RESTORATIVE JUSTICE DISCOURSE IN LEGAL POLITICS LAW NUMBER 35 OF 2009 CONCERNING NARCOTICS AGAINST REPETITION OF ADDICTS AND VICTIMS OF NARCOTICS ABUSE

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ABSTRACT

Anomalies in the law enforcement process against narcotics addicts over the implementation of rehabilitation measures—as legal politics, with the occurrence of a phenomenon where someone is caught a second time—even more so, when using narcotics in their daily lives. Therefore, Article 144 paragraph (1) of Law no. 35/2009 is a legal norm that burdens repeat offenders. Meanwhile, the regulation in PP No. 25/2011 contains a situation that allows the determination of rehabilitation measures for repeat offenders, at least, for the second time. This anomaly becomes an interesting study when the review and assessment is based on concept of restorative justice which is seen as the legal political basis for the formation of Law no. 35/2009, at the same time as a concept that provides a sense of justice for addicts and victims of narcotics abuse in Indonesia. This anomaly raises inconsistencies in legal praxis, namely in the enforcement of criminal law against addicts and victims of narcotics abusers, who have a tendency to impose criminal sanctions in prison. This study uses socio-legal research methods based on concepts in Legal and Social Sciences through a qualitative approach. Based on research on these problems, the researchers found an inconsistency in designing and formulating Law no. 35/2009 and its implementing regulations when associated with the concept of restorative justice. Where, imprisonment is always put forward by investigators in the enforcement of criminal law without interpretation.

Keywords: Restorative Justice, Narcotic, Rehabilitation.

INTRODUCTION

The principles of the rule of law, as stated in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, give rise to logical consequences, in the view of Padmo Wahyono, to create governance policies that encompass not only legislative actions but also the determination of the burden of implementing attributive authority and law enforcement. The perspective presented by Padmo Wahyono above carries significance for the implementation of executive power in the field of law enforcement, bound and limited by legal products from legislative actions themselves. In other words, according to Rocky Marbun, the establishment of a sound legal system in Indonesia through such legislative actions is a necessity in order to consider the interests of the wider society, accompanied by the limitation of absolute power of law enforcement institutions that serve as an extension of the state. Thus, according to Atip Latipulhayat, law enforcement, as a downstream element of the relationship between law and power, heavily depends on power derived from a clean and ethical political process, which will give birth to just and civilized laws.

However, referring to Ridwan's opinion, which explains that every legal system always has two types of flaws, whether intentional or inherent in its nature. These flaws are the result of the performance of legislation presented in written language, and therefore, the process of its formation is only temporary and influenced by economic, political, and socio-cultural factors. Consequently, the substance of a legal regulation often becomes "out of date." This is because the legislative actions that take place are unable to keep up with the dynamics of society, and thus, they are not proportional to the rapid and dynamic changes in society.

Another issue—in the context of the legislative system of regulations—is how the ability of legislators and drafters to interpret established legal policies is demanded in legislative action. The uniqueness of the legislative process and action on legal policy, particularly in relation to criminal law, is known as Penal Policy, where according to Marc Ancel, it aims practically to (1) provide guidance for lawmakers to formulate legislation better, (2) empower the judiciary, particularly judges, to implement the provisions of the law, and (3) serve as a guideline for government officials who have the authority to implement court decisions. Therefore, according to Muladi, the determination of Criminal Law Policy should be based on three distinctive characteristics of criminal laws: (1) defining prohibited conduct as a criminal act, (2) defining elements as components of the criminal act and their accountability model, and (3) determining the sanction threat based on the norm-addressed by the perpetrator of the criminal act.

In this study, the researcher focuses on the legal policy regarding the determination of sanctions or penalties for individuals considered to have violated Law No. 35 of 2009 concerning Narcotics. The determination of such sanctions or penalties cannot be separated from a philosophical foundation concerning the state's obligation to protect the younger generation, as stipulated in the Considerations of Letter a of Law No. 35 of 2009, which regards human resources (HR) as an asset in national development. Therefore, a policy needs to be formulated to safeguard and maintain their well-being.

Based on the aforementioned philosophical foundation, according to Heri Joko Saputro, it becomes the state's obligation to provide rehabilitation facilities, both medical and social, for drug addicts, as affirmed in Article 54 of Law No. 35 of 2009. However, Heri Joso Saputro justifies the use of Article 127 paragraph (1) of Law No. 35 of 2009 as a means of criminal punishment instead of directing efforts towards rehabilitation. On the other hand, according to Mu'amar Adfal, through his research, he affirms that Law No. 35/2009 presents different treatments for drug abusers. Drug abusers, on one hand, are perpetrators of criminal acts, but on the other hand, they are also victims. Drug abusers are designated as perpetrators of drug-related crimes through legal norms stated in Article 127 of Law No. 35/2009, which deals with the imposition of imprisonment as punishment for drug abusers. However, based on Article 54 of Law No. 35 of 2009, drug abusers are considered victims as drug addicts who require social and medical rehabilitation. Nevertheless, Mu'amar Adfal, in his research, does not examine the dialectic of this criminalization paradigm but only highlights the role of the National Narcotics Agency empirically in relation to rehabilitation implementation.

Therefore, when examined through systematic interpretation based on the construction of legal norms in Law No. 35/2009,

we can find Article 103 of Law No. 35/2009, which reduces the term "mandatory" in Article 54 of Law No. 35/2009 by introducing the term "may," granting judicial authorities the power to determine whether individuals, guilty or not guilty of drug-related crimes, should be sent to rehabilitation institutions. Furthermore, the drafters of Law No. 35/2009 attached the obligation of imposing rehabilitation in Article 127, paragraphs (2) and (3), by referring back to Article 127, paragraph (1). Although Article 127, paragraph (2), orders judges to consider Article 54, Article 55, and Article 103 of Law No. 35/2009.

However, Article 144, paragraph (1) of Law No. 35/2009 states the following:

"Anyone who commits repeated criminal offenses as referred to in Article 111, Article 112, Article 113, Article 114, Article 115, Article 116, Article 117, Article 118, Article 119, Article 120, Article 121, Article 122, Article 123, Article 124, Article 125, Article 126, Article 127 paragraph (1), Article 128 paragraph (1), and Article 129 shall have their maximum punishment increased by one-third."

At the implementation level, there is also confusion when formulating Government Regulation No. 25 of 2011 concerning the Implementation of Mandatory Reporting for Drug Addicts (PP No. 25/2011), as it does not provide clear regulations regarding repeat offenders among addicts and victims of abuse. Nevertheless, the perspective of former Head of the National Narcotics Agency, Gories Mere, affirms that PP 25/2011 provides two opportunities for rehabilitation, and for the third offense, punishment can be imposed. This view is based on Article 10, paragraph (2) of PP 25/2011, which states, "The self-reporting card, as referred to in paragraph (1), is valid for two treatment periods."

As a result of the ambiguity in these legal norms, legal practices have experienced disparities in judgments and legal uncertainties. This legal uncertainty ultimately leads to judicial decisions that produce injustice, as seen in the case between the South Jakarta District Court Judgment Number 2220/Pid.B/2007/PN.Jkt.Sel dated March 10, 2009, and the South Jakarta District Court Judgment Number 182/Pid.Sus/2015/PN.Jkt.Sel dated May 6, 2015. In the former case, Fariz Roestam Moenaf, as the Defendant in the South Jakarta District Court Judgment Number 2220/Pid.B/2007/PN.Jkt.Sel dated March 10, 2009, was found guilty of using Class I Narcotics in the form of plants, violating Article 85, letter a of Law No. 22 of 1997 concerning Narcotics. He was sentenced to 8 months in prison and fined Rp.2,000,000 (two million Indonesian rupiahs). However, in the same verdict, the Panel of Judges decided to place Fariz Roestam Moenaf in a medical rehabilitation institution for drug addicts at Melia Cibubur Hospital, for the duration of the prison sentence, resulting in his release from custody. However, in 2015, Fariz Roestam Moenaf repeated the same offense. Through the South Jakarta District Court Judgment Number 182/Pid.Sus/2015/PN.Jkt.Sel dated May 6, 2015, the Panel of Judges declared Fariz Roestam Moenaf guilty under Article 127, paragraph (1), letter a of Law No. 35 of 2009 concerning Narcotics, and sentenced him to 8 months in prison.

In relation to the above description, it becomes apparent that there is a mismatch between the implementation of legal policies in the legal system and the intersection of punitive paradigms as expected in the philosophical foundation of Law No. 35/2009 and the practice of criminal justice. Therefore, the purpose of this research is to elucidate the underlying intentions of legal policy in Law No. 35/2009 and to contribute scientifically to the existence of addicts as victims in the circulation of narcotics in Indonesia.

RESTORATIVE JUSTICE IN DIALECTICAL SPHERE

Restorative justice has a primary goal of creating "a meeting place for people." This activity aims to provide a way to repair damaged social relationships caused by crime and find peace. Restorative Justice, according to John Braithwaite, represents a stage of intellectual development throughout human history that recognizes local justice systems originating from ancient Arab, Greek, and Roman cultures. The evolution of thinking about justice is even applied to approaches addressing criminal acts such as murder. The restorative approach, which originated from the general assembly (Moots) in German society and spread throughout Europe after the fall of Rome, stems from ancient Hindu Indian civilization in the context of the Vedic Civilization with the term "the one who redeems is forgiven." It also draws influences from ancient Buddhism, Taoism, and Confucianism traditions, which are seen today mixed with Western influences in North Asia.

Restorative Justice, according to Kuat Puji Prayitno, is a philosophy, process, idea, theory, and intervention that focuses on repairing the harm caused by criminal acts. The functioning process of restorative justice is in stark contrast to the criminal law system that is applied to punish every criminal offender. In a more definitive position, Bagir Manan explains that restorative justice is a concept of punishment that is not trapped in the dichotomy of material criminal law and formal criminal law alone.

In a different version, originating from the fields of Victimology and Criminology, Daniel W. Van Ness claims that Restorative Justice originates from the realm of Victimology and Criminology. According to Daniel W. Van Ness, Restorative Justice is a new thought in the field of victimology and criminology. The restorative justice program, within the scope of victimology and criminology, recognizes the crimes that cause harm or loss to individuals and society. The perspective of Restorative Justice seeks to emphasize that the process of repair through the courts will only further harm the parties involved. Therefore, in the restorative justice program, it is desired that the parties involved take part in the repair process. The restorative justice program provides an opportunity for intersubjective communication between the victim, the offender, and the affected community in response to the committed crime. The presence of the victim, offender, and community in the restoration process is paramount in the criminal justice process. The government and the law must act professionally by fulfilling their role as facilitators of a system aimed at achieving restoration through the full participation of the victim, offender, and community.

The discourse on restorative justice in Indonesia, in the context of criminal law studies, follows the perspective of Muladi, who explains that the Restorative Justice Model is a concept advocated by followers of the abolitionist movement, who reject the punitive model of criminal punishment. The abolitionist movement proposes reparative measures as a means of punishment. Similar views are expressed by Romli Atmasasmita, who explains that followers of the "Abolitionist" movement see many problems and structural flaws in the conventional criminal justice system. Therefore, the abolitionists believe that it is realistic to change the fundamental structure of the current legal system. Furthermore, Romli Atmasasmita explains that in terms of the underlying values of the sanction system, within the framework of criminal sanctions, the values underlying the abolitionist concept are still reasonable in seeking alternative sanctions that are more appropriate and effective than imprisonment.

However, based on the diversity of the above views, the meaning of justice in the perspective of Restorative Justice is justice based on the creation of peace for both the offender, the victim, and the community. This justice model becomes the ethical foundation in the paradigm of restorative justice. Therefore, a justice model that promotes peace in its premises is known as the "Just Peace Principle" concept. The Just Peace Principle contains a postulate that justice and peace fundamentally move in a hermeneutic circle, continuously and inseparably. In the end, it brings forth the adage that peace without justice is oppression, and justice without peace is persecution or coercion. This effort is made by bringing together the victim, offender, and community with the aim of restoring the harm caused by the crime, and it is referred to as "Just Peace Principle" or "Just Peace Ethics" in the context of addressing crime in Restorative Justice.

The innovation of restorative justice offers society an alternative way to face and resolve conflicts. This concept believes it is necessary to involve individuals who are not only directly involved in a criminal act but also indirectly affected by it. The involvement of the community in the process of achieving justice based on peace is no longer abstract but very direct and concrete. The process within the just peace principle demands a condition adjusted to the involvement of the parties based on their own willingness and grounded in their respective capabilities. Therefore, their involvement should receive security guarantees in the process of dialogical communication. John Braithwaite explains that the discourse in the restorative justice program is not only about finding justice in criminal law but can also be used to address and resolve conflicts in various contexts and settings, including schools and workplaces.

Slightly different from the above perspectives, according to UNODC, restorative justice is an approach to problem-solving that can take many forms, involving victims, offenders, social networks, judicial bodies, and the community. The essence of restorative justice is based on a fundamental principle that views every criminal offender as not only violating the law but also causing harm to the victim and society in general. Therefore, any effort to find a way out of the consequences of a criminal act, if possible, should also involve various parties, including the offender, victim, and community, with the state being obliged to provide the necessary support and assistance.

Essentially, the concept of Restorative Justice is simple, as the measure of justice is not solely based on the retributive paradigm that has been prevalent until now. The criminal act that causes suffering and harm should be restored by providing support to the victim. This restoration is effective when the offender willingly, through dialogical communication and a sense of responsibility, provides assistance to the victim's family and the community when necessary. However, in theoretical terms, disagreements about the sources and origins of the concept of restorative justice still create a heated dialectic.

The self-awareness present in the reasoning patterns of the formulators and creators of Law No. 35/2009 is expressed in Consideration (c) of Law No. 35/2009, which emphasizes the awareness of the negative nature of narcotics, apart from their positive aspects in terms of scientific development and health services for society. This awareness serves as the basis for establishing a philosophical foundation, as stated in Consideration (a) of Law No. 35/2009, which emphasizes the protection of public health as one of the assets for national development.

Referring to legal politics, it can be seen that the legal politics of the Narcotics Law of 2009 are directed towards the aspect of the benefits of a reasoning pattern and argumentation in protecting the safety and health of the younger generation as a result of the increasing abuse of narcotics. Therefore, the legal politics that emerge involve shifting the retributive paradigm contained in Law No. 22/1997 to impose a form of punishment in the form of rehabilitation for addicts and victims of drug abuse. In other words, the legal politics contained in the Academic Draft of Law No. 35/2009 provide legitimacy and justification for imposing rehabilitative punishment, both medical and social.

In the academic draft, there is also an influence from Idee des Recht (Legal Ideas) that emphasizes the public benefit through the phrase "...productive and useful" in the implementation of rehabilitation.

However, the legislative action in enacting Law No. 35/2009 cannot be based solely on valid legal logic. It means that the process of formulating and designing a legal norm is not a legislative action detached from all possible influencing factors. If the validity of a concrete implementation of legal politics in the form of legislation is solely based on a straightforward thinking model grounded in legal logic, then fundamentally, the legislature has disregarded the existence of a thinking convention that has become a paradigm in criminal justice practice.

The emergence of Article 127(1) of Law No. 35/2009 seems to be based solely on Deontic Logic, which is a logic based on normative concepts and captures the logical elements of obligations, prohibitions, and permission. In legislation, it simply assumes the compliance of law enforcers with the series of legal norms in Article 54, in conjunction with Article 103 and Article 127 paragraphs (3) and (4).

In fact, Padmo Wahyono—as outlined in the early part of this research, has emphasized the state's obligation to not only establish laws but also to assert the "how" or the enforcement of these laws by law enforcers in implementing the regulations that become their responsibility to enforce. Similarly, the viewpoint of Barda Nawawi Arief explains that the process of criminal law enforcement is not significant at all, even if the Criminal Code is replaced or updated if the aspect of criminal law as a science does not undergo renewal or change. In other words, the reform of criminal law or legal substance reform is futile when not accompanied by the renewal of the scientific understanding of criminal law (legal/criminal science reform). Furthermore, Barda Nawawi Arief elaborates that besides the change in knowledge regarding criminal law, what is equally essential is the necessity for a cultural change in legal matters within society (legal culture reform) and a change in the structure or legal framework related to it (legal structure reform).

The fallacy of thinking from legislators, in elaborating the spirit of restorative justice and Idee des Recht, becomes futile when the norming of the spirit shifts the retributive paradigm, marked by the inclusion of the word "MAY" in the judicial authority vested in Article 103 of Law No. 35/2009.

The ambiguity of words in legal language, as explained by Lawrence M. Solan, often gives rise to conflicting meanings in laws regarding the correspondence between real-world events and the words used in the legislation. Since words (language) form the initial layer of living thought and the level of subjective interpretation varies, depending on the circumstances and conditions when the words (language) are used, they can give rise to misunderstandings.

The above explanation shows that the use of the word "MAY" heavily depends on the prevailing legal paradigm in the current law enforcement process. Therefore, a legal reform attempting to shift the retributive paradigm will still dominate the criminal law enforcement process related to drug offenses when linked to the protection of drug users and victims of drug abuse.

The inability of the legislators to implement the spirit of restorative justice in the 2009 Narcotics Law is also evident in the design and formulation of legal norms in Article 144 paragraph (1). The spirit of shifting the punitive paradigm through rehabilitation, as outlined in a series of Articles 54, 103, and 127 paragraphs (2) and (3), becomes marginalized when—in addition to the error in formulating the norms in Article 54—the legislators establish the concept of recidivism in Article 144 paragraph (1) in relation to Article 127 paragraph (1) of the 2009 Narcotics Law.

The existence of Article 144 paragraph (1) of Law No. 35/2009 actually confirms the superior binary opposition of the retributive paradigm contained in Article 127 paragraph (1) of Law No. 35/2009. Thus, the retributive paradigm, deeply ingrained in the practice of criminal justice, tends to overlook the meaning of restorative justice emerging in Article 127 paragraphs (3) and (4) of Law No. 35/2009. Moreover, when connected to Lawrence M. Friedmann's view that legal culture is the primary source that drives two elements in a system, namely the structure and substance of law, rules or norms expressed in writing through regulatory instruments or policy rules cannot be entirely applied in practice, even if grounded in legal logic. Instead, the interests, perceptions, attitudes, and culture of the society, reflected in their beliefs, values, thoughts, and expectations, greatly influence the implementation of law.

Lawrence's expression justifies that the functioning of legal norms heavily relies on the legal culture believed to be true in the institution of law enforcement. As a result, the shift from the retributive paradigm to restorative justice, prioritizing the rehabilitation of drug users and victims of drug abuse, is neglected. This negligence is not only due to the superiority of the existing paradigm but also because of the fallacy of thinking from the legislators in implementing legal policies into the legal system through the improper use of terms.

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