

THE COMPLETION OF MINOR OFFENCES BY APPLYING RESTORATIVE JUSTICE

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Abstract: *The settlement of minor offences can be pursued by penal mediation called restorative justice approach. Restorative Justice focuses on the direct participation of perpetrators, victims and the community by interpreting criminal acts as essentially attacks on individuals and communities as well as public relations. Justice is interpreted as the process of finding solutions to problems that occur on a minor criminal case with the involvement of victims, communities and perpetrators to be important in efforts to improve, reconcile and guarantee the continuity of the improvement efforts. In handling criminal cases, penal mediation prioritizes the interests of the perpetrators of crimes and at the same time the interests of victims, so that a win-win solution is achieved that benefits the perpetrators of crimes and their victims. In mediation penal victims are met directly with the perpetrators of crimes and can bring charges so that the peace of the parties is produced. Through mediation penal case handling process is done transparently. This research is normative juridical law research intended to review the settlement arrangements of minor crimes by applying restorative justice.*

Keywords: *minor offences, penal mediation, restorative justice.*

INTRODUCTION

Criminal mediation according to Martin Wright in Groenhuijsen (1999) is “a process in which victim(s) and offender(s) communicate with the help of an impartial third party, either directly (face-to-face) or indirectly via the third party, enabling victim(s) to express their needs and feelings and offender(s) to accept and act on their responsibilities.” Criminal mediation in the Explanatory Memorandum to the Council of Europe Recommendation on Mediation in Penal Matters as stated in Mediation in Penal Matters, Recommendation No. R (99) 19 adopted by the Committee of Ministers of the Council of Europe on September 1999, define criminal mediation as a process in which victims and perpetrators of crimes are allowed voluntarily, to actively participate in the resolution of

their problems resulting from criminal acts committed by perpetrators of crimes involving third parties or mediators.

Criminal mediation has been of widespread concern as in the recommendations presented by the United Nations Congress on The Prevention of Crime And The Treatment of Offenders and the International conference, supporting documents of the 9th United Nations Congress of the Year 1995 relating to the management of criminal justice. Member states of the United Nations need to consider privatizing some law enforcement and justice functions and alternative dispute resolutions. This advice is put forward to address the problem of overload or the accumulation of cases in court.

The Vienna Declaration produced by the 10th United Nations Congress in 2000 specifically on protection efforts for victims of crime, resulting in the regulation of mediation procedures and restorative justice. Ecosoc received resolution 2002/12 on the Basic Principles on the Use Restorative Justice Programmes in Criminal Matters on 24 July 2002, which also covers mediation issues (Hadisuprpto, 2007). The Committee of Ministers of The Council of Europe, received Recommendation No. R (99) 19 on Mediation in Penal Matters, on 15 September 1999 which was subsequently issued by The EU Council Framework Decision on the position of victims in criminal proceedings, EU 2001/220/JBZ, which also regulates mediation, on 15 March 2001. The International Penal Reform Conference held at Royal Holloway Collage, University of London, on 13-17 April 1999 presented one of the keys to the new agenda of criminal law reform is the need to enrich the formal justice system with an informal system or mechanism in dispute resolution in accordance with Human Rights standards.

In general, in the life of society, sometimes between individuals there is conflict, which causes harm both to one individual and to the two individuals in conflict. There are several forms of conflict. There are individual conflicts known in psychological science because what occurs is psychiatric conflict, there are also sociological conflicts such as conflict groups, conflict management and conflict systems, there are also conflicts with legal nuances. Conflicts with legal nuances can be distinguished into conflicts of a civil nature, state administration, state, and criminal.

In a criminal case, a conflict occurs between the perpetrator of the crime and the victim of the crime. Conflict in criminal cases because the perpetrators of crimes have committed deviant acts (Sudarto, 1986), that is contrary to the laws and regulations (Reksodiputro, 1997), resulting in a victim of the crime being harmed or may make it a cause was not pleased of victims of crime or family victims of crime.

Mediation as one form of restorative justice should be suitable to be applied in Indonesia because the culture of Indonesian law i.e. customary law strongly emphasized that the handling of the conflict (civil, criminal) directed at peace and in harmony with the power of the value of the morality of Pancasila which emphasizes the principle of deliberation and consensus. Minor offences are very appropriate settlement through mediation, low cost, fast, simple and can determine for themselves the best form of settlement between the parties.

The dimension of local wisdom of customary law based on the nature of cosmic, magical and religious thought is correlated with the sociological aspect of the perspective and culture of Indonesian society. In social practice in Indonesian society, penal mediation institutions have long been known and have become a tradition among others in the People of Papua, Aceh, Bali, West Sumatra and Lampung customary law. In Papuan society, for

example, it is known as "stone burning culture", as a symbol of local culture, which is used to resolve disputes or cases, including criminal cases, through peaceful efforts to maintain social harmony. Thus, criminal proceedings against perpetrators of crimes by the state apparatus are considered no longer necessary, because it is considered to damage the social harmony that has been achieved. In addition, in nanggroe Aceh Darussalam community as law No. 11 of 2006 on Aceh Government is applied and known for the settlement of cases done first through gampong or peaceful justice. In addition, in Qanun Aceh Number 9 Year 2008 dated December 30, 2008 concerning the Development of Indigenous Life and Customs especially Article 13 determines, the settlement of disputes / disputes of customs and customs is resolved gradually", then it is also mentioned, that "law enforcement officials provide an opportunity for disputes to be resolved first in custom or other names". Similarly, in Bali, through pakraman traditional village applied the existence of awig-awig which is another dimension identical to the settlement of cases outside the court through penal mediation (Mulyadi, 2015).

In the context of criminal procedures, the application of mediation is related to the principle of restorative justice in criminal matters. Referring to ECOSOC Resolution 2002/12 on "Basic principles on the use of restorative justice programs in criminal matters", the term restorative justice refers to two aspects, namely restorative process and restorative outcomes. Restorative justice can be used at any stage of the criminal justice system and is subject to national law. The outcome of an agreement arising from restorative justice must be, where appropriate, legally supervised or incorporated into judicial decisions or judgments. If that happens, the result must have the same status as other court decisions or decisions and should prevent prosecution with respect to the same facts. If no agreement is reached between the parties, the case should be referred back to the established criminal justice process and a decision on how to proceed should be taken without delay.

RESEARCH METHOD

This research was conducted using normative juridical approach. The approaches used in this legal research are: 1) Statute approach; 2) Historical approach; 3) Comparative approach (Marzuki, 2007). In this statute approach, the law is seen as a system that has the following characteristics: a. Comprehensive means that the legal norms contained there are logically related to each other; B. All inclusive that the set of legal norms is sufficiently able to accommodate existing legal problems so that there will be no shortage of laws; c. Systematic that in addition to linking with each other, the legal norms are also infiltrated hierarchically and systematically (Ibrahim, 2006). Historical approach is used considering that in indigenous peoples the law has been regulated for a long time and has even been regulated since before the time of the Dutch East Indies. Comparative approach is used to discuss the concept of penal mediation in other countries, as well as the implementation of penal mediation in the criminal justice system in other countries.

RESULTS AND DISCUSSION

Restorative Justice Theory

The lack of criminal settlement through repressive approaches as implemented by the Criminal Justice System, has given birth to Retributive justice, which is oriented towards

retaliation in the form of criminalization and imprisonment of perpetrators. Ironic in the current Criminal Justice System, although the perpetrators have already served narnun sentences have not provided satisfaction for the victims. Against the perpetrator, his presence has not been able to be integrated or glued into his social environment, thus causing a prolonged sense of resentment, and can give rise to new criminal behavior. This is because the settlement has not been reached completely between the perpetrator and the victim and the environment, because they (perpetrators and victims) are not involved in the decision-making process. In fact, the settlement of a case must contribute justice to those who litigate (Kartayasa, 2012). Mudzakir (2001) considers that the criminal law and the Criminal Justice System do not provide justice for the community because the justice that is enforced is still retaliation (Retributif). The concept of justice in criminal policy in the future must shift from Retributive justice to Restorative justice.

Looking at the development of criminalization theory that initially focused on the position of the perpetrator, continued to an important role for the victim. In the development of criminalization thinking was born a new Philosophy of Criminalization oriented towards the settlement of criminal cases that benefit all parties both victims, perpetrators and society. In resolving a criminal case it is not fair to solve a criminal problem only considering one of the interests, both the perpetrator and the victim. Therefore, a theory of criminalization that represents all aspects in the settlement of a case both victims, perpetrators and society therefore required a combination of one theory and another theory. The same thing was also expressed by Muladi in Zulfa (2011) who stated that the problem of criminalization becomes very complex as a result of efforts to pay attention to factors related to human rights, as well as make criminal is operational and functional. Therefore, a multidimensional approach is needed that is fundamental to the impact of criminalization, both concerning individual impacts and the necessity to choose integrative theories about the purpose of criminalization that can affect its function in order to overcome the damage caused by a criminal act.

Restorative Justice is a new legal philosophy that is a combination of existing criminalization theories. Restorative Justice is a solution-oriented one that focuses attention on perpetrators, victims, and the community. Here Restorative justice contains the value of classic criminalization theory focused on victim recovery efforts contained in the theory of deterrence, rehabilitation, resocialization. In addition to focusing on the recovery of perpetrators, restorative justice also pays attention to the interests of victims (restitution theory, compensation, and reparation) and society (Incapacitation).

Restorative Justice as the concept of criminalization is not only limited to the provisions of criminal law (formal and material). Restorative Justice should also be observed in terms of criminology and correctional systems (Manan, 2008). Restorative Justice contains 2 (two) meanings, namely (Walgraye, 2004):

- Understanding justice in an ethical perspective, i.e. referring to the concept of moral balance of truth and error, the advantages and burdens of the parties. In Retributif justice, this balance is actualized in the form of suffering inflicted on the perpetrator as retaliation while in Restorative justice, the balance is realized by efforts to repair through a number of compensation or other compensation in an effort to heal or repair the losses incurred by the crime committed. The purpose of Restorative justice is to encourage the creation of a fair trial and encourage the parties involved in it.

- The understanding of justice in a juridical perspective, namely legal justice is usually aligned with legal guarantees or certainty. Restorative Justice in its implementation must still respect the applicable law. Including it is the result of the existing process and its implementation. The approach to justice cannot be implemented as long as it is contrary to the prevailing legal system and laws and regulations. This becomes important because the legitimacy of the results of the process and the guarantee of its implementation will depend heavily on a rule that becomes the basis of the existence of guarantees and legal certainty. Therefore Restorative justice must be concentrated in the rule of law and integrated in the Criminal Justice System when it will be implemented.

Restorative justice can be used at any stage of the criminal justice system and is subject to national law. The outcome of an agreement arising from restorative justice must be, where appropriate, legally supervised or incorporated into judicial decisions or judgments. If that happens, the result must have the same status as other court decisions or decisions and should prevent prosecution with respect to the same facts. If no agreement is reached between the parties, the case should be referred back to the established criminal justice process and a decision on how to proceed should be taken without delay.

According to the description above, it is clear that mediation is used in criminal matters related to the principle of restorative justice. In the context of the Indonesian criminal justice system, there are several regulations that apply mediation on criminal matters or criminal mediation. The regulations are:

- National Police Letter No.B / 3022 / XXI / 2009 / SDEOPS on Case Handling through Alternative Dispute Resolution (ADR). The letter states that the pattern of settlement of social disputes through ADR or non-litigation among others by agreement, especially in criminal cases with very little damage / loss.
- Deliberation in the form of a minor crime or an offence punishable by a fine. Subject to article 82 of the Criminal Code, the authority to impose penalties will be removed when the defendant pays the maximum fine for related cases.
- Crimes by children under 8 years old. Article 5 of the Children's Court Act No. 3/1997 regulates that for children under the age of 8, the police/prosecutor may hand the child over to his parents.
- The Human Rights Court Act 1999 stipulates that the Human Rights Commission has the authority to conduct mediation procedures in cases of human rights violations.

The criminal mediation regulation indicates that mediation procedures can be applied as an Alternative Dispute Resolution (ADR) in some criminal cases. Mediation procedures are used to apply restorative justice with the aim of reaching an agreement so as to meet the individual and collective needs and responsibilities of the parties and achieve the reintegration of victims and perpetrators.

Criminal Law Policy Theory

The policy of tackling crime or can also be called criminal politics has the ultimate goal or main goal that is "the protection of society to achieve the welfare of the community". The criminal policy itself is part of the law enforcement policy. Law enforcement policy is part of social policy and also included in legislative policy. Criminal politics is also essentially an integral part of social policy, namely policies or efforts to

achieve social welfare (Arief, 2008). Efforts to combat crime can also be interpreted as criminal politics as the rational arrangement or preparation of efforts to control crimes by the community and inseparable from the broader policy, namely social policy (Arief, 1996).

Tackling crime is eliminating the causative factors or conditions that cause crime. Crime prevention or commonly referred to as political criminal can cover a considerable scope. According to Sudarto (1986) there are several definitions of political criminal or criminal policy:

- In a narrow sense is the whole principle and method that becomes the basis and reaction to violations of the law in the form of criminal.
- In a broad sense is the overall functioning of the law enforcement apparatus, including the workings of the courts and police.
- In the broadest sense is the overall policy, carried out through legislation and official bodies, which aims to uphold the central norms of society.

The definition of criminal politics according to Sudarto is a rational effort of the community in tackling crime. According to G. P. Hoefnagels in Arief (2008), efforts to combat crime can be achieved by:

- Application of criminal law application;
- Prevention without punishment;
- Influencing views of society on crime and punishment.

The crime prevention that has been disclosed by G.P Hoefnagels can be broadly grouped into two parts, namely penal crime prevention and non-penal crime prevention. Penal policy is a form of crime prevention that emphasizes on repressive actions after the occurrence of a criminal act, while non penal policy emphasizes preventive measures before the occurrence of a criminal act.

According to the political view of non-penal crime policy is the most strategic crime prevention policy. Because it is preventive before the occurrence of criminal acts. Non penal means is to handle and eliminate conducive factors that cause a criminal act.

Considering that efforts to combat crime through non-penal lines are more preventive measures for the occurrence of crime, the main goal is to deal with factors conducive to the cause of crime. Conducive factors include, among others, centered on social problems or conditions that directly or indirectly can cause crime. Thus, viewed from a macro and global criminal political point of view, nonpenal efforts occupy the key and strategic position of the overall criminal political effort.

Settlement of Minor Offences with Restorative Justice

Settlement through restorative justice in a case, especially minor crimes can be done in 3 (three) ways as follows:

- Restorative Justice in the Context of Investigation

The police are the gatekeepers of the criminal justice system. As Donald Black put it, his role as an investigator and criminal investigator, puts the police in touch with most ordinary or common crimes. Most police officers work reactively rather than proactively, relying heavily on citizens to complain or report suspected crimes (Anleu, 2010). With sufficient evidence, based on the criminal proceedings law (KUHAP), the police as investigators delegated the case to the Prosecutor's Office for prosecution. An important question in this case, is it possible for the police as investigators to implement restorative

justice processes? This is primarily related to the investigator's authority to seek information, make arrests and other necessary actions, detain or stop investigations. As stipulated in Article 7 paragraph (1) of the Criminal Code (Law No. 8 of 1981 concerning the Criminal Code) jo. Polri Law (Law Number 2 Year 2002 concerning the National Police of the Republic of Indonesia), the investigator's authority includes :

- receive reports or complaints about criminal acts;
- perform the first action at the scene;
- to stop the suspect and check the suspect's id;
- making arrests, arrests, searches and seizures;
- conducting examination and confiscation of letters;
- take fingerprints and photograph someone;
- call someone to be heard and examined as a suspect or witness;
- bring in the necessary experts in relation to the examination of the case;
- conducting a halt to the investigation;

Take other actions under responsible law.

As stated above, in normative-positivistic way of thinking, in Indonesia there is no specific legislation or special provisions governing restorative justice in the investigation process, such as juvenile delinquency, as in the country mentioned above.

The change in the investigative model from merely punitive to restorative (the recovery of perpetrators and victims) is more than just a technique, but a culture of investigation. Therefore, it requires a process for adaptation, which must be done. For example, a scheme involving victims' participation scheme in the process of investigation or investigation is not easy because it demands a change from the usual patterns of "closed" to more "open". Victims' participation must be defined, giving restorative care, especially the recovery and rehabilitation of victims.

Restorative Justice in the Context of Prosecution

Prosecution as a subsystem of the criminal justice system, has a strategic position also in realizing the concept of restorative justice. In general, restorative justice is related to each stage of the implementation of the prosecutor's authority to carry out detention, pre-prosecution, preparation of indictments and criminal charges, as well as legal efforts. The most extreme condition of the role that can be played by the prosecutor in the implementation of restorative justice, namely diverting (to divert) the prosecution to reach a settlement of the case out of court in certain cases. The diversion of prosecution itself has become a broad trend in criminal justice reform in the criminal justice system in various countries. Diversions can be conditional discharge, simplified procedure, and decriminalization of certain conduct. These matters are not explicitly regulated in the Criminal Code, except for the termination of prosecution.

The implementation of restorative justice certainly requires the creativity of prosecutors to develop restorative programs, so as to minimize the resolution of cases in court. In that context, prosecutors are required to use or build problem-oriented approaches or strategies. Prosecutors have so far tended to continue the settlement of cases through formal criminal proceedings to obtain court rulings of permanent legal force rather than resolve with restorative models.

With restorative justice, such traditional patterns should be seen as alternatives to solving social problems, which arise as crimes or crimes that come into contact with the interests of the victim, his family or the affected community. So, when the judicial process in the frame of prosecution, can not meet the interests of victims, families and communities affected by the crime, then creativity towards the application of the restorative justice model becomes inevitability, although from the telescope of criminal proceedings law has not obtained justification.

As quoted by Luhut M.P. Pangaribuan, in Scotland the prosecution can end with "prosecutor fine", i.e. "the victim and the person responsible for the crime are brought together and, if the mediation is successful, the public prosecutor's office can decide not to pursue prosecution". Even then expanded with the use of mediation. Similarly, in France, since 1993, chaterine Elliot and Catherine Vernon have said that "public prosecutors are often in practice seeking to apply intermediary solutions." The reason used, as Davies, Croall and Tyrer put it, is "the role of prosecutor is not to seek a conviction at all costs: they should prosecute not persecute (Pangaribuan, 2009)."

In addition to the traditional issue of the criminal justice system; institutional obstacles of prosecutors become variables of success or failure of restorative justice implementation at the level of prosecution when as stated by Yudi Kristiana (2009) that the implementation of the duties and authorities of the prosecutor is carried out with a bureaucratic, centralistic approach and the command system and hierarchical accountability. The decision of the head of the prosecutor as a form of control of the prosecution stage, at the level of bureaucracy that has a long distance with the reality of the case can distort the resolution of the case in the context of restorative justice, such as the implementation or diversion of prosecution in cases of child delincilence or domestic violence. Especially when the diversion criteria is not specified in the legislation or prosecutorial policy in general. Therefore, the change from within through the attorney general's policy becomes an important factor in the functionalization of restorative justice, until the Criminal Proceedings Act (KUHAP) provides an explicit basis.

Restorative Justice in the Context of Examination of Court Hearings

Examination of court hearings in criminal cases in Indonesia based on the Criminal Code of Law (KUHAP) or special criminal proceedings is not designed to resolve cases interpersonally. The design built in the criminal justice system in Indonesia, namely the court serves to determine whether the criminal law has been violated and if violated, then the perpetrator is sentenced; or if it is not violated, then the defendant is released or released from all charges. The role of such traditional courts is clearly different, even at the opposite of the concept of restorative justice which intends to restore balance in social relations in addition to the outcome of the judicial process, namely mutually acceptable compromises between victims, society and perpetrators of crimes or crimes. In other words, traditionally "adjudicative", restorative concepts offer a "negotiation" model. On that basis, the question that needs to be asked, namely whether the role of courts and judges in developing and implementing the initiation of restorative justice? Before discussing the role of the judge, it takes a change into the paradigm that the criminal procedural law that governs examination procedures at the court level, can be kept for the benefit of restorative justice. This paradigm clearly shows the exemption from the criminal proceedings law that has been the limit of examination of court hearings.

Restorative justice, which adheres to different principles from court hearings, is the clearest issue at this level. In the context of the Indonesian criminal justice system, the provisions on "openness" are very firmly and clearly regulated in the Criminal Code of Law (KUHAP), which is based on the principle of "examination of open court hearings to the public". Meanwhile, the conference, meeting model of restorative justice is usually arranged privately, so the issue is how judges and legal advisers judge that the interests of each party are respected.

More broadly, this relates to the ability of judges to design a model of meeting between the parties in a forum that is not "examination of court hearings for criminal cases. In the Indonesian context, it is also related to the activities that judges may be able to do to design a model of meeting outside the regularity as stipulated in the Criminal Code of Law (KUHAP). Indonesia's experience of mediation integrated with court connected mediation in civil cases has not yet shown satisfactory results. Therefore; the introduction of restorative justice at the court level without the basis of clear legal criteria is certainly an issue itself in addition to the main issues above. The restorative justice model at the level of court examination essentially gives the parties the opportunity to resolve through harmonious "conference" models for victims, perpetrators and society. Thus, judges are required to use strategies or manage the settlement of criminal cases by selecting and offering an appropriate alternative model.

The settlement of criminal cases using repressive approaches as implemented in the criminal justice system, has given birth to retributive justice, which is oriented towards retaliation in the form of criminalization and imprisonment. In its development, there is a discourse on the orientation of criminalization that accuses the victim as an important part of the purpose of criminalization. Thus offered a criminal case resolution system that is oriented to benefit all parties, namely Restorative justice. In the concept of restorative justice contained the concept of rehabilitation, socialization, restitution, reparation, and compensation in resolving a criminal case (Zulfa, 2011).

The need for restorative justice in efforts to renew criminalization is very important. According to Adrianus Meliala, this is because the current criminalization system brings further problems for the families of criminals. Criminalization of perpetrators does not relieve or heal the victim, the formal process of criminal justice that takes a long time, expensive, and uncertain, especially the community as a continuation of criminalization also does not make a meaningful contribution to the future for the inmate and his relationship with the victim.

In some developed countries restorative justice is not just a discourse by criminal law academics or criminology. In North America, Australia, and some countries in Europe restorative justice has been applied in the conventional stages of criminal justice process, starting from the stage of investigation, prosecution, adjudication and execution stage (Wahid, 2009).

CONCLUSION

Restorative Justice has brought new views in the criminal law and criminal justice system:

- Justice in criminal law is oriented to the interests or suffering of victims and the accountability of perpetrators of crimes against the actions and their consequences on the victim.
- crimes or violations of criminal law are in violation of the public interest and the interests of the victim are a major part of this public interest.
- the victim is the one who is harmed by the crime, especially the direct victim, the community, the state and indeed the perpetrator himself.
- implementation of criminal justice aimed at resolving conflicts.
- and the type of criminal to be inflicted on the perpetrator is part of the conflict resolution by emphasizing the responsibility of the perpetrator for the act and its consequences.
- victims, communities, countries and perpetrators in the criminal justice process play an active role.

Thus, restorative criminalization is a new way to look at criminal justice that focuses on healing wounds suffered and relationships instead of punishing perpetrators. The purpose of the restorative model in the criminal justice system is comprehensive justice by paying attention to all interested parties, namely victims, perpetrators of crimes, society and the state. The purpose of criminalization is to pay greater attention to the interests of all parties, because the occurrence of crimes not only harm and bring repercussions to the victims alone, but also society, the state, even the perpetrators of the crime itself.

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