LOCAL WISDOM-BASED MODEL OF PENAL MEDIATION IN MITIGATING MADURANESE VIOLENCE CONFLICT (CAROK)

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ABSTRACT

This research aims to construct the penal mediation model in mitigating Maduranese violence conflict (carok) based on local wisdom. This is regarded to Maduranese habit which prefers to resolve the conflict, especially the ones related to their dignity, by committing carok. There are two research problems, i.e. finding out the cause of why the criminal justice system cannot mitigate carok and creating carok mitigation model which will be applied by law enforcement agents. A doctrinal and non-doctrinal research methods were used in this research. The result revealed that the causing factors of carok among Maduranese are problems related to women, land, water, misunderstanding, and many more. However, all of them boil down to one thing, i.e. the abused dignity. The policy model to mitigate carok, which is applied by the law enforcement agents, is not only conducted through penal act, but it is conducted through penal mediation model involving the Police, Judiciary and Court. Thus, a support from the community leaders (local ulama) and a coordination with the Local Government (district level) as the neutral mediator are needed by the law enforcement agents. This collaboration can be conducted by empowering “Lembaga Perdamaian Adat”, a custom institution which let the warring factions to resolve their conflict, so that every problem can be satisfactorily resolved for both warring factions.

Key words: carok, penal mediation, local wisdom

Introduction

A modern law as the current legal system has not been supported by the adequate society growth, which was characterized as uniform, non-personal, territorial, normative, positive, and secular by Max Weber, Marc Galanter, and R. Unger.\(^1\) The design of national laws which pivots on codification and unification politics has succeeded in creating modern legal foundation with the presence of rationally-managed written regulations. The modern judiciary inhabited by educated professionals operates codification laws. However, it doesn’t mean that the modernity of the legal system brings no problem. On the other hand, the legal foundation, relied on those codification and unification politics, covers the issues at the practical level, especially on local community context with its uniqueness and plurality.\(^2\)

The codification and unification legal systems are unrealistically carrying out the noble mandate of accommodating the values of living laws, especially when it must be read as the access to heterogeneous people’s justice. At this point, the problem is not limited to the disregard of the norms and values from those two different systems. It is also not limited to the people’s ability to get into the complicated bureaucratic-technical system. Moreover, the other crucial problems are the ones dealing with the judges’ ability and readiness in exploring and finding the values, which are indeed unready to be used (which values and according to whom).

Carok among Maduranese has become a tradition or culture which has been going on for generations. It creates difficulty for law enforcement agents since it may cause relatively many victims and it trigger revenge from each warring faction. Moreover, it can reoccur in an unexpected situation.

The other most prominent character of Maduranese is outspoken. They are expressive, spontaneous, and open when they have to response to everything they faced, especially the ones dealing with the threat from others. Therefore, this condition may open the chance for more transparent individual expressions. Other typical culture and character of Maduranese is their religious manner,\(^3\)


\(^2\) Ibid., page. 2. (compared with the view of Soetandyo Wignjosoebroto who stated that the politic of legal codification and unification contradicts with the social reality in history, within his work: *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial Politik Dalam Perkembangan Hukum di Indonesia*, Raja Grafindo Persada, Jakarta, 1994, page. 37-60).

as it is said “abantal syahadat, asapoinman, apayung Allah (if they use syahadat, i.e. confession of faith in Allah, as their headbands, use iman, i.e. faith in Allah, as their blanket, and take refuge in Allah during their life, they will surely survive)”. Insulting religion, for Maduranese, is the same with insulting the dignity (apotetolang) so that a dead penalty is the punishment.4

According to data obtained from Pamekasan Police Office, of the total number of carok incident (202 cases) during four years (1990-1994), 40.6% cases were committed by uneducated perpetrators; 53.1% cases were committed by elementary school-graduated perpetrators, and 6.3% cases were committed by junior high school-graduated perpetrators. None of the carok perpetrators were graduated from Islamic boarding school. This means that none of santri, i.e. Islamic boarding school students, in Pamekasan District were the carok perpetrators. The similar condition also happened in the other three districts (Bangkalan, Sampang, and Sumenep), eventhough the similar statistical data were not available.5

Research Problems
Based on the research background, the writer formulates the research problems as follows:
1. Why is the Criminal Justice System unable to mitigate Maduranese carok?
2. How is carok mitigation model applied by law enforcement agents in Madura through local wisdom-based model of penal mediation?

Theoretical Review
Policies or efforts in combating crimes are essentially an integral part of efforts to achieve social defence and social welfare. The final or ultimate goal is the protection of people to achieve social welfare.6 Schematically, the correlation can be described as follows:

In line with the above scheme, G. Peter Hoefnagels said:7

“Criminal policy as a science of policy is part of a larger policy: the law enforcement policy... The legislative and enforcement policy is in turn part of social policy”.

Figure 1
Flow of Thought of the Correlation among Criminal Policy, Social Policy, and Social Welfare Policy According to G.P. Hoefnagels

(Source: BardaNawawiArief, 1996 : 3)


Data from Pamekasan Police Office during four years of 1990-1994

Bara Nawawi Arief, Bunga Rampai Kebijakan Hukum Pidana, Citra Aditya Bakti, Bandung. 2006, hlm. 3

7Ibid.
Based on the two charts written by G. Peter Hoefnagels, it will be used as one of the theoretical frameworks for analysing problems related to the culture of violence conflict (carok) among Maduranese, especially in Pamekasan District. Related to its prevention and mitigation, both of the charts have simply illustrated the correlation among criminal policy, social defence policy, and social welfare policy in achieving social welfare. Therefore, the correlation between penal and non-penal policy in mitigating crimes integrally becomes obvious.8

An integral crime mitigation means that the people, with all their potencies, should also be seen as the part of criminal policy, as has been stated in the seventh UN congress result in Milan in 1985 which emphasized that “the overall organization of society should be regarded as anti criminogenic” and asserted that: “community relations were the basis for crime prevention programmes”. Thus, Barda Nawawi Arief said that it is necessary to foster and enhance the effectiveness of extra legal system or informal system exist in the society in order to mitigate crime. These efforts can be in several ways such as having a cooperation with social and religious organisation, educational institutions, and volunteer organisation in the society.9

The above framework of thinking can be described as in the Flow of Thought of the Correlation among Criminal Policy, Law Enforcement Policy, and Social Policy by G.P. Hoefnagels,10 as follows:

Source: BardaNawawiArief, 1996 : 3

8Compared with the view of Barda Nawawi Arief, page.4 and Sudarto, 1981, Hukum dan Hukum Pidana, page.104.
9Barda Nawawi Arief, 2006, page. 21
Furthermore, the pattern between legal norms with other fields can be seen as follows:

**Figure 4**
The Pattern between Legal Norms with Other Fields within the Society

Based on the above theory, the Flow of Thought of The Integrated Criminal Justice System Theorization was used to prevent and mitigate violence conflicts (carok cases)
RESEARCH METHOD

Research Approach

The legal concept used in this research was the concept of law as decisions made by in concreto judges in a trial. These decisions were made as the judges’ attempt to solve a case. They may become the precedent either of the case or of the subsequent cases. Making doctrinal studies as one the theoretical studies in this research can be done as far as these studies were closely related to judges’ opinions on the substance of the laws and/or the decisions of the previous judges related to the precedents.

Because it was a doctrinal approach, a deductive syllogism was used as the analysis method, i.e. in reaching the conclusion, it is done by drawing the major premise into the minor premise. However, the studies on legal behaviour in trials will be difficult to

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be categorised as studies on legal doctrines. The extra-legal variables if they exist outside the doctrinal domain, as well as its research and studies, they belong to non-doctrinal category (also by using non doctrinal methods and idioms).\textsuperscript{12}

**Research Specification**

This was a descriptive research, in line with the research problems and purposes. Descriptive in a broad sense means providing an overview through an interpretation, evaluation, and general knowledge. This is because a fact will be meaningless without interpretation, evaluation, and general knowledge.

**Research Location**

This research was conducted in Pamekasan District Court, Pamekasan District Attorney's Office, Pamekasan Police Office, and Pamekasan Prison in order to obtain secondary data in the form of primary and secondary legal materials as supporting data.

**The Types and Sources of Data**

Primary Data: The research problems should be answered by using primary data, i.e. directly from the community-data obtained through non doctrinal research result (empirical). In this research, those data were from the law enforcement agents (judges, attorneys, policies, prison staff, and advocates), the informants and resource persons, as well as the carok perpetrators.\textsuperscript{13}

Secondary Data:

Primary legal materials were in the form of: The 1945 Constitution of Republic of Indonesia, The Act of Republic of Indonesia Number 48 Year 2009 on Judicial Power, The Act of Republic of Indonesia Number 16 Year 2004 on Judiciary of Republic of Indonesia, The Act of Republic of Indonesia Number 2 Year 2002 on The Indonesian National Police, and the provision of other relevant legislation.

Secondary legal materials are legal materials providing explanation about primary legal materials or the legal materials which can help analysing and understanding the primary legal materials. They are such as books, journals, scientific journals, mass media, archives, seminar results, workshops, etc.

Tertiary legal materials are legal materials providing guidance about primary or secondary legal materials. They are in the form of Indonesian dictionary, English dictionary, and legal dictionary.

**Data Analysis Techniques**

In accordance with the used research approach, this research used two stages data analysis:

1. **The first stage**
   - In analysing data on doctrinal-based research problems, a doctrinal analysis method (normative) was used. At this stage, the researcher performed a legal inventory of various legal norms. The researcher comprehended and described the laws using deductive-logic method. Deductive is a reasoning process which is based on general truths and is ended on specific conclusions.
   - The deductive deduction used a thinking process called syllogism, which is composed from two premises (major and minor premises) and a conclusion.

2. **The second stage**
   - In analysing data on non-doctrinal-based research problems, a qualitative analysis method, i.e. interactive analysis model, was used. Interactive analysis model means that the collected data will be analysed through three stages, i.e. data reduction, data display, and drawing and verifying conclusion. This model is conducted through a cycle process among the stages so that the collected data will be correlated one another and will really support the research result report. The three stages are:
     a. Data reduction is a process of selecting, focusing, simplifying, and abstracting fieldnote data. These activities emphasize, shorten, focus, discard unimportant things appeared in the notes, and organise the data in such a way that the final conclusion can be drawn.
     b. Data display includes matrix types, images/ schemes and tables which are then designed to assemble information regularly so that they can be easily seen and understood in a cohesive form.
     c. Drawing and verifying conclusion is an effort of drawing conclusion from everything existed in the process of data reduction and data display in which those things are previously tested their liquidity. The liquidity testing are conducted to obtain more valid conclusion.

**Research Result and Discussion**

\textsuperscript{12} Soetandyo Wignjosoebroto, *Hukum Paradigma, Metode dan Dinamika Masalahnya*, Eslam & Huma, Jakarta, page. 140.

The System of Criminal Justice in Mitigating Violence Conflict (Carok)

The theory of legal system according to Lawrence M. Friedman consists of three major elements, i.e.:

1. Legal structure
2. Legal substance
3. Legal culture

Lawrence M. Friedman stated that the effectiveness and success of law enforcement depends on three elements of legal system, i.e. legal structure, legal substance, and legal culture. Legal structure deals with law enforcement agents, legal substance includes laws, and legal culture refers to living laws embraced by the people.

The correlation among the three elements of legal system is powerless, like a mechanical work. The structure is like a machine, the substance is what the machine does and produces, whereas the culture is anything or anyone deciding to turn the machine on or off as well as deciding on how the machine is used. If this is associated with Indonesian legal system, Friedman’s theory can be used as a standard in measuring the law enforcement process in Indonesia. The police together with prosecutors, judges, advocate, and prisons are the part of legal structure. The interaction among the components of these law-servant determine the strength of the legal structure. However, the enforcement of laws cannot only be determined by the strength of legal structure but also by the legal culture existed among the people. Those three legal system elements, according to Friedman, have not been enforced well, especially the ones related to legal structure and legal culture. For example the police (legal structure), who are expected to catch the criminals, also involved in the crime network instead. The similar thing happens to the prosecutors. It has been very difficult to find the prosecutors who are really honest in solving the case. This statement appear because there are enough example of cases which involve the law enforcement agents.

Regarding to the legal culture, Friedman\(^4\) said as follows: “The third component of legal system, of legal culture. By this we mean people’s attitudes toward law and legal system their belief ...in other word, is the eliminate of social thought and social force which determines how law is used, avoided, or abused”.

Legal culture involves the culture of laws which refer to human attitude (including the culture of laws of the law enforcement agents) toward laws and the system of law. No matter how good the arrangement of the legal structure in establishing the rules is and no matter how qualified the made legal substance is, if they are not supported by the legal culture of people involved in the system and society, the enforcement of laws will never be effective.

The laws as the tool for changing the society (social engineering) is nothing but the ideas the laws seek to realise. In order to ensure the achievement of function as the social engineering toward a better way, the law availability (in terms of rule or regulation) as well as the guarantee over the realisation of the rule of law into the practice of law is needed. In other words, there is a guarantee over the good law enforcement.\(^15\) Thus, the law operation is not only the function of its legislation but also the activities of its executing bureaucracy.

In accordance with Friedman, Satjipto Rahardjo said that discussing about laws is basically cannot be separated from the principles of legal paradigm consisting of fundamental law and legal system. Some of fundamental law are legislation, law enforcement and justice. Meanwhile the legal system includes legal substance, legal structure, and legal culture. All of them significantly influence the effectiveness of a law. From those definitions, it can be concluded that the functioning of a law is a sign that the law has achieved the legal purpose, i.e. trying to maintain and protect people within their society. The level of legal effectiveness is also determined by how high the people’s obedience toward the regulation is.

According to Achmad Ali, if a law can be obeyed by most of its target it means that the law is effective. However, the effectiveness of a rule depends on the importance of obeying it. If the people’s obedience is because of compliance (fear of sanction), the degree of the obedience is considered very low. It will be different if the people’s obedience is based on the internalization interest, i.e. obeying the rule because the rule itself really fits with their intrinsic values, the degree of the obedience is considered the highest obedience.

According to the research result data on carok cases whose motives are (especially) disturbance over the women (wife) and other motives (defending family’s dignity); sourced from the verdict of Pamekasan District Court Number 163/Pid.B/2003/PN.Pks, Number 06/Pid.B/2004/PN.Pks, Number 126/Pid.B/2006/PN.Pks., Number 02/Pid.B/2007/PN.Pks., Number 06/Pid.B/2007/PN.Pks., Number 14/Pid.B/2008/PN.Pks, Number 164/Pid.B/2011/PN.Pks., Number 66/Pid.B/2012/PN.Pks., Number 127/Pid.B/2013/PN.Pks. and Number 160/Pid.B/2014/PN.Pks, as well as what has been said by one of carok’s perpetrators (accompanied by the prison officers namely Rudi, Tauflk, and Restu) during an interview with the researcher on Monday, 10 of April 2017 at around 10 a.m. in Pamekasan prison, it is said that:


Maduranese have their own way related to carok cases. Therefore, with this different construction, the state law is not able to resolve carok cases. The provided set of rules and mechanism is merely a normative guidance since in resolving cases of dignity, family, and religion harassment, Maduranese have their own mechanism which they consider to be fair and suitable with their cultural values.

Maduranese’ justice construction on the harassment of dignity is influenced by their unique and specific values, norm, and daily life. It means that the construction is based on Maduranese cultural values conceptualized and actualized into the norms which become their life guidance. With such construction, the presence of state law together with its equitable attributes which treat everything equally (without considering the cultural values exist within the society) doesn’t have significant influence over carok resolving efforts.

The values are believed, by Maduranese, to have noble wisdom, i.e. thing which is believed as a must and considered noble enough as well as demanding loyalty and obedience from Maduranese. Here is the difference of justice construction, which is according to Mahrus Ali, Maduranese who breaks the agreed cultural values will be given a punishment. The punishment is certainly different with the one given by the state.

For most of the time, the legal practice by the law enforcement agents in Indonesia, such as the practice of courts, police, attorneys’ office, and legal practitioners (the pillar group of the criminal justice system) tends to always rest upon legism thinking (as the main characteristic of legal positivism). In this case, the legal perspective only be seen from the legislation telescope which is then used to judge the occurred cases. Such practice does not need to always be interpreted in a wrong way. This is because the legism itself have given and always gives the meaning of legal certainty. Meanwhile, a legal certainty refers to an absolute need within the legal practice.

The Act Number 48 Year 2009 on the Principles of Judicial Power Article 5 (1) states that the judges are required to explore, follow, and understand the legal values and the living justice within the society. According to A. Sukris Sarmadi, a law should be widely understood as the justice in the society. A law actually aims at social purpose. It also aims to defend and protect the people’s interest. If a legal text is found to be on the contrary with social purposes, it should be read in the context of social substance of norms, community justice, social interest defender, and people’s protector. This is an effort to liberate the positive law from the perceived injustice felt by the people so that the law remains progressive.

Positivism has created a law in a mathematical sketches, resolving legal cases occurred in society based on what are written in the text of an act, crystallizing in a text’s binary position in which the reader should understand within that situation and they are not permitted to think about other things. Meanwhile, the judges give a verdict on a legal case using that text. As the case occurred in Indonesia, the judges give the verdict by prioritizing the written law as its major source. The group of judges who think in such a way, according to Lintong O. Siahaan, can be categorized as the conservationist.

Local Wisdom-Based Model of Penal Mediation in Mitigating Violence Conflict (Carok)
The concept of mediation and reconciliation is basically one of legal deliberations in which it is more commonly used to resolve a civil case. In the European Union, the legal commission of this institution proposes a diversion system in which this mechanism is also implemented in the criminal law. The basic of philosophical and moral consideration of this mechanism is for reducing the negative effect of stigmatization from the people over the criminals which are then labelled as a prisoner. Besides, a

16 Bernard L. Tanya, *Hukum.....op.cit.*, page. 236.
19 Ibid.
pragmatic consideration such as state budget savings and courts’ burden reduction are also applied. However, this institution also considers the binding nature of a decision agreed in a mediation, which is the result of out of court settlement, if the concept is implemented. A mediation in the concept of civil procedure law is one of the ways to resolve a case outside courts. In Black Law Dictionary, a mediation is defined as a method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

This is one of the ways, which is in its development, suggested by the United Nation in each dispute settlement. It has been said in the Basic Principles on the Use of Restorative Justice formulated by the UN as follows: The parties to all any disputes, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek solution by a negotiation, enquiry, mediation. Conciliations, arbitrate, settlement resort to regionagencies of arrangement, or other peaceful means of their own choice.

A mediation is not the only alternative ways of non-court dispute settlement, as has been mentioned in the charter of the United Nations. The other alternative ways are such as negotiation and arbitration. A negotiation is a problem solving way conducted through direct discussion among the warring factions in which its result is accepted by all factions.

At the international level, the dynamics of restorative justice gained inauguration in the Vienna Declaration on Crime and Justice in 2000 encouraging the development of policies, procedures, and restorative justice program which fully respected the rights, needs and interest of the victims, perpetrators, society, and all the involved parties. Furthermore, the 11th UN Declaration on the Prevention of Crimes and Treatment of Offenders in 2005 called on the member states to recognize the importance of developing policies, procedures, and restorative justice program which refers to an alternative way of criminal prosecution. The 9th congressional report on the Prevention of Crimes and Treatment of Offenders in 1995 had previously stated that one key of criminal law renewal agendas in resolving cases, within the criminal justice framework, was the needs for enriching the formal justice system through human rights- standardized informal mechanism or system. Those mechanisms involved the encouragement of applying restitution, compensation, and penal mediation.

In the history of human civilization, the form of dispute resolution with the involvement of the third party (including a mediation) has lasted for ages as the form of the civilization and the legal culture. China has been using mediation tradition since the Zhou dynasty around 1.100 years ago. The tradition is conducted through friendly consultation or direct consultation. In the time Before Christ, Aristotle and Cicero had practiced an arbitration by drawing arbiters to settle a dispute. Cicero (106-43 BC) said that through arbitration someone would not get everything, but he also would not lose everything.

The similar thing was implemented in Japan, through a law called Shogun Tokugawa (1603-1868). This law placed someone as a community leader who did the mediation. Furthermore, the similar law was also implemented in the South Asia such as Sri Lanka, which has been using mediation for more than 400 years. Pakistan and Nepal also put mediation forward by appointing respected person called Panchayats. In Bangladesh, the respected person is called Shalish.

In Middle East tradition, a mediation, known as a wisatha meant a mediator, still uses the set of law outlined within the Holy Koran (4:35), i.e. by implementing three elements. First, the parties who will implement the mediation. Second, the respected person who will facilitate the mediation. Third, the process of achieving a peace agreement called ishlah.

Sezai Ozcelik compares the mediation practice in the United Arab Emirates, which puts the respected person forward, with the mediation in the western countries, which is based on someone’s professionalism and knowledge about legal procedures. This difference is also supported by the background of dispute settlement, in which in the Middle East countries the settlement of a

22Ibid.


24Ibid.


29Ibid., page. 13.
dispute involves the family (clan) so that the purpose of the settlement is for creating harmony within the society. Meanwhile, in more modern and professional level, the dispute settlement often aims to eliminate losses or at least to achieve win-win solution.

In family law, the United States of America becomes one of the pioneers among the developed countries which develops mediation in a judicial system. Since the 1970s, mediation has become the important part of family dispute’s settlement. The mediation then developed and in 1981, California became the first state to apply mediation in a parenting dispute. In 1990, 13 states had implemented a mediation system integrated with the court (court based mediation of custody and visitation) in resolving a parenting dispute.30

In Islamic tradition, there are some terms used for describing peace, such as *sulh*. In the Middle East history, *sulh* has been existed since thousand years ago and has become an institution which can overcome various family or commercial problems either individually or inter-tribe. *Sulh* is not only conducted by an arbiter but also a judge.31

In the Holy Koran, *Sulh* can be found in Surah Al Hujuraat verse (9-10). In a historical study, *Rasulullah* (the prophet Muhammad) had ever reconciled the dispute occurred among Bani Amar bin ‘Auf and the dispute occurred among the Qubans. As he grew older, the prophet Muhammad even settled a peace among the Arabic tribes who were rivalling about the opportunity to move *Hajar Aswad* (the Black Stone), which moved because of flood. At that time, the prophet Muhammad saw. acted as the arbiter who conducted *sulh* among the warring tribes.32

Having recognised the various mediation model prevailing in the above countries, by using the theory of legal history and comparison, therefore it can be concluded that penal mediation can be implemented for resolving various cases occurred in Madura. This is in line with the view of Barda Nawawi Arief33 that penal mediation can be implemented for resolving a case committed by an adult or children. The method is by involving various parties who are met and facilitated by an appointed mediator. The mediator can be from formal officials such as a policeman, an attorney, a judge, a prison staff, an independent mediator, or a combination among them. The penal mediation can be applied in each stage of the process, either in the stage of police policy, prosecution, investigation, conviction, or after conviction.

Penal mediation has several advantages such as: first, it gives a broad access for the warring faction to get justice. Second, it belongs to one of the faster, cheaper, and simpler case settlement processes. Third, it provides the possibility of restoring good relation and satisfaction of the involved parties so that it has the potency for restoring the normal situation and resolving the problem completely.34

The local wisdom-based model of penal mediation policy for mitigating the future *carok* is very possible to be applied. Thus, it should be implemented among Maduranese, as referred to the formulation in Article 67 Paragraph (1) of 2008 Criminal Code Bill which reaffirms additional criminal nominations for the criminals, i.e. (a) revocation of certain rights, (b) appropriation of certain goods/charges, (c) announcement of the verdict, (d) payment of compensation, and (e) fulfillment of local customary obligation and/or living law-based obligation. Moreover, the revocation of rights obtained by the corporation also can be imposed even though it is not written in the formulation of crimes.

The idea of judicial policy model of “local wisdom-based penal mediation” in mitigating Maduranese *carok* will be realized if there is reconciliation between the parties. Then, there should be a firmness about the compensation payment so that the idea of restoration, which means restoring the damages and losses the perpetrators inflicted on their victims, may be soon realized. The term soon-paid compensation (within short period of time) is really needed to be regulated by the next provision because so far the payment of additional penalties is usually paid by the perpetrators to the state treasury, not to the victims.


32 Ibd., page. 6.


The local wisdom-based model of penal mediation is a rational effort of the society/authorities in mitigating crime by involving all the involved parties. This is done in order to jointly identify and understand the losses a crime caused, the wishes of the victims (victims’ family), and the obligation of the perpetrators (the criminals) so that restoring and putting every single thing on its place can be done in its best way.

An effort to dig up and examine the legal values living in the society, according to Barda Nawawi Arief, is basically a national burden and mandate. It is even a national obligation and challenge. Besides, it has become an international agreement and trend, as seen such as from the UN congressional reports on “The Prevention of Crime and the Treatment of Offenders.”

According to Barda Nawawi Arief, if the national legal system including the national criminal law system should be constructed from the legal values living in the society, therefore the consequence is that there should be an effort to dig up and examine those things. The effort of digging up and examining those living legal values can be conducted through jurisprudence and academic/scientific tradition. If these two ways are not well developed, the hope of establishing the national legal system will take a very long time.

In accordance with the idea of criminal law renewal, Muladi sees the need of establishing a criminal law which has Indonesian characters. The intended characteristics are: first, that the future national criminal law should fulfil the sociological, political, and practical considerations within the ideological framework of Indonesia. Second, the established criminal law must not neglect the aspects related to the condition of Indonesian citizens, nature, and traditions. Third, the established criminal law should adapt the universal tendencies grown within the civil society. Fourth, the criminal and law enforcement politics is an integral part of social politics because it is a criminal justice system. Thus, the future criminal law must also consider the preventative aspects. Fifth, the criminal law and the criminal justice system are basically a part of bigger super systems, i.e., political system, economical system, socio-cultural system, security defence system, and science and technological system. Therefore, the criminal law and criminal justice system must always be responsive to science and technological development in order to improve the effectiveness of its function within the society.

Mahrus Ali disagrees that the settlement of carok cases is solved solely by the use of criminal law and without accommodating Maduranese local cultural values. The reasons are based on these three things. First, carok is an expression of Maduranese in defending their abused dignity and is closely related to the cultural values used as the life guidance. Therefore, its existence cannot be equated with the common murder. Second, carok cases settlement through state law so far gives more emphasis on formal-procedural aspects with the fulfilment of the elements of the article formulation offence charged to the perpetrators. The state law does not pay attention to the uniqueness of Maduranese cultural values, especially the one concerning the defence of their dignity or their family and religion dignity. Third, the existence of criminal law as one of the instruments of crime prevention cannot be separated from the diversity of the cultural values in solving the dispute. Settlement of disputes relying on the thinking construction of criminal law sees a dispute on one aspect only. In fact, the dispute caused by violations of cultural values is one of the important references for resolving the dispute.

According to Arief Gosita, Pancasila is the moral foundation for every citizen in behaving and acting humanly to each other in accordance with each person ability. It is also the moral foundation of treating a person fairly and developing their welfare. Thus, the service to crime victims, both inside and outside the framework of the criminal justice system, can be seen as the rights and

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37 Ibid., page. 26.


obligations of every citizen. On this basis, the implementation of the service to criminal offences victimshave to be maintained and guaranteed. The Service, in a life of society, nation and state, is basically a measure of the society and nation’s civilization.

The Criminal Code has regulated the provisions on the protection of crime victims through compensation payments. This can be seen in Article 14c of the Criminal Code, saying: “in a case that a judge imposes a conditional penalty, the judge may set special conditions for the convicts to indemnify either all or some of losses caused by the committed crime”.

According to Barda Nawawi Arief, this provision is very difficult to be implemented on its real practice, even it has never happened and been asked by the victims in all studied carok cases. The obstacles are: 40 (1) compensation payment cannot be imposed as an independent sanction granted by the judge besides the primary punishment. It can only be imposed as “a special condition” for the implementation of the primary punishment imposed on the convicts; (2) the establishment of this special condition, in the form of paying compensation, can only be granted if the judge imposed a maximum one year sentence or imprisonment; (3) this special condition, according to the Criminal Code, should only be facultative not imperative.

Conclusion

1. The Criminal Justice System cannot mitigate violence conflict (Carok) among Maduranean because: First, the main reference of the Criminal Justice System Operation in the State Law of Indonesia boils down to the Act Number 8 Year 1981 on Criminal Code Procedures. The Criminal Code Procedures embrace the concept of differentiation among the components of law enforcement agents who implement the functions related to judicial power, i.e.: Investigation and Inquiry, Prosecution, Implementation of Court Ruling, and Provision of Legal Service. The functional differentiation causes the fragmented law enforcement because each component of law enforcement agents has different perception and interpretation. This has an impact on the difficulty in establishing an integrated criminal justice system because of the frequent clash of interest and different interpretation among the law enforcement agents. Therefore, the products of judiciary have not been able to meet people’s expectation about justice. Second, the imperfect part of Criminal Code Procedures only follows the attributive theory, i.e. the purpose of punishment is only directed to the criminals. Whereas, the Criminal Code Procedures should follow retribution theory (justice for all) in which all criminal case solving are expected to give justice for all involved parties (defendants, victims, and society). Third, the way of interpreting laws, which has been used so far by the law enforcement agents such as the police, prosecutors, and court, is systematic interpretation. A constitution is an absolute legality as well as its explanation which can be defined through an interpretation. This is the major characteristic of positivist paradigm, in which the subjects of law place themselves within a legalistic positivist thinking and understanding and rule bound. Thus, in examining the law it only concerns on its physical aspects without paying attention on values and norms emerged from social realities (such as justice, truth, or wisdom which usually underlie the rule of law) because they cannot be perceived by the sense.

2. The model of violent conflict (carok) mitigation conducted by the law enforcement agents through local wisdom-based penal mediation is as follows: Maduranean empower their custom institution in resolving carok cases, but it is still within the framework of the Criminal Justice System, beginning from the investigation/inquiry, the cases’ prosecution and examination by involving the warring factions, the perpetrators and the victims, the traditional leaders, ulama, the local government officials, police, and the other law enforcement agents. This model considered to be more flexible. If a reconciliation (islah) is unsuccessful, the cases can be resolved through the criminal law within the framework of the Integrated Criminal Justice System by referring to the valid Criminal Code and Criminal Code Procedures. In a murder case, the perpetrator can give di’et (diyat), i.e. a compensation in the form of giving something (usually gold and slaughtering cow/buffalo) to the victims (their heirs) and holding a traditional ceremony initiated by traditional leaders such as imeummukim, keuchik (geuchik) and tengkomeunasah which aims to end the cases as well as the revenge. Meanwhile, in a persecution and fight resulting in wounds and bleeding, the compensation is by giving goat or other similar thing through an institution called sayam. Furthermore, the cases concerning civil and domestic matters are resolved through sulok institution which essentially embodies a peace (islah) framed by traditional ceremonies. The ceremonies are led by religious leaders and traditional leaders through the giving of peusiujik (heart conditioning) and peumatjaroe (shared meals) held in an open place so that the people can see that the warring factions have reconciled and the case has ended.

B. Recommendations

1. The law enforcement agents assisted by the community leaders (the local ulama) and coordinated with the local government (the district level) should always try to wisely reconcile the two warring factions so that any problems which occur can be resolved satisfactorily for both factions.

2. Striving for doing preventive activities so that the people do not commit the violence conflict (carok). Some of the ways can be conducted by the local government are giving legal socialization and religious speech for Maduranean, especially on the areas which have high potency of carok, so that any issues concerning harassment of dignity should be resolved through deliberation and should call for reconciliation between the warring factions. Thus, the problems can be completely resolved and carok balasan (car ok committed to give revenge) will never happen for the next generation.

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