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RESTORATIVE JUSTICE APPROACH IN HANDLING MINOR OFFENSE

Karim

Restorative justice appears due to the lack of criminal justice system which not running as expected justice value. The criminal justice system is often caused a disappointment and dissatisfaction either for the victim, the perpetrator or both victim and perpetrator. Hence, this study aims to know how the restorative justice approach handling the minor offense case to reach justice. The methodology used in this study is juridical normative with statue and conceptual approach. Required data taken from regulations in Indonesia. The result of the research showed that restorative justice approach has aim to answer the disappointment ² on the present criminal justice system. Restorative justice approach is done by expressing regrets and apologies to ⁵ the victim and his family, as a counterpart, the victim and his family forgive the perpetrator. This is done due to reach justice for both parties. Therefore, restorative justice is an alternative justice concept in handling minor offense.

Keywords: restorative justice, criminal justice system, minor offense, Indonesia.

МЕТОД ВОССТАНОВИТЕЛЬНОГО ПРАВОСУДИЯ В ОТНОШЕНИИ МЕЛКИХ ПРАВОНАРУШЕНИЙ

Карим

Восстановительное правосудие возникает из-за недостатка системы уголовного правосудия, которое работает без ожидаемой от него высокой эффективности. Система уголовного правосудия часто вызывает разочарование и неудовлетворенность у жертвы, или у преступника, или у обоих из них одновременно. Таким образом, цель настоящего исследования состоит в том, чтобы узнать, как реституционный подход к рассмотрению дела о мелком правонарушении позволяет добиться справедливости. Методология, используемая в данной статье, является юридически-нормативной со

статическим и концептуальным подходом. Необходимые сведения взяты из нормативных актов Индонезии. Результат исследования показал, что обращение к восстановительному правосудию является реакцией на разочарование существующей системой уголовного правосудия. Метод восстановительного правосудия осуществляется путем выражения сожалений и извинений потерпевшему и его семье, а в ответ, жертва и ее семья прощают преступника. Это делается с целью добиться справедливости для обеих сторон. Таким образом, восстановительное правосудие является альтернативной концепцией правосудия в отношении мелких правонарушений.

Ключевые слова: восстановительное правосудие, система уголовного правосудия, мелкое правонарушение, Индонезия.

Introduction

Every legal solution should be in accordance with the valid rule of law as logic consequences due to make it in line with the legal itself. The thing that is becoming the basic validity in implementing the system of law enforcement is an adage of *Fiat jūstitia ruat cælum* or known as “let justice be done though the heavens fall” [12, p. 9]. However, this adage is implemented in the narrow thought with excuse of legal assurance and enforcement.

In its essence, criminal law has function to protect the legal interests from despicable actions [6, p. 10]. Meanwhile, in its legal enforcement the occurrence of criminal case is not yet able to be reduced significantly. Therefore, restorative justice appears as an alternative process in handling the criminal case. H. Strang in his book claimed that restorative justice becomes a new lens in seeing crime with consideration on moral, social, politics and economic contexts [9, p. 12]. Restorative justice appears due to the system of criminal justice which unable to run as expected justice value, as well as the process of minor offense’s case which submitted to the court cannot provide enough space on the victim’s and perpetrator’s benefit. In other words, the conventional system of criminal justice nowadays is often cause disappointment and dissatisfaction. H. Hendrojono in his book “Kriminologi

Pengaruh Perubahan Masyarakat dan Hukum” stated that there should be coherence between criminal offense and criminal act. He added that, every criminal should get the same or fair treatment on things he had done [2, p.19].

The present criminal justice system tends to focus on the rights of the perpetrator rather than the rights of the victim. This makes an impression that criminal law only gives protection to the rights of the perpetrator. In emphasizing its norm enforcement, there should be a support from criminal sanction even if it is the last effort (*ultimum remedium*) due to create justice for society [10, p. 25]. Therefore, every criminal case is not always proposed to the court but it can be done through restorative justice. Restorative justice as one of the efforts used as a solution in handling the cases is becoming the topic of this study. Hence, this study aimed to know restorative justice approach in handling minor offense’s case to reach for justice.

Methodology

This study is using juridical normative as the methodology. Juridical normative methodology is chosen because legal study has characteristic as a prescriptive and applied science or *sui generis* [5, p. 10]. It is a legal research with library research which focuses on reading and analyzing on law materials found in textbooks and legal journals [3, p. 18]. The type of the study is normative with statue approach and conceptual approach. Statue approach is done to produce a more accurate research result by analyzing the legal regulations related to the minor offense in Indonesia. Meanwhile, the conceptual approach is done to learn the paradigms, theory and doctrines within the legal study. Conceptual approach is used to find ideas which generate law definitions or concepts. The collected legal materials are then identified and classified based on the source and hierarchy. After that, the materials are analyzed using deductive and inductive legal reasoning methodology. The deductive methodology used to explain or solve the legal issue, started from the rule of law within regulations until it linked to the legal fact. The inductive methodology used to explain or solve the legal issue by formulating the legal fact first, before relating it to the rule of law.

Discussion

Equality before the law is one of the important principle in modern law. This principle is becoming the pillar of the rule of law which has been spread to developed countries, including Indonesia. Indonesian Constitution adopts this principle since colonial period through *Burgelijke Wetboek* and *Wetboek van Koophandel voor Indonesia* on April 30, 1847 via *Staatsblad* 1847 Number 23. In colonial period, this principle was not fully applied due to political pluralism which gave different space for Islamic and cultural law. However, the legal logic on the principle of equality before the law should have similar treatment either for the right of the victim or perpetrator. As written in Criminal Code Procedure, the rights of suspect and defendant have been adequately regulated in a detailed description in a separated chapter. But the rights of victims toward the minor offense case is not regulated in a detailed way but spread in some chapters. This showed that the government only gives attention to the suspect and defendant rather than the victim [11, p. 20].

Civil law system is a legal system that featured the legal codification which interpreted by the judge. It was derived from Roman law which developed in the 19th century and known as codification era. Indonesia based on the principal of concordance is one of the countries which adhere to civil law system. But in its journey, especially in its corporation law, Indonesia has been adopted the concepts from common law system. This system was started on 1066 when Norman, led by William I, when suffered a great loss from Anglo-Saxon in Hastings battle and caused the domination of almost the whole England region in the next year. The tradition from Norman was becoming the basic fundamental of the common law system nowadays [8, p. 20].

Jim Consedine, one of the expert in restorative justice from New Zealand, claimed that the concept of retributive and restitution justice based on revenge toward criminal offenders, with prison as the punishment, should be replaced with restorative justice system which based on reconciliation, damage restoration suffered by the victim, society integration, forgiveness and remission. In minor offense, the concept of restorative justice system becomes very important since it respect and not violate

the rights of victim and perpetrator. Restorative justice, at least, has aim to fix or restore the criminal action with useful actions either for victim, perpetrator or the environment around [1, p. 10].

Generally, restorative justice lies on cosmovision philosophy because it discusses about the local wisdom. The philosophy of cosmovision has its starting point from cosmologic view that a human being is a part of whole called the universe. It found within the vision of life from various traditional societies in the past until present. Hence, the infringement on behavior which has been positioned as criminal act requires the solution with certain mechanism that may lead to the interference of stability. Stability restoration should involve all parties on the effort of the whole, comprehensive and holistic restoration, including obligation for the perpetrator to refine and restore the damage along with the loss that he made either physical or psychological. In the construction of contemporary terminology, the restoration of physical and financial loss to the victim is called as restitution or compensation. This restoration is done by expressing regret and apology to the victim and the society around. One of the important elements in restorative justice is getting apology from the victim as a reply of victim's apology. In restorative justice system, apology is seen as a sign of achieved or completion of a case with some agreement before, in which its basic thought and process cannot be separated from the life's philosophy of local inhabitant [11, p. 12].

Seeing through the historical and sociological aspect, custom law is seen as an effort to restore the harmony within society by giving sanction based on the custom [11, p. 12]. This customary sanction is given in the form of obligation to apology to the victim and his relations. This obligation has shown the orientation of restorative justice in handling the criminal case. The example in expressing apology based on the custom can be seen as below:

1. Batak Karo society

Batak karo society solve the criminal case by holding a justice ceremony called as *Purpur Sage*, which attended by *Kalimbubu* parties or parties who were in dispute. The ceremony was started with delivering speech on life essential. The speech is

delivered until both of the parties reached their awareness on the effect from the conflict between them. The end of the ceremony is marked with a series of *Purpur Sage* ritual and continued with eating together. This condition showed that the conflict between *Kalimbubu* parties has been finished [11, p. 13].

2. Lampung society

If Batak Karo society holds *Purpur Sage* as a solution in handling criminal case, society in Lampung holds *Mewari* ceremony for solving the criminal case. *Menawari* ceremony or known as bonding brotherhood is a customary court decisions within traditional society in Lampung. *Menawari* is an agreement which formed between two parties who were in dispute by doing a brotherhood bonding (*Mewari*). This ceremony makes the relationship between dispute parties become well as is family relationship [11, p. 13].

3. Tuha Peut society

Tuha Peut is a teamwork that consisted of customary society, who becomes a valid guarantor on perpetrator's family and victim's family wishes statement due to avoid the negative excess in the other day. *Tuha Peut* is trying to make peace between their societies who were having criminal cases. *Tuha Peut* is facilitated by Police, especially for the violence and persecution case, as an institution which allowed borrowing the suspect to take home temporarily. This borrowing is done due to make the suspect could attend in case adjudication through discussion between suspect and victim along with their family which held by *Tuha Peut*. According to Aceh society, the criminal case adjudication through formal courts is often failed. The court's decision is only produce formal justice without fair adjudication felt by the victim and his family. Therefore, discussion is chosen as a solution in solving criminal cases to prevent the potential of revenge in the other day [11, p. 13].

Every criminal case has the cause and the effect within its case, including in minor offense. The criminal act that violates the provision is not yet enough to impose a crime to the perpetrator. It is still needed a fulfillment on other delict elements, such as the fulfillment on the availability of failure element. A person will be convicted crime if he did a failure. However, if he is only do violation, he will be

freed from crime conviction. It showed that a person can be jailed if he had failure, but if his failure is categorized in minor and the victim's side has been forgiven his failure, then he should not be jailed or punished [7, p. 15].

The society development brings shift in law values which will affect the law itself either before or after adjusted to the norm. At first, law is based on the absolute theory which emphasizes on a revenge that gives deterrent effect. Then it is shifted to relative theory which not only based on the deterrent effect but on the restoration of loss due to criminal act and on the justice fulfillment [2, p. 25]. ² Restorative justice approach is assumed to have the most recent shift from various models and mechanisms that work within the criminal justice system in handling criminal cases nowadays. PBB through basic principles evaluate that ⁴ restorative justice approach is a rational approach which can be used within the criminal justice system [13, p. 20]. According to L. Loqman, criminalization is a problem that needs to be noticed since its early phase. Therefore, the sentence given is aimed more at justice and not considered as a “factory measurement” but a “tailor mode” which can be modified based on the justice system [4, p. 12]. The justice value becomes the main measurement which involves stability between justice for the victim and perpetrator. This is an essence of restorative justice which leads to the transformation of criminal law.

³ Restorative justice approach is a paradigm, which can be used as a frame of criminal case strategy that aimed to answer the dissatisfaction on the present criminal justice system. The adjudication of a certain cases, especially on minor offense, has been arose a justice in a form of retributive justice which oriented on revenge such as imprisonment and criminalization of the perpetrator. Perpetrator who should not receive repressive treatment such as getting arrest, detention and imprisonment has become public attention because it considered as injustice treatment. Ironically, in the present criminal justice system, the perpetrator has been punished in sentences but the victim along with his relative are still having a feeling that the loss they suffered is not yet restored. As well as the perpetrator, his existence is not yet could be integrated within his social environment. Thus, it leaves a long term “revenge” which

can create a new criminal action. It happens because it is not involving both victim's and perpetrator's parties (such as family, friends and relatives) in decision making.

Conclusion

Restorative justice as the approach in handling minor offense's case is done through penal mediation mechanism by reunite the victim and perpetrator, or known as victim-offender mediation, together with police as the mediator. Hence, it will produce mutual agreement outside the litigation. Penal mediation which based on restorative justice approach is still lie within the scope of integrated criminal justice system. The main priority is to fulfill the victim's and perpetrator's desire, that is, the victim wants his loss is restored while the perpetrator wants his case done quickly and get no punishment. The consequence is the perpetrator should regret for his act and apologize to the victim. He also has obligation to restore all the loss caused by him. The point is, restorative justice is filled with principals, such as establishing mutual participation with victim, perpetrator and social group to solve the criminal case, putting victim, perpetrator and social group as stakeholders that work together to find justice for all parties or known as win-win solution. Furthermore, restorative justice encourages the resolution of minor offense case in more informal and personal way rather than through formal and impersonal way.

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