

# ESTABLISHING HUMANISTIC TENDENCIES THROUGH RESTORATIVE JUSTICE IN THE LAW ENFORCEMENT CONTEXT

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## ABSTRACT

*This paper is aimed to study how to accelerate restorative justice into police prudent-cautious actions. Through this perspective, restorative justice is expected to support the police task and to lead to a humanistic, responsive behavior and dignified police force which fit well to the community needs. Restorative justice emerges as a response to the goal of criminal law which is to restore the conflict in the community. In its early implementation in Indonesia, restorative justice was possibly be considered against the law because of its non existence in penal code of criminal law. The main idea which underline the importance of restorative justice, is that the police shall bring the value of humanity and fairness in implementing the duty of police as law enforcement apparatus.*

**Keywords:** Law Enforcement, Indonesia, Humanistic Tendencies, Restorative Justice.

## INTRODUCTION

Low trust of public to the police is the seedlings to the new paradigm in justice fulfillment. The police shall work harder in obtaining this goal. The goal is for the police to conduct participatory, empowering, people centered, and sustainable justice. Law enforcement undertaken by the police, however, has not shown fairness of justice for people. Rather than enforcing the police to tend to be over reactive, the idea of restorative justice is quite the opposite from the law enforcement conducted by the police. The police has been implementing positivistic and dogmatic rules of law.

They put themselves as the speakers of law. As a government body, police still regards the idea of restorative justice as a taboo. It cannot be taken as an alternative in dealing with annex criminal justice. In Indonesian Penal Code, that is adopted from Dutch Law, restorative justice is conducted only for trivial crime/minor offences, for example a trivial crime/minor offences report. In that kind of condition, restorative justice will emerge as a study that will bring the police to its genuine habitat-the community, the people. The police shall put themselves as an institution whose duty is to serve and protect. This paper is aimed to study how to accelerate restorative justice into police prudent-cautious actions. Through this perspective, restorative justice is expected to support the police task. Then it will lead to a humanistic, responsive behavior and dignified police force which fit well to the community needs.

## Conceptualizing the Basic Idea of Restorative Justice

Restorative justice is conducted by the police in dealing with law by putting fairness and protection. Restorative justice is based on the participation of the justice seekers, either from the

victim or the offender. It will result a strong bond of responsibility between the victim the criminal and the police which will lead to another way of avoiding the rule-centered paradigm (Hasan, 2013). Howard Zehr (1990) states that justice involves the victim, the offender, and the community in a search for solutions to promote repair, reconciliation, and reassurance. Minor and Morrison (1996) stated that restorative justice may be defined as a response to criminal behavior that seeks to restore the loss suffered by crime victims and facilitate peace and tranquility among opposing parties. According to Tony Marshall, (1999), restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the offense and its implications. Morrison (2002) stated that restorative justice is a form of conflict resolution and seeks to make it clear to the offender that the behavior is not condoned, as being supportive and respectful individual. Bazemore (1998) stated that restorative justice is a system or a practice which emphasises on healing the wound of the victim, the offender or the community, caused by verbal or physical violation. A perspective of restorative justice as way to enforce justice focuses on the healing and the restoration of damage caused by the crime or violation (Tkachuk, 2002). In this way, legal apparatus is highly demanded by the public to implement restorative justice on their behavior. Through restorative justice, the state apparatus like police as an institution does not only show a rule centered paradigm, but more to reflect the meaning of real justice. This meaning of criminal law as *ultimum remedium* will become another approach of remedial justice. It is another way of fixing a problem outside the criminal law that involves the victim, the criminal and others related to the process as retributivism has been dominant theory of punishment in the Western world for the past few decades (Amarasekara & Bagaric, 2000). Hence, restorative justice has a concept of rehabilitation, re-socialization, restitution, and compensation in conducting a criminal law (Zulfa, 2009).

### **The Practice of Restorative Justice in Indonesia**

In Indonesian criminal law policy, a trivial legal complaint can be pursuit privately under supervision from the police. This can be related to the meaning of restorative justice and Law No. 2 of 2002 about Police. Specifically, it is written in article 18(1) stating that police officials has the rights to decide according to his personal judgment and in article 18(2) stating that in dealing with emergency, it can also be done by paying attention to laws and Police Code of Professional Conduct. By determining the advantage and the risk, the investigation might accommodate the implementation of restorative justice. The interpretation or restorative justice is also relevant to article 16, paragraph (1) stating that conducting other action in legal action must be in accordance with the law. Article 16, paragraph (2) states that the action must be in accordance with law, the obligation, and requirements of appropriate, logic, responsibility, and human rights.

Restorative justice emerges as a response to the goal of criminal law which is to restore the conflict in the community, to heal the suffering of the victim and to free the offender from guilt. In reality, restorative justice in Indonesia is not governed in criminal law policy, especially when it is related to reported crimes. The dilemma between the actualization of law and order is often experienced by the police. When the agreement between the offender and the victim has been obtained, law is not necessarily applied. It is going to be very encouraging, if the community can see the police as equivalent colleagues or friends, not only as law enforcer. In

connection with the emphasis on restorative justice to find a meeting point between the conflicting parties, the police become mediators. In this regards, police in Indonesia are open to conducting restorative justice in dealing with non-legal complaint cases. The form of restorative justice in the level of police investigation, will come a certain agreement between the victim and the offender. The agreement between both parties will cause the dismissal of the reported case. This thing is closely related to the police professional conduct of discretion. Discretion is considered as freedom of measured action. Police officials of certain rank have the right to decide in doing the legal or illegal execution. Restorative justice annex police discretion may refer to diversion from formal court process, to actions taken in parallel with court decisions. This also refers to meetings between offenders and victims at any stage of the criminal process (from arrest, pre-sentencing, and prison release) (Daly & Immariageon, 1998). Moreover, the action of meeting, discussing and resolving criminal justice matters is conducted to meet material and emotional needs between both parties. Hence, there is a possibility in enforcing law to use empowerment as the alternative for people to choose available different options to resolve their own matter. The option to make such decisions should be present during the whole process (Aertsen et al., 2011).

Because the police cannot find a legal basis that can be used as an action to deal with the application of restorative justice, its implementation in the field is considered by investigators. In making decisions, investigators must work in accordance with the principles of law enforcement by considering the justice and psychological conditions of the community. Most importantly, investigators must be responsible for their behavior. Here, restorative justice is available as one of the methods used to build justice and law enforcement.

### **Implementation of Restorative Justice through Police Actions**

The basic idea of restorative justice is to accommodate the values of protection, solidarity, humanity and compassion. Actually the application of law is very closely related to the behavior of humans who undergo the process. This is not only based on rules, but also based on social behavior of the community. Although, this concept may look different when practiced by police institutions, where the application of the law will be very closely related to police regulations, criminal procedural law and material criminal law. This is also influenced by the legal structure where the police institution as a bureaucracy is only a representation of administrative justice.

In general, it can be said that the implementation of restorative justice through police actions in Indonesia has not been done well due to several obstacles. First, positivistic behavior / culture practices. Restorative justice is not legally included in Indonesian law, except for a number of transfers in criminal law for children. This will bring some consequences such as no legal rules for restorative justice. In addition, the police paradigm in Indonesia is still overshadowed by the police as mechanical law enforcement. In Indonesia, for criminal law cases and criminal procedural law, there is an understanding that restorative justice can be carried out only for minor crimes, so that there are no legal rules that define the limits of the application of restorative justice. Positivistic trends in police institutions often lead to repressive behavior in dealing with criminal behavior and threats. Secondly, the existence of paramilitary cultural practices. In the state administration structure, the Indonesian Police was the body separated from the Army institution in 1999. As a result, there was a culture of violence in

police education as in the military, producing graduates who would become arrogant and repressive in the future. Third, the practice of corruption, collusion and nepotism. Corruptive behavior by public officials is an obstacle in obtaining justice.

Here it can be possible to have collusive behavior in the form of compromise between the perpetrator or victim and the police. This will result in unfair bargaining power in the process of restoring justice. Permissive attitude towards corruption leads to public behavior that will influence law enforcement decision makers. Administration of justice may also open up the possibility of discriminatory and random practices in assessing cases. For example, if the perpetrator is from a poor class in the community, the police tend to take a repressive approach. On the other hand, if the offender comes from a high class society, restorative justice will be an option. A similar thing will happen to the victim. Corruptive behavior causes restorative justice to be seen as a process of compromise between power holders in handling cases. The result of the compromise may overlook the victim's needs. Restorative justice is then only taken as an effort to get freedom for the perpetrators without accommodating the victims' suffering. Unbalanced power between parties involved in restorative justice will create a conflict of interest, so the results are clearly not "*justice*" but only "*compromised conditions*".

The last is the uncertainty of the victim protection program in the legal substance. Restorative justice is not enough just to listen to the suffering of victims, who only give access to the perpetrator to stop their case from the trial. Here, the concept of applying restorative justice to violations should not be based solely on achieving an agreement between the perpetrator and the victim. So, if the victim has forgiven the perpetrator, the punishment can be alleviated or eliminated. Supposedly, the modern legal concept that ignorance to one of the citizens is also a crime to the state must remain a consideration. In this context, the possibility of applying restorative justice needs to take into account the conditions of victims, their families and the community. They must be actively invited to take part in the law enforcement process and / or the possibility of restorative justice. By involving the community, the police will be able to see different opinions in decision making for law enforcement or restorative justice. This is because the community is able to see deeply the impact of the conflict caused by violations on the social side. In addition, it will be easier for the police to find facts about the characteristics of victims / perpetrators from the community.

### **Restorative Justice and the Humanistic Police**

Restorative justice practices for police in Indonesia have several objectives. First, restorative justice can change police perceptions from punishment to rehabilitation. The placement of criminals in prison has been considered only as punishment, not as a therapy to restore conflict over the trauma of crime in society. In this case, restorative justice practices are similar to abolitionism. In addition, law enforcement is not a single task for the police, but also to find a balance of justice. Here, restorative justice is an inclusive legal instrument for the police, by reducing the centralistic monopoly of law enforcement. They can implement victim-perpetrator mediation, which emphasizes negotiation between both parties and decision makers. Restorative justice brings social transformation to the police to become more open and civilian in character. The civilian character of the police will bring social closeness between the countries, represented by the police, and the community. Furthermore, restorative justice has implications for community empowerment, using community mediation, carried out by involving community

leaders in the law enforcement process. Restorative justice can also result in the recovery of conflict in society. In addition, compensation for compensation from perpetrators to victims shows that restorative justice can be an alternative in bringing conducive conditions in dealing with law and order in society. Restorative justice is more accommodating in victim protection programs. Through restorative justice, victims' rights are considered in the mediation process with the perpetrators. In Indonesian criminal law, the right to protect victims is still very minimum. There is no system that can accommodate victim protection, such as recovery of losses. Indonesian criminal law does not recognize loss compensation in general criminal acts. So far crime is considered as an insult to the state, not a violation of individual rights. Lack of victim protection is directly caused by the inability of law enforcers to see the suffering of victims and make appropriate categorization of their rights that are violated. Restorative justice is improving integration and opening up community relations and violators. Victims also receive compensation compensation. Restorative justice allows the police to work with the community. This is consistent with the opinion of Johnson et al. (1981) that as an important element of law enforcement, police agencies must formally recognize the importance of communication with the public and constantly strive to improve their ability to determine public needs and expectations, to act on needs and this hope, and to inform people about the policies that are produced that are developed to improve the quality of police services.

Restorative justice allows the police to establish the value of informal justice. In carrying out restorative justice, the police will strive to emphasize more deeply the framework and harmony, not merely law enforcement. This value orientation is a philosophical side that is upheld by the police in implementing restorative justice, as a form of alternative search that is appropriate and responsive to the traditional justice system through a system of deliberation (Braithwaite & Pettit, 1990). This exploration of social values shows that the police must be a diagnostic expert on the problem of order and social integration (Cotterrell, 1992). So, restorative justice has the articulation of wise police actions based on justice and consistency with victims and perpetrators. Restorative justice is one of the progressive legal manifestations and is considered able to accommodate both law and order and a progressive response to crime. The concept of restorative justice that seeks to protect victims through proper law enforcement, and discarding negative stigmatization of perpetrators has been conceptualized as informal justice by Harrington (1985) and reintegrative humiliation (Braithwaite, 1989). This term refers to restorative efforts to negate insults that usually appear or be perceived by the public to the perpetrators.

## CONCLUSIONS

The reactive behavior of the police in carrying out repressive actions in minor cases illustrates that the police tend to act only with positivistic legal tendencies and are merely mechanically based on technical and procedural rules. Actually, restorative justice can be an alternative search for justice in law enforcement by the police. However, in the case of Indonesia, the weakness of the absence of a legal basis and the absence of guidelines for restorative justice within police institutions are likely to cause doubts for the police to implement restorative justice. Restorative justice must also deal with other aspects such as police education, integrity, the criminal law system. The application of restorative justice should exclude the positivistic paradigm. This application is expected to be more able to answer the needs of justice

seekers, both in protecting victims or the rights of perpetrators to get humane treatment, as well as involving the community in mediation or more humanistic law enforcement.

## REFERENCES

- Aertsen, I., Bolívar, D., & Lauwers N. (2011). Restorative justice and the active victim: Exploring the concept of empowerment. *Temida*, 14(1), 5-19.
- Amarasekara, K., & Bagaric, M. (2000). The errors of retributivism. *Melbourne University Law Review*, 24(1), 124-135.
- Bazemore, G. (1998). Restorative justice and earned redemption: Communities, victims and offender reintegration. *American behavioral scientist*, 41(6), 768-813.
- Braithwaite, J., & Pettit, P. (1990). *Not just deserts: A republican theory of criminal justice*. New York: Oxford University Press.
- Braithwaite, J. (1989). *Crime, shame and reintegration*. Cambridge: Cambridge University Press.
- Cotterrell, R. (1992). *The sociology of law: An introduction*. New York: Oxford University Press. CT: Greenwood Press.
- Daly, K., & Immarigeon, R. (1998). *The past, present and future of restorative justice: Some critical reflections*. The European Institute for Crime Prevention and Control, affiliated with the United Nations.
- Harrington, C.B. (1985). *Shadow justice: The ideology and institutionalization of alternatives to court*. Westport.
- Hasan, H. (2013). Application restorative justice child in the criminal justice system in Indonesia. *Jurnal Hukum dan Peradilan*, 2(2), 247-262.
- Johnson, T.A., Misner, G.E., & Brown, L.P. (1981). *The police and society: An environment for collaboration and confrontation*. New Jersey: Prentice-Hall.
- Marshall, T.F. (1999). *Restorative justice: An overview*. London: Home Office Research Development and Statistic Directorate.
- Minor, K., & Morrison, J.T. (1996). A theoretical study and critique of restorative justice. In: Galaway B, & Hudson J editors. *Restorative justice: International perspectives* (p. 117-133). Monsey, NY: Criminal Justice Press and Kugler Publications.
- Morrison, B. (2002). *Bullying and victimisation in schools: A restorative justice approach*. Canberra: Australian Institute of Criminology.
- Tkachuk, B. (2002). Criminal justice reform: Lessons learned community involvements and restorative justice. *Contemporary Justice Review*, 1(1), 21-45.
- Zehr, H. (1990). *Changing lenses: A new focus for crime and justice*. Indiana: Herald press.
- Zulfa, E.A. (2009). *Restorative justice In Indonesia (Study of the possibility of applying restorative justice approaches in criminal law enforcement practices)*. Dissertation, Doctoral Program of Law Faculty of Law UI, Jakarta.