperation and coordination between institutions tasked with this task by law. The main components of the criminal justice system are: responsible for their respective functions can be described as; investigative function (under the authority of the police), prosecution function (under the authority of the prosecutor), judicial function (under the authority of the Supreme Court/court), correctional function (under the authority of -correctional institutions/Ministry of Law and Human Rights), and legal aid function (under the authority of advocates). Marjono Reksodiputro believes that the criminal justice system is a crime control system consisting of -police, prosecutors, courts, and correctional institutions.

The criminal justice system is a translation of the Criminal Justice System, a system developed by law enforcement practitioners (Law enforcement officers) in the United States. According to Black's Law Dictionary: The Criminal Justice System is the collective institutions through which an accused offender passes until the accusations have been disposed of or the assessed punishment concluded. The system typically has three components: law enforcement (police, sheriffs, marshals), the judicial process (judges, prosecutors, defense lawyers) and corrections (prison officials, probation officers and parole officers) . (The criminal justice system is a collective institution, where a

criminal offender goes through a process until charges are determined or a sentence is decided.

This system has three components, law enforcement (police), trial process (judges, prosecutors and advocates), and correctional institutions (correctional officers and correctional institution officers).

b. Restorative Justice

Restorative justice is a fundamental concept that encompasses a range of human emotions, including healing, compassion, forgiveness, reconciliation, and sanctions, if necessary (not necessarily imprisonment). Restorative justice offers a process in which those involved in criminal behavior, whether victims, perpetrators, families involved, or the wider community, are all allowed to resolve the issues that have arisen, as a wise step toward resolving legal and interconnected issues. Restorative justice is a broader communal effort that seeks to achieve equality and justice for all people through transformative justice.

Restorative justice according, to Tony F Marshall, is a process whereby all the parties with a stake in a particular offense come together to collectively decide how to deal with the aftermath of the offense and its implications for the future. (Restorative Justice is a process whereby all the parties with an interest in a particular offense meet together to resolve the issue together, how to resolve the consequences of the offense for the benefit of the future. According to Van Ness from Canada, Restorative justice is a theory of justice that prioritizes the restoration of losses due to evil behavior, where the restoration is complete through an inclusive and cooperative process.

The concept of restorative justice The focus is not on past mistakes, but rather on how to resolve the perpetrator's future responsibilities and obligations. The resistance model is replaced by dialogue and negotiation. Deterrence is replaced by reconciliation and restoration as the primary goal. The community is seen as a facilitator in the restorative process , and the roles of both victims and perpetrators are recognized. Stigma must be removed through restorative actions , and the possibility of repentance and

forgiveness remains open as long as they help improve the situation caused by their actions.

Restorative justice is a problem-solving approach to crime that involves the parties themselves, and society at large, in active engagement with legal bodies. Restorative justice can be seen as criminal justice embedded in a social context, with an emphasis on its relationship with other components, rather than a separate, closed system. It is generally accepted internationally that restorative justice is a process whereby parties with a stake in a particular offense collectively address how to deal with the consequences of the offense and its implications for the future.

Several universally applicable principles inherent in the concept of the restorative justice approach in resolving criminal acts include: the Principle of Fair Settlement (Due Process), Equal Protection, Victims' Rights need to be considered, Proportionality, Presumption of Innocence, and the Right to Consultation or Legal Counsel.

c. Discretion

According to The Contemporary Law Dictionary , discretion is a decision made by a leader based on wisdom and conscience. Meanwhile, based on Law of the Republic of Indonesia Number 30 of 2014 concerning Government Administration, Article 1, point 9, Discretion is a Decision and/or Action determined and/or carried out by Government Officials to address concrete problems faced in the administration of government in the case of laws and regulations that provide options, do not regulate, are incomplete or unclear, and/or there is government stagnation.

According to Bryan A Garner, discretion is defined as follows: " A public official's power or right to act in certain circumstances according to personal judgment and conscience. There are three types of discretion, namely administrative discretion, judicial discretion and prosecutorial discretion.

According to Walker, that: Discretion is the authority granted by law to act in special situations according to the judgment and conscience of the agency or officer itself. And discretion is a policy from an official which essentially allows public officials to carry out a policy that violates the law. In administrative law, discretion is often referred

to as " freies ermesen " (free authority) which was originally " Ermessen ", then translated into Discretion.

According to Kenneth Cole Davis, Discretion: "Discretion means that one is free to make choices . The making of choices among a number of possible courses of action. (Discretion means freedom to choose. The act is the freedom to choose one of several actions to be taken).

According to Zudan Arief Fakhruallah, discretion is decision-making in the form of assessing, measuring, and taking action to resolve problems. This discretion has the following scope:

- a. Such actions/decisions are made when there is a regulation that provides a choice (limited discretion).
- b. The action/decision was taken because there were no regulations.
- c. The action/decision was taken because the regulations were unclear/overlapping.
- d. Actions/decisions are taken for broader interests due to government stagnation.

Discussion in the context of problem solving includes:

The Concept of Police Discretion Towards Criminal Perpetrators Through a Restorative Justice Approach

a. The Concept of Criminal Sanctions Based on Restorative Justice

The concept of the Indonesian National Police's discretion towards perpetrators of criminal acts through a restorative justice approach in its capacity as a law enforcer based on the criminal justice system that carries out initial legal action, its strategic concept does not recognize the method of retaliation against perpetrators of criminal acts. The application of legal action through an approach based on restorative justice , The Indonesian National Police's discretion emphasizes the concept of recovery with the aim of making everything right, as well as accommodating the sense of justice desired by the community.

b. Police Discretion Against Criminal Perpetrators Based on Restorative Justice

a restorative justice approach that can be used as a basis for handling criminal acts as part of the criminal justice system in general include empowering the community, especially victims and perpetrators, to play an active role together in resolving criminal acts., particularly for victims of crime, is a fundamental characteristic and foundation of the restorative justice approach to resolving or addressing various crimes . The involvement of both perpetrators and victims is understood as having greater rights to seek the best form and method of resolution for themselves, as they are ultimately the owners of the conflict itself. Reason for the process restorative justice.

- 1) This process is seen as more suitable than conventional criminal proceedings for achieving restorative goals, such as repairing harm, reconciling conflicting parties and public safety.
- 2) This process appears to have the potential to achieve a variety of other goals, including: increasing participants' sense of personal efficacy and power, increasing the ability of parties locked in conflict to recognize the other side, and increasing the confidence, capacity and inclination of ordinary members of society to resolve their own disputes and maintain their own order.
- 3) Achieving Restorative Goals. Restorative justice process necessary in order to achieve restorative results. Therefore, if after the perpetrators admit their crimes they have been dealt with through a restorative justice process , the victim will have the opportunity to explain to the offenders how the crime affected his life and he will be able to express his feelings about the problem.

Pointing to the beneficial, or even necessary, aspects of the restorative justice process to achieve restorative goals is the most common way to justify the process. However, through the assumption that the restorative justice process is the desired way of dealing with crime conflicts because it has the potential to foster moral growth and a sense of community.

Restorative justice process In this view, it is preferred not only because it is the best way to achieve restorative goals such as repairing harm and reducing re-offending , but because it can reap opportunities for moral development and community building to reduce crime conflict.

Achieving the goals of a restorative justice approach serves as the basis for National Police investigators' discretion in resolving criminal cases against perpetrators. By involving multiple parties involved in both cases, National Police investigators successfully resolved them through a restorative justice approach .

Implementation of the Police Discretionary Strategy Against Criminal Act Perpetrators Based on Restorative Justice

Empowerment of the community, especially victims, to participate In the process of resolving criminal acts, it is not only to provide opportunities or balance, but it is closely related to the process of achieving the meaning of justice itself. The restorative approach interprets that justice can only be provided through the involvement of the parties in resolving a conflict that arises from a criminal act, and not merely the fulfillment of justice according to statutory provisions. Giving the right to perpetrators and victims to be able to resolve the conflict that occurs between them is the main thing in the restorative approach because the restorative approach views a criminal act not merely as a violation of state law but as an act of one person to another that causes damage or loss that must be restored.

1). Strategy using the principle of recovery

In the concept of a restorative approach, the aim of resolving a crime is to restore the situation to its original condition. The strategy uses the principle of prioritizing recovery and imposing restorative sanctions and avoiding imprisonment. In the process of resolving criminal acts through a restorative approach, sanctions are attached as a form of the perpetrator's sense of responsibility towards the victim who has been harmed. From a restorative approach, the type of sanction chosen is restorative. is considered far more important and effective than sanctions that emphasize imprisonment, which is the last resort. Restorative sanctions can restore disrupted emotional relationships and recoup all material losses experienced by the victim.

2). An analysis of the resolution of criminal acts through a Restorative Justice approach.

Law No. 2 of 2002 concerning the Indonesian National Police, has given the Indonesian National Police the authority to carry out law enforcement functions to maintain public security and order, on the other hand, Law No. 2 of 2002 also provides space for the community and other elements to contribute to maintaining security and order within Indonesia, in the form of special police, civil servant investigators, and forms of voluntary security. In the context of this case, the National Police's discretion through an approach based on restorative justice, National Police investigators made efforts to involve community leaders, government officials and parties involved in the incident, which ultimately resulted in the restorative justice approach successfully reducing the conflict. A further implication of this perspective is the recognition of law as a social phenomenon. This means that law is not a "fixed value" viewed as sacred for resolving societal issues or social conflicts. Law as a social phenomenon is referred to as "living law." This term "living law" describes actual patterns of behavior within society. Every aspect or element of society and the institutions that exercise social control are "legal."

This substantively avoids the definition of law as always being tied to the government or state. Positioning law as a "moving process" substantively also means positioning the police's workload as shared responsibility. The end result of this process is a synergistic relationship between the police institution and elements within society that functionally fulfill the same duties. This process strengthens the legitimacy of the police, including a restorative justice- based approach to exercising discretion.

Placing law as a social phenomenon has implications for the police in responding to conflict in two dimensions at once, as follows.

First, positioning law as a social phenomenon tends to provide a critical perspective on law as a tool for resolving problems. This aspect clarifies that the police are an official instrument constructed by the state. The relationship between the breadth of police discretion and the tradition of a "legalistic" legal system is inverse. Strictness in the use of legal instruments (legalistic) to resolve conflicts in society means narrowing the scope for discretion itself. The narrow scope for police discretion also means limited interpretation for the police in carrying out legal actions.

Second, placing law as a social phenomenon also means believing in the existence of mechanisms that work in society within the framework of conflict resolution. Restorative justice is successfully carried out by producing a "Peace" solution. A dialogical approach can be part of restorative justice. The restorative justice approach is a legal effort outside the court, the principle of action is directed at restoring relations between the parties involved in the conflict, the principle upheld in the process is the social reintegration of perpetrators of violations in communities experiencing conflict (including crimes) and, material and symbolic improvements to victims and society.

That the efforts to take a sociological approach towards the parties in a dialogical manner through a restorative approach carried out by the Police were apparently successful in a peaceful manner.

The approach taken by the Indonesian National Police (Polri) is essentially a concrete step of "discretionary" legal action by the Indonesian National Police in accordance with the provisions of Article 7 Paragraph 1 (J) of the Criminal Procedure Code. This is part of "legal action" in law enforcement, to be combined with implementation efforts based on the concept of "restorative justice". As for the "dialogical effort that ends peacefully", this is an effort by the Indonesian National Police that can be categorized as successful in convincing the parties.

From this analysis, it can be concluded that implementing police discretion based on restorative justice for perpetrators of general crimes requires a legal basis to legitimize their actions and legal remedies. This way, the police can take legal action in the interests of the legal community and ensure legal certainty without violating the law.

4. CONCLUSION

The concept of Polri discretion towards perpetrators of criminal acts based on restorative justice is by means of carrying out Polri reform related to the implementation of discretion as regulated in Article 7 paragraph (1) letter j of the Criminal Procedure Code and Article 16 and Article 18 of Law Number 2 of 2002.

The need for police discretion towards perpetrators of criminal acts based on restorative justice is due to the lack of a legal basis that legitimizes legal action to resolve the criminal investigation process through a restorative justice approach, even though it provides benefits for social justice, including handling criminal conflicts, achieving restorative goals, developing morals and community strengths, and having the role of the community. Therefore, police discretion is needed to complete a criminal investigation process without going through a court hearing with a restorative justice approach. Thus, police investigators must be brave in using their discretionary authority to provide a sense of substantive justice through a restorative justice approach in seeking intelligent solutions to resolve the investigation process that is considered complete by the victim and perpetrator through a peace settlement.

The Indonesian National Police's discretionary strategy towards perpetrators of criminal acts based on restorative justice is twofold, namely:

- a. The police discretion strategy uses the principle of recovery and not punishment, so that the police discretion carried out must be based on the consideration that the recovery of the victim involving the perpetrator has achieved peace between the victim and the perpetrator.
- b. The Police Discretionary Strategy uses the principle of prioritizing recovery and imposing sanctions that are restorative and preventative.

Imprisonment sanctions are imposed on cases that have a large and widespread impact and require the participation of both local and central governments in resolving the underlying problem and achieving peace between the perpetrator and the victim

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