



## Criminal Problem Solving Model Through Restorative Justice Approach

### Model riešenia trestných problémov prostredníctvom prístupu restoratívnej spravodlivosti

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#### Abstract:

*Restorative Justice is a solution which can be seen as fair treatment to all parties (win-win solutions). Nowadays, Restorative justice in Indonesia is still dealing with the conventional criminal justice system. This research aims to examine further regarding the approach of restorative justice as a model for resolving minor criminal cases. This research is a qualitative research. The source of this research is secondary data in form of books and other literature sources such as research related to restorative justice and presidential decrees. The results of this study indicated that the process of resolving minor crimes through restorative justice was carried out as an effort to learn law and increase legal awareness of Indonesian people. Based on the results and discussion, it can be concluded that it is time for the settlement of minor crimes through the concept of Restorative Justice become a consideration in criminal system and normalized into laws and regulations. Thus, it is necessary to have a new system in the implementation of Indonesian criminal system, not only*

**Keywords:** List the keywords covered in your paper.

#### Abstrakt:

*Restoratívna spravodlivosť je riešením, ktoré možno považovať za spravodlivé zaobchádzanie so všetkými stranami (riešenia výhodné pre obe strany). V súčasnosti sa restoratívne súdnictvo v Indonézii stále zaoberá konvenčným systémom trestného súdnictva. Cieľom tohto výskumu je ďalej preskúmať prístup restoratívnej spravodlivosti ako modelu riešenia menších trestných vecí. Tento výskum je kvalitatívnym výskumom. Zdrojom tohto výskumu sú sekundárne údaje vo forme kníh a iných literárnych zdrojov, ako napríklad výskum týkajúci sa restoratívnej spravodlivosti a prezidentských dekrétov. Výsledky tejto štúdie naznačili, že proces riešenia menej závažných trestných činov restoratívnou justíciou sa uskutočňoval ako snaha osvojiť si právo a zvýšiť právne vedomie Indonézianov. Na základe výsledkov a diskusie možno dospieť k záveru, že je čas na riešenie menej závažných trestných činov*



*prostredníctvom koncepcie restoratívneho spravodlivosti, ktorá sa stane hľadiskom v trestnom systéme a normalizovaná do zákonov a iných právnych predpisov. Preto je nevyhnutné mať nový systém implementácie indonézskeho trestného systému, a to nielen prostredníctvom uväznenia, ale aj prostredníctvom trestnej mediácie založenej na prístupe restoratívnej spravodlivosti.*

**Kľúčové slová:** *Restoratívna spravodlivosť, obojstranne výhodné riešenia, trestný systém*

## **Introduction**

Based on the existing facts, the current criminal system for minor crimes in Indonesia does not fully guarantee integrated justice, justice for perpetrators, justice for victims, and justice for people [1]. This is what encourages the application on the concept of "restorative justice" for the future. As what was stated by Bagir Manan, that the substantiation of "restorative justice" contains principles, including: Building joint participation between perpetrators, victims and community groups in resolving a criminal act [2]. Placing perpetrators, victims, and society as "stakeholders" who work together and immediately try to find solutions that considered as fair for all involved (win-win solutions), and encouraging the completion of criminal act in more informal and personal manner, rather than settlement by means of formal (rigid) and impersonal proceedings.

A settlement that is deemed fair for all the involved parties (*win-win solutions*), as what stated by Manan, it is in line with 2010-2014 National Police Plan and Strategy, it is arranged in order to develop a good quality of human resource through the adequate development both in quantity and quality. The strategy is implemented by adding new members of National Police which prioritizes the principle of 'local boy for the local job'. The strategy is implemented by adding new members of National Police which prioritizes the principle of 'local boy for local job'.

The concept to resolve minor criminal cases through restorative justice is to raise a justice for every party (victims and perpetrators). The meaning of justice itself can be classified into three aspects: first, *retributive justice*, the main emphasis is on punishing the perpetrators for criminal act they have done. The second is related to *distributive justice*, the main focuses is on *extinguishing the concept of minor criminal case settlement* through restorative justice in order to realize the justice treat for victims and perpetrators. And the third is restorative justice, which is broadly equated with the principle of restitution. The relationship between these three things within an approach to overcome the dangerous consequences of the actions for perpetrators of crimes (minor crimes) and trying to actively involved. Both victims and perpetrators, in a process aimed at securing reparations for victims and rehabilitation for perpetrators [3].

Nowadays, Restorative justice in Indonesia still deals with the conventional criminal justice system [4]. It can be said that the pioneers of change, especially law enforcers, are not ready to change their perspective in assessing a crime and still hold the old paradigm, where criminal act is a violation against the state; they cannot imagine yet that the intended act is actually a violation among individuals in community. When the criminal justice administrators have changed the paradigm of thinking and recognizing started to apply restorative justice, then in a short time restorative justice will be in juxtaposition within the conventional criminal process [5]. Regarding this problem, Consedine quotes Martin Wright's opinion comparing the

process of handling restorative justice in England. According to the Considine not every level of criminal acts can be applied to the principle of restorative justice, however, for certain crimes the application of this principle is far more effective than conventional criminal justice process [6].

As for the operational sector, the social security services tend to be stable and controlled. Moreover, the success of National Police in handling terrorism by uncovering cases and their causes certainly needs to be appreciated. From the success that has been achieved and several programs that have not been achieved yet, an optimal results and people expectations that yearn for the existence of National Police, the strategy of Building Public Trust (trust building).

### **Methodology**

This research used descriptive qualitative approach, descriptive qualitative research is the characteristic of data that was taken from documents, transcripts, words, pictures, etc. Moreover, this study is categorized as qualitative research design because this study is aimed to check the quality of the the criminal system [7]. The source of this research is secondary data in form of books and other literature sources such as research that related to restorative justice and presidential decrees.

This research is a legal research to find the truth of restorative justice system. The restorative justice approach is assumed as the most recent system from various models and mechanisms that work in criminal justice system in handling criminal cases [8]. The data processing technique was carried out by selecting the results according to the specified topic. Determine and sort each section according to the research problem.

### **Result and Discussion**

#### **Penal Mediation as a Legal Instrument**

The Implementation of penal mediation as a legal instrument of *Restorative Justice* as a new model for Indonesian legal system that offers comprehensive and effective solutions to deals with minor offense of criminal acts, although mediation is not an alternative method of criminal cases solving it is quite new to Indonesian legal system. Besides, the basic characteristic of mediation is the same as deliberation mechanism. Therefore the use of penal mediation is expected to be well accepted by legal professionals and the effective general public. Penal mediation in the settlement of minor crimes is a form of diversion in criminal law system, According to Jack E. Bynum Diversion is an attempt to divert, or channel out, offenders from the juvenile justice system [9].

Furthermore, in the process of handling minor crimes outside the court, it can be carried out if the criteria of Restorative Justice have met such as the perpetrator has admitted his actions, the victim and victim's family has forgive the perpetrator and the society supports deliberation which meets the qualifications of minor criminal act, If this has been qualified, the Police can approach Restorative Justice through penal mediation forum in the Mediation room during the investigation process, with an aim to recover the condition of perpetrators, victims and society. If mediation and deliberation are successful and lead to an agreement, the agreement can be used as an excuse to remove the offenses of perpetrator, which can be replaced by efforts of perpetrator to recover the losses, however it causes the minor criminal

## **Criminal Problem Solving Model Through Restorative Justice Approach**

Karim

---

case to be resolved without the need to be brought to court. This condition requires a common perception among law enforcement officers to handle minor crimes, especially for police and this common perception can be achieved if there are special norms concerning on the settlement of minor crimes through penal mediation as the embodiment of restorative justice in Indonesian Integrated Criminal Justice System.

Children courts that currently in conflict with the law have become the last effort after various other attempts have been taken either by the family approach or other approaches. This should be an example to justify the settlement of other crimes through the principle of restorative justice, such as domestic violence which nowadays always ends in the official authorities such as court, and this case will affect the family condition.

It often encountered the thought that every criminal case should be solved by criminal justice mechanism and imprisoned as retribution for criminal actions. To a certain extent, criminal punishment in form of imprisonment can be an effective punishment to prevent criminal act. However, In Indonesia, prisons life still has negative impact regarding the treatment of prisoners / assisted residents, in certain correctional institutions that become a platform for proliferation of crimes, including the circulation of drugs criminality in prisons.

### **Criminal Justice Process in Indonesia**

In Indonesia criminal justice process, correctional institutions are still considered as gathering place for criminals, a place to hold perpetrators of various criminal act that have been proven by law, from the theft, lottery dealers, mutilating, drug dealers, to major crime of corruptors are imprisoned in same location [10]. Others can be the suspects who are entrusted by investigators that currently undergoing the trial process. Such conditions causes the correctional functions are not able to function properly.

Implicitly, the concept of restorative justice only contained in the provisions of Law number 3/1997 on Juvenile Justice. It will certainly put the legal instrument in a difficult position considering that the settlement of cases in our criminal justice system is formalistic legalistic. The principle of law enforcement that has been carried out is the civil settlement of giving compensation or compensation and requesting forgiveness from the perpetrator to the subject of criminal act, not eliminate criminal responsibility for perpetrator and the judicial process will continue, it can be an excuse to provide any leniency for perpetrator

In the settlement of minor criminal cases, especially through restorative justice, law enforcement officers have most important role to ensure the implementation of restorative justice, in this case law enforcing instrument includes the institutions and law enforcing persons.

The main problem on the existence of Mutual Agreement is that the Memorandum of Understanding does not change the criminal sanction; however law enforcement officials agree to provide a treatment (action) for minor criminal offenders which the handling does not have to be resolved through court. Settlement of criminal cases through the court will spend a long time, effort and money, which does not necessarily to bring a sense of justice for the parties and society; this is an important point considering that the settlement of minor criminal cases through restorative justice has developed in several small countries which the obtained results are good, because through this approach a sense of justice will be obtained for every parties of every level of societies. Therefore, it needs several efforts to solve the minor offense through restorative justice. The effort consists of:

## **Criminal Problem Solving Model Through Restorative Justice Approach**

Karim

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1. The concept should be normalized, thus the settlement of minor criminal offense can be solved through resortative justice efforts that has a separate statutory regulation
2. Normalization has made regarding the criteria for a criminal act that categorized as a minor crime.
3. The norms regarding the settlement of minor crimes through restorative justice should be regulated on the consent of the victim and victim's family and the losses they receive will be restored and the perpetrator obliged to recover the losses incurred and there is a sense of remorse and will not repeat the same mistakes
4. The norms regarding the settlement of minor criminal act through restorative justice should contain regulation of settlement mechanism.
  - a. The authorized side should mediate every party as an effort to resolve minor criminal act through restorative justice. In this case, Indonesian National Police is needed.
  - b. The mediation process in settlement of minor criminal cases through restorative justice is carried out by investigation process
  - c. The mediation process to settle the minor cases through restorative justice can be carried out on the basis of victim initiative of the victim, perpetrator or police within the consent of the victim and perpetrator.
  - d. The mediation process in the settlement of minor crimes through restorative justice is carried out with the aim of restoring the victim's loss and give deterrent effect to the perpetrator
  - e. The mediation process in the settlement of minor criminal cases through restorative justice is carried out in order to reduce the number of small cases investigations
  - f. The process of resolving minor criminal cases through restorative justice is carried out in order to reduce state costs, and the excess number of criminals whose stayed in correctional institutions
  - g. The process of resolving minor crimes through restorative justice is carried out as an effort to learn and increase legal awareness of Indonesian people.

If the norms already set what criminal cases should include as restorative justice, thus no other legal norms should be involved, as what Rock stated that Restorative justice had always been as much an ideology, a theory, and a social movement as a utilitarian practice.

### **Mediation Process of Both Sides**

The mediation process can provide greater understanding for both parties and sometimes obtain the real improvement. The mediation method between the perpetrator and the victim usually consist of reparations (the perpetrator corrects everything that was damaged), victim-perpetrator conferences (which involve families of both parties and prominent figures in society), and victim awareness (an attempt by the perpetrator to be more concerned about the impact of his actions). Basically, restorative justice consist several aspect as below:

1. Memprioritaskan dukungan penyembuhan dan pemulihan terhadap kondisi korban. To prioritize healing and recovery support for the victim's condition.
2. Perpetrators of criminal acts are responsible for the consequences of their actions.
3. Carry out human dialogue between the victim and the perpetrator to achieve understanding and resolution.

## **Criminal Problem Solving Model Through Restorative Justice Approach**

Karim

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4. Attempt to put down the incurred losses correctly
5. The Offenders should be aware of how to avoid future crimes
6. The community especially the apparatus (Polri) helped to integrate both victims and perpetrators

Furthermore, restorative justice tried to observe three different forms of criminal justice. It is related to the principles of 3R in restorative justice consist of responsibility, which was stated by James Dignan, underaged perpetrators along with their parents should apologize to the victim and made a confession of regret for the happened case; and *reintegration*, which is an underaged perpetrator should obeys the rules that currently applied in society and willing to pay every penalty to the victim as a result of the inflicted act inflicted.

Nowadays, In practice the Police also required to prioritize penal mediation to deals with criminal cases which the object of the case is small, It is stipulated in Police's Decree Number: B / 3022 / XII / 2009 / SDEOPS of December 14, 2009 concerning on Case Handling through Alternative Dispute Resolution (ADR) and the Regulation of National Head of Police Number 7/2008 concerning on Basic Strategy Guidelines and the implementation of community police in carrying out the police duties. In the Letter of Chief of Police Number B/3022/XII/2009/SDEOPS of December 14, 2009, several steps for handling cases through ADR are determined, such as:

1. Attempt to handle criminal cases that have minor material losses, the resolution can be directed within the concept of ADR.
2. Resolution of criminal cases of ADR should be agreed by every involved people of the case, if there is no agreement is reached related to the applicable legal procedures in a professional and proportionate manner.
3. Settlement of criminal cases using ADR should related to the principle of deliberation and consensus
4. Settlement of criminal cases using ADR should respect social/customary norms and fulfill the principle of justice.
5. Empower community policing members and play FKPM in their respective areas in order to be able to identify criminal cases that have minor material losses and allow them to be resolved by ADR concept.
6. For the cases that have been resolved through the ADR concept, it is should not be interfere by other counter-productive legal actions related to the aim of Polmas.

Furthermore in Article 14F on the regulation of Indonesian Head National Police Number 7/ 2008 concerning on the Basic Guidelines for Strategy and Implementation of Community Police and the Implementation of Polri's Duties, it is determined about the application of Alternative Dispute Resolution Concept (solving social problems through effective alternative routes in form of efforts to neutralize the problem through litigation processes), such as reconciliation. In such a context, the settlement of cases out of court through penal mediation should be focused to small or minor cases such as:

1. Violations as regulated in the third book of Criminal Code.
2. Minor offenses by imprisonment of a maximum 3 (three) months or penalty charge up to Rp. 7,500.00 (seven thousand five hundred rupiah).
3. Minor crimes (*lichte misdrijven*) as regulated in Criminal Code Article 302 concerning animals mistreatment, Article 352 concerning light maltreatment against humans, Article 364 concerning on minor theft, Article 373 concerning

## **Criminal Problem Solving Model Through Restorative Justice Approach**

Karim

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lon minor embezzlement, Article 379 concerning on minor fraud, Article 482 concerning on minor detention.

4. Crimes that regulated in Article 362.
5. Criminal act that stipulated in Article 359 and Article 360 of Criminal Code.
6. Criminal act committed by children as regulated in Law 3/1997
7. Criminal act that regulated in Law 23/2004 on the Elimination of Domestic Violence.
8. Medical dispute resolution.

The standards of limiting ADR as a reference for decision making can be determined, included:

1. minor criminal acts that do not have a big impact such as material loss, reputation, self-esteem will not cause counterproductive action under the system of ADR
2. Between the victim and the suspect should respect each other or there is an agreement to settle it in a family manner. The agreement was made by cooperative discussion not engineered by police officers.
3. Police officer who makes the decision of ADR action is obliged to report the act to his superior at least two levels above. also make administrative, legal and moral responsibilities. Should be a police officer who has a good track record and trustworthy.
4. Files or data on the results of initial examination, in form of Police Report, an Investigation Report, Letter of Order, Statement from two sides of people, Statement from the police officer responsible for ADR action should be completed.

Even though Head of National Police has issued a decree on penal mediation, However it is considered as non effective, consider that in practice there are still many minor criminal cases which still being resolved in court with an ordinary examination procedure. Moreover, what should be appreciated by Chief of Police Number: B / 3022 / XII / 2009 / SDEOPS, is a passion to provide restorative justice as the alternative of penal mediation on solving the cases of minor offense.

Regulated on the settlement of minor criminal cases through restorative justice needs to be done, considering that the characteristics of the incurred losses from minor crimes are different from other general criminal acts, Furthermore, if the norm has been made; there should be several things as the main concern, which consists of:

1. Norms regarding the model of minor criminal case settlement through restorative justice should contain the types of minor criminal acts that were adjusted to the incurred losses, Regulation of the Indonesian Supreme Court Number. 02/2012 can be used as a basis, of criminal offense can be categorized as minor offense if the object of loss in the case does not exceed the nominal value of Rp. 2,500,000 (Two thousand million and five hundred thousand rupiahs)
2. It also needs to be normalized that the settlement of minor criminal cases through restorative justice which can only be done if it has the consent from the victim and perpetrator, because without the consent of victim who wants to recover the loss to be recovered the loss, reatorative justice couldn't be implemented. If a party does not agree to done the settlement through restorative justice, then the settlement of case will be

returned based on the handling procedure through quick event inspection as arranged in Indonesian Law of Criminal Procedure.

3. It needs to be normalized, several parties who stand as mediators in the settlement of minor criminal cases through restorative justice consist of, Police investigators at least with Second Inspector level and have a minimum degree of law bachelor. It is important to normalize the system, thus the investigators who will stand as mediators are people who really understand the law, or at least have basic knowledge of law. Therefore, mediator can mediate the urge of both sides and achieve win-win solution.
4. It is also important to be regulated in the settlement of minor crimes through restorative justice of the reached agreement, which the perpetrator agreed to pay the penalty charge; it is because in principle, restorative justice is not intended as retaliation but to restore a situation to its original state. This is because the principle of restorative justice is not intended as revenge but to restore a situation to its original state
5. It must also be regulated a mechanisms regarding certainty (the decision regarding the perpetrator can recover the victim's loss or the consequences caused by perpetrator), and the sanctions if perpetrator fails to fulfill his obligations to recover the incurred losses, or the suffered loss of victim is not recovered yet, it is important to guarantee a sense of justice in society.

An Effort to resolve the cases outside the court which was carried out by perpetrators and victims of minor crimes are expected to solve the problems while providing a sense of justice. It can be interpreted that Restorative Justice is a series of out-of-court criminal case settlement processes that aim to restore or recover losses suffered by the victim. It is because when a crime occurs, the situation will change. Here is the role of law to restore the condition.

### **Conclusion**

Based on the results and discussion above, it can be concluded that the conventional criminal justice process was known for restitution or compensation for victims, while restoration in restorative justice has a broader meaning. Restoration includes recovery of losses and the relationship between the victim and perpetrator. This restoration can be based on mutual agreement between the victim and perpetrator. The victim can convey the losses they have suffered and the perpetrator is given the opportunity to compensate the losses, through compensation, social work, or other agreements depend on the incurred losses, in this case, the process should be mediated by the police who has a role as mediator who tries to reconcile the wish of every parties. Thus, an agreement can be reached based on each other sense of justice.

It is time for the settlement of minor crimes through the concept of Restorative Justice that should be considered as the criminal system that regulated in laws, or provide the revisions through the new Criminal Code (KUHP), especially for minor crimes, it aims to create justice and balance legal treatment of minor offenders and victims. Solve the criminal act without criminal punishment of imprisonment. Not only through imprisonment but also through penal mediation based on the approached Restorative Justice.



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