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**INSTITUTE FOR
CRIMINAL JUSTICE
REFORM**

ASSESSMENT OF INTERNAL RULES OF LAW ENFORCEMENT AGENCIES

ON RESTORATIVE JUSTICE COMPARED TO LAW
NUMBER 1 OF 2023 ON CRIMINAL LAW CODE



Assessment of Internal Rules of Law Enforcement Agencies on Restorative Justice Compared to Law Number 1 of 2023 on Criminal Law Code

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PREFACE

In support of the upcoming National Medium-Term Development Plan for 2025-2029, Indonesia has been integrating restorative justice principles into the national development agenda to build a more inclusive and responsive justice system. Based on this plan, UNODC aims to support Indonesia in optimising existing regulations and institutional frameworks by integrating restorative justice principles. This initiative mainstreams holistic support to victims, promote community healing and prevent reoffending in the future.

Over the past five years, internal regulations within law enforcement agencies have been emerging, and those regulations have explicitly incorporated restorative justice principles. Internal Regulations, such as the Attorney General's Regulation No. 15/2020 and the National Police Regulation No. 8/2021, demonstrated efforts to adopt restorative justice. Additionally, the guidelines issued by the Directorate-General of Public Courts (Badilum) are vital resources for implementing restorative justice within the judicial environment.

Following the adoption of the new Criminal Code, Law Number 1 of 2023, it has become imperative to assess the compatibility of the existing internal regulations with the new Criminal Code's framework. This Assessment Report on Indonesia Law Enforcement's Internal Regulations Concerning Restorative Justice Against the Criminal Code No. 1 of 2023 provides a comprehensive analysis of the implications of the 2023 Criminal Code on law enforcement agencies' internal regulations. Through a literature review, normative juridical analysis, and qualitative interviews, the Indonesia Judicial Research Society (IJRS) and the Institute for Criminal Justice (ICJR), in collaboration with UNODC, have identified areas requiring adjustment and formulated recommendations for legal reforms.

I commend the dedicated efforts of all stakeholders involved in this endeavour, including academics, police, prosecutors, judges, and policymakers. Your contributions have been instrumental in shaping this assessment. I would also like to extend my gratitude to IJRS and ICJR for their partnership in producing this invaluable resource. I also want to thank the Bureau of International Narcotics and Law Enforcement Affairs (INL) of the United States Department of State for their continuous support, which made this collaboration possible.

As we continue our journey towards a just and equitable society, may this report enable positive change and inspire further dialogue and action to pursue justice for all.

Jakarta, March 2024

Erik van der Veen

Head of Office and Liaison to ASEAN
United Nations Office on Drugs and Crime (UNODC) Indonesia

PREFACE

The implementation of restorative justice has been included in agenda of the 2020-2024 National Medium-Term Development Plan (RPJMN) and this mandate is subsequently followed-up by law enforcement agencies, including the Police Force, Prosecutor's Office, and Supreme Court, to fill gaps in criminal procedural law through internal rules of each agency that address provisions on restorative justice. As a response to those legal policies, the Indonesia Judicial Research Society (IIRS) has conducted several studies and policy advocacies relating to restorative justice in collaboration with various civil society organizations and Ministries/Agencies. Deriving from numerous researches and advocacies performed, it is essential to assess impacts of Law Number 1 of 2023 on Criminal Law Code to various Rules of Law Enforcement Agencies concerning Restorative Justice. Hence, the urgency of conducting the assessment of those internal rules cannot be separated from the enactment of Law No. 1 of 2023 on Criminal Law Code (KUHP 2023).

The conception of KUHP 2023 directly impacts internal rules of law enforcement agencies that contain provisions on restorative justice. This research identifies several legal frameworks relating to restorative justice that may be found in KUHP 2023, including rehabilitation, additional sentence in the form of redress, and probationary sentence that employs special conditions in terms of victims' restitution. In addition, this research also re-identifies the concept of restorative justice as a restorative process rather than restorative outcomes and gives recommendations on adjustment and harmonization of restorative justice frameworks in internal rules of law enforcement agencies to KUHP 2023. Recommendations produced from this assessment are expected to be followed-up by law enforcers and policymakers to formulate comprehensive legal policies, especially those relating to restorative justice.

We convey our gratitude to the research that due to their hard work, this research is finally concluded. We are also thankful to the United Nations Office on Drugs and Crime (UNODC) for their supports to the whole process of conducting this research. In addition, we also give our utmost appreciation to all parties that are involved in this research, either in discussions, data sampling, analysis, up to the writing of this research. Lastly, this research only constitutes a part of IIRS's commitments in reforming criminal justice policies through the expansion and improvement of quality of legal researches in Indonesia. Hopefully, this research may be beneficial for law enforcers, legal practitioners, policymakers, and the general public.

Jakarta, 12 February 2024
Adery Ardhan Saputro, S.H., LL.M.
Acting Executive Director of IIRS



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CHAPTER 01

INTRODUCTION





BACKGROUND

Restorative justice is defined as an approach that provides an opportunity for offenders to take responsibility for harms resulted by them against injured parties.¹ This approach serves as a recognition that criminal acts committed by offenders also inflict harms against victims and the community besides from those being classified as violations of the law.² Howard Zehr mentions that restorative justice constitutes a response to limitations and failures of the criminal justice system that is deemed to fail in upholding fairness.³ The current system is implemented by parties that represent offenders and the state as the representative of victims and they are mediated by judges.⁴ Involvement of victims and the community is very minimal in such process.⁵ In reference to restorative justice, The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters describes that restorative justice is regarded as a complementary variable to the criminal justice system.⁶ Restorative justice may also be implemented in stages of the criminal justice system.⁷ This indicates processes that are in line with restorative justice are not limited only to adjudication process, but it may also be involved in stages before and after the adjudication process.

In Indonesia, restorative justice is incorporated as an agenda in the 2020-2024 National Medium-Term Development Plan (RPJMN 2020-2024), namely through the implementation of Restorative Justice in law enforcement through the agenda of Reinforcement of Politics, Law, Defense, and Security (Polhukhankam) Stability and Transformation of Public Services.⁸ In the RPJMN, Restorative Justice is implemented through

¹ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, (Wina: United Nations, 2020), p. 4.

² *Ibid.*

³ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice*, (Intercourse: Good Books, 2002), p. 3.

⁴ *Ibid.*, p. 28

⁵ *Ibid.*

⁶ United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N.Doc. E/2000/INF/2/Add.2 at 35 (2000).

⁷ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 41.

⁸ Indonesia, *Regulation of the President of the Republic of Indonesia Number 18 of 2020 on the 2020-2024 National Medium-Term Development Plan*, Appendix 1 – Narrations of RPJMN 2020-2024, p. VIII. 11.

enforcement optimization of existing frameworks in laws and regulations that support restorative justice approach. This approach also involves optimization of roles of customary (*adat*) institutions and other relevant institutions that support alternative dispute resolutions. In addition, this approach emphasizes provision of rehabilitations, compensations, and restitutions to victims, including victims of human rights violations.⁹

The mandate for incorporating restorative justice in RPJMN should be followed-up with including restorative justice in Criminal Procedural Law Code, however, the mandate in RPJMN is implemented in various internal rules of law enforcement agencies that adopt the restorative justice approach. Several regulations that adopt the restorative justice approach by explicitly mentioning it in their titles are, among others, Regulation of the Attorney General Number 15/2020 on Cessation of Prosecution Using Restorative Justice ('Perja 15/2020'), Regulation of the Indonesian National Police Number 8/2021 on Handling of Criminal Acts Using Restorative Justice ('Perpol 8/2021'), as well as Decree of the Director General of General Judiciary Body of the Supreme Court Number 1691/DJU/SK/PS.00/12/2020 on Guideline for Implementing Restorative Justice within the Scope of General Judiciary.¹⁰

As the 2023 Criminal Law Code (KUHP 2023) promulgated on 2 January 2023, there are several new frameworks compared to KUHP that adopt restorative justice principles, including rehabilitation, additional penalty in the form of redress (*ganti rugi*), and probationary sentence (*pidana pengawasan*) with special conditions in terms of victims' restitution. As a logical consequence of hierarchy in laws and regulations, certainly there must be an adjustment made to implementing regulations to make them conform to superior regulations. Hence, an assessment to evaluate the compatibility of each internal rule issued by those institutions with KUHP 2023 as the superior regulation is necessary. The assessment is expected to identify the needs for adjusting or repealing those regulations due to the enactment of KUHP 2023 by mapping those regulations. In the future, results of this assessment may also contribute as inputs to the drafting of revision of Law No. 8 of 1981 on the Criminal Procedural Law Code (KUHP).

⁹ *Ibid.*, p. VIII. 15.

¹⁰ Decree of General Judiciary Body (Badilum) 1691/2020 as deferred by Decree of the Director General of Badilum Number 1209/DJU/ART.00/12/2020.



RESEARCH QUESTIONS

Questions for this research are as follows:

1. What are internal rules of law enforcement agencies that address restorative justice in Indonesia?
2. What adjustments need to be made to internal rules of law enforcement agencies that address restorative justice after the enforcement of KUHP 2023?



RESEARCH PURPOSES

1. Identifying internal rules of law enforcement agencies that address restorative justice in Indonesia.
2. Identifying adjustments that need to be performed to internal rules of law enforcement agencies that address restorative justice after the enforcement of KUHP 2023.



RESEARCH METHODS

This research is conducted by using inter-disciplinary legal approach through the mapping and analysis of existing provisions in internal rules of law enforcement agencies with existing provisions available in KUHP 2023, supported by the performance of literature reviews to delve into the concept of restorative justice from various literatures written and researched by experts. In addition, in-depth interviews are performed to gather diverse perspectives from various related parties in relation to issues that are researched.

As for interviews, this research involves myriad groups, including academics, prosecutors, and judges. Such variation is expected to provide a comprehensive illustration on impacts from the implementation of KUHP 2023 within the context of restorative justice in various internal rules of law enforcement agencies. The performance of in-depth interviews is expected to dig profound ideas and opinions from respondents as valuable information sources in elevating the analysis and to generate substantial recommendations. The table below lists interviewees in this research:

01 Dr. Erni Mustikasari, S.H., M.H

“Functional Prosecutor at the Attorney General’s Office of the Republic of Indonesia”

Interview Dates: 20 September 2023

02 Sugeng Riyono, S.H., M.Hum.

“Appellate Judge at the Appellate Court of DKI Jakarta”

Interview Dates: 20 September 2023

03 Dr. Surastini Fitriasih, S.H., M.H.

“Academic from the Faculty of Law of Universitas Indonesia”

Interview Dates: 21 October 2023

04 Prof. Dr. Edward Omar Sharif Hiariej, S.H., M.Hum.

“Criminal Law Professor from the Faculty of Law of Universitas Gajah Mada and Vice Minister of Law and Human Rights”

Interview Dates: 06 November 2023

05 Prof. Dr. Harkristuti Harkrisnowo, S.H., MA., Ph.D

“Criminal Law Professor from the Faculty of Law of Universitas Indonesia”

Interview Dates: 24 November 2023

All interviews conducted focus on questions relating to restorative justice issues and their connection with the enforcement of KUHP 2023, types of internal rules of law enforcement agencies relating to restorative justice issues, as well as impacts and mitigations that need to be performed to internal rules of agencies mentioned above due to the enforcement of new KUHP.



WRITING STRUCTURE

Adapun sistematika penulisan penelitian ini adalah sebagai berikut:

CHAPTER 01 INTRODUCTION

This chapter consists of 5 (five) sub-chapters, namely: background, identification of issues in the form of research questions; research purposes; research methods; and writing structure.

CHAPTER 02 RESTORATIVE JUSTICE IN INDONESIA AND ITS REGULATION IN INTERNAL RULES OF LAW ENFORCEMENT AGENCIES

This chapter consists of 2 (two) sub-chapters, namely: restorative justice (definition, outcomes, and process); and identification of internal rules of Indonesian law enforcement agencies that address restorative process.

CHAPTER 03 ASSESSMENT OF THE ENFORCEMENT OF KUHP 2023 TO INTERNAL RULES OF LAW ENFOCERS THAT ADDRESS RESTORATIVE JUSTICE

This chapter consists of 2 (two) sub-chapters, namely: provisions on restorative justice in KUHP 2023 as the basis for analysis; and analysis of impacts from the enforcement of KUHP 2023 to internal rules of Indonesian law enforcement agencies on restorative justice as the object of assessment.

CHAPTER 04 CONCLUSION AND RECOMMENDATIONS

This chapter consists of 2 (two) sub-chapters, namely: research conclusion; and recommendations from researchers relating to legal reforms that need to be performed.



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CHAPTER 02

RESTORATIVE JUSTICE IN INDONESIA AND ITS REGULATION IN INTERNAL RULES OF LAW ENFORCEMENT AGENCIES





RESTORATIVE JUSTICE: DEFINITION, OUTCOMES, AND PROCESS

Restorative justice is defined as an approach that provides alternative remedies for offenders, victims, and the community in repairing harms resulted by criminal acts and upholding fairness from committed criminal acts.¹¹ This approach is performed through participation of offenders and victims as core stakeholders, and in several situations, it may involve public participation in resolving¹² criminal acts and impacts resulted from those criminal acts.¹³ Victims are given the space to safely participate in resolving situations experienced by them, and offenders are given the opportunity to take responsibility for harms resulted from their actions.¹⁴ Within this context, the community at least have two roles: firstly, supporting and encouraging offenders to successfully perform their responsibility in repairing harms suffered by victims and the general public due to their committed criminal acts;¹⁵ secondly, supporting victims to have a level playing field when facing offenders.¹⁶ Meetings between offenders and victims in restorative justice process may be held through various methods that may also involve impartial third parties to facilitate the process.¹⁷

The retributive justice perspective in the conventional criminal justice system deems offenses as violations of the law and the state.¹⁸ This conventional perspective has series of consequences against positions of offenders and victims in the criminal justice system. For decades, the role of

¹¹ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 4.

¹² It needs to be noted that 'resolving criminal acts' in this context does not refer to cessation of prosecution process or elimination of criminal liability or sentencing.

¹³ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice*, p. 11.

¹⁴ *Ibid*, p. 3.

¹⁵ *Ibid*, p. 28

¹⁶ John Braithwaite, "Principles of Restorative Justice" dalam A. Von Hirsch, et. al., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms*, (Oxford: Hart Publishing, 2003), p. 9. Unequal power relation constitutes a structural phenomenon in restorative process, in this event, there are several measures that may be taken to minimize the occurrence of unequal power relation, including through circle or conferencing process. If the unequal power relation prevails in a very serious condition, this process may involve the community in the form of advocacy group.

¹⁷ Kathleen Daly, *What Is Restorative Justice? Fresh Answers to a Vexed Question*, Victims & Offenders, Vol. 11(1), (December 2015): 1-21, p. 20.

¹⁸ *Ibid*, p. 17.

victims as parties that are injured by offenses is neglected due to limited space for victims to participate by informing restitution needs from offenses committed against them.¹⁹ On the other hand, the opportunity for offenders to take direct responsibility for their actions is also blocked, causing offenders to always bear negative public stigma as violators, therefore, the reintegration process of offenders into the community becomes difficult.²⁰ From the perspective of restorative justice, offenses are identified as violations against victims (individuals) and inter-personal relationship.²¹ This restorative justice approach attempts to provide alternative responses to offenses by creating obligations for offenders to take responsibility to recover harms suffered by victims resulted from offenses committed by offenders.²²

Although the development of restorative justice approach is tied with critics toward the conventional criminal justice system that adopts retributive justice and does not employ victims' perspective, it must be stressed that restorative justice does not act as the "adversary" to retributive justice, instead, restorative justice must be deemed as a complementary to the conventional justice system itself.²³ This view is in line with the preamble of United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters stating that restorative justice approach encompasses series of flexible measures to be adapted in order to *complement* the existing conventional criminal justice system.²⁴ Furthermore, in principle, restorative justice may also be implemented in every stage of criminal justice system (pre-adjudication, adjudication, and post-adjudication), and indirectly, the restorative justice approach consequently shall not replace, erase, or negate sentencing (retributive)²⁵.

¹⁹ James Dignan, *Understanding Victims and Restorative Justice*, (Berkshire: Open University Press, 2005) p. 95.

²⁰ *Ibid*, p. 102.

²¹ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice*, p. 17.

²² *Ibid*.

²³ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 23.

²⁴ See preamble of United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N.Doc. E/2000/INF/2/Add.2 at 35 (2000). 'Noting that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and that complement those systems, taking into account legal, social and cultural circumstances.'

²⁵ Arianda Lastiur Paulina, Aisyah Assyifa and Matheus Nathanael, "Kasus Mario Dandy: Salah kaprah penerapan keadilan restoratif – pemulihan korban tidak boleh menghentikan proses pidana pelaku" <https://theconversation.com/kasus-mario-dandy-salah-kaprah-penerapan-keadilan-restoratif-pemulihan-korban-tidak-boleh-menghentikan-proses-pidana-pelaku-202614>, accessed on 15 February 2024.

In light of the above description, restorative justice principles or approaches contain the following elements at minimum:²⁶

- a. focus on harms caused by offenders;
- b. voluntary participation from parties that are (most) impacted or harmed by offenses, including victims, offenders, and in certain conditions also include supporters, family, community members that have interests, and suitable professionals;
- c. preparation by parties and facilitators who are practitioners trained on issues relating to restorative justice;²⁷
- d. dialogues between offenders and victims to discuss offenses that are committed, impacts resulted from those offenses, and how to fulfill victims' needs and an agreement on methods to retribute or repair results from committed offenses;
- e. results of restorative process may vary, and those results may cover expressions of regret, confession, offenders' responsibility, and commitments to perform remedies for victims or the community;
- f. offers of supports to victims to help the restitution, and to offenders to assist the reintegration and cessation of any further harmful acts.

Restorative justice elements mentioned above are incorporated into restorative outcomes²⁸ that are obtained from restorative process.²⁹ Restorative results (in general) refer to *restitution*,³⁰ either in the form of recovery from tangible harms suffered by victims, and/or recovery of interpersonal relationship in the public that was damaged due to impacts

²⁶ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 4.

²⁷ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 56. Preparation of the parties in this context takes form as a stage before restorative process commences to inform their rights, characteristics of restorative process, and risks for victims, offenders, or other participants. This stage must address assessments of willingness (or motivation) of the parties to undergo restorative process.

²⁸ United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N.Doc. E/2000/INF/2/Add.2 at 35 (2000). Restorative outcomes are generated from restorative processes.

²⁹ United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N.Doc. E/2000/INF/2/Add.2 at 35 (2000). Restorative process refers to a process where victims, offenders, and/or individuals or other members of the community that are impacted by offenses actively participate in the resolution of disputes arising from those offenses, and often times, assisted by impartial third parties.

³⁰ For numerous times, it must be stressed that restorative outcomes should lead to restitution, not cessation of prosecution, cessation of prosecution process, or elimination of criminal liability or sentencing.

from offenses. Restorative results in the form of restitution may be achieved through restorative process, among others:³¹

a. Victim–Offender Mediation (VOM)

Victim–Offender Mediation (VOM) is a restorative dialogue forum that meets offenders with victims, either directly or indirectly, to address impacts from offenses that are committed and restitution plans.³² This dialogue is facilitated by impartial facilitators that have received trainings on performing VOM.³³ In certain conditions, VOM is also open to participation by third parties that are relevant to the case, for instance, family or the community. Results of VOM take form as agreements that help offenders and victims to repair impacts resulted from committed offenses.³⁴

b. Restorative Conferences

Similar with VOM, but restorative conference mechanism involves more parties in addition to victims and offenders. Participants in restorative conferences include parties that are impacted by committed offenses, for instance, family members, friends, community representatives, and in certain situations may involve police or other independent third parties.³⁵ Restorative conferences aim to help offenders realizing that their committed offenses not only impact victims, but also victims’ family and friends. Through restorative conferences, offenders are expected to fix relationships that are impacted by their committed offenses.³⁶

c. Circles

In general, circles may ease the sentencing process and overcome public concerns on crimes through reinforcement of community participation and empowerment of victims, offenders, and members of the community in the process of seeking solutions to impacts resulted from committed offenses. Within the context of sentencing circle, those meetings may generate recommendations of sentences to be imposed by courts.³⁷ In this regard, judges are not bound to recommendations

³¹ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 25.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 27.

³⁶ *Ibid.*

³⁷ *Ibid.*, p. 32.

produced by sentencing circle, but the sentencing circle plays a pivotal role in providing relevant information to the case.³⁸

Comparison of parties involved in each restorative process

Restorative Process	Involved Parties
Victim-Offender Mediation	Offenders and victims, facilitated by impartial facilitators
Conferences	Offenders, victims, and impacted third parties (family, community, and others)
Circles (Sentencing circles)	Offenders, victims, and the public

Comparison of Goals in each restorative process

Restorative Process	Goals
Victim-Offender Mediation	Fixing impacts resulted from offenses
Conferences	Fixing impacts and damaged relationships resulted from offenses in broader sense
Circles (Sentencing circles)	Encouraging a proportional sentencing process

Comparison of the Outcomes involved in each restorative process

Restorative Process	Outcomes
Victim-Offender Mediation	Restitution
Conferences	Restitution
Circles (Sentencing circles)	Recommendations of sentences that will be imposed by courts

³⁸ *Ibid.*



IDENTIFICATION OF INTERNAL RULES OF INDONESIAN LAW ENFORCEMENT AGENCIES THAT ADDRESS RESTORATIVE PROCESS

As described in the previous section, restitution of justice as a restorative result may be achieved through restorative process, namely: VOM, Restorative Conferences, and Circles.³⁹ This section will outline several internal rules of law enforcement agencies in Indonesia that address **restorative process (restitution)**. Internal rules of law enforcement agencies mentioned above refer to regulations issued by institutions or agencies established under laws as referred to in Article 8 paragraph (1) of Law Number 12 of 2011 on Establishment of Laws and Regulations (Law 12/2011).⁴⁰ With that definition in mind, several internal rules of law enforcement agencies that address restorative process have been identified, among others:

- a. Regulation of the Attorney General Number Per-006/A/J.A/04/2015 on Guideline for Performing Diversions During Prosecution (Perja 6/2015).** This guideline is intended as a reference for Public Prosecutors in resolving juvenile criminal cases during prosecution, namely by carrying out obligations to strive for out-of-court resolution process through diversions using the restorative justice approach. Definition of diversion under Perja 6/2015 is consistent with the definition employed under Law Number 11 of 2012 on Juvenile Criminal Justice System (SPPA Law), namely the diversion of resolution of juvenile cases from the criminal justice process to out-of-court process.⁴¹ The restorative justice mechanism in the diversion process addressed in this Perja may be found in stages of diversion deliberation process up to performance of diversion agreements. In the diversion deliberation process, Public Prosecutors act as facilitators that provide opportunities to the parties to give arguments, suggestions, and/or responses to offenses that are allegedly committed by Children; results from examining correctional reports; results of social reports; and/or case resolution forms and methods.⁴² If an agreement is reached in the diversion deliberation process, Public Prosecutors will prepare and incorporate them into diversion agreements

³⁹ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 25.

⁴⁰ Indonesia, Law Number 12 of 2011 on Establishment of Laws and Regulations, LN No. 82 of 2011, TLN No. 5234, Art. 8 paragraph (1).

⁴¹ Indonesia, Attorney General's Office, Regulation of the Attorney General No. PER-066/A/JA/04/2016 on Guideline for Performing Diversions during Prosecution, Appendix p. 2.

⁴² *Ibid*, p. 7.

that are signed by the parties. These diversion agreements then submitted to local Head of the District Prosecutor's Office and Chief of the District Court to be later inputted into a diversion register.⁴³ The diversion process set out in this Perja is seemingly in line with VOM that provides a restorative dialogue forum mechanism that meets offenders with victims to address impacts from offenses committed and restitution plans as explained above. According to such explanation, Perja 6/2015 contains VOM mechanism as a form of procedural law mechanism in relation to restorative justice.

b. Regulation of the Supreme Court Number 4 of 2014 on Guideline for Performing Diversions in Juvenile Criminal Justice System (Perma 4/2014). This Perma contains provisions on diversion deliberation process between the parties involving children and their parents/guardians, victims, and/or their parents/guardians, correctional counselors, professional social workers, community representatives and other parties that are involved.⁴⁴ Judges that are appointed by the chief of court that handle the juvenile case act as diversion facilitators.⁴⁵ In the diversion deliberation process, diversion facilitators provide opportunities for children to give testimonies relating to indictments; parents/guardians to give statements relating to children's acts and forms of resolutions that are expected; and victims/child victims/parents/guardians to give responses and forms of resolutions that are expected.⁴⁶ Community representatives and other parties may also be involved by diversion facilitators to provide supporting information to resolve the case. Results of this diversion deliberation process are then incorporated into diversion agreements.⁴⁷ According to this description, it may be concluded that Perma 4/2014 contains VOM mechanism that provides a restorative dialogue forum by meeting offenders and victims, as well as related parties to address impacts from committed offenses and their restitution plans as a form of procedural law mechanism relating to restorative justice.

⁴³ *Ibid*, p. 9.

⁴⁴ Indonesia, Supreme Court, Regulation of the Supreme Court No. 4 of 2014 on Guideline for Performing Diversions in Juvenile Criminal Justice System, Art. 1 point 1.

⁴⁵ *Ibid*, Art. 1 point 2.

⁴⁶ *Ibid*, Art. 5 paragraph (4).

⁴⁷ *Ibid*, Art. 6.

c. Regulation of the Prosecutor’s Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice (Perja 15/2020). Perja 15/2020 addresses an amicable resolution between victims and offenders facilitated by public prosecutors.⁴⁸ This amicable resolution may involve family of victims/suspects, community figures or representatives, and other related parties. If an amicable resolution is reached, any fulfillment of obligations is incorporated into minutes of amicable resolution.⁴⁹ This amicable resolution is interpreted as an out-of-court case resolution (*afdoening buiten process*), therefore, the case will be closed in legal interests by public prosecutors.

In addition to internal rules of law enforcement agencies mentioned above, there are other internal rules of law enforcement agencies that brand themselves as regulations that implement restorative justice, even though those regulations do not address any restorative process as contained in regulations listed above. Those regulations include as follows:⁵⁰

a. Guideline of the Attorney General Number 18 of 2021 on Resolution of Narcotics Offenses Case Handling through Rehabilitations by Using Restorative Justice Approach as Implementation of *Dominus Litis* Principle by Prosecutors (Guideline 18/2021). This guideline explicitly mentions the phrase “Restorative Justice” in its title, but there is no restorative process found in that framework. Nevertheless, this regulation will be reviewed further because there are “Restorative Justice” provisions contained in it.

b. Regulation of the Police Force Number 8 of 2021 on Handling of Offenses Using Restorative Justice (Perpol 8/2021). This Perpol specifically mentions “Restorative Justice” in its title that is manifested in the form of an amicable resolution between both parties and fulfillment of victims’ rights and offenders’ responsibilities.⁵¹ This amicable resolution is proven with resolution agreements that are signed by the

⁴⁸ Indonesia, Attorney General’s Office, Regulation of the Prosecutor’s Office No. 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 7 in conjunction with Art. 9 paragraph (2).

⁴⁹ *Ibid*, Art. 10 paragraph (1) in conjunction with Art. 12 paragraph (1).

⁵⁰ As a side note, establishment of these regulations cannot be separated from the direction of strategic policies in the 2020-2024 National Medium-Term Development Plan (RPJM). That RPJM mentions that one of strategies to improve the criminal justice system is through the implementation of restorative justice approach. This strategy is implemented through the optimization of use of existing regulations in laws and regulations that support restorative justice, optimization of roles of *adat* institutions and institutions relating to alternative dispute resolution, prioritizing efforts to provide rehabilitations, compensations, and restitutions for victims.

⁵¹ Indonesia, Indonesian National Police, Regulation of the Police Force No. 8 of 2021 on Handling of Offenses Using Restorative Justice, Art. 6 in conjunction with Article 4.

parties as addressed in Article 6 paragraph (2) of Perpol 8/2021.⁵² Resolution agreements then serve as prerequisites for ceasing preliminary investigation and investigation of offenses. This process that is considered as handling of offenses using restorative justice according to Perpol 8/2021. However, this mechanism is not in line with the restorative process that demands the state, through its criminal justice system, to provide a dialogue forum between offenders and victims as previously elucidated. Hence, the restorative justice mechanism addressed in Perpol 8/2021 needs to be studied further.

c. Draft Regulation of the Supreme Court (Perma) on Guideline for Adjudicating Criminal Cases Using Restorative Justice. Although it is not yet promulgated, this draft Perma is important to be discussed because it addresses resolution agreements and probationary sentences.⁵³ Resolution agreement mechanism outlined in this draft Perma needs to be studied on its conformity with the restorative process explained in the previous section. Furthermore, although this draft Perma contains provisions on probationary sentences, this research gives recommendations to amend requirements of probationary sentences to be in accordance with KUHP 2023. As a side note, KUHP 2023 has issues relating to enforcement of probationary sentences in connection with violations of general conditions. Those issues will be elaborated further in the next section.

In light of internal rules of law enforcement agencies mentioned above, there are several notes given. *Firstly*, although provisions in those regulations fall into procedural law sector,⁵⁴ those provisions are not established on the level of laws, instead, they are addressed under internal rules of law enforcement agencies. Meanwhile, Article 3 of the Criminal Procedural Law Code (KUHAP) states that “Criminal justice process is performed according to methods addressed under this law”. Those provisions denote that procedural law must be established under laws.⁵⁵

⁵² *Ibid*, Article 6 paragraph (2).

⁵³ Article 17 of this draft Regulation of the Supreme Court states that, ‘Resolution agreements and/or willingness of Defendants to take responsibility for harms and/or needs of Victims resulted from offenses constitute grounds to alleviate sentences and/or considerations to impose conditional/probationary sentences in accordance with prevailing laws and regulations.’

⁵⁴ Indonesia, Law No. 8 of 1981 on Criminal Procedural Law Code, KUHAP 1981, LN No. 76 of 1981, TLN No. 3209, Art. 3.

⁵⁵ Article 1 of KUHAP is actually not being explicit regarding this. Article 1 of KUHAP must be construed that the criminal procedural law may only be implemented based on laws (without using the word ‘this’). Compared to Article 1 of Dutch *Wetboek van Strafvordering* stating that:

Secondly, internal rules of law enforcement agencies mentioned above both have upside and downside. The upside is that these internal rules may fill loopholes (*rechtvacuum*), especially in criminal procedural law that has not contained any provisions on restorative process, namely relating to VOM or penal mediation. However, their downsides are: those internal rules are sectoral-based, not victim-oriented, and employ time limits for victims' restitution. Separate regulations within the internal scope of the Police Force, Prosecutor's Office, and Supreme Court consequently result in no integration of policies among law enforcement agencies in relation to restorative justice. The definition of restorative justice in various internal rules of those law enforcement agencies is not oriented to victims' restitution, but it is just treated as an out-of-court alternative dispute resolution. This condition may be inferred from Perpol 8/2021 stating that resolution agreements between offenders and victims serve as a requirement to cease investigation.⁵⁶ In the same vein, Perja 15/2020 addresses that minutes of resolution agreements serve as a requirement to cease prosecution.⁵⁷ On the other end, the limitation of period for amicable resolutions and fulfillment of obligations relating to victims' restitution to 14 (fourteen) days at maximum, as addressed in Perja 15/2020, makes victims' restitution efforts difficult to be realized.

Strafvordering heeft alleen plaats op de wijze bij de wet voorzien. See Andi Hamzah, *Hukum Acara Pidana Indonesia*, Revised Edition, 5th print, (Jakarta: Sinar Grafika, 2006), p. 1.

⁵⁶ Article 2 paragraph (5) in conjunction with Article 6 of Perpol No. 8/2021.

⁵⁷ Article 5 paragraph (6) of Perja No. 15/2020.



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CHAPTER 03

ANALYSIS OF IMPACTS FROM THE ENFORCEMENT OF KUHP 2023 TO INTERNAL RULES OF INDONESIAN LAW ENFORCEMENT AGENCIES RELATING TO RESTORATIVE JUSTICE





RESTORATIVE JUSTICE PROVISIONS IN KUHP 2023 AS BASIS FOR ANALYSIS

KUHP 2023 not explicitly addresses norms relating to restorative justice. Nevertheless, at least there are 2 (two) new provisions in KUHP 2023 that are oriented to retribute impacts resulted from offenses as restorative outcomes. These new provisions will be used as basis for analysis to evaluate internal rules of law enforcement agencies relating to restorative justice, as mentioned in the previous section.

a. Additional Sentence in the Form of Redress Payment (Art. 94 in conjunction with Arts. 81–83 of KUHP 2023)

As mentioned in the previous section, restorative justice programs have orientations or outcomes in the form of full restitution. An example of restitution within the context of tangible harms is through redress payment made by offenders to victims for impacts resulted from their offenses. KUHP 2023 sets out types of additional sentences, one of them is an additional sentence in the form of obligation for convicts to make redress payment to victims or their heirs.⁵⁸ The mechanism to pay the redress payment obligation may also be performed in installments.⁵⁹ KUHP 2023 also states that in the event that the redress payment cannot be settled within the determined period, assets or incomes of convicts may be seized and auctioned by Prosecutors to pay fines that are not (or have not been) paid in full.⁶⁰ Subsequently, if seizures and auctions of those assets or incomes are not feasible to be performed, or yields from auctions are still insufficient to settle the redress payment, then the additional sentence in the form of redress payment may be substituted with imprisonment, probationary, or social work sentences proportionally by taking any partial amount of redress payment that has been paid (if any) into considerations.⁶¹

⁵⁸ Indonesia, Law No. 1 of 2023 on Criminal Law Code, KUHP 2023, LN No. 1 of 2023, TLN No. 6842 Art. 66 paragraph (1) letter b.

⁵⁹ *Ibid*, Art. 94 paragraph (2) in conjunction with Art. 81 paragraph (2).

⁶⁰ *Ibid*, Art. 94 paragraph (2) in conjunction with Art. 81 paragraph (3).

⁶¹ *Ibid*, Art. 94 paragraph (2) in conjunction with Art. 82 and Art. 83.

As a side note, the additional sentence in the form of redress payment is identical with financial restitution recognized in Law Number 31 of 2014 on Witnesses and Victims Protection (LPSK Law). Under the LPSK Law, financial restitution is defined as “redress paid to victims or their family by offenders or third parties”.⁶² The difference, however, is that the LPSK Law also accommodates financial restitution applications after a final and binding decision has been imposed (post-sentencing restitution or post-adjudication restitution).⁶³ Restitution rights for victims of offenses encompass rights to:⁶⁴

- compensation for loss of assets or incomes;
- compensation for harms resulted from injuries that are directly related to impacts from offenses; and/or
- reimbursement of medical and/or psychological treatment fees.

In its implementation, financial restitution in courts is also acknowledged in Perma 1/2022, containing two forms of financial restitution applications, namely financial restitution applications before court decisions acquire the final and binding status and financial restitution applications after court decisions acquire the final and binding status. Procedures for applying financial restitutions before court decisions acquire the final and binding status may still performed by victims through LPSK (Witnesses and Victims Protection Agency), investigators, or public prosecutors.⁶⁵ If financial restitution applications are filed before the assignment of case briefs to the court, Public Prosecutors must attach financial restitution applications to indictments and include applications into case briefs.⁶⁶ However, if victims do not file financial restitution applications before the assignment of case briefs to the court and victims are summoned to appear before the court as witnesses, judges must inform victims’ rights to obtain financial restitution that may be obtained through two forms of applications, namely before Public Prosecutors perform the prosecution or after court decisions acquire the final and binding status.⁶⁷

⁶² Indonesia, Law on Amendment to Law Number 12 of 2006 on Witnesses and Victims Protection, Law No. 31 of 2014, LN No. 293 of 2014, TLN No. 5602, Art. 1 point 11.

⁶³ *Ibid*, Art. 7A paragraph (3).

⁶⁴ *Ibid*, Art. 7A paragraph (1).

⁶⁵ Indonesia, Supreme Court, Regulation of the Supreme Court on Procedures for Resolving Applications and Granting Restitutions and Compensations to Victims of Offenses, No. 1 of 2022, Art. 8 paragraph (1).

⁶⁶ *Ibid*, Art. 8 paragraph (3).

⁶⁷ *Ibid*, Art. 8 paragraph (4).

When financial restitution applications are filed before court decisions acquire the final and binding status, judges will examine financial restitution application documents and give legal assessments relating to proofs submitted to the court. In relation to that, judges need to consider them in their decisions.⁶⁸ Furthermore, considerations in those decisions must contain a description on statements whether financial restitution applications are granted or refused; reasons for granting or refusing financial restitution applications, either partially or wholly; and amount of financial restitution that must be paid by defendants or defendants' parents in the event that defendants are children, and/or third parties.⁶⁹

As for filing financial restitution applications after court decisions acquire the final and binding status, those applications may be filed to the court either directly or through LPSK.⁷⁰ The deadline for filing financial restitution applications is 90 (ninety) days at maximum from the day when applicants aware that court decisions have acquired the final and binding status.⁷¹ Subsequently, the Chief of the Court will appoint Judges to adjudicate filed financial restitution applications no later than 1 (one) day after those applications are declared to be complete.⁷² Applications that are filed will be decided in the form of stipulations and the court must decide those applications no later than 21 (twenty-one) days from the first trial date.⁷³ If financial restitution applications are filed through LPSK, copies of those court stipulations are forwarded to LPSK no later than 7 (seven) days from the date when stipulations are read.⁷⁴

b. Probationary Principal Sentence with Special Conditions in Terms of Victims' Restitution (Art. 76 paragraph (3) letter a of KUHP 2023)

Similar with the previous point, to realize restorative outcomes in the form of restitution, KUHP 2023 addresses probationary sentence as a form of principal sentences.⁷⁵ In connection with restorative justice, not all models of probationary sentence have orientations to restorative outcomes in the form of victims' restitution. For instance, the probationary sentence that is imposed only with general conditions does

⁶⁸ *Ibid*, Art. 8 paragraph (11).

⁶⁹ *Ibid*, Art. 8 paragraph (12).

⁷⁰ *Ibid*, Art. 12 paragraph (1).

⁷¹ *Ibid*, Art. 12 paragraph (2).

⁷² *Ibid*, Art. 13 paragraph (4).

⁷³ *Ibid*, Art. 14 paragraph (9).

⁷⁴ *Ibid*, Art. 15 paragraph (1).

⁷⁵ Law No. 1 of 2023 on Criminal Law Code (KUHP), Art. 65 paragraph (1) letter c.

not have any orientations to victims' restitution.⁷⁶ Similarly with the probationary sentence that is imposed only with special conditions that require convicts to perform or refrain from performing an act (obligation to do certain conducts).⁷⁷ The model of probationary sentence that has orientations to restorative outcomes is probationary sentence with special conditions that require convicts to recover all or partial harms resulted from offenses committed by them during the probationary period.⁷⁸ Using this model, courts have imposed obligations on convicts to recover victims' harms resulted from offenses committed by offenders.

There is a principal difference between conditional sentence in KUHP with probationary sentence in KUHP 2023. In KUHP, conditional sentence does not constitute a principal sentence, but it functions as a method to perform principal sentences.⁷⁹ It means that judges still impose principal sentences in their decisions, imprisonment sentence for example. However, the enforcement of that imprisonment sentence is deferred for a temporary period that is referred to as probationary period. The model of deferring the enforcement of imprisonment sentence during the probationary period is referred to as conditional sentence. KUHP 2023 does not recognize probationary sentence merely as a method to enforce principal sentences, on the contrary, it is classified a form of principal sentences.⁸⁰

Asides from the above principal difference, there is another difference in terms of requirements for judges to impose conditional sentence compared to probationary sentence. KUHP addresses that the conditional sentence may be imposed in the event that judges impose imprisonment or confinement (*kurungan*) sentence of 1 (one) year at maximum.⁸¹ Hence, regardless of types of offenses and how high maximum punishments available for those offenses, as long as judges impose imprisonment or confinement sentence no longer than 1 (one) year, judges may exercise conditional sentence to defer the enforcement of imprisonment or confinement sentence. For instance,

⁷⁶ *Ibid*, Art. 76 paragraph (2).

⁷⁷ *Ibid*, Art. 76 paragraph (3) letter b.

⁷⁸ *Ibid*, Art. 76 paragraph (3) letter a.

⁷⁹ W.P.J. Pompe, *Handboek van het Nederlandse Strafrecht*, (Zwolle: N.V., Uitgevers-Maatschappij, W.E.J. Tjeenk Willink, 1959), pp. 394–395.

⁸⁰ *Ibid*, Art. 65 paragraph (1) letter c.

⁸¹ KUHP, Art. 14a paragraph (1).

even though premeditated murder offense is punishable with imprisonment up to 20 (twenty) years,⁸² if judges handling the case plan to impose imprisonment sentence no longer than 1 (one) year, judges have the authority to impose a conditional sentence. In contrast, KUHP 2023 states that judges only have the authority to impose probationary sentence on defendants that commit offenses punishable with imprisonment of 5 (five) years at maximum.⁸³ Using the same example, under KUHP 2023, judges have no authority to impose a probationary sentence against premeditated murder cases, even though judges handling the case plan to only impose imprisonment sentence under 1 (one) year.

In addition to 2 (two) provisions above, there are 2 (two) new provisions in KUHP 2023 that need to be elaborated as basis of analysis because they have effects to internal rules of law enforcement agencies relating to restorative justice, especially effects to regulations that have branded themselves as regulations that implement restorative justice, even though those regulations do not address any restorative process. Moreover, some provisions in those regulations are also addressed (differently) under KUHP 2023.

c. Rehabilitation Treatments

KUHP 2023 acknowledges several types of treatments (*tindakan*), one of them is rehabilitation treatment.⁸⁴ This rehabilitation treatment is imposed on defendants that are addicted to alcohol, narcotics, psychotropics, and other addictive substances; and or defendants that have mental disability and/or intellectual disability.⁸⁵

In relation to its implementing mechanism, the enforcement of this rehabilitation treatment may be performed simultaneously with the enforcement of the principal sentence imposed by judges.⁸⁶ That condition indicates that sentences and treatments are 2 (two) different concepts that are independent of one another. This condition differs from the 2009 Narcotics Law that views rehabilitation as a “sentence”

⁸² KUHP, Art. 340.

⁸³ KUHP 2023, Art. 75.

⁸⁴ KUHP 2023, Art. 103 paragraph (1) letter b.

⁸⁵ KUHP 2023, Art. 105 paragraph (1).

⁸⁶ KUHP 2023, Art. 103 paragraph (1).

because the period spent to undergo rehabilitation under the 2009 Narcotics Law is counted as period of serving the sentence.⁸⁷

In addition, KUHP 2023 only addresses rehabilitation treatments imposed on convicts in judges' decisions,⁸⁸ therefore, KUHP 2023 does not recognize the model of imposing rehabilitation treatments in pre-adjudication stage or before sentencing (pre-sentencing). Those provisions differ from the imposition of rehabilitation treatments addressed in Guideline of the Attorney General No. 18 of 2021 where rehabilitation treatments may be imposed through rehabilitation stipulations issued by the Head of District Prosecutor's Office or Head of Branch District Prosecutor's Office⁸⁹ and if suspects have completed the rehabilitation, Public Prosecutors shall not prosecute suspects.⁹⁰

d. Out-of-Court Resolutions that Dismiss Prosecutorial Authority

KUHP 2023 addresses a number of grounds that may dismiss prosecutorial authority of the state, namely:⁹¹

- I. there is a final and binding decision on individuals for the same case;
- II. suspects or defendants passed away;
- III. statute of limitations (*kedaluwarsa*);
- IV. maximum fines are voluntarily paid for offenses that are punishable only with fines no higher than Category II;
- V. maximum fines of Category IV are voluntarily paid for offenses punishable with imprisonment of 1 (one) year at maximum or fines no higher than Category III;
- VI. withdrawal of complaints for complaint offenses;
- VII. an out-of-court resolution established under Laws has been performed; or
- VIII. grant of amnesty or abolition.

This section is not intended to address all grounds that may dismiss prosecutorial authority of the state. This research will focus on 1 (one) ground for dismissing prosecutorial authority, namely an out-of-court

⁸⁷ Narcotics Law 35/2009, Art. 103 paragraph (2).

⁸⁸ KUHP 2023, Art. 103 paragraph (3), Art. 104.

⁸⁹ Indonesia, Attorney General's Office, Guideline of the Attorney General No. 18 of 2021 on Resolution of Narcotics Offenses Case Handling through Rehabilitations by Using Restorative Justice Approach as Implementation of *Dominus Litis* Principle by Prosecutors, p. 7

⁹⁰ *Ibid.*, p. 9.

⁹¹ KUHP 2023, Art. 132 paragraph (1).

resolution established under Laws has been performed,⁹² or in literatures, it is known with the term out-of-court dispute resolution (*afdoening buiten process*).

KUHP 2023 does not provide any further explanation on the definition of out-of-court resolution, and it only describes that this out-of-court alternative dispute resolution must be regulated on the level of law.⁹³ According to an interview with Harkristuti Harkrisnowo, during the deliberation process of KUHP 2023, those provisions are intended to address Diversions for Children facing legal issues, as addressed in the 2012 SPPA Law. However, according to Topo Santoso, provisions on Diversions for Children have already been addressed separately in other articles under KUHP 2023.⁹⁴ Eventually, the KUHP 2023 formulating team aims for provisions in Article 132 paragraph (1) letter g of KUHP 2023 to accommodate all forms of out-of-court dispute resolutions besides from Diversions for Children, including resolution mechanisms addressed under laws other than KUHP 2023.⁹⁵ Up to currently, out-of-court resolution mechanisms regulated under laws are, among others:

1. customary (*adat*) dispute resolution according to prevailing *adat* law in *Adat Villages*,⁹⁶ and community dispute resolution in Villages;⁹⁷
2. cessation of criminal investigation in taxation sector;⁹⁸
3. cessation of criminal investigation in customs sector;⁹⁹ and
4. *adat* justice system to examine and adjudicate *adat* civil and criminal cases among *adat* legal community members.¹⁰⁰

⁹² Law No. 1 of 2023 on Criminal Law Code (KUHP 2023), Art. 132 paragraph (1) letter g.

⁹³ Law No. 1 of 2023 on Criminal Law Code (KUHP 2023), Art. 132 paragraph (1) letter g.

⁹⁴ Law No. 1 of 2023 on Criminal Law Code (KUHP 2023), Art. 112 up to Article 117.

⁹⁵ Interview with Prof. Harkristuti Harkrisnowo, a Professor at the Faculty of Law of Universitas Indonesia, 24 November 2023.

⁹⁶ Indonesia, Law No. 6 of 2014 on Villages, Village Law, LN No. 7 of 2014, TLN No. 5495, Art. 103 letter d.

⁹⁷ *Ibid*, Art. 26 paragraph (4) letter k.

⁹⁸ Indonesia, Law No. 7 of 2021 on Harmonization of Taxation Laws, LN No. 246 of 2021, TLN No. 6736, Art. 44B as the amendment to Law No. 6 of 1983 on General Provisions and Procedures on Taxation, as amended several times, most recently by Law No. 16 of 2009 in conjunction with Regulation of the Government in Lieu of Law No. 5 of 2008 on Fourth Amendment to Law Number 6 of 1983 on General Provisions and Procedures on Taxation.

⁹⁹ *Ibid*, Art. 64 as the amendment to Law No. 11 of 1995 on Excises, as amended by Law No. 39 of 2007 on Amendment to Law Number 11 of 1995 on Excises.

¹⁰⁰ Indonesia, Law No. 21 of 2001 on Special Autonomy for Papua Province, LN No. 135 of 2001, TLN No. 4151, Art. 50 and Art. 51.

The question is whether every out-of-court resolution process will have the consequence of dismissing prosecutorial authority held by the state? Regarding this question, there are 2 (two) schools of thought. *Firstly*, Edward Omar Sharif Hiariej argued that out-of-court resolutions shall have the consequence of dismissing prosecutorial authority. This concept is necessary to prevent double prosecutions (*ne bis in idem*), because the case in question must be deemed as a closed case.¹⁰¹ *Secondly*, according to Erni Mustikasari, not all out-of-court resolutions always lead to the dismissal of state prosecutorial authority because there are out-of-court resolutions that are based on discretionary authority, and those still require stipulations from judges as the basis for ceasing prosecution. Consequently, in the event that out-of-court resolutions are unfruitful, prosecution may still be proceeded.¹⁰² A.M. Anderson also mentions that the use of opportunity principle by public prosecutors to resolve cases outside the court does not automatically dismiss state prosecutorial authority, although Anderson's ground is dissimilar from opinions entertained by Erni Mustikasari and Edward Omar Sharif Hiariej. According to A.M. Anderson, in the Dutch criminal justice system, in principle, 'waiver of cases' serves as the incorporation of opportunity authority held by prosecutors does not dismiss the state authority to continue prosecution.¹⁰³ However, on the other hand, public prosecutors are also bound to 'agreements' jointly made with defendants to not continue prosecution,¹⁰⁴ therefore, *ne bis in idem* principle can still be honored. Nevertheless, with the existence of civil lawsuits brought by other parties that successfully cancel 'agreements' between public prosecutors with those defendants, the prosecution may be continued.¹⁰⁵ Hence, A.M. Anderson and Erni Mustikasari mutually view that the implementation of out-of-court resolutions based on discretionary/opportunity authority held by public prosecutors does not formally dismiss state prosecutorial authority.

¹⁰¹ Interview with Prof. Dr. Edward Omar Sharif Hiariej, S.H., M.Hum., the Vice Minister of Law and Human Rights of the Republic of Indonesia, 6 November 2023.

¹⁰² Interview with Dr. Erni Mustikasari., S.H., M.H, a Functional Prosecutor at the Attorney General's Office of the Republic of Indonesia, 20 September 2023.

¹⁰³ A.M. Anderson, *Alternative disposal of criminal cases by the prosecutor: Comparing the Netherlands and South Africa*, Dissertation, University of Amsterdam, 2014, p. 62.

¹⁰⁴ *Ibid*, p. 65.

¹⁰⁵ *Ibid*, p. 65.d.



ANALYSIS OF IMPACTS FROM ENFORCEMENT OF KUHP 2023 TO INTERNAL RULES OF INDONESIAN LAW ENFORCEMENT AGENCIES RELATING TO RESTORATIVE JUSTICE AS THE OBJECT OF ASSESSMENT

1. Regulation of the Prosecutor's Office No. 15 of 2020

The previous section has discussed changes in grounds for dismissing prosecutorial authority in KUHP 2023, one of them is that an out-of-court resolution established under laws has been performed. This condition indicates that an adjustment to out-of-court resolution mechanisms in regulations on the level below laws must be made, including Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice (hereinafter referred to as Perja No. 15/2020).

Perja No. 15/2020 addresses the authority of Public Prosecutors to cease prosecution when out-of-court dispute resolution process has been performed, in the forms of: 1) voluntary payment of maximum fines for certain offenses; or 2) performance of restitution to the original state by using restorative justice approach.¹⁰⁶ To dive deeper on the conformity of mechanisms addressed in Perja No. 15/2020 with grounds for dismissing prosecutorial authority in KUHP 2023, there are at least two aspects that need to be elaborated further by referring to two forms of out-of-court dispute resolution in Perja No. 15/2020 as mentioned earlier:

Firstly, voluntary payment of maximum fines for certain offenses. This form of out-of-court resolution refers to *afdoening buiten process* mechanism adopted by Perja No. 15/2020 that constitutes as the ground of authority to cease prosecution.¹⁰⁷ In KUHP 2023, the *afdoening buiten process* is incorporated into grounds for dismissing prosecutorial authority, as addressed in Article 132 paragraph (1) letters d and e of KUHP 2023.¹⁰⁸

¹⁰⁶ Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 3 paragraph (3).

¹⁰⁷ This issue is stressed in Article 3 paragraph (2) letter e of Perja No. 15/2020 stating that one of the grounds for closing cases in legal interests is that an out-of-court resolution (*afdoening buiten process*) has been performed.

¹⁰⁸ See Article 132 paragraph (1) letters d and e of KUHP 2023:

- (1) Prosecutorial authority is dismissed if:
 - d. maximum fines are voluntarily paid for Offenses punishable only with fines no higher than category II;

In general, the *afdoening buiten* process (out-of-court dispute resolution) is addressed in Article 82 KUHP, stating that:

The authority to prosecute misdemeanors that are only punishable with fines shall be dismissed if maximum fines and costs incurred in the event of performance of prosecution upon authority of officials appointed for that purpose under public regulations are voluntarily paid, and within a period determined by those officials

This mechanism is also found in the Dutch criminal justice system, as addressed in Article 74 Sr. (Dutch Criminal Law Code) stating that before trials are commenced, Public Prosecutors are entitled to determine one or more requirements to prevent or cease the continuance of criminal prosecution. Requirements that are determined primarily take form of payment of certain money. Previously, the authority to exercise this authority is exempted for felonies punishable with imprisonment longer than 6 (six) years or misdemeanors in the Dutch Criminal Law Code.¹⁰⁹ However, in 1983, the authority to exercise this mechanism is expanded, therefore, the enforceability of *afdoening buiten* process mechanism in Netherland is no longer limited to misdemeanors that are only punishable with fines, but it also covers felonies punishable with imprisonment no longer than six years.¹¹⁰

Within the context of the Indonesian criminal justice system, the enforceability of *afdoening buiten* process is limited to misdemeanors punishable only with fines and cannot be enforced on minors.¹¹¹ However, requirements of offenses for cease of prosecution to be able to be performed using restorative justice in Perja No. 15/2020 also encompass

e. maximum fines of category IV are voluntarily paid for Offenses punishable with imprisonment no longer than 1 (one) year or fines no higher than category III;

¹⁰⁹ Jan Remmelink, *Hukum Pidana, Komentar Atas Article-Article Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia*, translated by Tristam Pascal Moeljono, (Jakarta: PT Gramedia Pustaka Utama, 2003), p. 442.

¹¹⁰ *Ibid*, p. 445.

¹¹¹ See R. Soesilo, *Kitab-Undang-Undang Hukum Pidana*, (Bogor: Politeia, 1996), p. 95. If a person commits a violation that is punishable only with fines (excluding felonies), then that person may be released from criminal charges by paying maximum punishable fines (if prosecution has been commenced, then it also includes payment of case fees) to the state treasury. In the event that the violation is also punishable with seizure of certain objects, those objects must be handed over or prices of those objects must be paid.

offenses punishable with imprisonment no longer than 5 (five) years.¹¹² This condition exhibits that the use of Article 82 KUHP as a reference for the establishment of Perja No. 15/2020 in this case is still inaccurate, because mechanisms addressed in Perja No. 15/2020 are also applicable to felonies, meanwhile, requirements of *afdoening buiten process* in Article 82 KUHP only apply to misdemeanors punishable only with fines. Those requirements differ from *afdoening buiten process* mechanisms that have been developed in the Netherland which make it possible for those mechanisms to be applied to felonies punishable with imprisonment no longer than 6 (six) years. Hence, in this regard, there is no relationship between provisions in Article 82 KUHP with mechanisms established in Perja No. 15/2020.

Secondly, performance of restitution to the original state by using restorative justice approach. This form of out-of-court dispute resolution produces a result in the form of cease of prosecution¹¹³ with the following applicable requirements:¹¹⁴

- a. Suspects have performed restitution to the original state;
- b. Victims and suspects have reached a resolution agreement; and
- c. Positive responses from the community.

In general, requirements that are addressed show that this mechanism may be categorized into a form of out-of-court dispute resolution mentioned in Article 132 paragraph (1) letter g of KUHP 2023. However, to assess whether this mechanism may be classified into grounds for dismissing prosecutorial authority, a further study is needed and it is insufficient to only study the dispute resolution process that is addressed. It is essential to analyze whether the authority of Public Prosecutors to cease prosecution using restorative justice in Perja No. 15/2020 is in accordance with the authority of Public Prosecutors to cease prosecution due to the existence of grounds for dismissing prosecutorial authority as set out in KUHP 2023.

¹¹² See Article 5 paragraph (1) letter b of Regulation of the Prosecutor's Office Number 15 of 2020:

- (1) Criminal cases may be closed in legal interests and their prosecution may be ceased using Restorative Justice if the following requirements are fulfilled:
 - b. offenses are punishable only with fines or punishable with imprisonment no longer than 5 (five) years; and

¹¹³ Regulation of the Prosecutor's Office No. 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 3 paragraph (4). Out-of-court resolutions that employ restorative justice approach through restitutions to the original state that employ restorative approach, cease prosecution.

¹¹⁴ Regulation of the Prosecutor's Office No. 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 5 paragraph (6).

From the aspect of dispute resolution process, according to the interview with Erni Mustikasari, the process for ceasing prosecution using restorative justice begins from Public Prosecutors assessing fulfillment or non-fulfillment of requirements for a case to be eligible to be prosecuted and whether they find any grounds for ceasing prosecution due to technical reasons or not. Subsequently, when a case fulfills requirements to be prosecuted and no technical reasons available for prosecution to be ceased, Public Prosecutors, by holding on to proportional and subsidiarity principles, consider whether that case needs to be resolved out-of-court or not.¹¹⁵

Perja No. 15/2020 specifies several considerations that are subjective-discretionary in nature that need to be assessed by Public Prosecutors in determining whether a case is eligible for cessation of prosecution or not. For instance, 'public responses and harmony,' 'propriety, decency, and public order,' and 'degree of despicability.'¹¹⁶ Results of considerations performed by Public Prosecutors, and results of resolution agreements between offenders and victims, require affirmations from leadership at the Prosecutor's Office, namely the Head of Appellate Prosecutor's Office, to determine whether the prosecution of the case may be ceased or not.¹¹⁷

The flow shows that, as a whole, Perja No. 15/2020 contains mechanisms that give rooms for Public Prosecutors to consider their discretion in determining whether prosecution of a case may or may not be ceased using restorative justice. The case that is considered by Public Prosecutors for its prosecution to be ceased essentially does not have any technical reasons for prosecution cessation to be performed. However, Public Prosecutors, in their discretion, may assess whether

¹¹⁵ Interview with Dr. Erni Mustikasari., S.H., M.H, a Functional Prosecutor at the Attorney General's Office of the Republic of Indonesia, 20 September 2023. See also Article 6 of Regulation of the Prosecutor's Office No. 15 of 2020, stating that 'Fulfillment of requirements for ceasing prosecution using restorative justice is used as considerations for Public Prosecutors to determine whether case briefs are eligible to be submitted to the court or not'.

¹¹⁶ See Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 4.

¹¹⁷ Article 3 paragraph (5) of Perja No. 15/2020 that cessation of prosecution using restorative justice performed by public prosecutors in responsible manner and submitted in tiers to the Head of the Appellate Prosecutor's Office. Furthermore, Article 12 paragraphs (1) and (2) of Perja No. 15/2020 state that when resolution agreements between victims and offenders have been reached, Public Prosecutors report to the Head of the District Prosecutor's Office, and subsequently, the Head of Branch District Prosecutor's Office or Head of the District Prosecutor's Office to request approvals for ceasing prosecution using Restorative Justice to the Head of the Appellate Prosecutor's Office.

prosecution of the case needs to be ceased using restorative justice or not as mandated by Perja No. 15/2020. Hence, by understanding the process illustrated above, it may be construed that the authority of Public Prosecutors in this context is discretionary.

This discretionary authority of prosecutors may be found in Article 34A of Law No. 11 of 2021 on Amendment to Law Number 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia (hereinafter referred to as Prosecutor's Office Law) stating 'In the interests of law enforcement, Prosecutors and/or Public Prosecutors in carrying out their duties and authorities are entitled to act according to their assessments by considering laws and regulations, as well as codes of ethics.'¹¹⁸ Further in the elucidation, that Article makes a reference to Article 138 of the 1981 Criminal Procedural Law Code (KUHP) stating 'After Public Prosecutors receive complete investigation results back from investigators, they immediately determine whether those case briefs have fulfilled requirements to be submitted to the court or not.' This context is further elaborated in Article 34A of the Prosecutor's Office Law as a form of regulation that is in accordance with restorative justice principle and diversion in the Indonesian criminal justice system, as well as in accordance with the doctrine of discretionary prosecution.¹¹⁹

From the aspect of form of authority, the Indonesian criminal justice system recognizes opportunity principle or discretionary prosecution principle that entitles prosecutors to have independence in determining whether to prosecute or not prosecute a criminal case, even though according to examination in investigation stage, suspects have fulfilled criteria to be prosecuted and are eligible to be sentenced, but it would

¹¹⁸ Indonesia, Law Number 11 of 2021 on Amendment to Law Number 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia, LN No. 289 of 2021, TLN No. 6755, Art. 34A.

¹¹⁹ Law Number 11 of 2021 on Amendment to Law Number 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia, elucidation of Article 34A. 'The discretionary principle addressed in Article 139 of Law Number 8 of 1981 on Criminal Procedural Law Code refers to 'after public prosecutors receive back complete investigation results from investigators, they immediately determine whether those case briefs have fulfilled requirements to be submitted to the court or not.' This authority is exercised without disregarding purposes of law enforcement that encompass the manifestation of legal certainty, justice, and benefits in accordance with restorative justice principles and diversions that become the catalyst of criminal law development in Indonesia.

To accommodate the development in the community that envisions minor offenses or offenses that result in low economic losses to be not criminally processed as a law enforcement effort that prioritizes justice.

This view is in line with doctrines of prosecutorial discretionary and leniency policy.

benefit public interests if that case does not go to trial, therefore, the case is dismissed (*sepot*).¹²⁰

Cessation of prosecution itself may be performed based on 2 (two) grounds, namely cease of prosecution in the name of legal interests and waiver of a case in the name of public interests.¹²¹ In terms of cessation of prosecution, the cessation ground is based on legal interests. KUHP acknowledges several grounds for ceasing prosecution, namely: (1) *Nebis in idem* (Article 76 of KUHP); (2) Suspects/defendants passed away (Article 77 of KUHP); and (3) Statute of limitations (Article 80 of KUHP). Meanwhile, waiver of a case (*seponeering*) is a form of implementation of opportunity principle held by prosecutors that grants the authority to the Attorney General to waive a case in the name of public interests, even though there are sufficient grounds and proofs to submit the case for trial.¹²²

According to that form of authority, it may be inferred that the form of authority to cease prosecution using restorative justice addressed in Perja No. 15/2020 leans toward the form of implementation of the opportunity principle held by prosecutors that in this event does not have any connection with grounds for dismissing prosecutorial authority. This view may be inferred from the existence of discretionary considerations by Public Prosecutors to determine whether a case is eligible to go to trial or its prosecution to be ceased using restorative justice. Those considerations are based on fulfillment or non-fulfillment of requirements in Perja No. 15/2020 that later require approvals from leadership at the Prosecutor's Office to determine whether cessation of prosecution using restorative justice may be performed or not. Hence, considerations to cease prosecution are classified as the implementation of the opportunity principle held by prosecutors and cannot be viewed as a form of dismissal of prosecutorial authority in the name of legal interests.

¹²⁰ Andi Hamzah and RM. Surachman, *Pre-Trial Justice Discretionary Justice dalam KUHP Berbagai Negara*, 1st print, (Jakarta: Sinar Grafika, 2015), hlm. 208; M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHP: Penyidikan dan Penuntutan*, (Jakarta: Sinar Grafika, 2017), pp. 36-37.

¹²¹ M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHP: Penyidikan dan Penuntutan*, pp. 436-437.

¹²² *Ibid.*, 436.

2. Analysis of Adjustment of Perja No. 15/2020 to KUHP 2023

The form of authority to cease prosecution using restorative justice addressed in Perja No. 15/2020 constitutes an implementation of opportunity principle held by prosecutors as outlined in the previous section. This condition indicates that the authority for ceasing prosecution using restorative justice indeed does not have any connection whatsoever with grounds for dismissing prosecutorial authority. Nevertheless, this authority has connection with forms of out-of-court dispute resolution laid out in Article 132 paragraph (1) letter g of KUHP 2023, where performance of an out-of-court resolution established under Laws serves as a ground for dismissing prosecutorial authority.

Tracing back, procedures found in Perja No. 15/2020 generally refer to forms of out-of-court dispute resolutions that produce results in the form of cessation of prosecution.¹²³ In brief, if Public Prosecutors have determined a case to fulfill requirements for its prosecution to be ceased using restorative justice, then Public Prosecutors offer an amicable resolution to victims and suspects.¹²⁴ If both parties agree to undergo the amicable resolution process, then it will be performed with Public Prosecutors taking the role as the facilitator.¹²⁵ If an amicable resolution is reached, then an amicable agreement will be drawn up, and if terms addressed in the amicable agreement have been fulfilled, Public Prosecutors will report to the Head of the Branch District Prosecutor's Office or Head of the District Prosecutor's Office and subsequently, the report will be submitted to request an approval for ceasing prosecution using restorative justice granted by the Head of the Appellate Prosecutor's Office.¹²⁶ If the cessation of prosecution is approved, Public Prosecutors will issue Decree on Cessation of Prosecution (*Surat Ketetapan Penghentian Penuntutan – SKPP*).¹²⁷

¹²³ Regulation of the Prosecutor's Office No. 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Article 3 paragraph (4). Out-of-court dispute resolutions that employ restorative justice approach through restitutions to the original state shall cease prosecution.

¹²⁴ Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 7 paragraph (1)

¹²⁵ Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 9 paragraph (2)

¹²⁶ Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 12 paragraph 1 up to paragraph (2).

¹²⁷ Regulation of the Prosecutor's Office Number 15 of 2020 on Cessation of Prosecution Using Restorative Justice, Art. 12 paragraph (6).

Those series of process illustrate that a case will not proceed to trial process because the case has been resolved through an amicable resolution process during prosecution, resulting in cessation of prosecution. This process serves as a form of out-of-court dispute resolution process. Hence, in general, it may be inferred that procedures addressed in Perja No. 15/2020 fall under the category of out-of-court resolution as a mechanism laid out in Article 132 paragraph (1) letter g of KUHP 2023. However, it does not necessarily mean that the authority of Public Prosecutors is automatically dismissed due to the performance of out-of-court resolution.

This situation occurs solely because provisions in Article 132 paragraph (1) letter g of KUHP 2023 state that out-of-court resolutions must be established on the level of laws to be eligible being classified as grounds for dismissing prosecutorial authority. Those provisions are essentially in accordance with Article 3 of the Criminal Procedural Law Code (KUHP) stating that 'Legal proceedings are performed according to methods addressed under this law', thus, it may be construed that provisions relating to procedural law must be addressed under laws.¹²⁸ Even though mechanisms established in Perja No. 15/2020 have been addressed under laws, that condition does not make cessation of prosecution process using restorative justice to be classified as a ground for dismissing prosecutorial authority because the cessation of prosecution process essentially stands above the institution of opportunity principle held by prosecutors. This may be inferred from procedures that require reached amicable agreements to be reported and submitted for approval in tiers to the Head of the Appellate Prosecutor's Office.¹²⁹ This approval creates a discretionary room for officials at the Prosecutor's Office¹³⁰ that enables them to refrain from ceasing the prosecution, even

¹²⁸ Article 1 of KUHP is actually not being explicit regarding this. Article 1 of KUHP must be construed that the criminal procedural law may only be implemented based on laws (without using the word 'this'). Compared to Article 1 of Dutch *Wetboek van Strafvordering* stating that: *Strafvordering heeft alleen plaats op de wijze bij de wet voorzien*. See Andi Hamzah, *Hukum Acara Pidana Indonesia*, Revised Edition, 5th print, (Jakarta: Sinar Grafika, 2006), p. 1.

¹²⁹ See Article 3 paragraph (5) of Regulation of the Prosecutor's Office No. 15 of 2020 that cessation of prosecution using restorative justice is performed by Public Prosecutors in responsible manner and performed in tiers to the Head of the Appellate Prosecutor's Office.

¹³⁰ Officials of the prosecutor's office in this context refer to Public Prosecutors, Head of the Branch District Prosecutor's Office or Head of the District Prosecutor's Office, Head of the Appellate Prosecutor's Office, and in certain cases, also involve the Attorney General as set out in Article 8 paragraph (6) of Regulation of the Prosecutor's Office No. 15 of 2020.

See Article 12 paragraph (1) and paragraph (2) of Regulation of the Prosecutor's Office No. 15 of 2020 that 'In the event that a resolution agreement is reached, Public Prosecutors report to the

though the case objectively fulfills requirements for cessation of prosecution to be performed (discretionary).¹³¹

However, it must be noted that although Perja No. 15/2020 uses the term restorative justice in cessation of prosecution, in principle, mechanisms that are constructed are inaccurate and not in line with how restorative justice approach should have been implemented. Basically, restorative justice may be implemented in every stage of legal proceedings (pre-adjudication, adjudication, and post-adjudication).¹³² However, restorative justice does not aim to cease the case, but to provide more participative responses, avoid stigmatization, and be more effective in responding offenses.¹³³ Inaccurate implementation of restorative justice in Perja No. 15/2020 is displayed from the inclusion of resolution agreements as a requirement for ceasing prosecution using restorative justice, and if the parties fail to reach an agreement or fail to reach a resolution, prosecution of the case will proceed.

An agreement is one of the objective that is attempted to be achieved through restorative process that in principle is designated to fulfill individual and collective needs and responsibility of the parties to achieve restitution of victims and reintegration of offenders, that may also encompass agreements relating to relationship of the parties in the future.¹³⁴ Hence, the concept of those agreements that are achieved through the implementation of restorative justice in this sense should not be used as a requirement to cease cases. This context is in line with

Head of the Branch District Prosecutor's Office or Head of the District Prosecutor's Office by attaching minutes of resolution agreement and opinion notes. Furthermore, paragraph (2) states that 'According to reports from Public Prosecutors as referred to in paragraph (1), the Head of the Branch District Prosecutor's Office or Head of the District Prosecutor's Office requests an approval to cease prosecution using Restorative Justice from the Head of the Appellate Prosecutor's Office.'

¹³¹ Regulation of the Prosecutor's Office No. 15 of 2020 on Cease of Prosecution Using Restorative Justice, Art. 12 paragraph (4) and paragraph (5) that 'Head of the Appellate Prosecutor's Office determines whether to approve or refuse the cessation of prosecution using restorative justice in writing, accompanied with considerations, no later than 3 (three) days from the receipt of the request.

Moreover, paragraph (5) states that 'In certain cases that are spotlighted by the leadership, the Head of the Appellate Prosecutor's Office requests an approval from the Attorney General by still considering the timeframe as referred to in paragraph (3).'

¹³² United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res. 2000/14, U.N.Doc. E/2000/INF/2/Add.2 at 35 (2000).

¹³³ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 42

¹³⁴ *Ibid*, p. 62

opinions given by Erni Mustikasari¹³⁵ and Sugeng Riyono,¹³⁶ who argue that the success of mediation process between victims and offenders should not be the basis for ceasing criminal legal proceedings. Agreements that are reached from the mediation between offenders and victims should have been designated for restitution of victims and fulfillment of responsibility of offenders. For example, agreements may encompass, but not limited to, apologies, recoveries, restitutions, supports for reintegration of offenders, community services, or any agreements relating to relationship of the parties in the future.¹³⁷

Since resolution agreement is included as a requirement in Perja No. 15/2020, this scheme shows that Perja No. 15/2020 still has not fully adopted victims' perspective because reaching a resolution agreement is not (the sole) objective of restorative justice. On the contrary, restorative justice has an objective to provide full restitution to victims. Apology and resolution between victims and offenders are important, but they are not primary objectives from the implementation of restorative justice. The decision to forgive and reconcile should depend on voluntary nature of core stakeholders (victims and offenders) and there should be no coercion exerted to achieve that condition.¹³⁸ In this event, it is possible for victims to refuse to reconcile or forgive offenders, but victims are still eligible to recover from the fulfillment of obligations by offenders to perform restitution. On the other hand, it is also possible for restorative process to be successful without any agreements to perform certain obligations by offenders, for instance, if victims are satisfied with the opportunity to express impacts from offenses suffered by them and to hear acknowledgement of responsibility from offenders.¹³⁹

Asides from inaccurate inclusion of resolution agreements as a requirement to cease prosecution and implementation of restorative justice solely as a variable to cease cases, there are several notes relating to the implementation of restorative justice principle in series of process addressed in Perja No. 15/2020. One of them is by assigning the function

¹³⁵ Interview with Dr. Erni Mustikasari., S.H., M.H, a Functional Prosecutor at the Attorney General's Office of the Republic of Indonesia, 20 September 2023.

¹³⁶ Interview with Sugeng Riyono, an Appellate Judge at the Appellate Court of DKI Jakarta, 20 September 2023.

¹³⁷ *Ibid.*

¹³⁸ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice*, p. 6.

¹³⁹ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 62

of Public Prosecutors as facilitators. This concept is incorrect in principle, because in restorative justice approach, facilitators assume obligations and responsibility to ascertain the fulfillment of impartiality principle, thus, facilitators must be third parties that have no interests in the case.¹⁴⁰ In this context, law enforcers have interests in cases handled by them. Hence, if public prosecutors act as facilitators, this framework does not endorse impartiality principle of facilitators in restorative justice process. Independence and impartiality of facilitators serve as keys to uphold credibility and effectiveness of restorative process.¹⁴¹ In addition, in several practices, facilitators need to have special trainings, facilitators may also partner with victims' support services or refer to other services.¹⁴²

In addition, Perja No. 15/2020 contains provisions on restitution to the original state by using restorative justice approach when striving for out-of-court resolutions.¹⁴³ Moreover, Perja No. 15/2020 dictates that amicable resolution process and fulfillment of obligations are performed within 14 (fourteen) days from the handover of responsibility over suspects and proofs at maximum.¹⁴⁴ Those provisions may be considered as problematic because from the standpoint of restitution concept, it would be difficult to perform restitution to the original state, especially only with a short window of 14 (fourteen) days. Hence, the term restitution should refer to improvement of relationship into better direction and to be morally adequate, without assuming any restitution to the original state.¹⁴⁵ This approach is in line with core values of restorative justice that view offenses as violations against individuals and interpersonal relationship,¹⁴⁶ therefore, from the point of view of restorative justice, restitution is designated to fix relationship between victims and offenders, and in several situations, it also involves the community.¹⁴⁷

Thus, an emphasis needs to be given that restorative justice implemented in Perja No. 15/2020 is still inaccurate by putting cessation of prosecution as the only result that is planned to be achieved through restorative

¹⁴⁰ *Ibid*, p. 58.

¹⁴¹ *Ibid*, p. 39

¹⁴² *Ibid*, p. 58.

¹⁴³ Regulation of the Prosecutor's Office No. 15 of 2020, Art. 3 paragraph (3) letter b.

¹⁴⁴ *Ibid*, Art. 9 paragraph (5)

¹⁴⁵ Margaret Urban Walker, "Restorative Justice and Reparations", *Journal of Social Philosophy*, Vol. 3 (3): 2006, 377-395, p. 384

¹⁴⁶ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice*, p. 17

¹⁴⁷ Margaret Urban Walker, "Restorative Justice and Reparations", p. 383

justice process. Restorative justice should be implemented with the objective of creating a more participative process for victims because participatory space for victims in the conventional criminal justice system is very minimal thus far. Victims' participation is needed to hear and fulfill their needs, as well as responsibility of offenders in terms of victims' restitution and reintegration of offenders into the community.¹⁴⁸

3. Regulation of the Police Force Number 8/2021 and Guideline of the Prosecutor's Office 18/2021

Regulation of the Police Force Number 8/2021 ('Perpol 8/2021') is an internal police rule for resolution of cases using restorative justice with a condition that such offenses are offenses that are not classified as terrorisms, offenses toward national security, corruptions, and offenses toward human lives.¹⁴⁹ Resolution of those cases may be carried out provided that other material requirements are met, including: 1) not causing any public unrests and/or refusals; 2) not resulting in social conflicts; 3) having no potentials of dividing the nation; 4) having no radicalism and separatism characteristics; 5) offenders are not recidivists.¹⁵⁰ In addition to those, formal requirements must also be met, namely the existence of amicable resolutions between both parties and fulfillment of victims' rights.¹⁵¹

Taking a different path compared to Perpol 8/2021 that produces outputs in the form of cessation of cases for various types of offenses, the Guideline of the Prosecutor's Office 18/2021 applies specifically to narcotics abuse offenses (Article 127 of Narcotics Law) with outputs in the form of imposition of rehabilitation on narcotics abusers.

With those two internal rules of law enforcers in mind, discussions below will focus on resolution of offenses using restorative justice in narcotics cases through the imposition of rehabilitation in pre-adjudication stage.

4. Provisions Relating to Imposition of Rehabilitation on Narcotics Cases in Pre-Adjudication Stage under Perpol 8/2021 and Guideline of the Prosecutor's Office 18/2021

As elaborated above, one of the changes in KUHP 2023 is the introduction of treatments, and that includes rehabilitation.¹⁵² In KUHP

¹⁴⁸ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 62

¹⁴⁹ Regulation of the Police Force Number 8 of 2010, Article 5 letter f.

¹⁵⁰ *Ibid.*, Article 5.

¹⁵¹ *Ibid.*, Article 6.

¹⁵² Law No. 1 of 2023 on Criminal Law Code (KUHP 2023), Art. 103 paragraph (1) letter b.

2023, rehabilitation may be imposed independently without any sentencing in court decisions on offenders that are addicted to alcohol, narcotics, psychotropics, and other addictive substances.¹⁵³ Conceptually, the imposition of rehabilitation does not constitute part of restorative justice, considering that if referring to the definition provided in the previous chapter, results of restorative justice may only be achieved through restorative processes, such as VOM, Restorative Conferences, and Circles.¹⁵⁴ Howard Zehr expresses that the imposition of rehabilitation will only be considered as restorative if the rehabilitation program is carried out by making offenders taking responsibility of impacts resulted from their actions and by considering needs of victims.¹⁵⁵ Howard Zehr also acknowledges that the popularity of the term restorative certainly gives birth to many measures that label themselves as restorative, although in reality, they are not.¹⁵⁶

Within the context of rehabilitation that is labelled as restorative justice in Indonesia, this phenomenon may be found in 2 (two) internal rules of law enforcement agencies, namely Perpol 8/2021 and Guideline 18/2021. Guideline 18/2021 aims to be a reference for public prosecutors in resolving narcotics cases by using restorative justice. This guideline makes it possible for offenders to obtain medical rehabilitation and social rehabilitation.¹⁵⁷ Those rehabilitations are designated for offenders indicted of committing offenses addressed in Article 127 of Law Number 35 of 2009 on Narcotics ('Narcotics Law') concerning narcotics abuses, narcotics addicts, or victims of narcotics abuses.¹⁵⁸ Requirements for offenders to obtain those rehabilitations are as follows:¹⁵⁹

1. Suspects are tested positive for consuming narcotics;
2. Suspects are not involved in illicit narcotics distribution network and act as end users;
3. Suspects are arrested or caught red-handed without narcotics in their possessions as proofs or with narcotics in their possessions as proofs, but the amount does not exceed 1 (one) day consumption rate;

¹⁵³ See Article 105 paragraph (1) of Law No. 1 of 2023 on Criminal Law Code (KUHP).

¹⁵⁴ UNODC, *Handbook on Restorative Justice Programmes: Second Edition*, p. 25.

¹⁵⁵ Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice*, p. 55.

¹⁵⁶ *Ibid.*

¹⁵⁷ Indonesia, Guideline of the Attorney General No. 18 of 2021, p. 5.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* pp. 5-6.

4. According to results of integrated assessments, suspects are qualified as narcotics addicts, victims of narcotics abuses, or narcotics abusers;
5. Suspects have never undergone rehabilitations or have undergone rehabilitations not more than two times (exempted for victims of narcotics abuses and narcotics addicts); and
6. There is a guarantee letter indicating that suspects undergo rehabilitations through legal process drawn up by their family or guardians.

The mechanism provided by the prosecutor's office in implementing this guideline is by notifying offenders when suspects and proofs are handed over by investigators.¹⁶⁰ In the event that suspects are willing to be sent to rehabilitation, then statement letters made by suspects and their family are needed.¹⁶¹ After fulfilling preliminary requirements and statement letters made by suspects and their family are available, the next step is preparation of opinion notes by public prosecutors to be submitted to the Head of the District Prosecutor's Office or Head of the Branch District Prosecutor's Office to invoke the issuance of rehabilitation orders.¹⁶²

Asides from the Prosecutor's Office, the police also have nearly similar rules with Guideline 18/2021 issued by the Prosecutor's Office, namely Perpol 8/2021, but it has broader scope of offenses that is not limited solely to narcotics offenses. In terms of regulation, Perpol 8/2021 shares more similarities with Guideline 15/2020 issued by the Prosecutor's Office. Resolution of narcotics offenses at the police is based on 2 (two) primary requirements, namely material requirements and formal requirements.¹⁶³ Below is the list of material and formal requirements in Perpol 8/2021.¹⁶⁴

¹⁶⁰ *Ibid.*, p. 6.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, p. 7.

¹⁶³ Regulation of the Indonesian National Police Number 8 of 2021 on Handling of Criminal Cases Using Restorative Justice, Article 4.

¹⁶⁴ *Ibid.*, Article 5 and Article 9.

Material Requirements	Formal Requirements
<ul style="list-style-type: none"> a. Not causing public unrests and/or refusals; b. Not resulting in social conflicts; c. Having no potentials of dividing the nation; d. Having no radicalism and separatism characteristics; e. Offenders are not recidivists based on court decisions; and f. Offenses are not classified as terrorisms, offenses against national security, corruptions and offenses against human lives. 	<ul style="list-style-type: none"> a. Narcotics addicts and victims of narcotics abuses applying for rehabilitation; b. When caught red-handed: <ul style="list-style-type: none"> i. Narcotics at the amount of 1 (one) day consumption are found in their possessions; and ii. No narcotics found in their possessions, but urine tests show positive results for consuming narcotics; c. Not being involved in illicit narcotics network as dealers and/or traffickers; d. Assessments have been performed by integrated assessment teams; and e. Offenders are willing to cooperate with police investigators to perform further investigations.

Perpol 8/2021 stresses that if offenders wish to gain rehabilitation access, there must be a written application made by offenders, offenders' family or related parties submitted to the police to invoke the process of issuing preliminary investigation/investigation cessation orders¹⁶⁵ and decrees for discontinuing those orders.¹⁶⁶ Subsequently, for narcotics cases, recommendations given from assessments performed by integrated assessment teams (*Tim Asesmen Terpadu* – TAT) must also be attached.¹⁶⁷

Although Perpol 8/2021 does not stress that cessation of preliminary investigation or investigation shall grant offenders with rehabilitation because it only provides orders for releasing offenders alongside with results of assessments by TAT, in practice however, Perpol 8/2021 is designated as means for the police to open rehabilitation possibilities in

¹⁶⁵ Provisions in Article 15 of Perpol 8/2021 on cessation of investigation are troublesome because in this stage, it cannot be ascertained whether the case being investigated may be categorized as an offense or not. Hence, those preliminary investigation cessation orders would be inappropriate to be addressed in internal rules of the police force that address matters on handling of offenses using restorative justice approach. Furthermore, see Article 1 point 5 of KUHAP.

¹⁶⁶ *Ibid.*, Articles 15-17.

¹⁶⁷ *Ibid.*, Article 18 paragraph (3).

preliminary investigation and investigation stages for narcotics abusers.¹⁶⁸

As inferred from the above discussion, those two regulations do not outline what kind of rehabilitation process that is going to be undergone by offenders. Both frameworks only address technical provisions relating to procedures for offenders to gain rehabilitation access. Although the rehabilitation concept in both regulations cannot be accurately categorized as part of restorative justice, those two regulations still use restorative justice label in their titles. Hence, assessment of those internal rules of law enforcement agencies that are affected by the enforcement of KUHP 2023 is still necessary and relevant to be performed.

5. Compatibility of Perpol 8/2021 and Guideline 18/2021 with the 2023 KUHP

Essentially, both internal rules of law enforcement agencies mentioned above address procedures for resolving narcotics cases before their trials commence, or in other words, imposition of treatments (rehabilitation) without undergoing the adjudication process. With the introduction of Article 132 paragraph (1) letter g of KUHP 2023 that states all provisions relating to out-of-court resolutions must be established under laws, consequently all provisions that are still scattered in internal rules of law enforcement agencies concerning all forms of out-of-court resolutions shall not be legally binding because they are in contradiction with KUHP 2023. Actually, far before KUHP 2023 enters into force, the legal basis for providing rehabilitation outside the adjudication process was an issue because there was no legal basis founded in laws and regulations on higher levels, namely laws.¹⁶⁹ Unfortunately, the enforcement of KUHP 2023 does not strengthen or provide a legal basis for those two internal rules. On the contrary, it further emphasizes that those two regulations are not in accordance with KUHP 2023 that is on the level of laws. At least there are 2 (two) other issues besides from the introduction of Article 132 paragraph (1) letter g of KUHP 2023 that make

¹⁶⁸ Republika, "Polri: Rehabilitasi Pecandu Narkotika untuk Menyelamatkan", 10 November 2021, accessed on 21 December 2023, <https://www.republika.id/posts/22044/polri-rehabilitasi-pecandu-narkotika-menyelamatkan>

¹⁶⁹ Article 1 of KUHP is actually not being explicit regarding this. Article 1 of KUHP must be construed that the criminal procedural law may only be implemented based on laws (without using the word 'this'). Compared to Article 1 of Dutch *Wetboek van Strafvordering* stating that: *Strafvordering heeft alleen plaats op de wijze bij de wet voorzien*. See Andi Hamzah, *Hukum Acara Pidana Indonesia*, Edisi Revisi, 5th print, (Jakarta: Sinar Grafika, 2006), p. 1.

those two internal rules incompatible with laws and regulations, including KUHP 2023.

Firstly, relating to the issue of imposing rehabilitation without court proceedings, both Narcotics Law and KUHP 2023 actually do not recognize any imposition of rehabilitation through non-adjudication legal process. KUHP blocks any possibility of imposing treatments other than through court decisions.¹⁷⁰ Meanwhile, Narcotics Law only recognizes the imposition of rehabilitation without court proceedings if offenders/offenders' family voluntarily report them to rehabilitation institutions appointed by the government to be treated with rehabilitation.¹⁷¹ Hence, concepts adopted in Perpol 8/2021 and Guideline 18/2021 are not in line with Narcotics Law and KUHP 2023.

Secondly, similar to the imposition of rehabilitation without court proceedings, the issue of solely imposing treatments (rehabilitation) without being accompanied with criminal sentences is actually problematic and it has incited debates before the enactment of KUHP 2023. Narcotics Law certainly acknowledges the imposition of rehabilitation for narcotics addicts in Articles 5, 103 and 127 paragraph (3) of Narcotics Law that serve as the basis for imposing rehabilitation. This explains that if offenders experience dependency/addiction, they may be sent to rehabilitation, but the framework is silent on whether the imposition of rehabilitation shall eliminate criminal sentences or not. If examined further, exemption for the imposition of rehabilitation without being accompanied with criminal sentences is only possible for offenders that are found not guilty of committing narcotics offenses, but they have narcotics addiction, therefore rehabilitation stipulations are imposed by judges.¹⁷² Such condition is possible if offenders are victims of narcotics abuses that have narcotics dependency. Meanwhile, for offenders of narcotics offenses that are not classified as victims of narcotics abuses, and have narcotics dependency/addiction, they are still bound to be punished with criminal sentences available for narcotics offenses committed.

This hypothesis is confirmed by Edward Omar Sharif Hiariej who mentions that Narcotics Law indeed does not recognize independent imposition of

¹⁷⁰ See Article 103 paragraph (3) of Law No. 1 of 2023 on Criminal Law Code (KUHP).

¹⁷¹ Indonesia, Law No. 35 of 2009 on Narcotics, LN No. 143 of 2009, TLN No. 5062, Art. 55.

¹⁷² Indonesia, Law No. 35 of 2009 on Narcotics, LN No. 143 of 2009, TLN No. 5062, Art. 103 paragraph (1) letter b.

rehabilitation or imposition of treatments.¹⁷³ Such statement denotes that treatments in Narcotics Law are still additional (*accessoir*) in nature to the imposition of criminal sentences. However, there is a different opinion expressed by Harkristuti Harkrisnowo who argues that the imposition of rehabilitation without imposing imprisonment sentence on narcotics abusers is possible to be performed especially if it is imposed in conjunction with Article 54 of Narcotics Law.¹⁷⁴ Responding to the Harkrisnowo's view, it is more ideal because narcotics abuses that require rehabilitations should not be imposed with criminal sentences. However, such view still faces regulatory obstacles because, as mentioned before, Article 54 of Narcotics Law does not eliminate punishable criminal sentences that are laid out for each type of narcotics offenses.

In KUHP 2023, the issue of imposing treatments – including rehabilitations – receives a positive development. Article 103 paragraph (1) of KUHP 2023 states that the imposition of treatments may be carried out despite there are criminal sentences or not. Unfortunately, specifically regarding rehabilitations within the context of narcotics abuses, there is a debate on which rehabilitation framework that is going to be followed, considering that within the context of Article 127 of Narcotics Law concerning narcotics abuses, those provisions are not included in provisions that are absorbed into KUHP 2023.¹⁷⁵ Therefore, it may be construed that provisions in KUHP 2023 do not apply *mutatis mutandis* to narcotics abuse offenses referred to in Article 127 of Narcotics Law. Although Article 613 paragraph (1) of KUHP 2023 explains that when KUHP 2023 enters into force, then all laws containing criminal provisions shall adjust to the first book of KUHP 2023, if we refer to Article 187 of KUHP 2023, provisions concerning rehabilitations in KUHP 2023 cannot prevail over Narcotics Law because provisions in the first book of KUHP 2023 may only prevail if they are not addressed otherwise in other laws.

Hence, the enforcement of KUHP 2023 further underlines that both Perpol 8/2021 and Guideline of the Prosecutor's Office 18/2021 cannot be enforced because they are in contradictory with laws. Even though the imposition of rehabilitations on narcotics addicts is a positive measure

¹⁷³ Interview with Prof. Dr. Edward Omar Sharif Hiariej, S.H., M.Hum., the Vice Minister of Law and Human Rights of the Republic of Indonesia, 6 November 2023.

¹⁷⁴ Interview with Prof. Dr. Harkristuti Harkrisnowo, S.H., MA., Ph.D, a Criminal Law Professor at the Faculty of Law of UI, 24 November 2023.

¹⁷⁵ See Article 622 letter W of Law No. 1 of 2023 on Criminal Law Code (KUHP).

and it is very unfortunate if they must undergo legal proceedings up to court decisions, it cannot be established in internal rules of law enforcement agencies. This condition further urges the inclusion of judicial authority to immediately impose rehabilitations on narcotics offenses (in pre-adjudication) through Revision of Narcotics Law.

6. Draft Regulation of the Supreme Court (Perma) on Guideline for Adjudicating Criminal Cases Using Restorative Justice¹⁷⁶

The Supreme Court has initiated the drafting of Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice. Article 17 of draft Perma sets out provisions on resolution agreements and probationary sentences, as stated in full below:¹⁷⁷

Resolution agreements and/or willingness of Defendants to take responsibility for harms and/or needs of Victims resulted from offenses serve as grounds to alleviate penalties and/or serve as considerations to impose conditional/probationary sentences in accordance with prevailing laws and regulations.

If examined further, provisions concerning resolution agreements and consequences from imposing probationary sentences tie closely with restorative justice concept, as elaborated in the previous section.

Resolution Agreements

The process to reach resolution agreements addressed in draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice is different from those addressed in Perpol 8/2021 and Perja 15/2020. In Perpol 8/2021, no facilitators and dialogue forums available. This Perpol only provides opportunity for the parties to submit resolution agreements that have been signed. Those resolution agreements serve as a requirement to cease preliminary investigation and investigation of offenses. Meanwhile, Perja 15/2020 recognizes dialogue forums held by public prosecutors as facilitators to reach resolution agreements.

¹⁷⁶ Draft Regulation of the Supreme Court (Perma) on Guideline for Adjudicating Criminal Cases Using Restorative Justice that is cited in this study is the draft dated 18 January 2023.

¹⁷⁷ Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice as deliberated in 18 January 2023.

Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice also provides dialogue forums, but through more comprehensive steps. Initially, judges shall ask victims whether a resolution has been reached or not between offenders and victims before the commencement of trials and enforcement of any agreements reached from the resolution.¹⁷⁸ Subsequently, if victims inform that a resolution agreement is reached before the commencement of trials, judges shall examine such agreement and put it as considerations in the decision.¹⁷⁹ Meanwhile, if victims explain that a resolution agreement is reached before the commencement of trials, but part or whole agreement has not been performed by defendants and defendants are unable to perform the agreement, judges inquire the willingness of victims to enter into a new agreement.¹⁸⁰ In the process of reaching the new agreement, judges explore various information relating to impacts from offenses and harms suffered by victims, and to provide opportunities for defendants and victims, in persuasive and constructive manners, to inform their respective issues and needs.¹⁸¹ If a new agreement is reached, this agreement is included as considerations in the court decision. Contents of that resolution agreement may take form as obligations for offenders to pay redress, perform an act, and/or refrain from performing an act.

From the whole series of process to reach a resolution agreement addressed in Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice, a conclusion may be drawn that this draft regulation has adopted a restorative process in the form of Victim-Offender Mediation (VOM). This conclusion is inferred from the existence of restorative dialogue forums that meet offenders with victims, either directly or indirectly, to address impacts from committed offenses and their restitution plans. The existence of judges as facilitators that actively develop persuasive and constructive dialogues, and they are being impartial, also indicate characteristics of restorative process that eventually produces restorative outcomes in the form of obligations for

¹⁷⁸ Article 8 paragraph (2) of Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice.

¹⁷⁹ Article 9 of Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice.

¹⁸⁰ Article 10 paragraph (1) of Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice.

¹⁸¹ Article 11 paragraph (2) of Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice.

defendants to pay redress, perform an act, and/or refrain from performing an act.¹⁸² A consequence resulted from the existence of this resolution agreement is that it enables judges to alleviate sentences imposed on defendants by imposing probationary sentences.

Probationary Sentences

Provisions relating to imposition of probationary sentences as a consequence from the existence of a resolution agreement between victims and offenders are laid out in Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice, and they serve as a follow-up to the introduction of provisions on probationary sentences as a new principal sentence in KUHP 2023. According to the interview with Harkristuti Harkrisnowo, the concept of probationary sentences in KUHP 2023 is derived from conditional sentences found in Article 14a-f KUHP.¹⁸³

Conditional sentences in KUHP are also often referred to as probationary sentences (*hukuman percobaan*) because of its imposition that depends on certain requirements or conditions and they are feasible to be imposed if judges sentence imprisonment no longer than one year or confinement. Meanwhile, probationary sentences in KUHP 2023 may be imposed on defendants committing criminal acts punishable with imprisonment of 5 (five) years at maximum. Differences between those two concepts are laid out in the table below:

Comparison between Conditional Sentences (<i>Pidana Bersyarat/Percobaan</i>) and Probationary Sentences (<i>Pidana Pengawasan</i>)	
Provisions	Enforceability of conditional sentences and probationary sentences
KUHP	If judges sentence imprisonment no longer than 1 (one) year or confinement, judges are entitled to order sentences to not be served, unless in the future, convicts commit an offense before their probationary period lapses (violating general conditions) or violate special conditions in the form of paying losses incurred from the offense. ¹⁸⁴

¹⁸² Article 16 paragraph (1) of Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice.

¹⁸³ Interview with Prof. Harkristuti Harkrisnowo on 24 November 2023.

¹⁸⁴ Article 14e of Law No. 1 of 1946 on Criminal Law Code (KUHP).

KUHP 2023	Judges are entitled to impose probationary sentences on defendants that commit offenses punishable with imprisonment no longer than 5 (five) years. ¹⁸⁵
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Comparison between Conditional Sentences (*Pidana Bersyarat/Percobaan*) and Probationary Sentences (*Pidana Pengawasan*)

Provisions	Amendment to special conditions
KUHP	Public prosecutors or convicts may request amendments to special conditions to judges, either in the form of types of special conditions or validity period of special conditions during the probationary period. ¹⁸⁶
KUHP 2023	Convicts are not entitled to rights as referred to in Article 14e KUHP, but Prosecutors may propose reduction of probationary sentences in the event that convicts are in good behavior during the probationary period. ¹⁸⁷

Comparison between Conditional Sentences (*Pidana Bersyarat/Percobaan*) and Probationary Sentences (*Pidana Pengawasan*)

Provisions	Violations of general conditions and special conditions
KUHP	If violations of general conditions (committing an offense during probationary period) and special conditions (paying losses incurred from the offense) occur, judges are not obliged to directly order convicts to serve their sentences, but there is an option to impose warnings beforehand. ¹⁸⁸

¹⁸⁵ Article 75 of Law No. 1 of 2023 on Criminal Law Code (KUHP 2023).

¹⁸⁶ Article 14e of Law No. 1 of 1946 on Criminal Law Code (KUHP).

¹⁸⁷ Article 76 paragraph (6) of Law No. 1 of 2023 on Criminal Law Code (KUHP 2023).

¹⁸⁸ Article 14f of Law No. 1 of 1946 on Criminal Law Code (KUHP).

KUHP 2023

If violations of general conditions (shall not commit any offense) occur, convicts must serve their imprisonment sentences that shall not be longer than maximum punishable sentences.¹⁸⁹

However, Article 77 paragraph (1) gives a window for probationary sentences to still be performed if convicts, when serving probationary sentences, commit an offense and they are imposed with sentences that are not capital punishment or imprisonment. Meanwhile, if during the process of serving their probationary sentences, convicts violate general conditions and are imposed with imprisonment sentence, their probationary sentences are suspended and will continue after convicts have served their imprisonment sentence.¹⁹⁰

If special conditions are violated, Prosecutors may propose to judges for convicts to directly serve their imprisonment sentences or extend their probationary sentences.¹⁹¹

From the table above, a conclusion may be drawn that the imposition of probationary sentences as a restorative outcome addressed in Draft Perma on Guideline for Adjudicating Criminal Cases Using Restorative Justice must still be adjusted to provisions on probationary sentences in KUHP 2023. However, there is a contradiction in provisions on probationary sentences in terms of enforcement of imprisonment sentences if convicts, when serving their probationary sentences, violate general conditions in the form of committing an offense. This condition occurs because Article 76 paragraph (4) of KUHP 2023 states that if violations of general conditions occur (shall not commit any offense), convicts must serve their imprisonment sentence with term no longer than maximum punishable sentences. Meanwhile, Article 77 of KUHP 2023 opens a window for probationary sentences to still be carried out if convicts, when serving their probationary sentences, commit an offense and are imposed with sentences other than capital punishment or imprisonment sentence. The contradiction with Article 76 paragraph (4) is also found in Article 77 paragraph (2). Differs from Article 76 paragraph (4) that directly imposes imprisonment on convicts when they violate

¹⁸⁹ Article 76 paragraph (4) of Law No. 1 of 2023 on Criminal Law Code (KUHP 2023).

¹⁹⁰ Article 77 paragraph (2) of Law No. 1 of 2023 on Criminal Law Code (KUHP 2023).

¹⁹¹ Article 76 paragraph (5) of Law No. 1 of 2023 on Criminal Law Code (KUHP 2023).

general conditions (imposed with imprisonment sentences), Article 77 paragraph (2) states that the imposition of imprisonment sentences on convicts shall not eliminate their probationary sentences, but those probationary sentences are suspended and will be continued after convicts have served their imprisonment sentences.

In addition to contradiction in provisions relating to probationary sentences above, KUHP 2023 is still silent on further provisions relating to procedures for examining violations of special conditions. Procedures for submitting proposals to shorten probationary period by Prosecutors as referred to in Article 76 paragraph (5) are still unavailable. Besides, the role of Correctional Counselors at Correctional Centers (PK BAPAS) in enforcing probationary sentences still needs to be optimized through adjustments to provisions in Criminal Law Procedural Code (KUHAP), Regulations of the Prosecutor's Office (Perja), Regulations of the Supreme Court (Perma), and Regulations of the Minister of Law and Human Rights (Permenkumham). These notes need to be considered by policymakers to fill legal gaps and provide legal certainty in implementing probationary sentences.



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CHAPTER 04

CONCLUSION & RECOMMENDATIONS



IV

CONCLUSION AND RECOMMENDATIONS



Conclusion

1. According to this study, there are several internal rules of law enforcement agencies containing restorative justice in Indonesia that adopt restorative process perspective, among others, Perja 6/2015, Perma 4/2014, and Perja 15/2020. Meanwhile, regulations that are not categorized as part of restorative justice, but they identify themselves as part of restorative justice in their titles are, among others, Perpol 8/2021, Guideline 18/2021, and Draft PERMA on Guideline for Adjudicating Criminal Cases Using Restorative Justice.
2. Of those regulations mentioned above, there are several of them that need to be adjusted because of the enactment of KUHP 2023, namely Perja 15/2020, Guideline 18/2021, Perpol 8/2021 and Draft PERMA on Guideline for Adjudicating Criminal Cases Using Restorative Justice.
 - a. Perja 15/2020 serves as a form of implementation of the opportunity principle held by prosecutors, meanwhile out-of-court resolutions addressed in Article 132 paragraph (1) letter g are classified as grounds for dismissing prosecutorial authority. In this event, an adjustment must be made to the law concerning scope and procedural law on out-of-court resolution mechanisms set out in Article 132 paragraph (1) letter g of KUHP 2023.
 - b. Perpol 8/2021 and Guideline 18/2021 shall be invalid because they are in contradictory with Article 132 paragraph (1) letter g. In addition to that, those two internal rules are in contradiction with legal frameworks on the level of laws, such as: imposition of rehabilitations without being accompanied with imposition of criminal sentences under Narcotics Law; and imposition of rehabilitations that is performed not through court decisions.
 - c. Draft PERMA on Guideline for Adjudicating Criminal Cases Using Restorative Justice needs to be adjusted to provisions on probationary sentences addressed in KUHP 2023. However, there is a contradiction in provisions on probationary sentences in terms of enforcement as addressed in Article 76 paragraph (4); Article 77 paragraph (1); and Article 77 paragraph (2) of KUHP 2023. In addition, provisions on probationary sentences in KUHP 2023 are silent on further provisions relating to procedures for examining violations of special conditions and procedures for proposing the shortening of probationary period by Prosecutors, as addressed in Article 76 paragraph (5) of KUHP 2023.



Recommendations

1. Adjustments to and harmonization of internal rules of law enforcement agencies that are impacted by the enactment of KUHP 2023 need to be performed immediately to avoid any conflicts between regulations on the same level (horizontally) and with regulations on higher hierarchy of laws and regulations (vertically).
2. Provisions on scope and technical rules for out-of-court dispute resolutions need to be established on the level of laws, as mandated by Article 132 paragraph (1) letter g of KUHP 2023 in conjunction with Article 3 of KUHP.
3. These provisions need to be further established on the level of laws, concerning:
 - a. Mechanisms for enforcing probationary sentences in KUHP 2023, especially when there are violations of conditions during the probationary period.
 - b. Scope and procedural law on out-of-court dispute resolution mechanisms as addressed in Article 132 paragraph (1) letter g of KUHP 2023.
 - c. Alignment between additional sentences in the form of obligations to pay redress in KUHP 2023, financial restitutions in PSK Law, and procedural law mechanisms to consolidate redress lawsuits in criminal charges as referred to in Article 98 of KUHP.
4. Review of internal rules of law enforcement agencies that identify themselves as restorative justice regulations, although they have no orientation toward restorative outcomes in the form of victims' restitution, needs to be performed.
5. Regulation on rehabilitation mechanisms for narcotics addicts that are able to be implemented without any imposition of criminal sentences, and without having to undergo adjudication process, must be established on the level of laws.
6. Revision of KUHP 2023 is necessary, because there are conflicting frameworks relating to probationary sentences addressed in Article 76 paragraph (4); Article 77 paragraph (1); and Article 77 paragraph (2) of KUHP 2023.
7. Provisions on procedural law for examining violations of special conditions and for proposing the shortening of probationary period by Prosecutors as referred to in Article 76 paragraph (5) of KUHP 2023 need to be established.



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