



Challenges And Obstacles To The Application Of Restorative Justice On The Criminal Justice System In Indonesia

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ABSTRACT

The practice of enforcing the law of restorative justice, as an out-of-court settlement mechanism based on the principle of justice, has also been reflected in several court decisions. Challenges and obstacles to the application of restorative justice in the criminal justice system in Indonesia are the settlement of cases in the spirit of restorative justice, must be the ability to find a fair and mutually beneficial solution (win-win solution) for both parties, both victims and perpetrators. The admission of guilt of the perpetrator of a crime is a prerequisite for restorative justice. Based on these challenges and obstacles, it is necessary to regulate the laws and regulations governing the implementation of restorative justice, the existence of an element of confession of guilt from the perpetrators of the crime as a prerequisite for restorative justice.

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INTRODUCTION

Modern restorative justice was developed in the 1970s through experimentation in several Mennonite communities. In an effort to apply their beliefs and perspectives to the world of criminal justice, Mennonites and other practitioners (Ontario, Canada and US Indiana) experimented with victim-perpetrator encounters, leading to programs of victim empowerment and involvement in justice. The alternative concept of law enforcement then becomes a model for programs around the world. Restorative justice theory was originally developed from these special efforts.¹

Along with its development, restorative justice entered Indonesia, and was developed into an alternative problem solving. Since 2009, the concept of *restorative justice* has begun to be adopted in laws and regulations marked by the issuance of the National Police Chief Letter No. Pol: B/3022/XII/2009/SDOPS dated December 14, 2009 regarding Case Handling through *Alternative Dispute Resolution* (ADR). Then, in children's cases, restorative justice is reflected in the practice of

¹Howard Zehr, 2002, *The Little Book Of Restorative Justice*, Good Books, Intercourse, United States of America, p. 11

diversion (settlement of child criminal cases outside the court) as regulated by Law no. 11 of 2012 concerning the Juvenile Criminal Justice System.²

In the field of copyright, in Article 95 paragraph (4) of Law no. 28 of 2014 concerning Copyright and Article 154 of Law no. 13 of 2016 concerning Patents, principally regulates the mediation process before carrying out criminal prosecutions which are adopted by the penal mediation model to tackle crime problems. The practice of enforcing the law of restorative justice, as an out-of-court settlement mechanism based on the principle of justice, has also been reflected in several court decisions. This prompted the Supreme Court (MA) to issue a number of policies in the form of Perma and SEMA. For example, SE Head of MA No. 3 of 2011 concerning Placement of Victims of Narcotics Abuse in Medical Rehabilitation and Social Rehabilitation Institutions.

Restorative justice in the police and prosecutor's offices applies SE Kapolri No. SE/8/VII/2018 2018 concerning the Application of Restorative Justice in the Settlement of Criminal Cases; Police Chief Regulation No. 6 of 2019 concerning Criminal Investigations; and Prosecutor's Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. Meanwhile, on the judicial side, Perma No. 2 of 2012 concerning Adjusting the Limits of Minor Crimes and the Amount of Fines in the Criminal Code; Perma No. 4 of 2014 concerning Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System; Perma No. 3 of 2017 concerning Guidelines for Prosecuting Women in Confrontation with the Law; Decision of the Director General of the Supreme Court of the Republic of Indonesia No. 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice on 22 December 2020.

Restorative Justice is a process to carry out the peace offered by the Prosecutor in certain cases, which begins when the case has been completely submitted by the investigator. The Supreme Court in the field of General Justice believes that Restorative Justice is also aimed at reconciling the parties through a penal mediation process. In addition, the Ministry of Law and Human Rights also believes that Restorative Justice will be able to overcome the problem of over-capacity of prisoners in prisons. With reference to these various understandings, further questions arise whether Restorative Justice can be translated or simplified as a pragmatic effort to reduce the workload of the Criminal Justice System and law enforcement officers who work in it? Will the application of Restorative Justice like that be automatically relevant in reducing the situation of Over Capacity in prisons?

METHOD

This method used in this research is a qualitative descriptive research. According to Cresswell (2010), qualitative and descriptive research is a way of investigating and understanding the implications of social or humanitarian problems for many individuals or groups. This study uses a literature review method or literature review (Cresswell, 2010). According to Noviardila (2021) and Bawono (2017), research that uses the literature review method is research conducted by finding sources of information about theories related to the problems found. In this study, the authors used the types of data collected through library research and analysed the data obtained using descriptive analysis methods. Descriptive analysis is a method of data analysis that can be done by presenting explanations related to the facts found from the previous strong and credible literature and analysing these data (Puspasari, 2021 & Halwiah, 2021). The focus of this research is to find various legal theories, propositions, principles, or ideas that are used to analyse and solve the formulated

² Agus Sahbani, Chief Justice of the Supreme Court: There are Challenges in Strengthening the Implementation of Restorative Justice, <https://www.Hukumonline.com/berita/baca/lt60317604be719/ketua-ma-ada-tantangan-menperukur-implementasi-keadilan-restoratif/>

research questions. The data used in this study is secondary data which is obtained not from direct observation.

Discussion

Howard Zehr and Ali Gohar argue that, restorative justice began as an attempt to deal with break-ins and other property crimes that are usually viewed (often wrongly) as relatively minor offences. Efforts through peace were also made to apply a restorative justice framework to situations of mass violence. These approaches and practices also spread beyond the criminal justice system to schools, to the workplace and to religious institutions. Use of restorative approaches such as circles as a way to resolve, resolve and change conflict in general.³

Kurniawan Tri Wibowo stated that, in its development the judiciary actually understood these problems, so that other problem solving ideas emerged that empowered victims, perpetrators, families and communities to correct an act that was against the law by using awareness and conviction as a basis for improving community life. The concept of recovery justice which focuses more on the participation or direct participation of the perpetrators, victims and the community in the settlement process.⁴

Miriam Liebman stated that, restorative justice has become a term that is commonly used in the criminal approach (as a punishment system such as a disciplinary school system) which emphasizes the concept of putting the victim and the environment back to their original state rather than punishing the perpetrator of a crime.⁵ While Morrison. BE argues that, restorative justice is a form of conflict resolution and seeks to explain to the perpetrator that the behavior cannot be justified, then at the same time as a step to support and respect the individual).⁶

Howard Zehr states that, victims often feel that control has been taken from them by the violation they experience of control over their property, their body, their emotions, their dreams. Involvement in their own cases as they go through the judicial process, therefore *Restorative justice* can be an important way to restore a sense of empowerment to them.⁷

Restorative justice in principle is a philosophy (basic guideline) in the peace process outside the judiciary by using mediation or deliberation in achieving a justice that is expected by the parties involved in the criminal law, namely the perpetrators of criminal acts and victims of criminal acts to find the best possible solution. agreed and agreed upon by the parties. *Restorative justice* is said to be a basic guideline in achieving justice that is carried out by parties outside the judiciary because it is a process of peace between the perpetrators of the crime and the victims who arise as a result, namely victims or losses from these criminal acts.

In the United States some policymakers appear to have considered restorative justice as a tool to advance criminal justice in a new direction. Having in common the fact that it was incorporated in the early justice system, restorative justice was slowly introduced into several communities around the United States since the 70s and has proven successful in many ways. However, it is important to note that this study was not intended to provide a solution to recidivism or the high costs of containment.⁸

³Howard Zehr and Ali Gohar, 2003, *The Little Book of Restorative Justice, Pennsylvania: Good Books*, page . 3

⁴Kurniawan Tri Wibowo, and Erri Gunrahti Yuni U, 2021, *Restorative Justice in Criminal Justice in Indonesia*, Pena Indish, Makassar, p. 5

⁵Miriam Liebman, 2007, *Restorative justice: How It Works* , Jessica Kingsley Publishers, London, p. 27.

⁶Morrison. BE, 2001, *The School System: Developing its capacity in the regulation of a civil society* , in J. Braithwaite & H. Strang (Eds.), *Restorative Justice and Civil Society*, Cambridge University Press, p.195.

⁷Howard Zehr, *Op cit .*, p. 15

⁸Erin Roaza, *Challenges In Implementing Restorative Justice Practices In The United States*, Capstone Collection. 3071. <https://digitalcollections.sit.edu/capstones/3071>, p. 5

As Howard Zehr so eloquently puts it, the reduction of recidivism is an expected by-product, but restorative justice is done first because it is the right thing to do: the needs of victims must be addressed, perpetrators must be held accountable, those affected by a violation must be involved in the process, regardless of whether the perpetrator “understood” and mitigated their offence.⁹ *Restorative justice* is also not primarily designed to reduce recidivism or repeat offences. Thus, if many people think that with *Restorative justice* the crime rate will decrease, because cases do not go to court, and prisons have fewer prisoners. This is a fallacy to view *Restorative justice*.¹⁰

Since the late 1990s many “restorative” prison programs have been implemented in the countries of the British Commonwealth. With few exceptions, however, the program does not include the use of conferences between victims and perpetrators. In contrast, such programs tend to be oriented toward the “principles” of *Restorative justice* towards the goals of empathy and remorse for offenders, conflict resolution in prisons and the use of prison work to atone for society's wrongs.¹¹ Some programs such as the *Sycamore Tree Project* include surrogate victims in their curriculum curricula, but generally what is called “restorative justice” inside prison is something very different from outside prison. Dhami notes, for example, that *Restorative justice* should be “used to improve the prison experience of inmates which can result in increased utility of prisons in terms of their efforts to reduce crime through these alternative strategies.”¹²

In various parts of the world restorative conferences have developed, the definition of restorative *justice* continues to grow and is applied to various practices outside the conference or other types of face-to-face meetings between victims, perpetrators and other parties. The debate over the proper definition of *restorative justice* is not new, however much of this debate focuses on the position of “purists” vs. “maximism”,¹³ where puritans argue that *Restorative justice* is a “process” involving key stakeholders to address the consequences of crime.¹⁴ While the maximalists argue that *Restorative justice* is a “choice” that encourages results to repair the harm caused by crime.¹⁵

William Aldo Caesar Najoan stated that, to settle cases in the spirit of restorative justice, one must be able to find a fair solution and bring about a *win-win solution* for both parties, both victims and perpetrators. But unfortunately there are still many parties who have not realized the benefits (*win-win solution*) for both parties, both victims and perpetrators or even the public prosecutor himself.¹⁶ The application of restorative justice emphasizes the pure willingness of the perpetrators to repair the losses they have caused as a form of responsibility. Repair of losses must be proportional to the rights and

⁹Howard Zehr and Ali Gohar, *Op cit* ., p. 8

¹⁰Howard Zehr, *Op cit* ., p. 6

¹¹M. Liebmann, 2007, *Restorative justice: How it works* . PA: Jessica Kingsley Publishers, Philadelphia, p. 67

¹² Mandeep K. Dhami, Greg Mantle and Darrell Fox c, 2009. *Restorative justice in prisons. Contemporary Justice Review* , 12(4), 433-448. doi:10.1080/10282580903343027, p. 434

¹³F. Dünkel, J. Grzywa-Holten, & P. Horsfield, 2015, *Restorative justice and mediation in penal matters – a stocktaking of legal issues, implementation strategies and outcomes in 36 european countries* . Mönchengladbach, Germany: Verlag Godesberg Forum, p. 48

¹⁴TF Marshall, 1999, *Restorative justice: An overview* . UK: Home Office. Research Development and Statistics Directorate. London, p. 1 99

¹⁵G. Bazemore, & L. Walgrave, 1999, *Restorative juvenile justice: In search of fundamentals and an outline for systemic reform* . In G. Bazemore & L. Walgrave (Eds.), p. 67

¹⁶ William Aldo Caesar Najoan, Veibe V. Sumilat and Sarah DL Roeroe, *Application of Restorative Justice in the Settlement of Minor Theft Cases in Indonesia* , Lex Crimen Vol. X/No. 5/Apr/EK 2/2021, p. 97

needs of victims. To produce an agreement between the parties, it is necessary to carry out informal dialogues such as mediation and deliberation.

On the perpetrator's side, the confession of guilt from the perpetrator of a crime is a prerequisite for restorative justice. Without the recognition of the person who committed the crime, the desired restorative justice in problem solving will be difficult to achieve. Accepting and acknowledging mistakes is part of accepting responsibility for the actions that have been done. In addition, community involvement is also very important and determines the success of restorative justice.¹⁷

The obstacles faced in the application of *Restorative Justice* in the settlement of minor theft cases, namely the public prosecutor indicted the suspect who committed minor theft using Article 364 (which carries a maximum imprisonment of 3 months or a maximum fine of Rp. 250, -) and prefers to Article 362 of the Criminal Code which carries a maximum imprisonment of five years or a maximum fine of nine hundred rupiahs, on the grounds that the loss has exceeded twenty-five rupiahs. Besides that, Perma No. 2 of 2012 in its application only applies to Court judges, and does not apply to investigators in this case Polri investigators and the Prosecutor's Office (as stated in Article 2).¹⁸Bambang Hartono stated that the culture of law enforcement officers often chooses the way of punishment rather than alternative punishments such as restorative justice and diversion.¹⁹The factor is that the cultural paradox of the community is still attached which considers that every criminal act must be repaid with imprisonment/punishment and has not yet cultivated a culture of forgiving behavior towards perpetrators of crimes by victims which is associated with the suffering experienced by victims due to crimes committed by perpetrators of crime, and there is no sanction yet. for law enforcement officers who do not apply restorative justice.

Restorative justice originated as a response to criticism of the traditional criminal justice system.²⁰This includes criticism of the practice of justice as "retributive",²¹where this system leaves the victim at the representative stage, where the Prosecutor is the spearhead of the prosecution, not the victim. Much of the initial focus of *Restorative justice* was on developing practices that offered alternatives to formal criminal justice practices. But in the nearly forty years since, this has not happened. In contrast, most *restorative justice programs* have been institutionalized in the conventional criminal justice system, often combined with diversion practices or as alternative sanctions within them.²²

Restorative justice generally does not have a "fact-finding" mechanism, and as such it relies on the conventional criminal justice system. While many early *Restorative justice programs* in the United States were developed outside the criminal justice system, the need for funding and continued growth has made them more dependent on alignment or inclusion in this system.²³In the case of Australia and New Zealand, *Restorative justice* is implemented as part of state judicial practice.²⁴*Restorative justice* practices have evolved over time, they often become more attuned to the needs of victims and perpetrators that cannot be met immediately through victim support services conferences, for example,

¹⁷ Muhammad Yasin, *Without Confession of Guilty, Restorative Justice is Hard to Achieving*, <https://www.Hukumonline.com/berita/baca/lt5f50b6f36a777/without-confession-guilt--keadilan-restoratif-elu-reach/>

¹⁸ *Ibid.*, p. 98.

¹⁹Bambang Hartono, *Analysis of Restorative Justice in the Context of Ultimum Remedium as a Resolution of Child Crime Problems*, *Journal of Legal Institutions* Volume 10 Number 2 July 2016, p. 96

²⁰KB Chiste, 2013, *The origins of modern restorative justice: Five examples from the english-speaking world*. *University of British Columbia Law Review*, 46(1), p. 33-80.

²¹Howard Zehr, 1990, *Changing lenses: A new focus for crime and justice*. PA: Herald Press, Scottdale, p. 89

²²A von Hirsch, J. Roberts, AE Bottoms, K. Roach & M. Schiff (Eds.), 2003, *Restorative justice and criminal justice: Competing or reconcilable paradigms?* Portland, OR: Hart Publishing, p. 195-218

²³ Howard Zehr & B. Toews (Eds.), 2004, *Critical issues in restorative justice* Boulder, CO: Criminal Justice Press, p. 189-202

²⁴ Joudo-Larsen, 2014, *Restorative justice in the australian criminal justice system*. Australian Institute of Criminology. Canberra, Australia, p. 201.

or perpetrator care and “wraparound programs”.²⁵; Finally, most *restorative justice programs* rely on the criminal justice system to ensure compliance with conference agreements.²⁶ Currently, there are very few *Restorative justice programs* which in some ways do not work within or depend on the criminal justice system.

The *Restorative justice movement* originally started as an attempt to rethink the need created by crime, as well as the role that crime implies. *Restorative justice* advocates are concerned about needs that are not met in the ordinary judicial process. They also believe that the prevailing understanding of legitimate participants or stakeholders in justice is too restrictive. *Restorative justice* broadens the circle of stakeholders who have an interest or stand in the event or case beyond just the government and perpetrators to include victims and members of the public as well. Because it is this view of needs and roles that is the origin of the movement, and because the needs/roles framework is so fundamental to the concept, it is important to start this review there. As the field develops, stakeholder analysis becomes more complex and thorough. *Restorative justice* addresses the needs of “judicial” i.e. the needs of victims, perpetrators, and community members which may be met, at least in part, through the justice system.²⁷

Howard Zehr and Ali Gohar²⁸ state that, restorative justice focuses on harm: Restorative justice views crime primarily as harm done to people and communities. Our legal system, with its focus on rules and laws, and with its understanding that the state is the victim, often ignores this reality. With regard to primarily ensuring perpetrators get what they deserve, the legal system regards victims as a secondary concern of justice. In contrast, a hazard focus implies an inherent concern for the needs and roles of the victim. For restorative justice, then, justice begins with caring for victims and their needs; it seeks to repair as much damage as possible, both concretely and symbolically. This victim-oriented approach requires justice to address the needs of victims even when no perpetrators are identified or arrested. Based on the description above, the focus of the goal of *Restorative justice* presented by Howard J. Zehr is repairing the loss of victims and the community.

Restorative justice is an alternative or other way of criminal justice by prioritizing an integrated approach to perpetrators on the one hand and victims/communities on the other as a unit to find solutions and return to the pattern of good relations in society. The key word of *Restorative justice* is “Empowerment”, even this *Empowerment* is the heart of the restorative ideology (*the heart of the restorative ideology*), therefore *Restorative justice* 's success is determined by this empowerment. In the traditional concept, the victim is expected to remain silent, accept and not interfere in the criminal process. Fundamentally, the idea of *Restorative justice* wants to reorganize the role of such victims, from being passively waiting and watching how the criminal justice system handles 'their' crimes, empowered so that victims have personal rights to participate in the criminal process.²⁹

Circular Letter Number: SE/8 /VII/2018 concerning the Application of Restorative *Justice* in the Settlement of Criminal Cases and the Attorney General's Regulation (Perja) No. 15 of 2020 concerning Cessation of Prosecution does not regulate community involvement. The strength of the *restorative justice movement* is to attract and inspire participants, which is ultimately rooted in the social nature of

²⁵AE Acorn, 2004, *Compulsory compassion: A critique of restorative justice* . UBC Press, Vancouver, Canada, p. 5

²⁶ SG Shoham, O. Beck & M. Kett (Eds.), 2008, *International Handbook Of Penology An Criminal Justice* , Boca Raton, FL: CRC Press, p. 691-708

²⁷ *Ibid* ., p. 13-14

²⁸ *Ibid* ., p. 21

²⁹Strong Puji Prayitno, 2013, *Restorative justice* , Postgraduate Law, Jenderal Sudirman University, Purwokerto, p. 5

humanity. The community cannot be marginalized when carrying out the *restorative justice process* because the function of the community occurs naturally when people are brought together in mutual dependence and reciprocity in a relationship of accountability and concern. This means that the parties involved share their respective roles so that recovery can be carried out not only between the perpetrator and the victim, but also the interests of the community.

The importance of community involvement can also be seen from the background of the birth of the idea of *restorative justice*. Restorative justice did not emerge as a centralized or coordinated movement, but rather as innovation and experimentation in many places and circumstances, partly because of the failure of formal institutions to solve problems. The formal judiciary is seen as incapable of resolving cases completely and thoroughly. It is as if only through the Criminal Justice System will order be created. In fact, the Criminal Justice System itself has inherent defects related to the monopoly of order and leaves a stigma on victims and perpetrators.

Conclusion

Constraints and challenges to the application of *restorative justice* in the criminal justice system in Indonesia, among others, are as follows:

Settlement of cases in the spirit of restorative justice, must be able to find a fair and mutually beneficial solution (*win-win solution*) for both parties, both victims and perpetrators. But unfortunately there are still many parties who have not realized the benefits (*win-win solution*) for both parties, both victims and perpetrators or even the public prosecutor himself.

The admission of guilt of the perpetrator of a crime is a prerequisite for restorative justice. Without the recognition of the person who committed the crime, the desired restorative justice in problem solving will be difficult to achieve.

The culture of law enforcement officers who often choose the path of punishment rather than alternative punishments such as restorative justice and diversion

The factor is that the cultural paradox of the community is still attached which considers that every criminal act must be repaid with imprisonment/punishment and has not yet cultivated a culture of forgiving behavior towards perpetrators of crimes by victims which is associated with the suffering experienced by victims due to crimes committed by perpetrators of crime, and there is no sanction yet. for law enforcement officers who do not apply restorative justice.

Restorative justice generally does not have a “fact-finding” mechanism, and as such it relies on the conventional criminal justice system.

Circular letter number: se/8 /vii/2018 concerning the application of restorative justice (*restorative justice*) in the settlement of criminal cases and the attorney general's regulation (perja) no. 15 of 2020 concerning termination of prosecution does not regulate community involvement.

Suggestion

Based on these challenges and obstacles, it is necessary to regulate the laws and regulations governing the implementation of *restorative justice*, the existence of an element of confession of guilt from the perpetrators of crime as a prerequisite for restorative justice. It is necessary to change the culture of law enforcement officers who often choose the path of punishment rather than alternative punishments such as restorative justice with the socialization of rules regarding *restorative justice*.

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