



## Moral Approach in Restorative Justice Implementation on Criminal Act of Molesting (Case Study on the behalf Perpetrator Kasemi binti Kasemo Semito)

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### **Abstract**

Restorative justice is an effort of perceiving peace between the victim and the perpetrator, compared to taking criminal justice. This is a kind of breakthrough, noticing nearly all of the criminal acts which were taken by criminal justice system of Indonesia always ended in imprisonment. One of restorative justice implementations was experienced by Gunung Kidul District Attorney. According to Gunung Kidul No PRINT-704/M.4.13/Eoh.2/08/2020 dated on August 13<sup>rd</sup>, 2020, a reconciliation based on restorative justice in the case of defendant Kasemi Binti (daughter of) Kasemo Semito who was accused to break over Primary article 251 paragraph (2) Criminal Code, Subsidiary article 351 paragraph (1) Criminal Code, positioned in Gunung Kidul District Attorney. Nevertheless, resolving cases using restorative justice mechanism remains to be controversial. The reason is because law enforcement like a prosecutor, does not possess an adequate legal basis in applying restorative justice in common criminal acts. Accordingly, the author would connect between restorative justice and moral approach to law so that restorative justice could be worthwhile for community.

**Keywords:** *Restorative Justice; Moral Approach; Criminal Act; Molesting; Legal Basis*

### **1. Introduction**

This article aims to review restorative justice by employing moral approach to law. The concept of restorative justice theory itself offers answers to underlying matters relating to criminal act which are: first, critics about criminal justice system which does not give particular chance to the victim (criminal justice system that disempowers individual); second, the fact that powerless feeling of the victim as the effect of criminal act must be resolved in order to achieve reparation; third, taking away the conflict especially between the perpetrator with the victim and also with the community (Ivo Aertsen, 2011). Thus it can be concluded by the author that restorative justice is an effort of perceiving peace between the victim and the perpetrator, compared to taking criminal justice. This is a kind of breakthrough, noticing nearly all of the criminal acts which were taken by criminal justice system of Indonesia always ended in imprisonment. Even though putting the perpetrator in a jail is not the best solution in resolving criminal issues, particularly those that are “destruction” affected on the victim and the community can be restored, so that the “destroyed” condition can be repaired into the initial condition, as well as deleting bad impacts

of imprisonment. To prevent bad impacts of imprisonment for criminal act perpetrator, a punishment paradigm, termed as restorative justice, which is an effort of encouraging the perpetrator restoring or repairing the loss that affecting on the victim, his family, and also community has been established. In that case, perceiving a repairment of the loss, a main program which is called “a meeting place for people” to obtain connection repairment solution and criminal loss effect (peace) (Kuat Puji Prayitno, 2012) needs to be implemented.

Restoring or repairing connection and loss of criminal effect has been implemented by criminal justice system of Indonesia. It is confirmed in Law No. 11 of 2012 about Criminal Justice System of Children, in Article 6 Jo Article 8 emphasizes on the concept of restorative justice through being revised (Hariman Satria, 2018). The meaning of that regulation is that, in resolving a children-related case, encouraging the perpetrator and the victim’s family can be done by deliberating. An effort of preventing the perpetrator being convicted and restoring the good name’s victim is the purpose of restorative justice. It just has been implemented in Indonesia and served a good stepping stone for criminal justice system of Indonesia. However, the current issue of restorative justice has not been yet affirmatively regulated to deal with common criminal acts. In addition, if law enforcement officers want to manage the issue by applying restorative justice principle, it will become a breakthrough. One of restorative justice implementations was experienced by Gunung Kidul District Attorney. According to Gunung Kidul No PRINT-704/M.4.13/Eoh.2/08/2020 dated on August 13rd, 2020, a reconciliation based on restorative justice in the case of defendant Kasemi binti (daughter of) Kasemo Semito who was accused to break over Primary article 251 paragraph (2) Criminal Code, Subsidiary article 351 paragraph (1) Criminal Code, positioned in Gunung Kidul District Attorney. It was actually reconciled through restorative justice mechanism, which has become a fresh air for criminal justice system of Indonesia. Nevertheless, resolving cases using restorative justice mechanism remains to be controversial. The reason is because law enforcement like a prosecutor, does not possess an adequate legal basis in applying restorative justice in common criminal acts. Accordingly, the author would connect between restorative justice and moral approach to law.

A reason for selecting moral approach to law is because its principle to law confirms that law is rooted in the belief of nature of human beings and what is true and what is false. Moral approach mainly focuses on the charge that law must express a common morality which is based on a certain consensus about moral-related matters considered as true or false. By reviewing restorative justice with moral approach to law, author hoped that it would be implemented, even though it does not have a legal basis, restorative justice could be worthwhile for community. Restorative justice can be beneficial since it applies traditional concept, the victim is expected to remain silent, accept, and does not have to interfere the process of judgment. The idea of restorative justice fundamentally resetting what-so-called role of the victim, from being passively waiting and watching criminal justice system managing “their” crimes, become actively participating in criminal justice process. The theoretical review of restorative justice mentions that “empowerment” means the agents or parties relating to criminal act (victim, perpetrator, and community) (Ivo Aertsen, 2011). The research problems reviewed by author, how was Restorative Justice Implementation in Molesting Case (Case Study O/B Perpetrator Kasemi binti Kasemo Semito)?”

## **2. Research Methods**

The research method is a way of thinking to achieve the research objectives. Research may not be able to formulate, find, analyse, or solve problems without research methods (Soerjono Soekanto, 2008:43). Research the laws are drafted by the authors is the study of law empirical or research non-doctrinal (sociological). The nature of the study of law is classified by descriptive and analytical, namely the study of law to determine and analyse the strength of legal agreements orally on the implementation of the cooperation partnership breeding chickens in the district of Klaten and the protection of the law for the parties who agreed to perform the agreement.

### 3. Discussion

#### **Restorative Justice Implementation in Molesting Case (Case Study O/B Perpetrator Kasemi binti Kasemo Semito)**

Restorative justice principle is fundamentally based on tranquility between the perpetrator, the victim, and also the community. This tranquility or making peace effort becomes an ethics moral of restorative justice, hence it is also called as “Just Peace Principle”. This principle reminds us that justice and peace basically cannot be disintegrated. Peace without justice will become oppression; justice without peace is a new form of molesting/suppressing. It is said as Just Peace Principle or Just Peace Ethics because the approach of criminal act in Restorative Justice aims to restoring the damage of the crime itself (it is an attempt to recovery justice), this endeavor has been done by getting the victim meet the perpetrator and law enforcement officers (Kuat Puji Prayitno, 2012).

Restorative justice is a justice system emphasizing on recovery of the loss by getting the victim meet the perpetrator and law enforcement officers, which is caused or related with criminal act. It is done through cooperative process which involves the stakeholders (Darrell Fox, 2009). The purpose of Restorative Justice is to achieve peace or agreement, so that the perpetrator does not have to undergo a criminal sentence and the victim can play an active role in obtaining compensation, this is because in the traditional concept, the victim is expected to remain silent, to accept and does not interfere in the criminal process. The current problem is that the implementation majority of criminal cases settlement still uses traditional concepts and restorative justice that has not been regulated in the current legislation. This is a stumbling block because in Indonesian positive law, criminal act cannot be resolved outside the court.

But the reality shows that criminal law enforcement in Indonesia, although there is no positive law regulation, criminal acts were mostly resolved outside the court through the discretion of law enforcement officers, for example, in traffic accident cases, where the parties involved are usually reconciled by police officers and finally an agreement was reached between the parties. In addition to discretion by law enforcement officers, other outside the court settlement attempts is a peace mechanisms carried out by customary institutions, which until now still exist in remote rural areas in Indonesia. The consequence of the increasing numbers of out-of the court settlements carried out by police officers and customary institutions as an alternative for resolving criminal law cases through restitution in the criminal process, shows that the difference between criminal and civil law is not so great and dysfunctional (Barda Nawawi Arief, 2008).

According to Barda Nawawi Arief, the reason for using an out-of the court settlement of criminal cases is because the idea of penal mediation relates to the issue of criminal law reform (Penal Reform), it is also related to pragmatism, another reason is that the idea of victim protection, harmonization idea, restorative justice idea, overcoming the rigidity (formality) and negative effects of the criminal justice system and the applicable criminal system, as well as a punishment alternative form discovery (other than imprisonment) (Barda Nawawi Arief, 2000). The author can conclude that alternative punishment form using outside the court settlement mechanism has been implemented in Indonesia for years, and it is common for resolving cases by the police and traditional institution assistance that is in accordance with restorative justice principle.

The implementation of restorative justice carried out by police officers and traditional institution is in line with the theory of a moral approach to law. This is because the moral approach is not based on specific law principle or value, but incorporates into morality. For example, Henry David Thoreau argues that public disobedience to law is justified because moral and ethical principles confront against law and are more important than law, even when it is democratically created. Similar thing also happens in settlement of criminal cases out-of the court. Although regulating positive law is not present, moral

principles are in consideration; so that the perpetrator does not need to be imprisoned. Thus, according to moral approach to law, criminal offenders do not need be imprisoned as it is written in positive law.

The imprisonment of someone for committing a crime is not an indicator of the success of law enforcement. In fact, according to Soerjono Soekanto, law enforcement is an activity to harmonize the relationship of outlined values in solid regulations and views that manifest in attitude and act, as a series of final elaboration to create peace among society (Soerjono Soekanto, 1983). Creating a peaceful social life is the goal according to Soerjono Soekanto. This shows that it will be worthless if the victim wins in court and the perpetrator is imprisoned, yet no peace is achieved for both of them. The perpetrator becomes the losing party, since the case that should have been resolved by deliberation, is imprisoned due to positive legal provisions. The similar case happened in Magetan, chicken and goat thieves joined a group to conspire committing curanmor. (It is definitely a very detrimental phenomenon to society. (<https://regional.kompas.com/read/2020/03/24/18074801/bertemu-di-penjara-maling-kambing-dan-pencuri-ayam-bersatu-bentuk-komplotan>, 2020).

Furthermore, according to Mardjono Reksodiputro, law enforcement can only be implemented if various dimensions of legal life always maintain harmonization (conformity, balance and accord) among social, institutional and civil morality based on actual values implemented in social life. Thus, collaboration is crucial not only to make national regulation for socializing among people, but also to enforce them (Mardjono Reksodiputro, 1999). According to Mardjono Reksodiputro, social morality; institutional morality and civil morality are important aspects for creating law enforcement. Consequently, the author concluded that law enforcement would not undergo without morality.

Morality is distinctive and independent meaning that morality is always welcome to any arguments to reach the same words. Meanwhile, law is authoritarian in resolving any matters. Morality is autonomous which binds us to our own decisions and desires. Law is heterogeneous which binds us without exception. The settlement of criminal cases through the principles and mechanisms of restorative justice should be carried out by law enforcement officers in Indonesia. Although it does not have a strong legal basis, restorative justice is more fruitful than the current criminal justice mechanism. Through a moral approach to law, restorative justice has been more suitable with moral principles, since the problem regarding criminal justice system is resolved by major opinion of the community. Implementation of Restorative Justice in Cases of Persecution (Case Study on the behalf of Perpetrator Kasemi binti Kasemo Semito)

In Indonesia, restorative justice has been implemented under certain circumstances. To deepen the study of restorative justice, the author presented an example of a restorative justice case study in the form of a Decision on Termination of Prosecution Number 002/M.4.13/Eoh.2/08/2020 dated August 14th, 2020, a criminal act of persecution on the behalf of Perpetrator Kasemi binti Kasemo Semito. Furthermore, the author linked the case study examples with several theories regarding restorative justice and a moral approach to law. Gunung Kidul District Attorney made a big step by implementing restorative justice in the Victim Masiyem Binti Kasemo Semito (hereinafter referred to as Masiyem) and the Perpetrator Kasemi Binti Asem Semito (hereinafter referred to as Kasemi).

Meanwhile, Kasemi and Masiyem were siblings. This case began with Kasemi's anger due to WhatsApp message written by Masiyem that said "Aku krungu dewe, adol bondo-bondo ku dewe, cangkeme mencak-mencak" (I heard it myself, selling my own property, then she became furious) to Setiawan, Kasemi's biological son. Because she was offended, Kasemi went to the house of witness Masiyem and slapped witness Masiyem 1 (one) time using the perpetrator's right hand and hit the left cheek of witness Masiyem, after that the perpetrator and witness Masiyem pushed each other's shoulders using both hands which resulted in the perpetrator and witness Masiyem both fell to the ground.

When witness Masiyem fell, witness Masiyem felt the perpetrator pulled witness Masiyem's hair and hit witness Masiyem's right shoulder from behind, so witness Masiyem swung her right elbow backwards causing the perpetrator and witness Masiyem to fall. Long story short, Masiyem went to Cawas Hospital, the results of the visum et repertum from Cawas Islamic General Hospital Number 323/RM.01/VII/2020 made and signed by dr. Wisnu Wahyu Nugroho with examination result: a wound due to a blunt force in the form of a bruise on the right hand. A fracture on the right calf was found, as it caused a restriction of working for a while on June 5th, 2020, the patient had been hospitalized at the Cawas Islamic Hospital and not fully recovered, yet he forced going home, on June 11st, 2020 the patient came back and intended to have a surgery on her broken arm.

Due to her broken arm, Masiyem then took legal action to get a justice for the calamity she had. The public prosecutor alleged that Article 351 paragraph (2) of the Criminal Code and Article 351 paragraph (1) of the Criminal Code were subsidiary. On August 13<sup>rd</sup>, Gunung Kidul District Attorney took an initiative attempt to conduct restorative justice. The reasons behind the implementation of restorative justice were 1) the Regulation of Prosecutor's Office of the Republic of Indonesia Number 15 of 2020 dated July 21st, 2020 concerning Termination of Prosecution Based on Restorative Justice; 2) The relationship between the perpetrator and the victim was sibling; 3) On July 4th, 2020 (During the investigation process) a peace agreement was achieved between the perpetrator and the victim, by compensating Rp. 20,000,000, - (twenty million rupiah) for the cost of the victim's right hand fracture surgery; 4) On August 12nd, 2020, the perpetrator and evidence were handed over to the District Attorney (stage 2); 5) the fulfillment of the condition to stop a prosecution based on the Regulation of the Attorney General of the Republic of Indonesia number 15 of 2020. Therefore, Gunung Kidul District Attorney reached a peace agreement.

Meanwhile, on August 13rd, the victim and the perpetrator agreed to make peace. As stated in the minutes of the peace agreement, the defendant had to fulfill obligations to the victim, namely 1) being able to pay the medical expense Rp. 7.500.000,- (Seven Million Five Hundred Thousand Rupiah) to the victim's treatment from August 2020 to April 2021 which was then deposited to the Head of Dukuh Karang Pilang Kidul); 2) The defendant was able to pay the medical expense of the surgery (metal implant removal) and check-ups. Based on the minutes, on August 14th, 2020 the Head of the Yogyakarta High Prosecutor's Office then issued an Approval for Termination of Prosecution Based on Restorative Justice in the case of the criminal act of molesting On the behalf of Perpetrator Kasemi Binti Kasemo Semito in writing accompanied by considerations as stated in the approval letter Number B-2573/M.4.1/Eoh.2/08/2020 dated August 14, 2020. Based on this case, the author concluded that the settlement of criminal case through outside the court channels, although it has not recognized by Indonesian positive law (especially the Criminal Procedure Code), this settlement model in reality has been implemented. Recognition by both law enforcement officers and customary institutions shows criminal case settlement through outside the court (non-litigation) channel should be more developed.

According to Agus Rahardjo (Agus Rahardjo, 2008) the settlement of criminal cases outside the court can be conducted based on several conditions: First, using non-litigation route, it is necessary to initially investigate if the case is a formal offense or a material offense. Based on law enforcement on regular basis, most cases were formal offenses that could be resolved outside the court channels. The reason behind this was because formal offense formulation contained in the article concerning a complaint offense, so that the complaint could be revoked by the victim.

Second, the majority of settlements through this route were complaint offences. It is an offense whose prosecution depends on the victim who has been harmed by the perpetrator. Two kinds of complaint offences are a relative complaint offense and an absolute complaint offense. Relative complaint offence which only under certain circumstances constitute a complaint offense, such as Article 367 paragraph (1), paragraph (2) and paragraph (3) of the Criminal Code, as well as Article 370 of the

Criminal Code, Article 376 of the Criminal Code, and Article 394 of the Criminal Code. An absolute complaint offense is an offense which under any circumstances remains a complaint offense, such as a disdain (Articles 310-319 of the Criminal Code), Articles 284, 287, 293, 322 and 332 of the Criminal Code. Identification of cases that are classified as complaints offenses because of the initiative to proceed or not to take this case to court, is determined by (mainly) the victim or her family. The victim can also stop this case in the criminal justice process if there is an agreement between the victim and the perpetrator regarding the compensation that must be paid by the perpetrator.

Third, cases resolved through out-of-court channels are those which are closely related to the parties, meaning that between the perpetrator and the victim have more business than other criminal cases which become (mostly) state's affairs because they disturb the peace and order. It is called as a quasi-civil-criminal case, because there is a civil element in the settlement of criminal cases. In the author's opinion, cases resolved outside the court are included to the private cases and do not disturb order. As in the case above, the problem begins when the perpetrator feels humiliated by the victim which finally causes injury to the victim. The case discussed does not disturb the community, so restorative justice efforts can be carried out.

Fourth, the use of non-litigation channels must be based on an agreement between the victim and the perpetrator. The initiative of using this route can come either from the victims, the perpetrators, the police, legal advisors or community leaders. As an example of the case above, the initiative through justice restorative principle comes from the prosecutor's office as the law enforcer.

Fifth, the use of mediators (police, lawyers and other third parties) is also based on an agreement between the victim and the perpetrator. Third parties are not able to force using the services being offered, but they can only suggest the use of a mediator to bridge and figure the problems out that arise.

Sixth, the injuries caused by perpetrators' actions are not included to those extremely serious cases, meaning that the criminal acts do not damage or offend the values protected by the state or society, such as murder, treason, rape, severe abuse and so on. The injuries caused are more directed at people (personally and only their families) such as defamation, fraud, minor persecution, embezzlement or slander and are not felt by the wider community. Such injury allows the provision of compensation to victims, both material and non-material.

Next, the writer looked at the moral approach to law through this case study. According to Prof. Dr. Hazairin in his book *Demokrasi Pancasila* (Ahmad Manshur, 1985) that law without morals is tyranny. Moral without law is anarchy and utopia that leads to animalistic. The law being embraced by morality and rooted in morality is the only law that can establish morality itself.

Based on the example of the case study, the Gunung Kidul District Attorney put forward the moral values by using the biological relation between the victim and the perpetrator as the reason for implementing the restorative justice. In addition to biological relation, the perpetrators' good will which was reimbursing the cost of surgery and medical expenses also became one of the reasons that restorative justice was morally right to implement. By the perpetrator making compensation, it meant that the victim had actually been returned to her/his original state. The perpetrator had been punished in the form of spending tens of millions of money for surgery and medical expense. So in this case, the mechanism through the court was no longer needed. Therefore, "the good law enforcement" is largely determined by the attitude and behavior of the law enforcement officers. In this case, the behavior of the prosecutor as a law enforcer was morally appropriate by providing restorative justice. Basically, a good law is a law that is able to accommodate and distribute justice to the people it will regulate.

## **Conclusion**

Restorative Justice is an alternative to criminal settlement without taking the prison route. In this day and age, imprisonment is considered conventional and deprivation of the right to freedom in a humanitarian point of view. Restorative Justice is a breakthrough which emphasizes the “Just Peace” principle. This principle reminds us that justice and peace are basically inseparable. Peace without justice is oppression; justice without peace is a new form of persecution/pressure. This principle is in accordance with the objective of Restorative Justice which is to achieve peace or agreement, so that the perpetrator does not have to undergo a criminal sentence and the victim can play an active role in getting compensation. This is due to the fact that, in the traditional concept, the victim is expected to remain silent, accept and not interfere in the criminal process. The application of Restorative Justice is in accordance with the principle of morality because it solves problems, which is in the opinion of the majority; those cases are regarding the criminal justice system.

Based on a case study of restorative justice in the form of a letter of prosecution termination No. 002/M.4.13/Eoh.2/08/2020 in the case of the criminal act of mistreatment of Kasemi a daughter of Kasemo Semito, the Gunung Kidul District Attorney made a big step by implementing restorative justice. Based on the case study example, the Gunung Kidul District Attorney had puts forward the values of morality by using the biological relation between the victim and the perpetrator as the reason for implementing restorative justice. In addition to biological relation, Gunung Kidul District Attorney made the good intention of the perpetrators who compensate for surgery costs and medical expenses, one of the reasons that restorative justice was morally right. This was due to the fact that, with the perpetrator making compensation, the victim had actually been returned to her original state. The perpetrator had already been punished in the form of spending tens of millions of money for surgery and treatment cost. So in this case, the mechanism through the court was no longer needed. Therefore, "good law enforcement" is largely determined by the attitude and behavior of the law enforcement officers. In this case, the behavior of the prosecutor as a law enforcer was morally appropriate by providing restorative justice. Basically, a good law is law that is able to accommodate and distribute justice to the people who will be governed. As the result, this restorative justice is an alternative step in carrying out criminal settlements without going through imprisonment. It is in accordance with the principles of morality and the purpose of restorative justice which is to achieve peace or agreement, so that the perpetrator does not have to undergo a criminal sentence and the victim can play an active role in getting compensation. It is because in the traditional concept, the victim is expected to remain silent, to accept and not interfere in the criminal process.

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