

## *Ius Constituendum* Restorative Justice in Indonesia

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### Abstract

In recent times, legal experts in Indonesia have engaged in widespread discussions on restorative justice. This is because the country's criminal justice system has been unable to deliver justice to society, with many cases deemed unworthy of trial, let alone convictions and sentencing. Most institutions that make up the criminal justice system, including the police, prosecutors' offices, and courts, cannot be held solely responsible for this issue as they simply enforce existing regulations. Therefore, a new approach is necessary to resolve cases that prioritize mediation to reach a consensus based on social justice values, in which the concept of restorative justice plays a role. Restorative justice is not a new concept as it has been used by society for hundreds of years to solve problems that are not in line with social norms. Many customary practices prioritize technical solutions through local wisdom and emphasize forgiveness. Such practices include Gotong Royong, Tepo Seliro, Tego Lorone Gak Tego Patine, and others, all of which are foundational to society's way of thinking about problem-solving. Based on these basic norms, Indonesian Founding Fathers incorporated these practice into Principles 2, 4, and 5, which are part of the Pancasila (Five Principles of Indonesian) norm. However, law enforcement may not fully understand these basic norms while implementing them. To anticipate the existing concept, criminal justice system institutions have created rules that are yet to reflect the approach of restorative justice. These institutional rules appear poorly integrated, potentially leading to normative conflicts that ultimately result in uncertainty within the criminal justice system.

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## Introduction

Since August 18, 1945, Indonesia has had a constitution called the Indonesian Constitution. The constitution was ratified by the Indonesian Independence Preparation Committee (PPKI) a day after the reading of the Proclamation of Independence on August 17, 1945, by Ir. Soekarno. It has served as the supreme law of land, making the country a sovereign state.<sup>1</sup> Article 1, paragraph (3) of this constitution is particularly significant, as it declares that "Indonesia is a state of law".<sup>2</sup> the essence of this rule is to

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<sup>1</sup> Jimly Asshiddiqie, 'Gagasan Negara Hukum Indonesia' [2012] *Majalah Hukum Nasional* 1 <<http://library.stik-ptik.ac.id/file?file=digital/47442-Mhn1-12-055.pdf>>.

<sup>2</sup> MPR RI, *UU 1945 Undang-Undang Dasar Negara Republik Indonesia 1945 (Amandemen 1-IV)* (Pustaka Baru Pres 2020) 58.

prevent arbitrary actions by the government or the rulers. The founding fathers aimed to direct the state to become a rule of law that was more in line with the nation's moral values of protection, nurturing, and soothing, rather than a state full of sanctions and imprisonment.<sup>3</sup> In pursuit of this goal, Indonesia's symbol of justice/ law is based on Decree No. J.S. 8/20/17, dated December 6, 1960, represented by the "Banyan Tree." This symbolizes protection and represents a shelter under which all people, regardless of their race, skin color, religion, gender, or ethnicity, can seek refuge with the ultimate goal of achieving happiness.

Despite the aforementioned meanings, Indonesian law is perceived as harsh towards the lower class and lenient towards the upper class. This is evidenced by the handling of cases, from investigation to prosecution, and even by the judge's decision in court. Such practices do not align with justice values that have grown and developed in society. For instance, in Verdict No. 39/Pid B/2016/PN Situbondo, a 63-year-old grandmother named Asyani was sentenced to 1.3 years in prison for allegedly stealing teak wood,<sup>4</sup> while in Verdict No. 247/Pid B/2009/PN PWT, a 55-year-old grandmother named Minah was sentenced to 1 month and 15 days in prison for allegedly stealing 3 kg of chocolate fruit.<sup>5</sup> These are just a few examples of similar cases, such as child perpetrators being found guilty of stealing flip-flops. Such verdicts indicate that the state has neglected its duty to protect citizens, as mandated in the 4th paragraph of the Indonesian Constitution.<sup>6</sup> It tends to be argued that the state has misinterpreted and misapplied the rule of law (*rechtstaat*) intended to protect and nurture citizens, as mandated in Article 28D(1) of the Indonesian Constitution.<sup>7</sup>

After facing criticism from various segments of society, the government realized its mistakes and acted quickly with great intensity to rectify the situation. The criminal justice system institutions, including the police, prosecutors' offices, and the judiciary

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<sup>3</sup> Syukri Akup and Baharuddin Badaru, *Wawasan Due Process of Law Dalam Sistem Peradilan Pidana* (Amir Ilyas ed, Rangkang Education 2012) 37.

<sup>4</sup> Verdict No. 39/ Pid B/ 2016/ PN Situbondo.

<sup>5</sup> Verdict No. 247/ Pid B/ 2009/ PN. PWT.

<sup>6</sup> MPR RI (n 2) 7.

<sup>7</sup> *ibid* 35.

issued a range of internal institutional rules to delve deeper into the values of justice that have emerged and developed within society, or the “living law.” This approach is guided by Howard Zehr’s concept of restorative justice, which views “*crime as a violation of people and relationship, creating an obligation to make things right. Justice involves the victim, the offender, and the community in a search for a solution that promotes repair, reconciliation, and reassurance*”.<sup>8</sup> The United Nations has also recognized the importance of restorative justice. At the XI Congress in Bangkok, point 32 of the resolution stated that, *to promote the interests of victims and the rehabilitation of offenders, we recognize the importance of further developing restorative justice policies, procedures, and programs. These programs include alternatives to prosecution, thereby avoiding possible adverse effects or imprisonment, helping to decrease the caseload of criminal courts, and promoting the incorporation of approaches into criminal justice systems, as appropriate*.<sup>9</sup> This highlights the need for alternative criminal case settlement methods through restorative justice.

The rules outlined above were preceded by various justice institutions through the Decree of the General Court Administration No. 1691/I/DJU/SK/PS.00/12/2020 regarding the Guidelines for the Implementation of Restorative Justice. This was followed by the issuance of the Regulation of the Attorney General of Indonesia No. 15 of 2020 concerning the Termination of Prosecution and, most recently, the Police Regulation No. 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice. However, these rules appear to be symbolic in nature owing to their lack of effectiveness and the fact that there are still numerous weaknesses. One such weakness is the lack of integration between criminal justice systems, which needs to function as a cohesive system driving law enforcement. The provisions of these institutions seem to be egocentric and sectoral in nature since they are not products of laws. Furthermore, they tend to contradict higher-level regulations, including both material and formal criminal laws. Rules such as these have the potential to enforce justice, as envisioned in the concept of a rule of law state, which is the vision of the founding fathers. These rules

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<sup>8</sup> Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990) 181.

<sup>9</sup> Document : a/Res/55/59 <<https://daccess-ods.un.org/tmp/8945981.86016083.html>> (17 January 2001) in Jonlar Purba, *Penegakan Hukum Tindak Pidana Bermotif Ringan Dengan Restorative Justice* (Jala Permata Aksara 2017).

are also considered to have lost control over the fundamental concept of resolving cases through a restorative justice approach.

The implementation of these three institutional rules has led to disorderly law enforcement, as evidenced by the handling of many cases involving suspects who were reported, investigated, and proven by the police. Although the case was sent to the prosecutor's office, it was resolved through restorative justice systems, as regulated by the Regulation of the Attorney General of Indonesia No. 15 of 2020. Many suspects were also released through these systems, without the mediation results being determined by the local court. As a result, society has become confused, as it appears that many cases have been reported but not handled based on the usual applicable rules. The handling of cases in this manner seems to allow the police and the prosecutor's office to determine the guilt of suspects, which contradicts Law No. 48 of 2009 regarding the judiciary and presumption of innocence. Meanwhile, the implementation of institutional rules such as these has resulted in wounds and disappointment among criminal justice institutions. This causes each institution to blame the others and compete for its reputation in the eyes of the public. These institutional rules seem to be used as mere lip service and in good manners, with law enforcement officers pursuing the quantity rather than the quality of case handling. This is because of a lack of understanding of the basic concept of restorative justice resolution.

Taufik's point regarding the criminal justice system's inability to resolve cases through the restorative justice approach has been well taken.<sup>10</sup> These institutions are still in the practical stage of this approach and are yet to fully comprehend their fundamental concepts. Restorative justice entails certain basic elements that include mediation or discussion led by a respected local societal leader or appointed representative, consolidation of an apology from the perpetrator, forgiveness from the victim, and agreement on a win-win solution (which may involve restitution to the victim and the environment). It also entails representation by government officials, such as law enforcement officers, and submission of the agreement reached in mediation to the local

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<sup>10</sup> Taufik Rachman, 'Keadilan Restorative "Re- Thinking"' (paper presented at the Webinar seminar in commemoration of the 62nd Bhakti Adyaksa day, 2022) 5.

court for a final ruling without further legal action. The guidelines for the resolution of diversion in child cases outlined in Law No. 11 of 2012 on the Juvenile Justice System (JJS Law) further underscore the importance of adhering to established procedures. Even officials involved in JJS Law face severe sanctions when they fail to comply. The three institutional rules mentioned above fail to specify this obligation. In conclusion, the objective of these institutional rules was to enhance substantive justice enforcement. However, the criminal justice system has taken actions that go against the law because of the poor quality of the implemented rules. Based on the outlined background above, this paper try to formulate the the ideal *ius constituendum* in law enforcement through restorative justice..

### **Research methods**

The method used in this study was juridical normative. It entailed a comprehensive literature study that analyzed data from various library materials, commonly referred to as secondary data. These materials included primary legal materials,<sup>11</sup> such as the Indonesian Constitution, Law No. 8 of 1981 on the Criminal Procedure Code, Law No. 48 of 2009 on Judicial Power, and other pertinent regulations. Secondary legal materials included scientific writings from legal experts and other relevant sources.

### **Restorative Justice Basic Concepts**

Before delving into the analysis of the aforementioned issue, it is important to acknowledge that the effectiveness and efficiency of any well-crafted legal rule hinges on the readiness and acceptance of society. Rules that are imposed without regard to the local wisdom and values of the country are often met with resistance and are difficult to implement. Although the concept of restorative justice, which involves mediation and discussion, has not been codified in written rules, it has long been practiced in customary societies. Mediation essentially entails a problem-solving process through a *rembug* (discussion) path that embodies many of the nation's philosophical values, such

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<sup>11</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Rajawali Pers 2019) 12.

as *gotong royong* (mutual cooperation), *tepo seliro* (mutual respect), *mikul duwur mendem jero* (forgiveness), *tego lorone gak tego patine* (mercy), and others. These basic concepts have been a part of the nation's practices since ancient times, particularly in the resolution of disputes. Therefore, the restorative justice approach has been ingrained in the culture and basic norms of society and is widely supported by people.

In his book "Nasehat Hidup Orang Jawa," Imam Budi Santoso provided the following concrete example: Two siblings engaged in long-standing conflicts over their parents' inheritance. This disagreement eventually escalated to the point where they had to file a lawsuit in the local court. During this period, the older sibling fell ill and required urgent medical attention. This situation makes younger siblings act with compassion and withdraw lawsuits. In a selfless act, the younger sibling decided to sell all the disputed inheritance to cover the medical expenses of the older sibling.<sup>12</sup>

This paragraph highlights Indonesia's cultural strength in resolving issues through cooperation. The restorative justice approach exemplifies this concept. Therefore, the founding fathers incorporated this reflection into the fundamental norms of Pancasila, particularly in the 2nd principle of "Fair and civilized humanity," the 4th principle of "People's sovereignty guided by the wisdom of deliberation and representation," and the 5th principle of "Social justice for all Indonesian people." The morality, spirit, and culture<sup>13</sup> of a nation are reflected in the principles of Pancasila, which serve as fundamental legal sources.<sup>14</sup> As such, Pancasila provides a framework to explore and discover laws that develop within society and the state.

These principles are further elaborated in the set of guidelines known as P-4 (Guidelines for the Implementation of Pancasila). These principles provide practical guidance to facilitate the implementation of Pancasila in daily life in all Indonesian societies. The 2<sup>nd</sup> principle obliges the government to:

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<sup>12</sup> Imam Budi Santoso, *Nasehat-Nasehat Hidup Orang Jawa* (Dian Panjering Wengi ed, Noktah 2021) 16.

<sup>13</sup> Syofyan Hadi, 'Hukum Positif Dan the Living Law (Eksistensi Dan Keberlakuannya Dalam Masyarakat)' (2017) 13 DiH: Jurnal Ilmu Hukum 262.

<sup>14</sup> The Decree of the People's Consultative Assembly No. 111/MPR/2000 Regarding the Sources of Law and Order of Regulations.

1. Treat Indonesian society following their dignity and status as creatures of God Almighty;
2. Ensure equal rights and obligations without discrimination based on ethnicity, lineage, religion, belief, gender, position, race, or even skin color;
3. Develop a spirit of love for fellow human beings;
4. Develop a spirit of tolerance and mutual respect;
5. Not oppress others;
6. Uphold the values of humanity; and
7. Dare to defend truth and justice.

To elaborate on the 4th principle, the state has also mandated that:

1. Indonesian society has equal positions, rights, and obligations;
2. One should not impose their will on others;
3. Prioritize deliberation in making decisions for the common interest;
4. Deliberation is intended to achieve consensus with the spirit of kinship;
5. Respect and uphold every decision reached from deliberation;
6. Accepts and implements the results of deliberation with good intentions and a sense of responsibility;
7. In society, the common interest is prioritized over personal/group interests;
8. Deliberation is conducted with common sense and honesty;
9. Decisions made have to be morally accountable to God Almighty, uphold human dignity, truth, and justice for the common interest;
10. Entrust representatives who are trusted to carry out the deliberation.

The ultimate goal of the two norms above is reflected in the 5th principle of Pancasila, in which the state has instructed society to:

1. Develop noble actions that reflect a sense of family and togetherness,
2. Develop a fair attitude towards others,
3. Maintain a balance between rights and responsibilities,
4. Respect the rights of others, and
5. Not use their possessions to exploit others.<sup>15</sup>

The evidence suggests that the resolution of cases with a restorative justice approach reflects the need for cultural values such as mutual respect (*tepo seliro*), cooperation (*gotong royong*), forgiveness (*mikul duwur mendem jero*), and others. These values have existed since ancient times and have become a dream that needs to be achieved for the prosperity and happiness of people. Therefore, it is clear that the basic concept of resolving cases using a restorative justice approach is an integral part of the nation's culture. This concept needs to be explored in the real life of the country, which

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<sup>15</sup> MPR RI (n 2) 118.

will continue to develop and cannot be denied.<sup>16</sup>

It is evident that the principles discussed align with Weber's three approaches to law, as detailed in Gerald Turkel's book "Law and Society." These three approaches are (1) moral, (2) jurisprudence, and (3) sociological. Each of these approaches focuses on the relationship between law and society, and how the law needs to be studied".<sup>17</sup> The moral approach emphasizes the importance of developing legal rules based on the societal morals and values of justice. In Indonesia, legal rules must be based on the basic norms of Pancasila, which reflect morals obtained through the exploration of values of justice. This shows a country's avoidance of punishment patterns based on retaliation for wrongdoing. As a Pancasila, it is essential to reflect the Indonesian spirit through the basic concept of law (*rechtstaat*) and justice rules.

Before discussing the principles and objectives of restorative justice, it is important to understand the following basic concepts:

1. Reconciliation and humanistic dialogue are central to the process of involving both victims and offenders in problem-solving. The fundamental concept behind this approach is that all parties involved must reach mutual agreement;
2. During the mediation or dialogue process, an important aspect is the effort of the offender to apologize and the victim's willingness to forgive, with or without restoration of their rights. It is the offender's complete responsibility to restore the victim's condition and compensate for any other losses incurred owing to their actions;
3. Community participation is a critical aspect of this process, with people serving as mediators and law enforcement officers such as the police, prosecutors' offices, and courts functioning as facilitators;
4. Ensuring that the offender does not repeat the offense is crucial for creating harmony among the victims, their families, and society;
5. Avoiding imprisonment (punitive) and seeking alternatives through the replacement of fines such as compensation and other social work sanctions;
6. The settlement of a case using the restorative justice approach is the choice of the parties involved and is not a requirement or obligation. This is the only alternative option for the settlement of a particular case;
7. It is used for resolving certain criminal offenses with small fines, such as minor violations of the Telecommunications Law, traffic accidents resulting in material damage, and minor injuries. In some cases, law enforcement officers may also consider

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<sup>16</sup> Atip Latipulhayat, 'Khazanah: Friedrich Karl von Savigny' (2015) 2 Padjadjaran Jurnal Ilmu Hukum 198 <<http://pustaka.unpad.ac.id/wp-content/uploads/2016/07/Friedrich-Karl-von-Savigny.pdf>>.

<sup>17</sup> Gerald Turkel, *Law and Society: Critical Approaches* (Allyn and Bacon 1996) 10.



it appropriate to use the restorative justice approach, based on their discretion. It is important to note that this approach may not be suitable for all criminal offenses, particularly serious ones such as terrorism, narcotics, corruption, and genocide;

8. The results of this settlement requested a court order by law enforcement officers, who acted as facilitators to obtain legal certainty.

### **Restorative Justice Normative Analysis**

After analyzing the basic concept of restorative justice, it is evident that this approach is aligned with the values and culture of the nation. This approach is also consistent with the principles of justice established by the founding fathers, as explicitly stated in the noble values of Pancasila. Therefore, restorative justice should be codified into a *lex specialis* or at least amended into formal legal provisions, such as the Draft Criminal Procedure Code. This will strengthen the legal standing of restorative justice and enable the criminal justice system to implement it in an integrated and maximal manner, resulting in substantive justice. The purpose of the criminal justice system is to ensure that justice is served. To achieve this goal, justice systems must work closely together.<sup>18</sup> However, there has been no collaboration or integration in the three institutional rules: Regulation of the Attorney General of Indonesia No. 15 of 2020, Decree of the Director General of the General Court Administration, and Police Regulation of Indonesia No. 8 of 2021. These institutions tend to carry out enforcement in an ego-sectoral manner, which could set a bad precedent for future law enforcement.

These fundamental weaknesses, which could be explored together, include the following:

1. It is only a decision of administrative institutions that is concrete and specific or becomes a policy product (*beschikking degree*);<sup>19</sup>
2. When there is a conflict with a higher-level provision, such a rule will lose and become ineffective (*lex superior derogate legi inferiori*);
3. Institutional rules tend to set aside previous rules, both the Colonial Penal Code (WVS) and Law No. 8 of 1981 concerning the Criminal Procedure Code (*lex posterior derogate legi priori*);
4. Resolving these three institutional rules seems to take over the judge's authority

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<sup>18</sup> Karim, *Ius Constituendum Pengaturan Penyelesaian Perkara Tindak Pidana Ringan Melalui Restorative Justice* (Jakad Media Publishing 2019) 76.

<sup>19</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana 2005) 137.

- and tends to violate the presumption of the innocence principle;
5. The role of the Supreme Court as a supervisory institution in the settlement process has not been fulfilled;
  6. There tends to be no integration between criminal justice system institutions because they operate independently or partially;
  7. Law enforcement agencies are not clearly and explicitly regulated as facilitators or mediators;
  8. Those interested in settling cases using the restorative justice approach are seemingly government or state parties such as the prosecutor's office, police, and court;
  9. There are no provisions that the settlement of cases using restorative justice is final. This shows that there are no other legal remedies available, whether it is a pretrial, lawsuit against unlawful acts, or administrative court proceedings;
  10. In the process of settling the case, none of the three institutions, including the police, the prosecutor's office, and the court, were present. The judge's decision must be requested, as it can determine whether someone is guilty;
  11. There is no provision in the three regulations stating that resolving a case through a restorative justice approach is not mandatory and is purely an initiative of the parties involved in the case;
  12. There is no regulation governing what solution can be taken by the victim or law enforcement authorities when the offender violates the agreement reached through settlement;
  13. There is a loophole in the institutional rule since the agreed-upon settlement can be annulled by law, and when any party is dissatisfied with the decision, they can file a lawsuit, either a Pretrial, Administrative Court, or Lawsuit for Unlawful Acts;
  14. There are no sanctions stipulated for investigators, prosecutors, and judges when they do not inform the parties involved in the case, as provided for in Articles 96-101 of the JJS Law;
  15. Specific criminal offenses that can be resolved through restorative justice processes have not yet been regulated.

After considering the weaknesses of the current institutional rules, they should be immediately revoked and replaced. This can fulfill the aspirations of the nation's founding fathers for a legal state supported by strong provisions and professional law enforcement agencies.

## **Conclusion**

Resolving cases using a restorative justice approach is the mandate of Indonesian founding fathers. This is indicated in the concept of the rule of law as stated in the Indonesian Constitution. This concept is rooted in the fundamental norms of the nation, which are embodied in Pancasila as the source of all laws. These norms are reflected in

the 2nd and 4th principles, which aim to achieve the ultimate goal of the 5th principle. Pancasila is an agreement or manifestation of the nation's spirit, which has long been conceived as a friendly, cooperative, harmonious, and respectful trait. When facing problems or disputes, the attitude of forgiveness and others is always practiced.

The concept of resolving cases with a restorative justice approach should ideally be enshrined in a specific regulation or law (*lex specialize*) to provide a clear and strong guidelines for law enforcement officials. This will enable officials to carry out their work optimally, effectively, and efficiently. The current legal framework governing restorative justice has some limitations, and falls short of meeting the requirements needed to ensure that justice is delivered effectively. There are several weaknesses that can endanger those seeking justice and law enforcement officials.

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