



RESTORATIVE JUSTICE APPROACH IN POSITIVE LAW ENFORCEMENT ON THE IMPLEMENTATION OF CUSTOMARY SANCTIONS IN PAPUA

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Abstract

This research will know the extent to which positive law enforcement is implemented using restorative justice concerning the application of customary sanctions in Papua. In general, the restorative justice approach is an alternative case settlement by involving the perpetrator, victim, family, & other related parties to jointly seek a fair solution by emphasizing restoration to its original state, and not retaliation. This research was conducted in Wamena Papua. Researchers used socio-legal research, namely research that focuses on individual or community behavior concerning the law with data sources in the form of documents and statutory regulations. The result of this research is that a restorative justice approach to positive law enforcement has been regulated and promulgated starting from the Police, Prosecutors, and Courts. However, in positive law enforcement, it is associated with the application of customary sanctions. So the restorative justice approach attached to the customary sanctions does not necessarily free the perpetrator from criminal prosecution following the applicable positive law. Customary sanctions in Papua apply sanctions in the form of customary fines, including giving pigs, money and noken the amount of which has been agreed upon between the perpetrator and the victim's family. The act that is given the customary sanction is a murder case. In practice, even though the perpetrator has paid the customary fine, it turns out that the legal process is still being continued by the Police and the Court. Specifically for the Prosecutor's Office, murder cases can apply a restorative justice approach by adhering to the Prosecutor's Office Regulation Number 15 of 2020 and Law Number 21 of 2001 concerning the Special Autonomy of the Papua Province.

Keyword: Restorative Justice, Law Enforcement, Customary Sanctions



Abstrak

Penelitian ini akan mengetahui sejauh mana penegakan hukum positif dilaksanakan dengan menggunakan keadilan restoratif terhadap penerapan sanksi adat di Papua. Secara umum pendekatan keadilan restoratif merupakan alternatif penyelesaian kasus dengan melibatkan pelaku, korban, keluarga, & pihak terkait lainnya untuk bersama-



sama mencari penyelesaian yang adil dengan menekankan pemulihan pada keadaan semula, dan bukan pembalasan. Penelitian ini dilakukan di Wamena Papua. Peneliti menggunakan penelitian socio-legal yaitu penelitian yang menitikberatkan pada perilaku individu atau masyarakat mengenai hukum dengan sumber data berupa dokumen dan peraturan perundang-undangan. Hasil dari penelitian ini adalah pendekatan restorative justice dalam penegakan hukum positif telah diatur dan disosialisasikan mulai dari Kepolisian, Kejaksaan, dan Pengadilan. Namun, dalam penegakan hukum positif dikaitkan dengan penerapan sanksi adat. Jadi pendekatan keadilan restoratif yang melekat pada sanksi adat tidak serta merta membebaskan pelaku dari tuntutan pidana sesuai dengan hukum positif yang berlaku. Sanksi adat di Papua menerapkan sanksi berupa denda adat, antara lain pemberian babi, uang dan noken yang besarnya telah disepakati antara pelaku dan keluarga korban. Perbuatan yang diberi sanksi adat adalah kasus pembunuhan. Dalam praktiknya, meski pelaku telah membayar denda adat, ternyata proses hukum tetap dilanjutkan oleh pihak Kepolisian dan Pengadilan. Khusus untuk Kejaksaan, kasus pembunuhan dapat menerapkan pendekatan restorative justice dengan berpedoman pada Peraturan Kejaksaan Nomor 15 Tahun 2020 dan Undang-Undang Nomor 21 Tahun 2001 tentang Otonomi Khusus Provinsi Papua.

Kata Kunci : *Keadilan Restoratif, Penegakan Hukum, Sanksi Adat*

Pendahuluan

Indonesia is a state of law. This is stated clearly and unequivocally in Article 1 (3) of the Constitution of the Republic of Indonesia Year 1945. State law in - mak - sud one of which is a country that uphold the rule of law to uphold truth and justice. Concerning the rule of law/law enforcement, it is understood that the law in Indonesia is the commander in chief in all actions of the life of the nation and state.

Law enforcement today has evolved from punishing lawbreakers but shifting to returning the situation to its original state, both victims, witnesses, perpetrators and the community. The concept of restorative justice comes from a belief that conventional legal processes are often ineffective in their bureaucratic separation of offenders from the actual consequences of acts, in the timing of any remedial actions (delayed incarcerations or other punishments), and the inattention to the personal nature of the wrong (both for rehabilitation of the offender and restitution of the particular harm suffered by the victim), not to mention in their failure to deter or reduce crime (Carrie Menkel, Meadow: 2007).

In its development in Indonesia, the restorative justice approach was first recognized in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System which regulates diversion institutions. Prosecutors, and the Supreme Court) have issued legal products to enforce the law with a restorative justice approach.

Law enforcement above only talks about positive law, but in people's lives there is also a *living law* whose existence is still recognized. For example, Wamena is an area that belongs to the Papua region, which is located in the central mountains, precisely in



Jayawijaya Regency. In Wamena itself, there is still life and strong customs that apply in the community.

Talking about the application of sanctions in Papua, there are 2 (two) types of sanctions applied, namely legal sanctions and customary sanctions. Customary sanctions themselves automatically apply restorative justice. The application of restorative justice can be seen in the mechanism for resolving customary offenses that occur in customary law communities in Papua (Budiyanti, 2021).

In its application, it turns out that even though customary sanctions apply restorative justice, they do not necessarily free perpetrators from punishment according to positive / criminal law. Customary settlements are usually carried out through the traditional way of peace or compensation given by the perpetrator to the victim or family.

About customary sanctions in Papua, there is a legal umbrella in the application of restorative justice, as contained in Law Number 21 of 2001 concerning Special Autonomy for the Papua Province, precisely in Article 51 paragraph (7) and (8) that to release perpetrators of criminal charges according to the provisions of the applicable criminal law, a statement of approval is required to be carried out from the Head of the District Court who is in charge of the area obtained through the Head of the District Attorney concerned with the place where the crime occurred. If the request for a statement of approval to be implemented for the decision of the customary court as referred to in paragraph (7) is rejected by the District Court, then the decision of the customary court shall be the subject of legal consideration of the District Court in deciding the case in question.

In relation with the background above, the problem of the research can be stated as follow. "How is positive law enforcement with a restorative justice approach concerning the application of customary sanctions. The following are objectives of the research **"To find out the extent to which a restorative justice approach in law enforcement is positive towards the application of customary sanctions."**

Methodology

This study uses a type of socio legal research, namely research that focuses on individual or community behavior about the law. Sources of data in this research include primary data from law enforcement officers. Secondary data, obtained through primary legal material sources, namely laws and regulations. Secondary legal materials derived from scientific works and internet media. The data were analyzed using qualitative analysis techniques following the object of study being studied to get a clear picture of the reality that is happening in society.

Finding And Discussion

Restorative justice is an alternative to resolving criminal cases by involving perpetrators, victims, families, & parties other related to joint search fair settlement by emphasizing recovery back to its original state, and not revenge. The restorative justice approach was first recognized in Law Number 11 of 2012 concerning the Juvenile



Criminal Justice System which regulates diversion institutions.) has issued its legal products to enforce the law with a restorative justice approach.

In positive law several legal products already regulate restorative justice, including:

- Law No. 11 of 2012 Child Criminal Justice System
- Supreme Court Regulation No. 2 of 2012 concerning Tipiring Limits jo. Memorandum of Understanding with MARI, Menkumham, AGO and the National Police Chief Number 131/KMA/SKB/X/2012 dated October 17, 2012 regarding the Implementation of Adjustment of Limits on Minor Crimes and Amount of Fines, Quick Examination Procedures and the Implementation of Restorative Justice
- Circular Letter of the Head of the State Police of the Republic of Indonesia No. 8/VII/2018 concerning the Application of Restorative Justice in the Settlement of the Criminal Case of Jo. Regulation of the National Police Chief No. 6 of 2019 concerning TP Investigations
- Prosecutor's Regulation No. 15 of 2020 concerning Termination of Prosecution Based on RJ
- Decree of the Directorate General of the General Judiciary Agency No. 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Restorative Justice Guidelines
- Indonesian National Police Regulation No. 8 of 2021 concerning Handling of Crimes Based on Restorative Justice

From some of these regulations, it can be seen that in the development of positive law enforcement in Indonesia, especially regarding crime, the *political will* of each law enforcement institution has accommodated the restorative justice.

To find out more about the requirements for restorative justice, the following is an explanation of the application of restorative justice in the police, prosecutors and courts.

1. Police

Police are one of the law enforcement institutions as stipulated in Law Number 2 of 2002 concerning the Indonesian National Police. As one of the law enforcers who work to solve legal problems in the community, the Police are known to use coercive measures in handling their crimes, such as arrests, searches, confiscations, detentions and the determination of suspects.

Concerning the application of restorative justice, the Police have made a regulation, namely the Regulation of the State Police of the Republic of Indonesia Number 8 of 2021 concerning the Handling of Crimes Based on Restorative Justice. According to Article 5 letter f of Perpol Number 8 of 2021, one of the conditions that must be met for Restorative Justice to be carried out is that the crime is not a crime



against terrorism, a crime against state security, a crime against corruption and a crime against people's lives.

To carry out law enforcement based on restorative justice in the Police institution, there are general and specific requirements, namely:

1. General Terms are divided into material and formal requirements. The material requirements are:
 - Does not cause unrest and/or rejection from the public;
 - Does not impact social conflict;
 - Does not have the potential to divide the nation;
 - Not radicalism and separatism;
 - Not a repeat offender based on a court decision;
 - Not a criminal act of terrorism, a crime against state security, a criminal act of corruption and a crime against people's lives.

Formal requirements are:

- Letter of peace from both parties, except for drug crimes
 - Fulfillment of the rights of victims and responsibilities of perpetrators, except for drug crimes, which consist of:
 - Return thing;
 - Compensate for losses;
 - Reimbursement of costs incurred from criminal acts; and/or
 - Compensate for the damage caused by the crime.
2. Special Terms are divided into material and formal requirements.
 - ITE crime;
 1. perpetrators of Information Crimes and electronic transactions that spread illegal content;
 2. the perpetrator is willing to delete the uploaded content;
 3. the perpetrator apologizes through a video uploaded on social media accompanied by a request to remove the content that has spread; and
 4. the perpetrators are willing to cooperate with Polri investigators to carry out further investigations.
 - Drugs
 1. Drug addicts and victims of drug abuse who apply for rehabilitation;
 2. at the time of being caught red-handed;
 3. evidence of the use of narcotics for 1 (one) day is found with the classification of narcotics and psychotropics following the provisions of the legislation; and
 4. no evidence of drug crime was found, but urine test results showed positive for drugs;
 5. not involved in drug crime networks, dealers and/or dealers;
 6. an assessment has been carried out by an integrated assessment team; and



7. the perpetrators are willing to cooperate with Polri investigators to carry out further investigations.

- Traffic

1. traffic accidents caused by driving a motorized vehicle in a dangerous manner and condition resulting in material loss and/or minor injuries; or
2. traffic accidents on the road due to negligence resulting in human casualties and/or property loss.

2. Prosecutor

The Prosecutor's Office is an institution that has the authority to prosecute a criminal offender, concerning restorative justice, the provisions have been regulated with the following conditions:

1. the suspect has committed a crime for the first time;
2. a criminal offense is only punishable by a fine or punishable by imprisonment of not more than 5 (five) years; and
3. a criminal act is committed with the value of the evidence or the value of the loss caused as a result of the criminal act of not more than Rp.2,500,000,000.00 (two million five hundred thousand rupiah).

Termination of prosecution based on Restorative Justice is carried out by fulfilling the following conditions:

- a. there has been a recovery back to its original state carried out by the Suspect by:
 1. return the goods obtained from the crime to the Victim;
 2. compensate the Victim's loss;
 3. reimburse the costs incurred as a result of the criminal act; and/or
 4. repair the damage caused by the criminal act;
- b. there has been a peace agreement between the Victim and the Suspect; and
- c. people respond positively

Discontinuation of prosecution based on Restorative Justice is excluded for cases:

- a. criminal acts against state security, the dignity of the President and Vice President, friendly countries, heads of friendly countries and their representatives, public order and morality;
- b. a criminal act that is punishable by a minimum criminal threat;
- c. narcotic crime;
- d. environmental crime; and
- e. criminal acts committed by corporations.

3. The Court



The court is a law enforcement institution that examines, hears and decides on a case received from the Prosecutor's Office. In terms of the application of restorative justice, a regulation has been made that re-ensures law enforcement using a restorative justice approach, as stated in the Decree of the Director General of the General Judiciary Agency Number 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in General Court Environment. In terms of restorative in the general court / court, it is limited to 4 (four) things, including:

1. Minor Crime
2. Child Case
3. Women's Case Against the Law
4. Narcotics (addicts and abusers for oneself).

The four scopes above are cases where a restorative justice approach can be carried out with the following limitations:

1. Minor Crime

The application of restorative justice for minor crimes has been regulated in the Supreme Court Regulation Number 2 of 2012 concerning Adjustment of the Limits of Minor Crimes and the Amount of Fines in the Criminal Code (Book of Criminal Law) with the following conditions:

- Cases of theft, fraud, embezzlement, confiscation, the value of goods or money which is the object of the case for a maximum of Rp. 2,500,000 is examined by a Quick Examination Procedure;
- If the defendant was previously subjected to detention, the Chairperson of the Court does not determine the detention or extension of detention;
- Each maximum number of fines that are threatened are multiplied to a thousand times;
- In dealing with criminal cases charged with articles of the Criminal Code for which fines can be imposed, the judge is obliged to multiply it to a thousand times;

2. Child Case

As regulated in the Juvenile Criminal Justice System Act, there is a diversion effort, namely the transfer of the settlement of children's cases from the criminal justice process to a process outside the criminal justice system. With the conditions, that the child is sentenced to be under 7 years of age and the child's actions are not repeated.

3. Women's Case Against the Law

The implementation of restorative justice in cases of women dealing with the law has been contained in the Regulation of the Supreme Court Number 3 of 2017 concerning Guidelines for Adjudicating Cases of Women in Conflict with the Law. In essence, it regulates, among other things:



- Judges must consider legal facts with a restorative justice approach
- The judge's decision explores legal, local values and a sense of justice that lives in society to ensure gender equality
- Judges must consider legal facts and future implications with a restorative justice approach
- The judge must consider the harm suffered by the victim and the impact of the case as well as the need for recovery for the victim
- The judge is obliged to inform the victim about their rights regarding restitution and compensation, and others.

4. Narcotics (addicts and abusers for oneself).

Restorative justice can only be applied to addicts, abusers, victims of narcotics abuse, narcotics dependence and narcotics use for 1 day as regulated in Article 1 of SKB Number 01/PB/MA/III/2014 concerning Handling Narcotics Addicts and Victims of Narcotics Abusers in Rehabilitation Institutions.

As for the conditions so that the Narcotics case specifically for addicts can be carried out a restorative justice approach, namely:

- When caught red-handed by Polri and BNN investigators, evidence of 1 day use was found;
- The Registrar ensures that the Public Prosecutor has attached the results of the assessment from the Integrated Assessment Team at the time of delegating the case file following article 103 (1) and Article 127 paragraph (1) of the Narcotics Law
- If the Public Prosecutor does not attach the results of the assessment, the judge during the trial may order PU to attach the results of the assessment from the Integrated Assessment Team.
- The judge may order the Defendant to present the family and related parties for their testimony to be heard as mitigating witnesses in the framework of the Restorative Justice approach
- The judge in the trial may order narcotics addicts and victims of narcotics abusers to carry out treatment, care and recovery at medical rehabilitation institutions and/or social rehabilitation institutions.

From some of the above arrangements, in real conditions in society, especially in Papua, it has been far regulated and has its legal umbrella so that law enforcement is carried out with a restorative justice approach, namely through Law Number 21 of 2001 concerning Special Autonomy for the Papua Province, to be exact. in Article 51 paragraphs (7) and (8) which stipulate that to free criminal perpetrators from criminal charges according to the provisions of the applicable criminal law, a statement of approval is required to be carried out from the Head of the District Court in his area which is obtained through the Head of the District Attorney concerned with the place of



occurrence. criminal event. If the request for a statement of approval to be implemented for the decision of the customary court as referred to in paragraph (7) is rejected by the District Court, then the decision of the customary court shall be the subject of legal consideration of the District Court in deciding the case in question.

From these arrangements, it turns out that the customary sanctions which are the authority of the customary institutions are different from the sanctions in the positive law itself, so that the enforcement of positive law does not depend on the customary sanctions.

From the results of a search in Wamena Papua, it was found that the categories of cases that were subject to customary sanctions were murder cases and cases related to child protection. The case was obtained from 2020 to 2021, for both cases during examination at the Police, the perpetrators were willing to pay customary fines in the form of pigs, money and noken. The customary fine is part of the customary sanction which is the obligation of the perpetrator to fulfill it.

If it is related to the regulation of restorative justice in institutions such as the Police, the Prosecutor's Office and the Court, then at the Police level, homicide cases and cases related to child protection cannot be approached for restorative justice because it involves life and children, while at the Prosecutor's Office, if tracing the regulation Regarding the application of restorative justice, the Prosecutor's Office can take a restorative justice approach, with several conditions that have been regulated in Prosecutor's Regulation No. 15 of 2020, in addition, the Prosecutor's Office can also guide Law No. 21 of 2021 concerning Special Autonomy for the Province of Papua, which can release the perpetrators based on the customary sanctions.

Conclusion

Based on the discussion in the previous chapter, the findings of the results show that a restorative justice approach to positive law enforcement has been regulated and promulgated starting from the Police, Prosecutors and Courts. However, in positive law enforcement it is associated with the application of customary sanctions. So the restorative justice approach attached to the customary sanctions does not necessarily free the perpetrators from criminal charges under the applicable positive law. Customary sanctions in Papua apply sanctions in the form of customary fines, including giving pigs, money and noken the amount of which has been agreed upon between the perpetrator and the victim's family. The act that is given the customary sanction is a murder case. In practice, even though the customary fines have been paid, it turns out that the legal process is still being continued by the Police and the Court. Specifically for the Prosecutor's Office, murder cases can apply a restorative justice approach by adhering to the Prosecutor's Office Regulation Number 15 of 2020 and Law Number 21 of 2001 concerning the Special Autonomy of the Papua Province.

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