

Legal Reconstruction of Hate Speech Criminal Cases in the Digital Space through the Restorative Justice Approach by Police Investigators

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ABSTRACT

This study uses a normative research method with a statute approach, a conceptual approach and a *comparative approach*. The results of this study are 1). The Criminal Code as a positive law that regulates the law enforcement system by the National Police is no longer in accordance with the values of justice contained in Pancasila. 2) The National Police, which in carrying out its duties as law enforcers, implements more retributive *justice* than implements restorative justice. 3) There are too many laws and regulations that regulate *the restorative justice mechanism* with different provisions. Therefore, it is necessary to encourage the immediate passage of the new National Criminal Procedure Bill to accommodate the regulations on the restorative justice mechanism and immediately make changes to the Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia, especially by forming additional rules in Article 16.

INTRODUCTION

Law enforcement, in Soerjono Soekanto's opinion, is an activity of harmonizing the relationship between values described in the rules, a steady view of the view and embodying it in attitudes, actions as a series of final stage of elaboration of values to create peace of association. Law enforcement of criminal acts can be given to perpetrators of criminal acts in the form of criminal and non-criminal law facilities.

The Criminal Code was issued as a codification and unification of written regulations in the field of enforcement and legalized human rights to suspects or defendants to defend their interests in front of the examination of law enforcement agencies. However, the Criminal Procedure Code still has shortcomings and weaknesses that are no longer in accordance with changes in the constitutional system and legal developments in society, so it is necessary to update the criminal procedure law that is more responsive. There are indicators that show that the Criminal Code is outdated, including not being able to meet the legal needs in society as well as legal developments and changes in the political map, one of which is accompanied by technological developments.

One form of criminal acts that have emerged due to technological developments is hate speech in the digital space including fake news, defamation and hate speech containing Sara. Based on data published by the National Police Directorate, from the period from 2019 to 2023, the National Police has handled 444 cases of hate speech crimes consisting of 111 cases of fake news, 216 cases of defamation and 117 cases of hate speech crimes containing Sara. The National Police of the Republic of Indonesia which is authorized by the State to conduct investigations or investigations into alleged perpetrators of hate speech crimes in the digital space.

The regulation of restorative justice as a renewal of criminal law enforcement is basically in various provisions of laws and regulations, including Law Number 11 of 2012, Law Number 31 of 2014, Government Regulation Number 35 of 2020 concerning Amendments to Government Regulation Number 7 of 2018.

Restorative justice has long been a local wisdom in various customary law communities in Indonesia where the system is the original law of the Indonesian nation that cannot be separated from the structure of society that is still in the pre-modern stage. Restorative justice is also considered in accordance with the values of Pancasila which is the source of all Indonesian legal sources. The concept of the family state is reflected in the concept of restorative justice where case settlement is carried out in a family manner.

Law reform in the criminal justice system, the National Police makes restorative justice a basic guideline in achieving justice in accordance with the values of Pancasila, but is constrained by the Criminal Procedure Code as a positive law which does not regulate the application of restorative justice by adhering to the concept of retributive justice. Some of the causes of the emergence of inconsistency and inconsistency in restorative justice regulations include the inability of law enforcement agencies to coordinate and the existence of political pressure from certain groups.

In relation to hate speech crimes that occur in the digital space, the application related to restorative justice is only regulated in Articles 7 and 8 of the National Police Regulation of the Republic of Indonesia Number 8 of 2021. There are also various restorative justice regulations that are issued differently between law enforcement agencies that cause differences in perception. This difference can cause confusion in the interpretation of the law which causes the non-realization of regulatory synchronization which affects the quality of the regulation of the law enforcement reform process.

The concept of reforming restorative justice law enforcement is influenced by the law enforcement process through retributive justice enforced in the Criminal Procedure Code, as well as hate speech in the digital space. Police investigators place themselves in a legalistic, positive, and rule-based way of thinking and acting or based on higher regulations by conducting investigations, investigations, and arrests. Law enforcement reforms are structured clearly, logically, and in accordance with the hierarchy that will be able to change the legal paradigm of investigators.

Departing from the legal reality above, research on the reconstruction of the law enforcement system by the National Police against hate speech crimes in the digital space through a restorative justice mechanism based on Pancasila justice is very necessary in order to provide a clear picture of this reality and what steps must be taken to change the legal paradigm of police investigators who are legalistic positivists who are only oriented to law enforcement through the retributive justice mechanism.

THEORETICAL REVIEW

The Concept of the Pancasila Legal State

The conception of the Indonesian legal state has characteristics and characteristics that are based on the spirit and soul of the Indonesian nation (volkgeist), namely Pancasila. The concept of the state of law that is actually embraced by the Indonesian state is to look at the Preamble and Articles in the 1945 Constitution of the Republic of Indonesia as the overall source of Indonesian legal politics. Pancasila as a matter of thought and as an ideal of law. The characteristics of the Pancasila state of law are as follows:

- a) Family Country
- b) A Stable and Fair Rule of Law
- c) Religious Nation State
- d) Combining law as a means of changing society and law as a mirror of community culture.
- e) The formation of the law is based on the principle of law that is neutral and universal

Pancasila Justice Theory

Justice based on Pancasila is justice that really provides what is needed in the life of the community. The view of justice in the national law of the Indonesian nation is focused on the foundation of the state, namely Pancasila, where the fifth precept is social justice for all Indonesian people. The

characteristics of justice based on Pancasila as the nation's philosophy and ideology include several principles, namely:

- a) The principle of Pancasila justice is based on the One Godhead.
- b) The principle of Pancasila justice prioritizes human rights.
- c) The principle of Pancasila justice upholds the value of unity and unity
- d) The principle of justice of Pancasila adheres to the principle of democracy.
- e) The principle of Pancasila justice provides justice for all citizens and their rights.

Aristotle's Theory of Distributive Justice

A book titled *The Ethics of Nichomachea* explains his thoughts on justice. The book is entirely devoted to justice, which according to Aristotle's philosophy of law, law can only be established in relation to justice". Distributive justice is a form of transparent justice. The concept of distributive justice is assessed from the distribution of rights that is carried out proportionally or balanced, which can fulfill several things in accordance with the law, impartiality, and according to the achievements of each person.

Progressive Legal Theory

Progressive law is a thought of legal development initiated by Satjipto Rahardjo, who holds the view that law is formed for humans, not humans, for laws that are also part of the process of searching for the truth that never stops. Progressive Legal Theory has a number of characteristics, including:

- a) Progressive law seeks to shift the focus of studies that originally used legal optics to behavior.
- b) Progressive law deliberately places its presence in close relationship with humans and society (responsive law).
- c) Law is not viewed from the perspective of the law itself but is seen and judged from the social goals to be achieved and the consequences that lead from the work of the law.

The Concept of Restorative Justice

Tony F. Marshall in his article "Restorative justice an Overview" said that restorative justice is a process in which interested parties in a particular offense meet together to solve the problem of how to resolve the consequences of the violation for the benefit of the future. The concept and philosophy of criminal law and the criminal justice system are currently better known as restorative justice as a judicial concept that produces restorative justice.

Theory of Authority

Authority consists of several authorities which are power over a certain group of people or power over a field of government. According to its nature, authority is divided into three types, namely binding, facultative (optional) and free which is related to the authority to make and issue decisions (besluiten) or decrees (bechikingen) by government institutions so that it is known as binding and free decrees.

Police Discretion Theory

According to the legal dictionary compiled by J.C.T Simorangkir, discretion is defined as "the freedom to make decisions in every situation faced according to one's own opinion". Meanwhile, according to Davis, "police discretion may be defined as the capacity of police officers to select from among a number of legal and illegal courses of action or inaction while performing their duties". Police discretion is an action taken by a police officer based on the authority he has to choose one of two or more options of action based on his own consideration or belief in order to maintain public security and order, humanity, justice and education or enlightenment to the community.

METHODOLOGY

This study uses normative legal research methods. Normative legal research is legal research that places law as a building of a norm system. Normative legal research is a process to find legal rules, legal principles, in order to answer legal problems, normative legal research is carried out to produce new arguments, theories or concepts as prescriptions (assessments) in the problems at hand.

The approaches used to solve problems in this study are the statute approach, the conceptual approach, and the comparative approach. The sources of legal materials used in compiling this research methodology are primary, secondary and tertiary. The technique of collecting legal materials used is document analysis and observation techniques.

The analysis technique used in this study is qualitative mechanism analysis, interactive analysis models to produce the achievement of scientific and empirical data descriptions. This analysis method includes steps: data collection, reduced to having the main things that are in accordance with the focus of the research, data display, so that it is possible to draw a conclusion.

RESULTS AND DISCUSSION

Weaknesses of the Law Enforcement System by the National Police Against Hate Speech Crimes in the Digital Space through Restorative Justice Mechanisms

1. Authority of the National Police

a. The Authority of the National Police as an Investigator of Hate Speech Crimes in the Digital Space

The Special Criminal Law Law is limited as a law that specifically regulates material criminal law which at the same time regulates its formal criminal law (the criminal procedure law). Therefore, the ITE Law is not in the form of a Special Crime Law because the ITE Law does not regulate special criminal law, but regulates various matters related to ITE, which also regulates special criminal law, and slightly regulates special formal criminal law regarding investigation.

Meanwhile, the prosecution and examination of court hearings are not regulated in the slightest. The principle of the enactment of codification criminal law is all criminal laws both inside and outside codification. The ITE Law, in principle, remains valid as the Criminal Procedure Law on investigations which

is specifically regulated in Chapter X OF THE ITE Law. Based on the principle of *Lex Specialis Derogat Legi Generalis*, the rules of special matters are enforced.

b. The authority of the National Police Based on the Criminal Procedure Code (KUHP) is as follows: 1). Arrest Authority 2). Detention Authority 3). Search Authority 4). Authority to Confiscate 5). Authority to Examine Letters

c. The authority of the National Police Based on Law Number 2 of 2002

Concerning the National Police of the Republic of Indonesia is 1) Arrest, detention, search and confiscation; 2) Prohibit everyone from leaving or entering the scene of the crime; 3) Bringing and exposing people to; 4) Ordering the arrest of the suspect; 5) Conducting inspection and confiscation of letters; 6) Calling people for examination; 7) Bring in an expert as is required in relation to the examination of the case; 8) Hold a termination of the investigation; 9) Submit the case file to the public prosecutor; 10) Submit a request directly to the authorized immigration official; 11) Provide guidance and investigation assistance; 11) To take other actions in accordance with the responsible law.

d. The authority of the National Police Based on Law Number 11 of 2008

Concerning Information and Electronic Transactions (ITE) is 1). Authority of Arrest and Detention 2). Seizure and Search Authority

2. Various Regulations of the National Police Discretionary Policy in the Implementation of Restorative Justice by the National Police Against Hate Speech Crimes in the Digital Space

In connection with the non-regulation of restorative justice in the investigation stage for hate speech crimes, the National Police as investigators in Law Number 8 of 1981 concerning the Criminal Procedure Law have the authority to carry out other actions according to the law or can make policies in the form of *freies ermessen* (discretion): These policy regulations include:

- a. Circular Letter of the Chief of the National Police of the Republic of Indonesia Number SE/8/VII/2018
- b. Regulation of the Chief of the National Police of the Republic of Indonesia Number 6 of 2019 concerning Criminal Investigation
- c. Police Regulation Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice.
- d. Circular Letter of the National Police Chief (SE) No.SE/2/11/2021
- e. Telegram Letter Number: ST/339/II/RES.1.1.1./2021

3. Various Arrangements for Restorative Justice Mechanisms in Different Countries

a. Restorative Justice as a general and overall scheme based on the law

The countries that have enacted restorative justice in general and comprehensively based on concrete regulations are Germany, Poland, Finland, Hungary, and Denmark.

b. Restorative Justice as a general and overall scheme in the shadow of the law

The Restorative Justice in question is applied based on discretionary authority. Countries that use this system are the United Kingdom and the Netherlands.

Reconstruction of the Law Enforcement System by the National Police Against Hate Speech Crimes in the Digital Space through Restorative Justice Mechanisms

1. Legal Reconstruction of Article 16 of Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia

The legal construction of article 16 of Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia is as follows:

- [1]. In order to carry out the duties as referred to in Articles 13 and 14 in the field of criminal proceedings, the National Police of the Republic of Indonesia is authorized to make arrests, detention, searches, and seizures and prohibit everyone from leaving or entering the scene of the case for the purpose of investigation;
 - [2]. The investigator as referred to in Article 6 paragraph b has authority in accordance with the law that is the basis of their respective law and in the implementation of their duties is under the coordination and supervision of the investigator in Article 6 paragraph a;
 - [3]. In carrying out their duties as referred to in paragraphs and paragraphs, investigators are obliged to uphold the applicable law.
- 2. Reconstruction of Criminal Procedural Law Related to the Application of the Concept of Restorative Justice to Hate Speech Crimes in Digital Space by the National Police.**

As for the legal construction of the criminal procedure law related to the application of the concept of restorative justice to hate speech crimes in the digital space by the National Police, it is not specifically and strictly regulated in the Criminal Code. The author has added new rules related to the restorative justice mechanism, including changing and adding a new draft of additional drafts, especially those related to the authority of the National Police as investigators/investigators

The legal reconstruction of the reading of article 74 of the draft Criminal Procedure Bill is as follows:

- [1]. The Restorative Justice Mechanism is implemented through the settlement of cases outside the court. The settlement of out-of-court cases as referred to in the sentence is carried out at the following levels: Research; Investigation; and Prosecution
- [2]. In the event that the case is part of a criminal act as intended in Article 441 paragraph of Law Number 1 of 2023 concerning the Criminal Code and/or Article 45A paragraph of Law of the Republic of Indonesia Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Information and Electronic Transactions, then:

- a. The settlement of cases outside the court must be carried out at the level of investigation or investigation first before the case file is transferred to the Public Prosecutor;
- b. The Investigator or Investigator is obliged to make minutes about the implementation of the Settlement of the case out of court and the minutes are an integral part of the requirements for the issuance of a letter of termination of Investigation or Investigation in the event of an agreement or the transfer of the case file to the Public Prosecutor if there is no agreement;
- c. If the provisions as referred to in letters a and b are not met, the letter of termination of the Investigation/Investigation or the Indictment is null and void.

Meanwhile, the Legal Reconstruction of Article 76 is as follows:

[1].Settlement of out-of-court cases is carried out through:

- a. applications submitted by the perpetrator, the Suspect, the Defendant, or their families, and/or the Victim of the crime or their families; or offers from Investigators, Investigators, Public Prosecutors, or to Victims and Suspects;
- b. in the event of an alleged criminal act as referred to in Article 441 paragraph of Law Number 1 of 2023 concerning the Criminal Code and/or Article 45A paragraph of Law of the Republic of Indonesia Number 1 of 2024 concerning the Second Amendment to Law Number 11 of 2008 concerning Information and Electronic Transactions, Settlement of cases outside the court must be carried out by the Investigator or Investigator with or without an application or offer as intended in letters a and b above.

Broadly speaking, the legal reconstruction in article 76 above is intended to encourage the National Police as investigators to play a more active role in implementing restorative justice against hate speech crimes in the digital space. There is no reason for investigators to rule out the restorative justice mechanism for hate speech crimes in the digital space under the pretext that there must be an application or offer.

CONCLUSIONS AND RECOMMENDATIONS

Based on the description of the research results and the discussion in the Dissertation research, it can be concluded as follows:

The Criminal Code as a positive law that regulates the law enforcement system by the National Police is no longer in accordance with the values of justice contained in Pancasila, namely the family values referred to in restorative justice.

Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia, the Criminal Procedure Code, Circular Letters and Telegram Letters issued by the Police causes the National Police in carrying out their duties as law enforcers against hate speech crimes in the digital space inseparable from positivist legalism or based on higher regulations by applying more retributive justice than applying restorative justice which is only regulated in the authoritative policy regulations.

The too many laws and regulations that regulate the restorative justice mechanism with different provisions and applied to certain criminal acts among law enforcement agencies have caused legal uncertainty in the application of restorative justice mechanisms to hate speech crimes.

Suggestion

The suggestions from the results of the research and discussion in this Dissertation research are as follows:

Encourage the immediate enactment of a new National Criminal Procedure Bill that has accommodated the restorative justice mechanism regulations by adding additional rules to the draft Criminal Procedure Bill dated March 20, 2025, including limiting the authority of the public prosecutor in Article 74 along with Articles 81 to 83 and Article 61 letter j to harmonize functional differentiation among law enforcement agencies and carry out legal reconstruction in Article 76 by providing special rules of obligation for The National Police to implement a restorative justice mechanism.

Encourage immediate changes to the Law of the Republic of Indonesia Number 2 of 2002 concerning the National Police of the Republic of Indonesia, especially by forming additional rules in Article 16, namely adding new authority for the National Police as law enforcers to carry out preventive actions against criminal acts that give rise to acts of discrimination, violence, loss of life, and/or social conflicts and adding new authority for the National Police as law enforcers to Authorized to resolve criminal acts through the mechanism of restorative justice.

FURTHER STUDY

The research can further add other contingency variables in regulating the criminal law enforcement system by the police related to hate speech in the digital space in addition to using the restorative justice mechanism.

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