

Narrative Legal Reform in Indonesia: Between Fulfilling Human Rights and Restorative Justice

Hilaire Tegnán^{1*}

¹ Law School, Williamsburg, Virginia, United States

*Corresponding author. Email: gtegnan@email.wm.edu

ABSTRACT

This study discusses the implementation of human rights and restorative justice in Indonesia. The promulgation of the Universal Declaration of Human Rights and Human Dignity in 1947 has led many countries across the globe to modify their constitution to accommodate human rights principles. In Indonesia, these principles are provided for in the Preamble to the 1945 Constitution of the Republic of Indonesia that says that to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate in the establishment of a world order based on freedom, perpetual peace and social justice. Principles of justice and human rights are also enshrined in Pancasila, the nation's ideological pillar made of five principles prescribing that the Republic of Indonesia shall be built as a sovereign state based on a belief in the one and only God, a just and civilized humanity, the unity of Indonesia, and democracy. Echoing the preamble to 1945 Constitution, Article 28 of the same constitution guarantees among many others freedom of association, assembly, and opinions. This constitutional provision goes on to say that every citizen is entitled to assistance, equal treatment and fairness in seeking justice. This leads to the question how do human rights principles affect the implementation of restorative justice in Indonesia? This is a socio-legal study drawing on a textual approach. The study reveals that one way to build a nation respectful of human rights and the rule of law is the implementation of restorative justice, as an alternative to retributive justice, which is inconsistent with human rights.

Keywords: Legal Reform, Human Rights, Restorative Justice, and Era Reformasi.

1. INTRODUCTION

Since the end of the Second World War, the world has have experienced the expansion of globalization, a process primarily concerned with the rapid integration of the world's economy. Globalization has led to new challenges and opportunities for the protection and promotion of human rights, justice and the rule of law. Article 1 section 3 of the Indonesian 1945 Constitution states that Indonesia is a rule of law country. Unlike many other Islamic States, Indonesia has opted for the rule of law instead of the 'rule of religion'. Today this idea is regarded as the best guarantee for democracy, freedom, and human rights. Not only in Indonesia but also in many countries around the world. One needs not work hard to notice the presence of the rule of law and human rights in Indonesia. Several major events have contributed to the advancement of these two key concepts since the fall of President Suharto along with his *New Order* (*Orde Baru*). Among these events are: the introduction of provisions on human rights in the 1945 Constitution, as pointed out at the outset of this paper, government accountability, direct democratic elections and the limitation on president's term and powers, Judicial Review and impeachment of

the Head of the State, and decentralization. Initiated in 1999 by the political era known as *Era Reformasi* put in place shortly after the collapse of the *Orde Lama* (Old Order), it was not until 2004 that these vital reforms were carried out within both the legal and socio-political environments.

Legal Reform in Indonesia: Era Reformasi

As mentioned above, the rule of law and human rights were enhanced through a series of legal reforms that took place after the collapse of Suharto's regime in 1998. From Sukarno's *Orde lama* to Suharto's *Orde Baru*, the people of Indonesia have been in search of democracy, political and economic freedom. However, change and reform did not occur until 21 May 1998 when President Suharto surrounding to public pressure and growing civil disorder in the wake of a continuing economic crisis, resigned and ceded power to his Vice President Bacharuddin Jusuf Habibie who vowed to turn Indonesia away from the path it had taken under his predecessors. Habibie promised to bring about social, political, legal, and economic changes. He began by releasing political prisoners such as Sri Bintang Pamungkas, Muchtar Pakpahan, and Xanana Gusmão. Provinces were given greater control over their finances, hence the birth of Regional Autonomy

(*Otonomi Daerah*) per Law No. 22/1999 on Regional Autonomy. Although Habibie did not last in office for his bit to prolong his term failed to meet MPR's approval, he did accomplish a few crucial reforms including:

1. Introduction of freedom of the press;
2. Allowing the establishment of new political parties and unions;
3. Release of political prisoners; and
4. Limiting the presidency to two terms of five years.

2. RESEARCH METHODS

This is a socio-legal research relying on a textual approach to determine, identify and analyze the research data comprising of secondary data and tertiary data that consist of statutes, government regulations, legal publications, courts decisions etc.

3. DISCUSSION

a. Understanding Restorative Justice

There are three models of criminal justice that coexist: punitive justice, rehabilitative justice and restorative justice. Punitive justice consists in refocusing the perpetrator of the offense on the fault he/she has committed, while rehabilitative justice seeks to encourage the perpetrator to no longer break the law. Restorative justice, on the other hand, makes it possible to find a way to repair the fault/act committed by the author. It is a way of seeing and approaching crime and conflict primarily as the harm done to people and relationships. Restorative justice seeks to support those affected by the crime i.e., victims, offenders and members of the community) and provide them with opportunities to participate and communicate in order to foster responsibility, reparation and progression towards feelings of satisfaction and healing[1].

Restorative justice can be defined as any process in which the victim and the offender and, where appropriate, any other person or member of the community suffering the consequences of an offense jointly participate actively in the resolution of problems arising from the offense. this offense, usually with the help of a facilitator[2]. Restorative justice is also referred to as transformative justice or participatory justice or comprehensive justice[3].

According to Tony F. Marshall (1999), restorative justice is a process whereby parties with a stake in a specific offense collectively resolve how to deal with the aftermath of the offense and its implications for the future. Restorative Justice is a problem-solving approach to crime which involves the parties themselves, and the community generally, in an active relationship with statutory agencies. It is a set of principles which may orientate the general practice of any agency or group in relation to crime. These principles include:

1. making room for the personal involvement of those mainly concerned (particularly the offender and the victim, but also their families and communities);
2. seeing crime problems in their social context;
3. a forward-looking (or preventative) problem-solving orientation; and flexibility of practice (creativity).

Restorative justice, based on Marshal's analysis, may be seen as criminal justice embedded in its social context, with the stress on its relationship to the other components, rather than a closed system in isolation[4].

b. Restorative Justice and Human Rights

Recognized by several international treaties, restorative justice aims to provide justice to victims[5]. It is a right of victims of gross human rights violations and serious violations of international humanitarian law[5]. Restorative justice is an integral part of a certain conception of reconstructive justice, a symbol of peace in that it allows the perpetrator to express a desire for reparation and the victim to accept reparation[6]. The reforms that took place during the reformation era aim to establish a more human legal order concerned with the well-being of individuals by the recognition and protection of freedoms and therefore human rights.

In international law, the concept of restorative justice finds its justifying basis in the regime of State responsibility[7]. It is a principle of international law that the breach of an undertaking entails an obligation to make good in an adequate form. Restorative justice is therefore the essential complement to the application of a convention, without it being necessary for this to be included in the convention itself[8]. Is it worth noting that the path of restorative justice has been suggested with a view to alleviating the shortcomings of the criminal justice system. This form of justice, through the mechanisms of truth commissions and reparations, is more likely to facilitate the construction of a rule of law respectful of human rights.

4. CONCLUSION

The legal reform that took place during *era reformasi* has led to a systemic change in the social, economic, political fields in Indonesia. The changes also concern the Law and is meant to build a new society respectful of the rule of law and human rights. To achieve this, by settling past abuses, two avenues are often favored: restorative justice and retributive/punitive justice. In practice, however, retributive justice seems to lead to the violation of human rights. To remedy this, an alternative path is suggested: restorative justice. This form of justice, using truth commissions and reparation mechanisms, tends to facilitate the construction of a post-crisis state that is peaceful and respectful of human rights.

REFERENCES

- [1] Division de la Justice réparatrice et règlement des différends, *In Quand l'espoir devient parole. Semaine de la justice réparatrice 2001*. Canada: Multigraph, 2001.
- [2] Economic and Social Council, "Commission on Crime Prevention and Criminal Justice," New York, 2002.
- [3] R. Cario, *Justice Restaurative Principes et Promesses*. Paris: L'Harmattan, 2010.
- [4] T. F. Mashall, *Restorative Justice: an Overview*. London: Crown, 1999.
- [5] D. G. Pablo, "Justice and Reparations," in *The Handbook of Reparations*, Oxford: Oxford University Press, 2006, p. 454.
- [6] K. Catherine, B. de C. Laurances, Q. J. François, and V. Santiago, "La Réparation des Crimes de l'Histoire vue Sous l'angle du Droit International privé," in *Crimes de l'Histoire et réparations: les réponses du droit et de la justice*, Bruxelles: Bruylant, 2004, pp. 85–96.
- [7] R. Paul, "Principes de Droit International Public," *RCADI*, vol. 103, pp. 431–652, 1961.
- [8] Factory at Chorzow (Germ. v. Pol.), "Permanent Court of International Justice," *P.C.I.J.*, vol. A, no. 9, 1927.