

37. The Restorative Justice in Shariah Perspective

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The Restorative Justice in Shariah Perspective

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Abstract. Criminal law enforcement through the Penal not the only beacon of hope to be able to completely solve the problem. In addition to efforts penal, in the context of the criminal policy of delinquency prevention can also be solved by non-penal. The application of restorative justice is a framework of thinking to find a way out in deciding actions in accordance with the conditions and development criminals. The existence of some weaknesses in the substance of criminal justice system, demanding the importance of implementation from restorative justice. In restorative justice, the parties involved in the whole process of reaching an agreement. Application of restorative justice involving the parties concerned have been rooted in Shariah.

Keywords: Restorative Justice, Shariah Perspective

1 Introduction

The terms of restorative justice appear in the writings of Colson and Van Ness (1990), Mackey (1981, 1991), Van Ness and Strong (1997), Wright (1991), and Zehr (1990: 89). Nonetheless, social movements which are then given the name of restorative justice has emerged much earlier, for example, in the 1970s held Victim-Perpetrator Reconciliation Programs (VORP) first time in Canada. Then by K. Daly and R. Immaregon (1998), the emergence of of restorative justice be encouraged by a blend of social movements, practices and programs as well research and scientific theory.

Restorative justice approach is a paradigm that is used as a frame from strategy of handling criminal cases, aims to answer dissatisfaction with the workings of criminal court system that exists today, the process of completion criminal cases conventionally is highly complex, require a long time to arrive at a decision by the judge, even not necessarily get justice or satisfaction expected by the litigants.

Restorative justice in the last 20 years been progressing very rapidly in some countries, such as Australia, Canada, England and Wales, New Zealand and several other countries in Europe and the Pacific region. and also, the United States as a country that is more often making associations with countries to introduce repressively to punitive measure who cannot avoid the strong influence development of restorative justice.

Restorative justice is a process for settling disputes which took place outside the formal justice. Restorative justice has a way of thinking and new paradigm of looking at a crime committed by a human without solely provides criminal penalties. The handling of a criminal offense can be done by taking into account the wider impact on the victim, the perpetrator and

the community. Restorative justice starts and begins from the notion that crime is an act against the people or the community, and relates to a breach/destruction of a legal norm in force.

The violations committed not only a law breaking which has made by the country, but also destructive to the society value, because of the crimes committed concerning the interests of victims, the environment, public and state. The opinion was expressed by Howard Zehr (1990: 181), which explains that the interests of all parties that come into contact with such violations should be actively involved in the process of completion. Although the criminal offenses committed have damaged the foundations of society, but which became the central or the subject matter of the offenses committed is that the problem of violations was declared a guilty and subject to criminal liability.

In the view of restorative justice, the handling of crimes that occurred is not only responsibility of the state, but also the responsibility of society. Therefore, restorative justice is built on the understanding that crimes have caused losses must be returned, both the losses suffered by the victim and losses are borne by the public.

Towards the view of restorative justice, many experts refer to it as new paradigm in the thinking pattern of response to crime that happened. In practice, restorative justice gives peoples an opportunity to take an active role in the resolution of criminal matters. Restorative justice becomes a framework of thinking in an attempt to find an alternative solution to the criminal cases that occur. Alternative completion as settlement efforts that create humane justice.

2 Methods

The methods used in this research is a case study. According to Yin (Woodside, 2010) research case study is the empirical studies that investigates a contemporary phenomenon in real life terms, especially when the boundaries between phenomenon and context are not clear. While according to Eisenhardt (Woodside, 2010) case study is a study that focuses on a time to understand and explain the dynamics.

3 Results and Discussion

Restorative justice is a concept of thought to respond to the development of criminal justice systems with emphasis on the needs of community involvement and victim that is felt excluded by mechanism that work in criminal justice systems that exists today. Tony F. Marshall (1998: 1) argues that restorative justice is:

“Restorative justice is a process whereby all the parties with a stake in particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”

Restorative justice first emerged in Canada and North America and then spread to Australia, New Zealand, and to other areas. Starting from the social movements of the volunteers who carry out programs for reconciliation and mediation to react and judicial practices deemed unfair imprisonment. Social movements are equipped with research and critical analysis to then bring the principles and restorative justice.

In restorative justice, the dignity of the victim must be reckoned with. Perpetrators must be held accountable and be integrated back into the community. Perpetrators and victims to be domiciled balanced and need each other, therefore must be reconciled. In the application of

6

restorative justice, the position of the case need to be changed, that is no longer in the interest of order in the country, but for the sake of the interests of victims and perpetrators.

Restorative justice involves the victim, the family and other parties to solve the problems and make the perpetrator liable to repair the damage caused. At the victims, emphasis which carried for restoration of asset losses, physical pain, safety, dignity and satisfaction or a sense of justice. With restorative models, perpetrator do not need to go to jail if the interests and casualty losses already in restoration, the victim and society had already forgiven, while the perpetrator has expressed remorse.

The justice system is currently assigned with the effort penal or formal, does not prove that a person becomes a deterrent and also does not solve the problem. Conceptually, restorative justice is a justice that can be viewed overall. This comprehensive justice includes the possibility of improvements made by the inmate victim. In this way, restorative justice can be accepted by all parties. Unlike today, where someone could take revenge on inmate after she got out of prison.

Another face of laws and formal legal process is is a fact that the formal justice in Indonesia, was 'expensive' and 'convoluted'. One of issues that make it look problematic form of justice is done one for all mechanism.

This has resulted in the developed and growing countries search for alternative settlement of a problems that conflict with the law, namely to put forward well-being, promote mediation or deliberation, consider the interests and future of perpetrators as well as victims of crime.

According to Eva Achjani Zulfa & Indriyanto (2011: 88-89), the characteristics of processes using restorative justice approach among others:

- a. Flexibility of response from the environment, both on criminal acts happened, the perpetrators and the victims, is individual and should be seen a case-by-case;
- b. Response were given on a case that occurred reflects a deep concern and equal treatment for everyone, building understanding among fellow members of the community and encourage a harmonious relationship between citizens to eliminate the damage caused by a criminal act;
- c. An alternative to settling disputes outside or using the formal criminal justice system in force and preventing the negative stigma that arise in the process due to the perpetrators. This restorative approach may use criminal law as settlement efforts, both in the process and the type of sanctions;
- d. This approach also covers efforts to solve the problem and resolve any conflicts that arise;
- e. This restorative approach is an effort aimed at eliminating guilt the perpetrators and is a medium for businesses to meet the needs of victims;
- f. This approach should be accompanied by efforts to encourage the perpetrators to get correction and feedback for behavior change and encourage perpetrators accountable through meaningful actions;
- g. Flexibility and variables used in the approach to the use of this paradigm can be adopted from the environment, legal traditions in the society as well as the principles and philosophy adopted in the national legal system.

Restorative justice is based on a certain understanding about crime. According to conventional understanding, crime is a destructive action order of the universe derived from divine law. This action is then called unlawful. Evil actions must be redeemed by a self-cleaning action by the perpetrator. This is called a penalty. With an understanding of such crimes, as described before, the pressure put on punishment on the perpetrators of crime.

According to the theory of restorative justice, the definition of crimes above is not longer appropriate for the era that has already been secularized. Currently, the order of divine and

universe is not longer into thought of today's society. Currently, crime was understandable as a hurt action of victims and their families, as well as damage the community. Then, it would should be recovered so that the trauma suffered by victims can be healed, and also so that victims and perpetrators was restored, and peace in society will be restored.

Then as described above, the focus is on recovery restorative justice and peace the victims, perpetrators, and the community. To achieve this objective, the process of reconciliation reached by restorative justice is to involve all parties, namely the victims, their families, societies, and perpetrators. Unlike the judicial processes that involve only officials in the judiciary as judges and prosecutors as well as the perpetrators of crime and its defenders, restorative justice involves all the relevant parties to the crime, the victim, perpetrators and community. Restorative justice minimize the role of government.

Restorative justice is not concerned with the punishment that must be endured perpetrators, but the compensation paid to recover damages and losses suffered by the victim and society. In determining the amount of compensation is also carried out along with conversations involving the victim and society. No matter how big punishment undertaken by the perpetrators, it will not heal the wounds of victims and damages society. But compensation is negotiated together in discussions that involve perpetrators, victims, and the community will recover and reconcile all parties. Based on the new paradigm, Yoachim Agus Tridiatmo (2015: 42) introduces the four pillars of restorative justice:

Firstly, restorative justice is based on the view that in human life, there is a relation between one person to another person, the institution and community with community institutions and others. If a violation of the relationship, for example with a crime, then devastated the harmonious relationship. So to restore the network of relationships, the encounter should be held between the parties involved in that relationship.

Secondly, in contrast to the view of the legal system that sees crime as a violation of state regulations or society. Crime is a violation on victims. Who bear the brunt of crime, first is the victim and then the community and transgressor. So, different from the court system that emphasizes punishment for the perpetrators of crimes, the principle of restorative justice emphasize rapprochement the transgressor with the victim and the community. The perpetrator or the transgressor must provide compensation for the damages received by the victim and community. Punishment for victims who applied in the court system is often less effective. Perpetrators of these violations can not repair themselves to that penalty, but instead it became a grudge because of punishment it receives the perceived inequitable. In addition, punishment were mostly in the form of imprisonment does not cause the perpetrators, or law violators repent into a good person, instead they learn to commit a crime or offense to other inmates in prison. Imprisonment is precisely the perpetrator, or law violators more skilled/expert in doing evil. Therefore, restorative justice is more emphasis on restoring the relationship between offenders with victims and their communities, with an obligation for the offender to compensate the victims and their communities.

Thirdly, the principle of collaboration/cooperation through meetings and deliberations was emphasized. To restore the relationship between perpetrator, victims and community, a meeting between the parties concerned. In the meeting, victims share their experiences as victims who are suffering. Instead offenders listen to stories the victims then give responsibility on their breach. Finally, in that meeting was agreed on the compensation to be borne by the offenders that should be a given to the victim and the community for repairs and damages that have occurred as a result of these violations.

Fourthly, restorative justice concerned with respect for each person. Comity is indicated with the encounter and dialogue between the parties concerned. Unlike the judicial process with

interrogation and accusation on lawbreakers, in a restorative justice that happens is dialogue and mutual listening.

To develop restorative justice must consider several things:

- a. Crime is basically a conflict between individuals that generate traumatize on the victim, society, and perpetrators of themselves, only by the effects of continuation is lawlessness.
- b. The purpose is more important than the process of criminal justice systems must reconcile the parties that aim to fix the damage that existed at the victim as a result of criminal that happened.
- c. The process of criminal justice system of facilitating the active participation of victims, perpetrators and society was not dominated by the state with put out all the people who involved with violation from the settlement process.

3.1 The Basic Principles of Restorative Justice

First, restorative justice prioritizes the recovery or restoration of for all parties of affected by the crime, namely the victim, perpetrators and society. The first victim is the most disadvantaged because of crime. Direct victim suffered because of crime. it will be suffered physically and mentally. It could be that suffered loss of material, whether it's money or other assets. It could also lose the honor due because derided, humiliated, abused, or raped.

The perpetrators also suffer losses. With committing crimes, a perpetrator suffered mental deterioration, thus losing the power of self-control and ability to follow his conscience. otherwise it may give in to temptation bad, and lose yourself to choose the good and true. Instead it will choose the bad and wrong. This causes the loss of honor and dignity as human beings. The common life and society is also harmed by crime. Shared living arrangements into chaos. Authority of law harassed by the courage of lawbreaker who have violated. Peace was gone, replaced by fear, anxiety, suspicion and feelings of distress, the possibility of a crime will come again. Social relations between citizens become damage by blaming each other, or a loss of trust.

From the damaged condition that, restorative justice aspire to recover the three parties. Victims was restored from physical injuries, emotional hurt, and all other losses. The perpetrators was restored honor and dignity as a human person. Shared living arrangements are also restored. Here, restorative justice does not concentrate on the punisher of perpetrators, but recover all the aggrieved party because of crime.

Secondly, with regard to the ideals of the above restoration, restorative justice focuses on needs of three parties, including victims, perpetrators, and society, which is not met by the judicial process. In judicial proceedings, victims of crime are ignored, because crime is understood as action against or harm the state. The role of victims was taken over by the state. The state that have responsibilities to punish perpetrators of crimes, while victims of crime do not get anything at all. A penalty imposed on the perpetrator is not at all concerned with the suffering of victims. In this case the victim needs are ignored. Therefore, the restorative justice will focus on the needs of victims.

At least, there are four needs by the victims to be met. (1) Victims need information about why crime is imposed on him. In other words, the victim wants to know "why me?" "Is it my fault that I was subjected to a crime?" The need for information or answers to these questions can be obtained if a meeting and dialogue was held between victims and perpetrators. (2) In order to heal the inner wounds, the victim needs a chance to recount his experiences of suffering because of crime. Victims have a need to be heard. This is a basic requirement for the sake of healing emotional wounds or trauma victims. (3) the victim in need of empowerment or support, because when the victim suffered a crime, the victim is helpless and lost control of himself and

what it has. Power or those strengths will be restored when the victims were included in the negotiation process (4) The victim also require compensation (restitution) for the suffering and loss as a result of crime received. Certainly it is not easy to determine the amount of compensation for the victims. Any amount of compensation will not be able to replace the amount lost and the suffering of victims. Then, the compensation was more symbolic role as a form of recognition from the perpetrators will be the impact their actions for victims. It would be perfect if in providing redress the perpetrator apologized and sorrow for what it has done.

Perpetrators have different needs with the victim. As a human person, the perpetrators need a chance to take responsibility for his actions. Perpetrators need to admit to the crime and all the effects of crime act. Based on such recognition, then agreed compensation and damages to be borne by the perpetrators will be given to the victim. Such recognition is not possible in the judicial process, because what happens in the judicial process is the trial that convey the charges and allowing perpetrators to argue or defend themselves. Responsibility and recognition of perpetrators will actually occur when there is dialogue and conversation between the victim and perpetrators. Dialogue and conversation will happen in a meeting between the victim and the perpetrator to follow the principles of restorative justice.

As described above, society is also a victim of crime. Order to live together and the rule of law to be damage because of crime and lawlessness. Recognizing the common life and society are involved in the crime, even as a victim, then society must strengthen their self, for example, searching for the truth on acts of violence and do not add to the rumors or issues that are not true. Society leaders must take the initiative to form a joint community forums. Society must create the conditions that will help restoration the victim and perpetrators.

Thirdly, restorative justice must consider the obligations and responsibilities arising from the crimes. Perpetrators must restore the damage suffered by the victim, and society. The obligation on the victim is accomplished first by admitting that his was guilty. This recognition is important, because this is evidence of recognition of suffering endured by the victims. Victims need to be heard and recognized his suffering. Acknowledgment and apology is an important process in the healing of wounds and mental suffering of victim. After that, perpetrators have an obligation to recover the physical suffering and material. This obligation can be satisfied by compensating for paying the cost of healing physical injuries and replace the loss material for the victims.

As described above, the crime is also bad for society and living order together. Then the perpetrators must disclose acknowledgment and apology to the public or the person who is believed to represent. Perpetrators should also provide compensation to repair the damage that occurs in the community caused by these crimes.

The obligation of victims to receive recognition from the perpetrators and forgive the perpetrators. Similarly, communities were required to receive the recognition of perpetrators and forgive the perpetrators. Thus, it comes about reconciliation and peace returned.

With the principles above, according to Howard Zehr there are six things in restorative justice:

- a. Restorative justice is not first of all mean that forgiveness and reconciliation. Many parties, including victims and advocates, suspicious that restorative justice is a form of coercion to the victims to forgive and reconcile with the perpetrator. From the basic principles outlined above, it appears that restorative justice is not to focus on forgiveness and reconciliation. Of course, it is possible that the impact of restorative program is forgiveness and reconciliation.
- b. Restorative justice is not just mediation. Indeed, restorative approach prioritizes the encounter, but is not first of all aimed at making mediation. The term "mediation" is not

- appropriate to refer to the restorative justice. As described above, the precursor to restorative justice is mediation programs, such as VORP, VOM, FGC, and judicial circles. But then a term that is widely used is the conference, dialog, or deliberations. Restorative approach can still occur if meetings between the victim and the perpetrator does not occur.
- c. Restorative justice is not intended to provide a deterrent effect so that perpetrators do not repeat the crime again. So, when after the model of restorative approaches are applied, crime still occurs, it does not mean the failure of models restorative approaches. Which is made by a restorative approach to the needs of three parties that deal with crime, victim, perpetrators, and society.
 - d. Restorative justice is not a program that is ready to use with the blueprint that has been finished. Programs of restorative keep looking form, in accordance with the conditions of society and culture that exists. Restorative programs must be built from the ground according to the circumstances and needs of society. The initiative of society is required. But the principals involved in restorative justice above must be adhered to.
 - e. Restorative justice not only be applied in cases of small or new cases. Restorative justice can be applied in any case, the important basic principles above are applied. The big case or a small case of children or adults can be handled with restorative approach. Cases of new or old cases can be approximated by models of restorative.
 - f. Restorative justice is not intended to replace legal system. Restorative justice is not to replace imprisonment and retribution. Restorative justice emphasizes the restoration damages and cracks caused by crime. The crime was loading the social dimension, local, and personal. Retributive and legal approach just looked from the public and social dimensions, and less in looking at local and personal dimension, so that handling is handed over to the state. The approach of restorative make it balanced with watched the dimension of local and private.

3.2 The Perspective Of Shariah

There are differences in the practise of restorative justice procedures in comparison to judicial practice in retributive justice (Zehr and Toews (eds), 2004: 6). First, there was a meeting between the victim and the family, perpetrators, and facilitators as community representatives. Perpetrators are required to participate in a meeting with the victim, and third parties are facilitators. In this meeting all parties will be given the first opportunity to speak. Victims are given the first opportunity to tell state and suffering caused by the crime. Similarly, the victim's family are given the same opportunity. While the perpetrators were asked to listen in earnest story of victims and their families. If necessary, perpetrators are asked to answer the questions to confirm the victim's story. Similarly, perpetrators are given the opportunity to tell the reasons and circumstances so that the perpetrators committing crimes and why perpetrators choose victims as targets. Recognition of perpetrators that is truly honest will create an atmosphere of regret. From the sincere regret will be expected to appear to apologize.

Additionally, in the restorative justice perpetrators are not required to pay (retribution) for crimes in the form of punishment and suffer pain, but perpetrators is obliged to forgive without limit. The above description shows the evolution of civilization gradually towards universal love and leave hatred and vengeance as understood by Islam.

In the religion of Islam, to **11** give is also an important virtue, that flows from the power of God that Merciful. It can be found in the Qur'an and the Hadith of Prophet Muhammad. There are three words that have meaning "pardon" or "forgive" is afw which means 'forgive', 'delete', 'punishment', 'amnesty', Al-Qur'an Surah 42: 40; 2: 187); sahf which means 'repent from sin or wrong action', 'ignore' (Al-Qur'an Surah 2: 109; 15: 85; 43:89); ghafara, maghfira

meaning 'close', 'forgive', 'forgave', (Al-Qur'an Surah 2: 263; 42: 37; 43: 43). Prophet Muhammad are prime examples in embodying the spirit of pardon or forgiveness.

In addition, the spirit of forgiveness in the tradition of Islam in Indonesia is very evident in the celebration of Eid. After fasting during the month of Ramadan, mankind returns to their disposition. At that time Muslims were saying "beg forgiveness" or in Arabic reads "minal aidin wal faidzin" which roughly means "may you be among the blessed". In Java there is the tradition of paying respect or tip. In that tradition, young people kneeling or kissing knee elder people to salute and begged forgiveness. The elders will be forgiving and blessing. So, this is strong tradition, to the extent that spirit to forgive each other is also spoken by people of non-Muslims. Thus, the spirit of forgiveness has become the nation's premises or even mankind throughout the world.

Allah SWT has advocated the faithful that "forgiveness is better: "... But if you pardon and overlook and forgive - then indeed, Allah is Forgiving and Merciful." (QS. At-Taghaabun: 14). In another verse Allah says: "... and let them pardon and overlook. Would you not like that Allah should forgive you? And Allah is Forgiving and Merciful." (Qur'an, An-Nur: 22). The Qur'an states that forgiving is noble commendable. "And whoever is patient and forgives - indeed, that is of the matters [requiring] determination." (QS. Asy-Syuura: 43). Based on this, the believers are men who are forgiving, compassionate and tolerant.

The researchers believe that anger is likely to increase the occurrence of heart attack. In a rage the release of stress hormones, increased oxygen demand by the heart muscle cells, and increasing the viscosity of platelets of blood. When angry, the heart rate increases beyond reasonable limits, and cause a rise in blood pressure in the arteries, and thus increase the likelihood of having a heart attack. 1

Understanding of believers about forgiveness is very different than those who do not live by teachings the Qur'an. Although many people may say they have forgiven someone who has offended them, but it takes a long time to free themselves from hate and anger in the heart. The attitude of forgive people of faith is sincere because they know that human beings are tried in this world, and learn from their mistakes, they are tolerant and compassionate. Moreover, believers are also capable of forgiveness even when they are right and others wrong.

When forgiving, they do not distinguish between major and minor errors. A person can only hurt them accidentally. However, believers know that everything happens according to the will of Allah, and according to a specific destiny, and therefore, they surrendered (put my trust in Allah SWT) for the incident, were never fettered by anger. Allah says: "Indeed, those who have believed and done righteous deeds - the Most Merciful will appoint for them affection" (QS. Maryam: 96).

According to Dr. Frederich Lukin, in his book, "Forgive for Good", anger which is maintained (revenge) can cause physical impacts (physical) that can be observed in a person. The problems about long-term anger (revenge) or already failed is we've seen it resets the temperature control system in the body. When you get used to the low level of anger all the time, you do not realize what's normal. It creates a kind of adrenaline rush that people get used. It burns out the body and makes it 'difficult to think clearly' make things worse. "

An article entitled 'Forgiveness', published by the Healing Current Magazine in edition September-October 1996, stated that anger towards an individual or an event led to negative emotions in oneself and harmed their emotional balance and even their physical health. The article also states that people realize after a while that the anger is a nuisance to them, and wish to repair the damage to the relationship.

So, they take steps to forgive. It added that, despite all they endure it, people do not want to spend the precious moments of their life in anger and anxiety, and prefer to forgive themselves and others.

All the available research shows that anger is a state of mind which is very damaging to human health. Forgive themselves, on the other side, though heavy, feels happy, one part of that commendable morals, that eliminates all the destructive effects of anger, and help these people enjoy a healthy life, both physically and spiritually. It has been proven scientifically, it has been revealed in many verses in the Qur'an, is just one of many sources of wisdom it contains.

Dr. 'Aidh Al Qani revealed in his book 'La Tahzan ". Prices punishment (qisash) The most expensive is to be paid by someone vindictive and spiteful when envious with the others. The reason has to pay all of it with heart, blood, flesh, feeling, peace, tranquility, and happiness itself. So how disadvantage the spiteful. That Allah SWT has spread the news to believers about medicines and cure of these diseases: "...and who restrain anger and who pardon the people - and Allah loves the doers of good;" (QS. Ali 'Imran: 134).

4 Conclusion

Restorative justice is a concept of thought as a response to development the criminal justice system that focuses on the involvement of the victim and society. The concept is an alternative that accommodates weakness penal efforts, without going through the expensive process, serpentine, and a long time, not just for the sake of order in the country, but instead notice as well the interests of victims and perpetrators, as well as the the interests of society.

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