

Implementation Study of Restorative Justice for Juvenile Criminal Justice System by Customary Court in Mainland Sulawesi

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Abstract: Children's rights are specifically different from adult human rights. In all circumstances the rights of children must take precedence over other interests, namely the existence of legal protection for them and the existence of special protection aimed at children who violate the law. Act No.11 of 2012 on the Juvenile Criminal Justice System requires restorative justice efforts as a form of protection for children, which emphasizes restoring the harm caused or incurred by criminal acts. Restorative justice has long been practiced in indigenous community of Indonesia, i.e. where a criminal act occurs by its citizens (including juvenile delinquency), the dispute settlement is conducted within the indigenous community internally without involving the State apparatus. The formulation of the problem is, firstly, how is the policy of restorative justice formulation of juvenile criminal justice system in handling the juvenile with conflict of law, secondly how is implementation of restorative justice of juvenile justice system by customary court in Makassar. The results of the study indicate that customary court in Makassar has legal and cultural characteristics, moral values that can solve problems by deliberation, involving various parties in litigation such as in restorative justice mechanism in the juvenile criminal justice system.

Keyword: Implementation Study, Restorative Justice, Customary Court

1. Introduction

Every child is protected from inside of the womb to become adult. Children also have specific rights different to adult people. Physically, the condition of children and their mental states are unstable, making their ability to act and be responsible to their action different to the adults. Court process can cause psychological impact of harming children. They will get pressure and stigmatization during the process. Therefore, the actions in juvenile court conducted by policemen, attorneys, judges, or other officers should be based on the principle of children's welfare and interests. However, the court process often takes a long time. The treatment of the officers to the offenders of juvenile delinquency is full of pressure which can give bad experience to children that will be remembered and recorded to their life forever.

Thereby, they need different treatment to those adults in getting the process of juvenile criminal justice system, making their need special concerns, particularly for juvenile court justice system. The settlement of criminal act through restorative justice is deemed as one choice to cover the weakness and disappointment to retributive justice system and rehabilitation in general criminal justice system. According to Sudarto, "juvenile justice system includes all activities including investigation and verdicts on children's behalf". Based on the Regulation of Minimum Standard of United Nation regarding Administration of Juvenile Court (Beijing Rules), Article 1 section 4 regulates that juvenile court should be deemed as the integral part of the process of national development in every country in a comprehensive framework for social justice to all children; thus, it gives contribution to young generation and maintain the order of peace in the society".



In the Convention on The Children's Rights, it is regulated that legal process should be done as the last resort in a short time. There should be an alternative effort or the best solution which does not make a stigma to children. Therefore, the legal action to children should be balanced with integrated program related to education, health, psychological guidance, and the involvement of community which will avoid the children from repeating the same crimes. Mechanisms in the judicial system process can be done as a means to create justice that emphasizes the recovery of dangers and relationships due to abuses committed by adolescents. Both parties must reach agreement without any pressure.

In his article, Tyler said that the goal of this review is to point to common elements shared by this procedural justice approach, the restorative justice movement, and a focus on morality and moral development. These approaches are united by their common goal: to encourage the development or activation of people's internal values so that they will become more motivated to engage in self-regulatory behavior. It is suggested that a civil society is most effective when its members buy into commonly held values and follow rules because they are motivated to do so, rather than because they are motivated by incentives or sanctions. [1]

According to Llewellyn and Howse (1998): The main elements of the restorative process involve voluntariness, truth telling, and a face-to-face encounter. Consequently, the process should be completely voluntary for all participants; the offender needs to accept responsibility for the harm and be willing to openly and honestly discuss the criminal behaviour; and the participants should meet in a safe and organized setting to collectively agree on an appropriate method of repairing the harm. [2]

The next statement of John Braitwhite states that : The types of restorative justice standards are articulated: limiting, maximizing, and enabling standards. They are developed as multidimensional criteria for evaluating restorative justice programs. A way of summarizing the long list of standards is that they define ways of securing the republican freedom (dominion) of citizens through repair, transformation, empowerment with others, and limiting the exercise of power over others. A defense of the list is also articulated in terms of values that can be found in consensus UN Human Rights agreements and from what we know empirically about what citizens seek from restorative justice. Ultimately, such top-down lists motivated by UN instruments or the ruminations of intellectuals are only important for supplying a provisional and revisable agenda for bottom-up deliberation on restorative justice standards appropriate to distinctively local anxieties about in justice. A method is outlined for moving bottom-up from standards citizens settle for evaluating their local program to aggregating these into national and international standards.[3]. This is defined in the mechanism of justice recovery, and the method of governance is the need of citizens to also regulate their local programs for national and international standards.

According to Sidney W.A. Dekker and Hugh Breakey, culture needs to be considered, including in substantive justice that regulates how rules and procedures are fair and legitimate; and restorative justice that aims to restore the status of individuals involved and heal the relations and injuries of victims and the wider community after the occurrence of ethical violations. His opinion is as stated below:

Culture needs to be considered. These include substantive justice which prescribes how regulations, rules and procedures themselves are fair and legitimate; procedural justice which sets down processes for determining rule-breaches, offers protections for the accused, and governs who should make such determinations; and restorative justice which aims to restore the status of the individual involved and heal relationships and injuries of victims and the wider community in the wake of an ethical breach. Just culture approaches need to provide such foundations for a genuinely just safety culture, to be conducive to reporting, engagement, and safety improvement.[4]

The structure of society in Indonesia is assigned by two unique characters of horizontal and vertical. Horizontally, it is assigned by the existence of social unities based on differences of tribes, religions, culture, and regions. Indonesian society, in Furnivall, is mentioned as plural societies (Nasikun,1974). Social plurality also shows cultural diversification. This difference of culture causes many contradictions.

On the one hand, there is a local principle which should be kept. Meanwhile, on the other hand, people are demanded to adapt with global life. According to Van Ness, customary justice system is significantly a part of restorative justice in three different forms with two characters of restorative justice program adapted from customary practices: conference system (found in the traditional practices of Maori tribes in New Zealand) and round-table system (in the practice of American first civilization). Second, the philosophical basis of custom process is the court tries to repair the criminal structures in the society which injures them and give information regarding restorative justice. Third, some forms of customary court is included in formal efforts in the process of criminal handling.[5].

Vertically, the structure of Indonesians is assigned by the differences of upper and lower layers of agrarians and industries. It causes the disparities in expanding the development; since, society is still doing agrarian activities, while the others have stepped to industries or technology of information fields. Fred W. Riggs says it as prismatic society. [6]. In Indonesia the existence of customary court in some areas is still considered, making the restorative justice principle not become a new thing. Marc Levin states that the old and traditional approach is recently used as progressive approach. [7]

2. The Problems

Naturally, the settlement of juvenile cases is not simple. It needs equal perception and vision to give the children protection and fulfill their rights with good commitment in the form of ratification of international convention, law, and local wisdom for children's behalf. Related to this statement, there are some questions raised in this research: How is the formulation of restorative justice system for juvenile crimes or children with law problems? and How is the implementation of restorative justice system for juvenile crimes by customary court in Makassar?

3. Findings

3.1 The Formulation Policy of Restorative Justice for The Juvenile Criminal Justice System

The results show that various policies in international legal instruments have been established in the legal protection effort for child offenders, including the criminal justice system of children. It is needed to prioritize then on-formal settlement process to avoid the stigma for children. Children who was in custody before the court will be housed separately from adults and shall be detained in separate institutions from institutions convicting adults, receive cares, protection, and all necessary assistance for children, like social, educational, skills, psychological, and physical treatment they need according to age, gender, and personality.

The protection of juvenile against the law has been set up in several international legal instruments, including UN Standard Minimum Rules on the Administration of Justice for Juvenile ("Beijing Rules") by the United Nations Assembly Resolution No. 43/33 November 29, 1985, and UN Guidelines order Crime Prevention Centre ("Riyadh Guidelines") authorized and declared in the UN General Assembly Resolution No. 45/112 December 14, 1990, with the assertion that the UN resolution is the minimum standards for the protection of juvenile from all forms of deprivation of liberty, which is based on human rights and prevent the child from the side effects of all forms of detention in order to achieve the integration of children into society. In addition, the Convention on the Rights of the Child (Convention on the Rights of the Child) is acting as international law, which began on 2 September 1990, seeing the need to perform systematic and comprehensive steps to provide protection to children who are in conflict with the law.

Law No. 11 year 2012 regarding juvenile court justice system explains the process of justice system to children with lawful conflicts. The attempts of intervention have been done by Government and all stakeholders to fulfill the rights of the child with lawful conflicts. Likewise, Law No 35 year 2014 as the amendment of Law No.23 year 2002 regarding children's protection also explains that children should get

protection and "special" treatment if they are in emergency situation, like suspected as criminal offenders, involved in violence, etc. It is affirmed by the law and international law of the rights of the child convention by explaining the existence of protection and "special" treatment to children with law conflict. In Indonesia, the Act No. 11 of 2012 regarding Juvenile Criminal Justice System regulates the entire process of settling disputes concerning Juvenile against the law, starting from the investigation phase to the stage after a sentence of supervision.

People are expected to participate and be involved in the children case through Diversion and Restorative Justice. Furthermore, under Section 28 I of the Constitution of 1945, in clause (3), cultural identities and rights of traditional communities should be respected along with the times and civilization. This means that any activity in the community with regard to the values of traditional/ local knowledge is respected and recognized in accordance with the times and civilization.

In international instruments and national instruments, it has been arranged that the legal mechanisms as well as law enforcers and citizens are connected and responsible for the implementation of the juvenile criminal justice system and prefer the informal approach as preventing juvenile against the law.

3.2. *The Implementation of Restorative Justice In Juvenile Court Justice System In Makassar*

South Sulawesi is located in 0°12' – 8° South Latitude and 116°48' – 122°36' East Longitude. Its area coverage is 62.482,54 km². This province is bordering with Central Sulawesi and West Sulawesi in its North, Bone Bay and Southeast Sulawesi on the east, Makassar Strait on the west, and Flores Sea on the south. South Sulawesi's civilization consists of four main tribes, Toraja, Bugis, Makassar, and Mandar.

The latest data on July 2017 showed that 55 criminal offenders, like violence and vehicle thefts, were arrested by the policemen of city police of Makassar, South Sulawesi. The offenders were dominated by dropout underage teenagers who repeatedly convicted. 21 of them did the thefts of vehicles, 22 of them did thefts with violence, and 12 of them did thefts of weighted items.

Police officers had confiscated some evidences including electronic devices, such as television, monitor with CPU, 2 units of smartphone, and fabric bridal accessories. Next, these 52 offenders will be suspected by Article 363 of Book of Law with five years of imprisonment.

According to A.A.G. Peters, law should not be used to reach arbitrary decision, even if it is attached in written or not written rules. Law should be used as the director of justice and legitimation which is oriented to law principles and law values based on living law of the society. Therefore, it is not wrong if there is an attempt of reactualization and revitalization of custom law in the society. [8]

Indonesia is a country with rich varieties of cultures, with diverse social order, and has a process that is based on the values of local wisdom without involving the legal process in an approach that is based on the principles of decency and fairness in the mechanism agreed upon jointly. Human involvement in the implementation of the law shows the relationship between culture and law. Legal culture determines individual attitudes, ideas, and values against the law in society. Friedman states that differences in education, gender, ethnicity, nationality, and other income may be a factor affecting a person's legal culture. Legal culture is the key to understanding the differences contained in one legal system to another system. In the restorative justice system, the role of the community is very important, since the understanding of the justice system is crucial for implementation. The restorative justice system will fail if people do not participate in the implementation process.

As with other kingdoms in South Sulawesi, every noble is written in his birth in "*panguriseng*" (genealogy chapter) by specifying the time of birth, the special event of the day and the degree of blood of his nobility. Determining degree of nobility is always based on the formula: Dad's Degree + Degrees Mother = X / 2. This is based on a provision in Luwu, namely: "*AmbE 'pawata' cappa 'passapu, Indo' parenreng ikko 'simpolong'*" (the father pulls with the tip of the destar, the mother heaved with a bun). Then at other times clarified with the motto too, namely: "*AmbE 'mappabbati, Indo' mappattase '"*" (the

father lowered the nazab, mother made the blood cook). It is clear that both provisions constitute an oversight that the people of Luwu embrace the bilateral system, not patrimonial or matrimonial. Thus, a Datu Luwu is the absolute owner of the purest blood of the nobleman who is weighed from his father's blood and mother's blood by lontara experts coordinated by AnrEguru Anakarung.

Bugis tribe as a regional community of Sulawesi is using the language Bugis (talk Ogi) is a language that has a script, namely: *Sure' / Hurupu' Ugi* (Lontara: Mak.). This language has 4 strata, namely: *Talk DEwata* (I la Galigo or Bissu Talk), *Talk Ade 'Baruga*, *Speak Lalo* and *Speak Ammeng*. But then, when spoken everyday according to the user community in its communication function, Bugis language can be stratified into 6 levels as well as called "Wari Ada" (language strata) which is often abbreviated as "WErEkkada". Then if according to the function classification, Wari Ada is termed "PasileIE Ada" (mutual switching) which is often referred to as "EXE Ada" with the limits of simple meaning, namely: *pinutur*.

Based on interviews with Mr. Andi Oddang, the source persons as Luwu Royal People's People are as follows:

A sustainable customary formation since 36 Generation TopapoataE Datu / Pajung Luwu to this day. Tana Luwu the only "nation" in the history of the beloved Republic of Indonesia is the former Kingdom in South Sulawesi that is sustainable and its Adat Council still exists to this day and Insya Allah throughout the world's future life. Luwu) actually existed since the oldest and largest kingdom in Eastern Indonesia was founded by TopapoataE Bataraguru. But then it is always perfected in every era of leadership Datu / Pajung Luwu next where the completion of the formation according to the needs of the time (period).

Tana Luwu was established and organized by the government with love, dignity and justice, "tessibEtta-bEtta olo, tessiala akka" (not stepping over authority, not taking honor each other) or in other words: Professional Managerial. All matters concerning the policy in the organization of the kingdom institute is implemented with the principle of "appadaEloreng" (consensus to reach consensus), as in Wajo called it "assamaturuseng" (agreement). So with this mechanized system, a Datu Luwu is glorified by a special treatment, as it is called: "Naiyya Datu E mattuku ulu mattukku ajE, angel arie tenna, tennawellang tikka, iyapa napasedding, ade'pa teddu'i" (actually Datu Luwu covering the head, covering the legs, not blowing the wind, and not being exposed to the sun, he will wake up, if the customs stir).

In Luwu society Pangadereng custom is interpreted as a custom, then it must stand on the values of goodness. Say good words, be nice and always try to think well and then applied to the behavior in the framework of communication among human beings, according to the ability of our customs performance. The custom is placed in the deepest niches of culture. Until then the form of custom is emitted with language and behavior. So the content of the true customs is the culture of mutual human-language and behaving according to their respective pranatanya, especially in terms of language culture, which customs call it "wari ada" (grammar) until it is known as "werekkada". Khazanah pangadereng reveals: "mappabati sadda exists, there mappabati gau ', gau' mappabati tau" (the voice that gave birth to the word, the word that gave birth to deeds, deeds that gave birth to human).

Words heard or read by others are human reflections of how to declare or write them down, according to the judgment of their fellow human beings. As for the underlying intentions, it is none other than the only known to be the Most Goib, then it is fitting that the words are guarded and should be used with great respect to uphold the dignity of humanity, for in fact only the human beings themselves can recognize and glorify the dignity his own humanity. Thus, the teachings and customs exist in the Luwu community as human beings that are part of a cultured society.

The solution of cases in Toraja is also based on its historical values. Whereas, all Tana Toraja area respects and obedient to the justice system of *Tarian pitu*, since it works under the teaching of *Aluk Todolo* which states that justice is united to its custom. According to local myth, *pitu* justice system has been assigned to Tana Toraja since the first civilian comes to Earth.

Then, Bugis Bone tribe of Makassar acknowledges the custom of *Malaweng*. Based on different sources, *Malaweng* has three levels of rule:

- 1) First class *Malaweng* (*Malaweng Pakkita*), means people who offend crimes through their vision. For example, by seeing other people cynically, seeing other gender coming from different *mahram* (blood relation), and etc.
- 2) Second class *Malaweng* (*Malaweng Ada-ada*), means people who conduct crimes by their spoken words. For example, swearing, disgracing people, being arrogant, says harsh words, and etc.
- 3) Third class *Malaweng* (*Malaweng Kedo-kedo*), means people who do crimes because of their action. For example, people who do consensual sexual intercourse to their relatives, eloping, conducting incest, murders, stealing, and etc.[9]

Regarding the development of culture, Bugis tribe tries to nurture local values as the part of national culture based on the application of noble value and local wisdoms of Bugis people. One of the forms is the facilitation of Culture Institution of “Saoraja” as the partner of custom and culture preservation as well as cultural development. Bugis tribe in South Sulawesi also upholds *pancanorma* as five fundamental living norms, which differentiates this tribe from other tribes.

In the justice system of Bugis, specifically in Kajangese custom, they also know customary justice. The customary justice in this area is known as *A'borong* (sitting together in a round of discussion). *A'borong* or Bugis- Makassarrese is known as *Tudang Sipulungor* the process of presenting all customary apparatuses to certain cases.

Restorative justice is required to replace Retributive Justice. Crime in restorative justice is not seen as a violation of the state's interest, but is considered infringement of a person by another person. In this case, the restitution is a means of improvement of the parties and the conciliation, with restoration as the ultimate goal. The victims and offender of criminal acts are recognized, both in the problems and in the settlement. The rights and needs of victims are recognized; while criminals are offenders who need to take responsibility.

In the context of human rights, restorative justice takes on a very important role to ensure that children's rights are protected. Today, Indonesia has implemented restorative justice as a way of resolving juvenile delinquency conflicts. Indonesia has a model of deliberation, which has the same idea as restorative justice as an attempt to create and utilize alternative measures to handling juvenile delinquency cases. Restorative justice in Indonesia encourages a better criminal justice system. Restorative justice resolves the delinquency case by fixing the damage or loss caused by the delinquency behavior. It is a process of familial settlement of delinquency cases by children by involving victims and perpetrators in a deliberation to get the best agreement for both parties.

4. Conclusion

In international instruments and national instruments, it has been arranged that the legal mechanisms as well as law enforcers and citizens connected and responsible for the implementation of the juvenile criminal justice system prefer the informal approach as preventing juvenile against the law.

The customary law in Toraja Land is the customary law of *Kombongan* which has become an institution that has principles for the people of Tanah Toraja from *Kombonan*. Customary Law can also direct the Tanah Toraja people to become better and there is no division between them.

For the Bugis, Kajao Lalliddong teaches the law to society, both individually and noble groups plus taboos to make it perfect and complete. Kajao then became the guide of the Bugis kingdom in South Sulawesi. In fact, Bugis society has the strength of the bonds of values, morals, culture and local wisdom in solving the problems that occur in society. The joint participation of the community in the criminal justice of children is expected to realize a condition that supports all interests to realize the future of a better child.

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