بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

RESTORATIVE JUSTICE FOR GROSS VIOLATION OF HUMAN RIGHTS IN INDONESIA: OPPORTUNITIES AND CHALLENGES

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RESTORATIVE JUSTICE FOR GROSS VIOLATION OF HUMAN RIGHTS IN INDONESIA: OPPORTUNITIES AND CHALLENGES

THESIS

By:

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INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY

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YOGYAKARTA

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Karya ilmiah ini saya ajukan kepada Tim Penguji dalam ujian Pendadaran yang diselenggarakan oleh Fakultas Hukum Universitas Islam Indonesia. Sehubungan dengan hal tersebut dengan ini saya menyatakan:

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MOTTO

Pearls don't lie on the seashore. If you want one, you must dive for it.

(hinese proverb)

“Jangan Hanya Hidup, Bergunalah”

(Reychashita Kusuma Habibilah)

Apa yang kita pikirkan menentukan apa yang akan terjadi pada kita. Jadi jika kita ingin mengubah hidup, kita perlu sedikit mengubah pikiran kita.”

(Wayne Dyer)

أَلَمْ نَشْرَحْ لَكَ صَدْرَكَ ﴿١﴾ وَوَضَعْنَا عَنْكَ وِزْرَكَ ﴿٢﴾ الَّذِيْ أَنْقَضَ ظَهْرَكَ ﴿٣﴾
وَرَفَعْنَا لَكَ ذِكْرَكَ ﴿٤﴾ فَإِنَّ مَعَ الْعُسْرِ يُسْرًا ﴿٥﴾ إِنَّ مَعَ الْعُسْرِ يُسْرًا ﴿٦﴾ فَإِذَا فَرَغْتَ
فَانْصَبْ ﴿٧﴾ وَإِلٰى رَبِّكَ فَارْغَبْ ﴿٨﴾

Q.S Al-Insyirah

DEDICATION

I, with „All of My Hard Work and Commitment", dedicate this magnificent thesis to:

Allah Subhanallahu wa ta'ala,

Thanks to Allah for giving me this opportunity, strength and patience.

Thanks to all of my family

who keeps supporting

my lecture, who petienly guide me to finish this thesis

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For all their inspiration, support, motivation, laugh and love in every aspect of my tough yet a beautiful life

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TABLE OF CONTENT

ABSTRACT

The feasibility of implementing restorative justice to address historical gross human rights violations in Indonesia is the point of this research, drawing upon the experiences of Truth and Reconciliation Commissions (TRCs) in South Korea and South Africa. The study assesses the suitability of restorative justice to redress these deeply rooted issues while examining the associated opportunities and challenges. This study used normative legal research by using conceptual, comparative, and juridical approach. The key findings highlight the potential effectiveness of restorative justice in Indonesian history. Lengthy legal proceedings have impeded witnesses and evidence collection, leading to unsatisfactory verdicts. Transparent communication from the Indonesian government on the mechanisms used by the Presidential Palace of Human Rights and Anti-Violence (PPHAM) is imperative. The willingness of victims and their families to engage in the resolution process varies due to the trauma endured by their loved ones. The issue of impunity remains a significant obstacle. Indonesia, however, presents opportunities for advancing restorative justice. It has demonstrated its commitment to promoting the restorative justice movement through Presidential Decree Number 17 of 2022, mandating victim recovery as a central objective. Drawing lessons from the TRCs in South Korea and South Africa, this research provides insights into the applicability of restorative justice. It highlights the importance of transparent communication, victim engagement, and eradicating impunity as pivotal steps towards achieving justice and reconciliation in Indonesia's unique context.

Key words: restorative justice, gross violation of human rights, PPHAM.

Abstrak

Kemungkinan menerapkan keadilan restoratif untuk mengatasi pelanggaran hak asasi manusia yang parah dalam sejarah di Indonesia menjadi inti dari penelitian ini. Dengan mengambil Komisi Rekonsiliasi (KKR) di Korea Selatan dan Afrika Selatan sebagai contoh, studi ini menilai kesesuaian keadilan restoratif sebagai sarana untuk mengatasi permasalahan yang mengakar dan mengkaji peluang dan tantangan yang ada. Penelitian ini menggunakan jenis penelitian hukum normatif dengan menggunakan pendekatan konseptual, komparatif, dan yuridis. Temuan-temuan utama dalam tulisan ini menyoroti potensi efektivitas keadilan restoratif dalam sejarah Indonesia. Proses hukum yang panjang telah menghambat pengumpulan saksi dan bukti, sehingga menghasilkan putusan yang tidak memuaskan. Komunikasi yang transparan dari pemerintah Indonesia mengenai mekanisme yang digunakan oleh Tim Penyelesaian Non-Yudisial Pelanggaran HAM Berat Masa Lalu (PPHAM) sangatlah penting. Kesediaan korban dan keluarganya untuk terlibat dalam proses penyelesaian berbeda-beda karena trauma yang dialami oleh orang yang mereka cintai. Masalah impunitas masih menjadi kendala yang signifikan. Namun, Indonesia memberikan peluang untuk memajukan keadilan restoratif. Komitmennya dalam mendorong gerakan keadilan restoratif telah ditunjukkan melalui Keputusan Presiden Nomor 17 Tahun 2022 yang mengamanatkan pemulihan korban sebagai tujuan utama. Dengan mengambil pelajaran dari KKR di Korea Selatan dan Afrika Selatan, penelitian ini memberikan wawasan mengenai penerapan keadilan restoratif. Tulisan ini menyoroti pentingnya komunikasi yang transparan, keterlibatan korban.

Key words: restorative justice, gross violation of human rights, PPHAM.

CHAPTER I

INTRODUCTION

A. Introduction

In Indonesia, violations of human rights remain an interesting issue. This is because until today, the issue left society with some fundamental problems on how is the settlement process of the victims of the past violation of human rights.[1] Several cases of human rights violations in Indonesia still become an unfinished long history.

The existence of these actions had an injustice impact on the victim or the victim's family and even caused a long-standing problem with the demands of the community for the settlement of cases of human rights violations to date, such as the Trisakti and Semanggi student shooting cases around 1998 and 1999, the Mass Massacre case (1997-1998), Jambu Keupok case (2003), and cases of human rights violations in the aftermath of the East Timor opinion poll by the Indonesian government at that time.[2] These cases are a sign that the paradigm built in the

[1] Rena Yulia, "Keadilan Restoratif dan Korban Pelanggaran HAM (Sebuah Telaah Awal)" *Jurnal hukum dan Peradilan* No. 3, Vol. 1, November 2012. p. 276

[2] *Ibid.*

current criminal justice system determines how the state should play its role based on the authority.[3]

In Indonesia, a criminal case will be settled through the criminal justice system. The objectives of the criminal justice systems are: [4]

1. To prevent the citizen from being the crime's victim
2. To settle the criminal cases so that the community will be satisfied that the justice is now upheld and the perpetrator has been punished
3. To ensure that those who commited the crime do not repeat their conduct.

In reality, the settlement mechanism with the retributive justice system could not provide a significant effect. This situation leads to the use of the non-trial mechanism which is the restorative justice system as an alternative and considered the best way to resolve past gross human rights violations cases.[5] According to the Law and Human Rights Vice Minister, Sir Edward Omar Sharif, since the government has concluded that those tragedies that happened in the era of Reformation were gross human rights violations, those cases should be resolved

[3] Eva Achjani Zulfa, "Restorative Justice dan Peradilan Pro-Korban", Reparasi dan Kompensas Korban dalam Restorative Justice, Kerjasama antara Lembaga Perlindungan Saksi dan Korban Dengan Departemen Kriminologi FISIP UI, Jakarta, 2011, p. 27

[4] Henny Saida Flora "Pendekatan Restorative Justice Dalam Penyelesaian Perkara Pidana Dalam Sistem Peradilan Pidana di Indonesia", Jurnal Law Pro Justitia No. 2, Vol. II Juni 2017, p. 44

[5] Sofyan, "Restorative Justice dalam upaya penyelesaian kejahatan hak asasi manusia perspektif hukum islam", *Jurnal Ilmiah*, No. 1, Vol. 1, Jan 2020, p. 23

with corrective, rehabilitative, and restorative justice.[6] Therefore, settling human rights through a restorative justice approach is an interesting formulation for upholding human rights in Indonesia. The Restorative justice system is a system that emphasizes repairing losses caused or related to criminal acts committed through a cooperative process involving all parties.[7] In other words, restorative justice is the alternative to settling a case outside of the court (non-trial).[8]

The restorative justice approach in resolving cases of human rights violations is referred to as a non-trial mechanism by uncovering the truth and apologizing to the perpetrators, as well as repairing the victims. Unlike the case with the way of achieving criminal justice which is characterized by retaliation and restitutive justice emphasizing compensation justice.[9] In the implementation of restorative justice, hereby the fundamental principles which consist of:[10]

a. The justice demanded is the existence of recovery efforts for the aggrieved party.
b. Anyone involved in and affected by a crime must have the opportunity to fully participate in following it up.

[6] Resolve human rights violations trough restorative justice: Ministry of Law and Human Rights, Antara News. https://en.antaranews.com/news/203077/resolve-human-rights-violations-through-restorative-justice-ministry , Accessed on January 28, 2023.

[7] Kuat Puji Prayitno "Restorative Justice Untuk Peradilan Di Indonesia (Perspektif Yuridis Filosofis dalam Penegakan Hukum In Concreto), *Jurnal Dinamika Hukum* No. 3 Vol 12 Sep 2012 p 409

[8] *Ibid.*

[9] *Ibid.*

[10] Rena Yulia, *Op.* cit., p. 284

c. The government plays a role in creating public order, while society builds and maintains peace.

The emergence of the idea of restorative justice is a form of criticism of the application of the criminal justice system in punishment which is considered ineffective in resolving various forms of social conflict, this ineffectiveness is caused because the parties involved in the conflict are not involved in settling cases.[11] Restorative justice in Indonesia has been used frequently before the existence of laws governing restorative justice, this can be seen in several regions in resolving cases according to custom by taking the path of peace. Apart from that, restorative justice is also used in juvenile justice which can be seen in Law No. 11 of 2012 which prioritizes diversion in its settlement.[12]

On August 17, 2022, President of the Republic of Indonesia, Joko Widodo released a President Decree regarding the Formation of Non-Juridical Team for the Settlement of Human Rights Violations in the Past. This Presidential Decree firmly explained that the government prioritized the non-judicial mechanism in dealing with the gross human rights violations in the past. Society assumed that this mechanism was chosen by the government to simplify

[11] Rodrigo F. Elias, Tonny Rompis "Penerapan dan Pengaruh Keadilan Restorative sebagai Alternatif Penyelesaian Tindak Pidana dalam Sistem Peradilan Pidana di Indonesia", *Lex Crimen* , No.5 Vol. 10, April 2021, p. 145

[12] Riska Vidya Satriani, Keadilan Restorative sebagai Tujuan Pelaksanaan Diversi pada Sistem Peradilan Pidana Anak https://mahkamahagung.go.id/id/artikel/2613/keadilan-restoratif-sebagai-tujuan-pelaksanaan-diversi-pada-sistem-peradilan-pidana-anak, Accessed on January 11, 2023.

The Presidential Decree explicitly shows that the Government prioritizes non-judicial mechanisms in handling gross human rights violations in the past time which were used as shortcuts to appear to have resolved gross human rights violations.[13] The concept of non-judicial or restorative justice is an approach in the legal system that focuses on repairing or restoring damaged relationships as a result of criminal actions and not just focusing on punishment for the offender. However, the society also assumed that this method was only chosen by the Government to serve gross human rights violators to avoid judicial mechanisms.[14] The effectiveness of the team's role and function are worth questioning because if regulation and institution which stated in the law could not provide maximum results, how a team without decent public participation can conduct such duty? To gain examples from other countries experiences in establishing a truth and reconciliation commission, this research will provide implementation of truth and reconciliation commission from South Korea and South Africa experience as they have related issues on gross violations of human rights in the past. South Korea with its Truth and Reconciliation Commission has been one of the parts of transitional justice which a way for a country to deal with conflicts due to systematic or gross human rights

[13] YLBHI, Presiden arus Cabut dan Batalkan Keppres Pembentukan Tim Penyelesaian non-yudisial Pelanggaran Ham Berat di Masa Lalu https://ylbhi.or.id/informasi/siaran-pers/presiden-harus-cabut-dan-batalkan-keppres-pembentukan-tim-penyelesaian-non-yudisial-pelanggaran-ham-berat-masa-lalu/. Acesssed on January 11, 2023.

[14] *Ibid.*

violations. This commission can be said to have succeeded in achieving its initial goal of investigating all cases of gross human rights violations in the past.

Meanwhile, in South Africa, the establishment of TRC has released the country from the colonialism era. One of the key successes was the granting of amnesty for perpetrators through the process of truth discovery and providing compensation for victims. These examples of the two countires could be a reflection for Indonesia to end the past gross human rights violation issue by promoting restorative justice as a mechanism.

Therefore, according to the explanation above, the author will analyze the effectiveness of restorative justice in the settlement of past gross human rights violations in Indonesia.

B. Problem Formulation

1. Is the restorative justice mechanism suitable to resolve past gross human rights violations in Indonesia?
2. What are the opportunities and challenges in the application of restorative justice for the past gross human rights violations cases in Indonesia?

C. Research Objectives

1. To analyze whether the application of restorative justice is suitable to resolve the past gross human rights violations cases in Indonesia

2. To analyze the opportunities and challenges in applying the restorative justice system to resolve the past gross human rights violations cases in Indonesia.

D. Research Originality

No.	Researcher's Name	Similarity	Difference	Research Originality
1	Candlely Pastorica Macawalang, "Penerapan dan Pengaruh Keadilan Restoratif sebagai Alternatif Penyelesaian Tindak Pidana dalam Sistem Peradilan Pidana di Indonesia", Lex Crimen, Vol. 10 No. 5, 2021	Discussing about restorative justice system as the alternative method of criminal justice in Indonesia	Not specifically discussing about human rights violations as a topic	The Impact of restorative justice in the criminal justice system in Indonesia
2	Hilaire Tegnan, "Narrative Legal Reform in Indonesia: Between Fulfilling Human Rights and Restorative Justice", Atlantis Press, Advances in Social Scienc, Education and Humanities Research, Vol. 590, Virginia, USA, 2021	Discussing restorative justice to resolve human rights cases in Indonesia	Emphasizing on the history of human rights violations in reformation era.	Analyzing the principles in the restorative justice and its implementation in Indonesia's human rights violations cases

3	Rena Yulia, "Keadilan Restoratif dan Korban Pelanggaran HAM (Sebuah Telaah Awal)" *Jurnal hukum dan peradilan* , No. 3, Vol. 1, 2012	Describing restorative justice in human rights violations and using the past cases in Indonesia	Specifically describing the violations of human rights in the perspective of the victims	Explaining how the restorative justice mechanism profoundly support the victims of human rights violations
4	Roy Rovalino Herudiansyah, et. al., "The Conception of Restorative Justice in Actualization of the Indonesian Criminal Justice System", Vol. 5 No. 3, 2022	Explaining restorative justice and its application in Indonesia criminal justice system	Addressing the implementation of restorative justice in all criminal cases	Discuss the actualization of restorative justice in the Indonesian criminal justice system
5	Hendro Dewanto, "Settlement of Gross Human Rights Violations in the Perspective of Local Wisdom in Indonesia (Case study of Tanjung Priok), Vol. 22, Issue 2, May 2022.	Describing the gross violation of human rights cases in Indonesia	Explaining the obstacles in resolving the gross violations of human rights with the perspective of local wisdom	Explaining the settlement of gross violations of human rights with the approach of local wisdom in Indonesia

E. Theoretical Review

1. Criminal Justice Theory

There are three fundamental values that emerged in law: justice, expediency, and legal certainty.[15] The purpose of law is to gain justice in society, which means that the rule of law must be equitable and the enforcement and implementation of law shall not be concluded in such a way that erase the ethical values and human dignity. At its root, the criminal justice theory is a branch of the philosophy of law that deals with criminal justice and in particular punishment. Criminal justice is a system that intertwines the government institutions private facilities and defines regulations that manage the punishment of criminal behavior within a jurisdiction. It maintains order, punishes crime, and ensures justice is provided to all parties involved in criminal proceedings. In Indonesia, the arrangement of criminal procedural law instruments and punishment has regulated the formal legal procedures that must be followed in resolving criminal cases. The purpose of punishment is to protect society against criminal acts. Punishment is an action against a perpetrator of a crime, where punishment is aimed not because someone has committed a crime but so that the perpetrator of the crime no longer commits crimes against other people or provides a deterrent effect so that other people do not commit similar

[15] Yustinus Suhardi Ruman, "Keadilan Hukum dan Penerapannya dalam Pengadilan", Humaniora, Vol. 3, No. 2, Oktober 2012, p. 346.

crimes. There are at least three things to be achieved by enforcing criminal law in society, namely:

a. form or achieve the ideal or aspired community life;
b. maintain and uphold noble values in society;
c. defending something that is considered good or a deal and followed by society with the technique of destroying negative norms.[16]

As a system, criminal justice can be reviewed from two points of view which are the functional and the substantive-norm point of view.[17] In functional view, criminal justice is defined as a set of rules to operate a system that regulates the way the criminal law was enforced in a concrete way, hence the perpetrator can be punished based on the criminal law procedure. Three major perspectives dominate the field of criminal justice which are; restorative justice, retributive justice, and transformative justice.

a. Restorative Justice

Restorative justice is the criminal approach focuses on the direct participation of perpetrators, victims, and society in the settlement

[16] Mudzakkir, *et. al., Perencanaan Pembangunan Hukum Nasional Bidang Hukum Pidana dan Sistem Pemidanaan (Politik Hukum dan Pemidanaan)*, Departemen Hukum dan Hak Asasi Manusia, Badan Pembinaan Hukum Nasional, 2008, p. 79.

[17] *Ibid.*

process.[18] The history of restorative justice initially emerged when many countries suffer and feel dissatisfaction in the application of formal criminal law. The conventional criminal justice system did not offer justice for people nor protection for the victim. Emerged in 1960, resotrative justice is sign of the development thought in the criminal justice system which emphasize that the community involvement and the protection of victims is a prominent matter.[19]

b. Retributive Justice

In a few decades, retributive justice has played a dominant role in the theory of punishment. Upon many ways to apply retributive justice in different countries, hereby lays three major principles to be understood in this theory: a) that persons who carry out specific types of crime, which are considered to be major crimes, morally deserve to receive a punishment that is appropriate; b) if a legitimate punisher gives the punishment the perpetrator's deserve, is morally right and appropriate without regard to any other benefits that may result; c) it is impermissible intentionally to punish the innocent.[20] According to Eglash, retributive justice is a punishment to the perpetrator of the crime

[18] Eva Achjani Zulfa, "Restorative Justice in Indonesia: Traditional Value", Indonesia Law Review, Vol. 1 No. 2, p. 34.

[19] *Ibid.* p. 35.

[20] Retributive Justice, Stanford Ensyclopedia of Philosophy, https://plato.stanford.edu/entries/justice-retributive/#EtymMeanRetr , Accessed on February 17th, 2023.

he conducts. The objective of retributive justice is to provide rehabilitation for the perpetrators. Briefly, the law enforcement of retributive justice is like what we see in our criminal justice system. The law enforcement based on the statutory law, the wrongdoers will be punished, and the right ones will be released.[21] Under these schemes, it is important that the perpetrators be guilty of the crime for which a penalty has been imposed.

c. Transformative Justice

This theory is derived from the concept of democratization. Transformative justice gives the understanding that restorative justice fails to recognize the socio-political injustices within a criminal case. With the aim of encouraging dialogue for lasting peace for all, the phrase transformative justice may allow us to examine structural violence and perspectives on justice in various political contexts. This concept is often applied to address racism and structural violence, gender-based violence and domestic abuse violence.[22]

[21] "Mahfud: Hukum Kita Keadilan Retributif, tapi di Masyarakat terasa Koruptif dan Manipulatif", https://nasional.kompas.com/read/2020/11/26/15464341/mahfud-hukum-kita-keadilan-retributif-tapi-di-masyarakat-terasa-koruptif-dan , Accessed on 17th February 2023.

[22] Jennifer J. Llewellyn, "Transforming Restorative Justice", Annual Lecture, The International Journal of Restorative Justice, Vol. 4(3), 2021, p. 380.

This sub-chapter will later describe the theory of criminal justice, the criminal justice system in Indonesia, and the major perspectives on criminal justice which are retributive and restorative justice.

2. International Criminal Law

According to Antonio Cassese in his book International Criminal Law, the definition of international criminal law is defined as a component of international laws prohibiting international crimes and requiring states to prosecute and punish offenders who have committed multiple crimes that are deemed to be crimes.[23] International criminal law is a set of public international laws that concerns individuals and place responsibility on individuals- not states or organizations- and prohibits and punishes acts that are defined as crimes by international law. International criminal laws include laws, procedures, and principles relating to modes of liability, offenses, evidence, court procedure, sentencing, victim participation, witness protection, mutual legal assistance and cooperation issues.[24] International criminal law has five sources as international law had, which generally are: a) treaty; b) customary international law; c) general principles of law; c) judicial decisions; and d) doctrines. It is stated under Article 38 (1) of the Statute of the International

[23] Antonio Casesse, *International Criminal Law*, Third Edition, Oxford University Press, United Kingdom, 2013, p. 87.

Court of Justice (the ICJ). Each country in the world has its own national criminal jurisdictions. These are the major crimes under international criminal law which are genocide, war crimes, crimes against humanity, as well as the crime of aggression.[25]

The term international criminal law expresses the existence of criminal law principles that regulate about international crimes. Those principles were enacted within international conventions such as the Genocide Convention of 1948, the Tokyo Rules, the Denhaag Convention of 1970, etc. Individuals become subjects in international law who can be tried or held criminally responsible individually before the Court or International Court of Justice, such as International Miltary Tribunal Nurenberg (IMTN) 1946, International Military Tribunal Tokyo (IMTT) 1948, International Criminal Tribunal for the Former Yugoslavia (ICTY) 1993, and International Criminal Tribunal Rwanda (ICTR) 1994, Hybrid Tribunal in Sierra Leone, Cambodia, Timor Timor, and International Criminal Court (ICC) 1998.[26]

[25] Fajri M. Muhammadin, Kay Jessica, "Introduction Criminal Law in the Minds of Our Student", Recent Developments in International Criminal Law, Gadjah Mada Undergraduate Research Anthology Vol. 1, 2022, p. 4.

[26] Joko Setiyono, "Hukum Pidana International", Edisi 3, Penerbit Universitas Terbuka, 2015, p 1.11.

F. Definition of Term

1. Gross violation of human rights

Human rights has been understood as inherent and inalienable rights for every individual.[27] Humans have human rights solely because of their dignity as humans, not because they are granted by society or based on law.[28] All countries in the world share the same opinion and recognize gross violations of human rights which consist of: (1) genocide; (2) crimes against humanity; (3) and war crimes. In customary international law, a country is considered to have committed a serious violation of human rights if (1) the state does not try to protect or even abolish the rights of its citizens which are classified as non-degradable rights; or (2) the country concerned allowed the occurrence or actually committed through its agents international crimes or serious crimes, namely genocide, crimes against humanity and war crimes; and/or the state failed or did not want to demand accountability from the state apparatus who committed the crime.[29]

Law No. 26 of 2000 about Human Rights provides that human rights are a set of rights that are part of the essence and existence of humanity itself as creatures of God who must be respected, held in high regard and protected

[27] Philip Alston, Franz Magnis-Suseno, et al., *Hukum Hak Asasi* Manusia, Pusat Studi Hak Asasi Manusia (PUSHAM) Universitas Islam Indonesia, Yogyakarta, 2008, p. 40.

[28] Jack Donnely, *Universal Human Rights in Theory and Practice*, Cornell University Press, 2017, p. 70

[29] *Op. cit.* p. 20.

by the state, the law, the government, and all individuals for the sake of the value and worth of humanity. [30] Meanwhile, the gross violations of human in the Indonesian Human Rights Law, are defined as extraordinary crimes impacted on both national and international level and do not constitute criminal acts as regulated in the Indonesian Criminal Law Code (Kitab Undang-Undang Hukum Pidana). Those acts are causing great destruction for individuals and the community whether materially or immaterially. Hence, an immediate remedy is obligated to restore the supremacy of law to achieve justice, peace, order, harmony, and prosperity for society.

2. Restorative justice

Restorative justice is one of the parts of the criminal justice model that is applied until the present. Restorative justice is a criminal justice process in which the victim and offender, as well as any other person or member of the community experiencing the effects of an offense, actively engage in the resolution of problems resulting from the offense committed.[31] As a problem-solving approach to crime, restorative justice involves the parties themselves, and the community in general, in an active relationship with statutory agencies. Restorative justice has a meaning which is that justice is restored or healed.

[30] Article 1 of Law Number 26 of 2000 about Human Rights Court ("Law No. 26 of 2000")

[31] Hilaire Tegnan, "Narrative Legal Reform in Indonesia: Between Fulfilling Human Rights and Restorative Justice", Atlantis Press, Advances in Social Scienc, Education and Humanities Research, Vol. 590, Virginia, USA, 2021, p. 196.

Each party involved in a criminal offense was given the opportunity to have a discussion which makes restorative justice emphasize justice and welfare.[32] There are principles in the restorative justice system, which are, making the perpetrator remedy the destruction he made because of his offence, giving the offender an opportunity to prove his capacity and qualities as well as dealing with his guilt in a constructive way, involving the victims, parents, school, family, create forums of cooperation, and also in issues related to crime to overcome them.

For instance, the application of restorative justice has a purpose to give justice to the victims. In international law, restorative justice finds its justifying basis in the regime of State responsibility.

G. Research Methods

1. Type of Research

This study uses normative legal research which is legal research conducted by analyzing the literature sources or secondary data as the main sources of the research. The research will be conducted by exploring and analyzing the regulations as well as the legal literature about the topic.[33]

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[32] Apa itu Restorative Justice? http://mh.uma.ac.id/apa-itu-restorative-justice/#:~:text=Keadilan%20Restoratif%20adalah%20penyelesaian%20perkara,keadaan%20semula%2C%20dan%20bukan%20pembalasan. , Accessed on January 28, 2023.

[33] Soejono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Rajawali Press, Jakarta, 2009, p. 13-14.

2. Research approach

a) Conceptual approach

A Conceptual approach is an approach that departs from the views and doctrines that have developed in the science of law. This thesis will use the conceptual approach to analyze the concepts or ideas in the development and implementation of restorative justice and how international instruments apply the concept of restorative justice.

b) Comparative approach

The Comparative approach is a qualitative legal research that consists of comparative evaluation of human experience occuring in legal systems of different jurisdictions. It focuses on understanding the important differences and similarities of the implementation in certain countries as a reflection to improve the legal systems and decision-making process by providing clear evidence and taking benefit from other countries' experiences. This thesis will provide the settlement of a gross violation of human rights in South Africa and South Korea and explain the Truth and Reconciliation Commission process to resolve the case.

c) Juridical approach

The Juridical approach is legal research conducted by examining library materials or secondary data as the basis for research by conducting a search of laws and literature related to restorative justice. The statutory regulations that will be used in this thesis are the Law No. 26 of 2000 of Indonesia about Human Rights Court, the Presidential Decree No. 17 of 2022, and the Criminal Code.

3. **Source of data**

The collection was carried out by studying the literature on legal materials, both primary legal materials, and secondary legal materials, as well as tertiary legal materials and non-legal materials. The interpretation used in this paper is historical interpretation, namely by studying the history of law or the making of statutory provisions and international agreements, especially those related to restorative justice.

a) Primary Legal Materials is a binding legal material because they are issued by the government. This study includes:

(i) Presidential Decree No. 17 of 2022

(ii) The 1945 Constitution

(iii) The Criminal Code

b) Secondary Legal Materials is a source of law that provides an explanation about the primary legal materials, which consists of:

(i) Books related to Restorative Justice Mechanism

(ii) Journals and articles about the human rights violations and the restorative justice mechanism

c) Tersiary legal materials

4. Data collection method

The data collection technique carried out by researchers is through library research, namely by examining legal norms, journals, or other existing legal sources related to the subject under study.

5. Data Analysis

This study uses data analysis through descriptive qualitative research by examining the data that has been obtained from the literature and selecting other sources that are appropriate to the object under study, after which conclusions can be drawn and a baseline drawn objectively and systematically in the form of a narrative, based on the results of the research. which has been done

CHAPTER II

THEORETICAL REVIEW

General Overview on Restorative Justice Theory, Violations of Human Rights, and State Practice in Solving the Past Gross Violations of Human Rights

A. Theory of Criminal Justice

In order to achieve the purpose of the law as Gustav Radbruch said about three ideal value of law which are justice (*gerechtigkeit*), benefit (*zweg lassigkeit*), and legal certainty (*rechtssicherheit*), a legal product ideally requires these principles as one united instrument, interrealated and tiedly connected[34]. This value therefore become a guidelines for every act conducted by legal subject as a essence of the creation of the law. Merdikno Kusumo highlights[35], that justice seeker tend to know about law in certain aspect before initially starting a case and received a legal protection in finding for their justice. The legal certainty is the essence matter that they want to achieve. The concept of justice also contained in the Fifth Precept of Pancasila which reads "social justice for all Indonesian people". However, the interpretation of justice are many and the use of the word 'justice' is relatively depends on how people overview the theory of justice.[36]

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[34] Satjipto Rahardjo, Ilmu Hukum, Citra Aditya Bakti, 2014, p. 19

[35] Sudikno Mertokusumo, *Bab-bab Tentang Penemuan Hukum*, Cita Aditya Bakti, 1993, p. 3

[36] Bambang Sutiyoso, "Mencari Format Ideal Keadilan Putusan Dalam Peradilan", *Jurnal Hukum Ius Quia Iustum* 17.2, 2010, p. 225

In legal philosophy, the discourse on the theory of justice is multi-interpretive. According to Jhon Rawls, all people have equal rights in the procedure of choosing principles; everyone can propose, reason for their acceptance. The basis of equality is that everyone has a conception of virtue and has a sense of justice. He understands justice as fairness. What is meant by fairness according to John Rawls is the original position and the veil of ignorance. He points out that in the original condition of ignorance no one knows his place, position or social status in society, nor does he know his wealth, intelligence, strength so that no one is advantaged or disadvantaged. So, everyone in such a state has the same opportunities.[37] The theory put forward by John Rawls can be related to fair law enforcement, namely that everyone must be assumed to be equal before the law. This means that for the sake of justice, consideration of complementary factors such as economic, social, racial, ethnic, gender, political and others must be denied.[38]

The discussion of justice in criminal law cannot be separated from the concept and purpose of punishment. The purpose of punishment has a supporting function of the function of criminal law in general which is to be achieved as the ultimate goal, namely the realization of public welfare and

[37] Yustinus Suhardi Ruman, "Keadilan Hukum dan Penerapannya dalam Pengadilan, Humaniora Vol. 3 No. 2, Binus University, Oktober 2012, p. 349

[38] Edor J. Edor, John Rawls's Concept of Justice as Fairness, Vol. 4 Issue 1, Pinisi Discretion Review, 2020, p.182

protection, which is oriented towards the goal of protecting society to achieve social welfare. According to Sudarto[39], the objectives of punishment are:

a. To frighten people from committing crimes (general preventie) or to frighten certain people who have committed crimes so that in the future they will not commit crimes again (special preventie);
b. To educate or correct people who have committed crimes so that they become people of good character, so that they are beneficial to society;
c. To prevent the commission of criminal offenses for the protection of the state, society and the population, i.e. to guide the convicted person to come to his senses and become a well-studied and useful member of society, and to remove the stains caused by criminal offenses.

There are two conceptual views on the purpose of punishment, namely the retributive view and the utilitarian view. The retributive view presupposes punishment as a negative reply to deviant behavior that has been committed by the person so that this view sees punishment only as a reply to mistakes made because of moral responsibility. The utilitarian view sees punishment in terms of its benefits or usefulness where what is seen is the situation or condition that

[39] Dion Valerian, "Kriteria Kriminalisasi: Analisis Pemikiran Moeljatno, Sudarto, *Theo de Roos* dan *Iris Haenen*", Vej Volume 2, Nomor 2, p. 423

wants to be produced from the imposition of punishment. This view is also useful in order to prevent other people from the possibility of committing the same act as the perpetrator of the crime. This view is also often said to have a preventive nature because it has a forward-looking orientation. In utilitarian perspective, proposed by Jeremy Bentham,[40] this perspective seeks to ensure that the law can provide deep happiness, so that it can be said that a piece of legislation is not enough just to have legality and legitimacy but more than that, namely the law is expected to be able to accommodate and distribute justice and legal benefits as much as possible for the happiness of many people.[41]

In the utilitarian perspective according to Rudolf von Jhering, the function of law is to guarantee and maintain the foundation of social life, the law according to him is also to protect the interests of society, so that coordination will minimize the possibility of conflict.

[40] Lorenzo Bertolesi, "Victims and Responsibility: Restorative Justice: a new path for justice towards non-human animals?" , University of Milan, 2017, p. 6

[41] J. Driver, *The History of Utilitarianism*, Stanford University, 2009, p. 162

Furthermore, the purpose of punishment when associated with retributive theory according to Romli Atmasasmita is to produce several objectives consisting of[42]:

a. A feeling of satisfaction for the victim, both for himself and the family involved. These feelings are unavoidable and cannot be used as an excuse to accuse disrespect for the law This type of restributive is called vindicative;
b. Punishment serves as a warning to criminals and other members of society that any threat to harm others or gain unlawfully or unfairly from others will be punished. This type of restitution is called fairness;
c. Punishment is intended to show a comparison between what is called the gravity of the offense and the punishment imposed. This type of punishment is called proportionality.

The criminal justice system consists of a series of processes from the inquiry, investigation, arrest, detention, prosecution, and investigation at the trial until the sentencing process. Those stages are very complex and cannot be easily understood by the public, and are sometimes considered an intimidating

[42] Romli Atmasasmita, *Sistem Peradilan Pidana Kontemporer*, Kharisma Putra Utama, 2010, p. 151-156.

process by society. In theory, the criminal justice essentially have ground norms that aim to create a condusive and in-order system for the society.

This chapter will explain more on retributive justice which derived from the retributive theory, followed by the explanation of restorative justice in the application of criminal justice as the focus of the topic, and the transformative theory of criminal justice as another explanation on the developed theory in criminal justice.

1. Retributive Justice

For more than half a century, Indonesia has practiced law enforcement based on retributive and deterrent philosophies. Retributive practices focus on quantitative aspects with the dimension of assessing how many cases are handled and perpetrators are imprisoned. This theory focuses on punishment as an absolute obligation to carry out vengeance (vergelding) against those who have committed a crime. This idea has two characteristics: subjective vergelding, or direct retaliation targeted at the mistake of the creator; and an objective style, or retaliation targeted only at the action of the target.[43] These three following principles are defined as a form of justice that refer to the retributive theory: (1) that those who commit certain kinds of wrongful acts, essentially serious crimes, morally

[43] Lilik Mulyadi, *Bunga Rampai Hukum Pidana Umum dan Khusus*, PT. Alumni, Bandung, 2012, p. 54

deserve to suffer a proportionate punishment; (2) that it is per se morally good without reference to any other goods that might arise if some legitimate punisher gives them the punishment they deserve; (3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers. In retributive justice measures, the offenders must be guilty of the crime for which a penalty has been imposed. By this retributive justice scheme, crime is a conduct that disarrange the "right" relationships within the community which are the relationships between offender and victim, offender and community and victim and community. A criminal act deserves to be punished because he or she has violated the "moral order" and proportionality is the rope used to measure the type of punishment that he or she deserves. Retributive justice is what we know as the conventional criminal justice system. This theory views that punishment is retribution for mistakes that have been made which makes this theory oriented to the act and to the crime itself.[44] The basis for punishment must be sought from the crime itself because the crime has caused suffering to other people, in return for which the perpetrator must be given suffering. It responses to criminal behavior that focuses on the punishment of lawbreakers and the compensation of victims.

The severity of the punishment is proportionate to the seriousness of the crime. The criminal justice system is considered successful if every criminal offender can be tried and imprisoned. This is because this theory prioritizes the notion that "penalties in criminal law are imposed solely because there is someone who has committed a crime, thus being an 'absolute consequence' as a punishment for the wrongdoer."[45]

2. Restorative Justice

The principle of restorative justice is one of the law enforcement principle in the case settlement in any legal system. Emerged in the 1960s[46], restorative justice is a model approach to solve criminal cases which focuses on the direct participation of perpetrators, victims, and society in the settlement of criminal cases.[47] The initial practice of restorative justice was conducted in Kitchener, Ontario in 1974 when two young men as the perpetrator of destruction met their victim and agreed to pay a compensation due to their commission. Known as Kitchener Experiment, this case got a positive support from communities and encouraged the

[45] Jennifer Llewellyn, *Restorative Justice, Reconciliation, and Peacebuilding*, Oxford University Press, 2014, p. 76-77

[46] The birthplace of restorative justice, https://mcccanada.ca/centennial/100-stories/birthplace-restorative-justice, Accessed on February 18, 2023

[47] Meredith Rossner, "Restorative Justice in the 21st Century: Making Emotions-Mainstream", London School of Economics, Oxford University Press, 2017, p. 17

formation of Kitchener Victim Offender Reconciliation Program.[48] This theory is in fact a fast growing and impacted the legal policies and practices in several countries. The encouragement to implement restorative justice in international scale exists in the United Nation 10th Congress in 2000 regarding the Prevention of Crime and the Treatment of Offenders. The continuation of the attitude of UN member states in implementing restorative justice is again stated in the UN Economic and Social Council Resolution Number 1999/26 regarding Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice which encourages member states to advance and mutually exchanging information on mediation and restorative justice as well as reaffirming the mandate given to the Commission on Crime Prevention and Criminal Justice to formulate measures and standards for implementing mediation and restorative justice.[49] These standards and measures were then standardized through UN Economic and Social Council Resolution Number 2000/14 concerning Basic Principles on the Use of Restorative Justice Programs in Criminal Matters.[50] It is hoped that the general

[48] Peluang dan Tantangan Penerapan Restorative Justice dalam Sistem Peradilan Pidana di Indonesia, Institute for Criminal Justice Reform, https://icjr.or.id/peluang-dan-tantangan-penerapan-restorative-justice-dalam-sistem-peradilan-pidana-di-indonesia/ . Accessed on 30 February 2023.

[49] Resolutions and decisions of the Economic and Social Council, Economic and Social Council Resolution 2000/14 (2000), 27 July 2000, p. 41

[50] *Ibid.*

principles contained in this resolution will become a benchmark and encourage member states to implement measurable and standardized restorative justice schemes in their respective legal systems, even though the nature of these principles is not binding. [51]

According to Tony F. Marshall, restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future.[52] Restorative justice is a concept that responds to the development of thought of the criminal justice system with emphasis on community involvement and the needs of victims to be felt, which is felt excluded by a mechanism that works in the criminal justice system that is being availed at the moment. Mark Umbeit defined restorative justice as an essential different framework for understanding and responding to crime. Crime is understood as harm to individuals and communities, rather than a violation of abstract laws against the state. The victims, community members and offenders as the most directly affected parties by the crime were encouraged to play an active role in the justice process. Rather than focus on offender punishment, restoration of the emotional and material

[51] *Ibid.*, p. 42

[52] Tony F. Marshall, *Restorative Justice an Overview*, Home Office Research Development and Statistics Directorate, p. 9

losses resulting from crime is far more important.[53] In the United States, the application of restorative justice gives a significant impact because of the concept that provides much more benefit in all stages in judicial process and plea the perpetrator in a right way in the trial.[54] According to Susan Sharpe, restorative justice has five key principles:

i. includes full participation and consensus;
ii. seeks to heal the damage or loss resulting from the occurrence of a crime
iii. provides direct accountability from the perpetrators as a whole
iv. seeks reunification for members of society who have been divided or separated due to criminal acts;
v. provides resilience to the community in order to prevent further criminal acts from happening.

The concept of restorative justice is an approach focuses on the conditions of building justice and balance for the perpetrators of the crime and the victims.[55] The procedural and criminal justice mechanisms that focus on prosecution are converted into a process of dialogue and

[53] Eva Achjani Zulfa, "Restorative Justice in Indonesia: Traditional Value" , Vol. 1 , Number 2, Indonesia Law Review, Faculty of Law Universitas Indonesia, 2011, p.36

[54] Michael Tonry, *The Handbook of Crime and Punishment*, Oxford University Press, p. 323

[55] United Nations Office for Drug Control and Crime Prevention (UNODCCP), *Handbook on Justice for Victims*, Centre for International Crime Prevention, New York, 1999, p. 36.

mediation to create an agreement on the settlement of criminal cases that are more just and balanced for the victims and perpetrators.[56]

The ideas of criminal justice can be summarized in the term of "due process of law" which means a fair and proper legal process. Bagir Manan argues that Indonesian law enforcement is considered to have failed in achieving the objectives hinted by the law. Derived from that ideas, the restorative justice system is used as a part of sociocultural approach, rather than the normative approach.[57]

In Indonesia, the guideline for restorative justice appear under the Attachment to the Decree of the Director General of Public Courts No. IX: 1691/DJU/SK/PS.00/12/2020, concerning Guidelines for the Implementation of Restorative Justice in the General Courts Environment, December 22, 2020.[58] This guideline was created with the purpose to ease the judicial body in the scope of the general court to understand and apply restorative justice, to encourage the application of restorative justice that is regulated by the Supreme Court in the verdict enacted by the judges, and

[56] Juhari, "Restorative justice in the renewal of criminal law in Indonesia", International Journal of Business, Economics and Law, Vol. 16, Issue 5, 2018, p. 129

[57] The Conception of Restorative Justice in Actualization of the Indonesian Criminal Justice System, p. 4

[58] Lampiran Surat Keputusan Direktur Jenderal Badan Peradilan Umum No: 1691/DJU/SK/PS.00/12/2020, tentang Pedoman Penerapan Restorative Justice di Lingkungan Peradilan Umum, 22 December 2020, p. 1

to fulfil the principle of fast, simple, and cheap with fair justice of the court. The guidelines also explains about the basis principle of restorative justice which is to provide restoration to victims who have suffered a lot as a result of the crime by providing compensation to victims, build peace, peace perpetrators doing community service and so on. It is hoped that restorative justice can provide a law that is impartial and one-sided, not arbitrary, ad only sides with the truth in accordance with the existing law.[59] Indeed, this guidelines has provide a fresh air in the legal field that finally Indonesia has solemnly encourage the non-judicial settlement for certain cases that was very difficult to be settled such as restorative justice for minor offenses, restorative justice for juvenile cases, restorative justice for woman's cases, and restorative justice for narcotics cases. However, this guidelines did not describe about responsibilities of the perpetrators to give apologies and recognize for the mistakes and trauma that they left to the victim's life.[60] Besides, this guidelines also did not include the gross violations of human rights cases as part of the objective.

In the past, in the case between Indonesia and Timor Timor, the restorative justice mechanism was implemented by the government of

[59] Badan Peradilan Umum, "Pedoman Penerapan Restorative Justice di Lingkungan Peradilan Umum", Surat Keputusan Direktur Jenderal Nomor 1691/DJU/SK/PS.00/12/2020, p. 3

[60] *Ibid, p. 12*

Timor Leste (after the independence). East Timor (Timor Timor) was permitted to hold an independence vote after Indonesian President Suharto's resignation in 1998. Following the election, an overwhelming majority of voters (78.5 percent) chose independence. In order to coerce people into voting against independence, the Indonesian military funded and armed Timorese militias, which recruited young, illiterate, and disaffected men through coercion, the provision of drugs, and the promise of prizes and honor. Following this, the militias killed civilians and displaced almost three-quarters of the population. Many people were slaughtered, numerous women were raped, and the area was left in a terrible ruin. Almost 60,000 homes were burned down, and 70% of the infrastructure was destroyed. The UN established many legal mechanisms to offer justice in reaction to this tragedy. To handle the worst crimes, like as murder, rape, and torture that occurred there, the UN Serious Crimes Unit was selected. A resolution seeking a Truth and Reconciliation was voted by the National Congress in 2000 with unanimous support (KKR). In Timorese, it is known as CAVR, or the Commission for Reception, Truth, and Reconciliation. The CAVR's responsibility is to facilitate the arrival of refugees from Indonesia in order to learn the truth about the politically motivated atrocities committed during Portuguese decolonization and the Indonesian occupation, as well as to reintegrate low-

level offenders into their communities. CAVR has main initiative that is the Community Reconciliation Process which fused the legal principles of the new state with traditional customary practices, involving direct participation of local leaders, perpetrator, victims, community members, and the courts. Extensive community consultations revealed the desire to incorporate traditional forms of conflict resolution with the formal criminal justice system. The tradition system was effective for dealing with conflicts within daily life and not sufficient for the gravity and scale of crimes committed in 1999. Conversely, the formal legal system was too strict to meet the needs of individual communities. With restorative justice intervention, the CRP promoted dialogue and communication between victims and perpetrators as a means of repairing the damaged community.[61]

In many countries, dissatisfaction and frustration with the formal justice system or a regenerated interest in preserving and strengthening customary law and traditional judicial practices has led to calls for alternative responses to crime and social disorder. Many of these alternatives provide the parties involved, and often the surrounding community, the opportunity to participate in resolving the conflict and dealing with its consequences. Restorative justice programs are based on the belief that parties to a conflict must be actively involved in resolving

[61] *Ibid.*

and mitigating negative consequences. They are also based, in some cases, on a willingness to return to local decision-making and community structures.[62]

3. Transformative Justice

At its nature, transformative justice seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence. Since it is a political framework and approach responding to violence, transformative justice has the objectives to transform the conditions that enabled the harm, at the same time as facilitating repair for the harm, by cultivating accountability, healing, resilience and safety for all.[63] Transformative justice is focused on macro-level social and structural change, it is oriented to the cause of bringing about a new and different state. The first aspect of restorative justice is that it comes from the root system of the harm and try to change, heal and transform the harm felt by the victims, by the perpetrator and by the community in order to not minimize the long-term harm. It comes from the idea that justice must be ultimately seen from the perspective of the larger community; on how

[62] Bruce A. Green, "Restorative Justice from Prosecutors' Perspective". Fordham Law Review, Vol. 88, 2020, p. 8

[63] "Discover restorative and transformative justice". https://www.sace.ca/learn/restorative-and-transformative-justice/#:~:text=Transformative%20Justice%20(TJ)%20is%20a,reduction%20to%20lessen%20the%20violence. Accessed on 28 February 2023.

mechanisms and processes of justice, while also giving resources to individuals, and help societies to heal and recover from past violations and move toward a sustainable peace.[64] The history of transformative justice begin in the late 1990s. A quaker in Canada named Ruth Morris challenges restorative justice due to its inability to address the issues of oppression, injustices, and social inequities within conflicts. She points out that the terms "transformative" and "restorative" have been incorrectly used synonymously and argue that restorative justice fails to recognize the socio-political issues addressed by the transformative justice.[65] As an ilustration, if a 14-year-old LGBT boy from a low-income neighborhood robbed a store at 2:00 a.m. when it was closed, transformational justice would examine both the youngster's motivations and the burglary as a whole. Was the boy's father a homophobe who forced him out of the house? Does the boy require money for his housing, clothing, and food? Transformative justice aims to use disagreement as a chance to solve bigger socio-political inequalities, whereas restorative justice only tackles the individual conflict between the victim and offender.

[64] Syrian Women's Right Leader, Chapter 05: "Towards an Era of Transformative Justice", a Chapter from the book of *the Pieces of Peace: Realizing Peace Through Gendered Conflict Prevention*, p. 102.

[65] Anthony J. Nocella II, "An Overview of the History and Theory of Tranformative Justice", Peace & Conflict Review Vol. 6 Issue 1, 2011, p. 4

In this matter, transformative justice is explicitly opposed to helping someone get arrested, imprisoned, fired from their job, repressed, or oppressed. Transformative justice often in the case of child abuse, sexual violence against women, violations and abuses of women human rights and gender-based crimes.[66]

B. The Settlement of Gross Violations of Human Rights in South Africa and South Korea

a. South Africa

The end of the apartheid regime in South Africa has come to an end since the banning of the liberation movement and opposition political parties by President F.W. de Klerk in 1990. Peace was also marked by Nelson Mandela's release from prison and the lifting of the state of emergency in South Africa which paved the way and ended South Africa's more than 300-year struggle against colonialism and apartheid.[67] The Truth and Reconciliation Commission ("TRC") was born of a spirit of public participation, as the new government solicited the opinions of South Africans and the international regarding the issue of granting amnesty as well as the issue of accountability in respect to past violations and reparations for victims. Civil society, including

[66] Syrian Women's right leader, *Op. cit.*, p. 6

[67] Stuart J. Kaufman, "The End of Apartheid: rethinking South Africa's 'Peaceful' Transition, University of Delaware, 2012, p. 12

human rights lawyers, the religious community, and victims, formed a coalition of more than 50 organizations that participated in a public.[68] Also, the UN actively participated by creating the United Nations Observer Mission in South Africa (UNOMSA). However, the UN did not role the influential role, rather, left the decisions largely to local government officials and other international organziations. The role of Truth and Reconciliation Commission ("TRC") in South Africa has released the country from colonialism. The idea of a TRC had been proposed in the country since 1992, but it was not until Nelson Mandela was elected President in 1994 that serious discussions about the form of a national truth commission took place. The most contentious issue during negotiations on the interim constitution in late 1993 was whether to grant amnesty to offenders, as the military and government wanted. At the last moment, a concluding section of the constitution was agreed upon which stated that "amnesty will be granted for acts, omissions and offenses related to political objectives and occurring within the scope of the past conflict". This amnesty was then linked to the truth-seeking process.

[68] Ashley DeMinck, *The Origins of Truth and Reconciliation Commissions: South Africa, Sierra Leone, and Peru*, Macalester College, 2007, p. 14

Of all the existing truth commissions at the time, the mandate of this commission was the most complex and intricate, with balanced powers and a wide range of investigations. It was designed to work in three interrelated commissions: the Commission on Human Rights Violations, which was responsible for collecting statements from victims and witnesses and recording the extent of human rights violations; the Amnesty Commission, which processed and decided on individual applications for amnesty; and the Redress and Rehabilitation Commission, which designed and proposed a redress program for victims.

The TRC was established under the Promotion of National Unity and Reconciliation Act No. 34 of 1995, based in Cape Town. The first session began in 1996. One of the most important and controversial innovations of the TRC in South Africa was the granting of amnesty to individuals for politically motivated crimes committed between 1960 and April 1994. South Africa derived its amnesty rules from complex political negotiations between Apartheid and anti-Apartheid political forces. Apartheid political forces were willing to smooth the transition to democracy if they were guaranteed not to be prosecuted. Nelson Mandela managed to combine the granting of amnesty with the process of truth discovery and compensation for victims. The granting of

amnesty was based on the willingness of individual perpetrators to honestly admit their actions.[69] TRC never operate in a vacuum and that therefore every commission works under political constraints or contextual challenges which cannot necessarily be avoided. The South African TRC should be evaluated with this in mind and, despite the many political problems, it is important to re-iterated that the very existence of the TRC in a country going through such a transition process, is a significant political success in itself.

The TRC made detailed public disclosures that were a condition of amnesty for the most egregious and brutal crimes. The truth commission was the first to have its decisions upheld by the judiciary, and was involved in a large number of legal issues and clashes during its term. The commission's five-volume report was released in October 1998. During this time, the commission's shortcoming was that it left the regular court system on the periphery, where it should have played a supportive role in building the credibility of the country's legal system. Nonetheless, the work of the TRC was universally regarded as successful in addressing the problems and political situation in South Africa at the time. The TRC found that a further 19,050 people had been

[69] Graeme Simpson, "A Brief Evaluation of Sotuh Africa;s Truth and Reconciliation Commission: Some lessons for societies in transition", Centre for the Study of Violence and Reconciliation, p. 13

victims of gross human rights violations, with an additional 2,975 victims identified through amnesty applications. In reporting these figures, the TRC expressed regret that there was very little overlap of victims between those seeking restitution and those seeking amnesty. A criticism of the TRC is that it has failed to fulfill procedural and formal justice as the legal route to take in human rights violations cases. However, it cannot be denied that due to the application of the TRC, South Africa has become the main mecca for efforts to resolve gross human rights violations in the world.[70]

b. South Korea

Unlike the Truth and Reconciliation Commission in South Africa, which was implemented during the country's political transition, the Truth and Reconciliation Commission in South Korea ("South Korea's TRC") was implemented during a non-transitional era. Truth and Reconciliation Commission is one of the part of transitional justice in which a way of a country to deal with the conflicts due to systematic or gross human rights violations. South Korea's TRC was established to address the gross violations of human rights and abuses that occurred during the country's tumultuous history, particularly during periods of

[70] *Ibid,* p. 22

authoritarian rule and conflicts.[71] The commission aimed to uncover the truth behind these past injustices, acknowledge the victims' suffering, and promote reconciliation and healing within South Korean society. South Korea's TRC establishment was part of broader efforts to transition from an authoritarian regime to a democratic society and to confront the dark chapters of the nation's history. It was officially established in 2005 under the 'Special Act on the Establishment and Operation of the Truth and Reconciliation Commission'. Its primary goal was to investigate and document human rights violations occurred between 1945 and 1993, covering the Japanese colonial period, the Korean War, and the authoritarian regimes.[72] In Korean War, more than 2 million people were killed. The casualties included not only military personnel but also innocent civilians. The official records of government, military and police, as well as survivor testimonies, reveal that mass killings committed by South Korean and UN forces occurred before and during the Korean War from June 19500 to July 1953. During the South Korea's TRC period, matters protected during the operation include (1) no person may threaten a commissioner, staff,

[71] Anggarani Utami Dewi, "Truth and Reconciliation Commission in Non-transitional Era: Implementation in South Korea and Canada", Jurnal HAM, Vol. 13 No. 3, 2020, p. 473

[72] Ahn Byung-Ook, "Truth and Reconciliation Commission of the Past Three Years", Samin Publishing, 2009, p. 30

witness, or assessor including prohibiting interference with the commissioner's, staff's, or assessor's duties in an investigation, (2) no person may suffer harm such as dismissal, housing, pay cut, or transfer, for cooperating or providing information in connection with an investigation, (3) no person may be named as a perpetrator in a newspaper, magazine, broadcast, or other publication, because of past positions in the government, military, courts, or organizations under investigation, unless proven in court and for the public good, (4) no person may disclose the results of an investigation in a (3) no person shall be named as a perpetrator in newspapers, magazines, broadcasts, or other publications, because of past positions in the government, military, courts, or organizations under investigation, unless proven in court and for the public good, (4) no person shall disclose the results of an investigation in newspapers, magazines, broadcasts, or other publications prior to the publication of the Commission's Final Report, (5) no names shall be disclosed that are considered unfavorable to a person during the investigation process.[73]

Several truth commission had been made in South Korean government regime such as The Jeju Commission (2000), The Presidential Truth Commission on Suspicious Deaths (2000-2004), and

[73] *Ibid*, p. 65

Truth and Reconciliation Commission, Republic of Korea/ South Korea's TRC (2005-2010). The rights and authorities granted to South Korea's TRC included carrying out field inspections, such as opening the graves of people who were suspected of being victims of gross human rights violations with reference to the Funeral Services Act and the approval of the landlords. South Korea's TRC has identified 154 locations and has opened 13 locations across South Korea. The result was that 1,617 victims of the Korean War whose bodies or ashes were temporarily stored in the university museum were found.[74] South Korea's TRC can also summon and examine certain parties and these parties are required to provide materials or documents requested by the commission.

The functions and responsibilites of South Korea's TRC included:

i. Investigating and documenting past human rights violations.
ii. Identifying perpetrators and victims.
iii. Collecting and preserving evidence, including testimonies and documents.

[74] Kim, "A Tale of Two Commissions: Explaining the Different Trajectories of Human Rights Movements in Korea," p. 178.

iv. Providing a platform for victims to share their stories.

v. Making recommendations for reparations, legal actions, and policy changes.

vi. Promoting awareness and understanding of the past among the general public.

During its operation,[75] South Korea's TRC faced challenges and criticisms such as the lacked of power to prosecute the legal consequences/ sanctions to the perpetrators, not supported by the government which is the conservative groups that opposed the commission, fearing that investigations could lead to social unrest or tarnish the country's image.[76] The other challenges faced was the difficulties in accessing some classified documents and uncooperative action from victims and perpetrators who refused to testify. From the society's perspective also, many South Korean's people were unaware of the South Korean's TRC's work and its findings.

At the end, South Korea's TRC has successfully gained 11,174 petitions which consists of 290 cases regarding independence

[75] *Ibid*, p. 85

[76] *Ibid*, p. 87

movement, 8.175 regarding massacre of citizens, and 2.79 regarding violations of human rights occurred by other country.[77]

C. Gross Violation of Human Rights

Human rights are a set of basic ideas about the treatment that everyone is entitled to receive for being human. The problem of human rights violations is related to the existence of the International Criminal Court, which is also a guide and examines issues regarding the upholding of justice in tackling international crimes, especially genocide crimes that violate human rights. Article 6 of the Rome Statute explains the types of genocide crimes as follows:

Based on the type of crime that is its scope or material jurisdiction (rationae materiae), the jurisdiction of the ICC is on crimes which are the most serious crimes in the view of the international community as regulated in Articles 5-8 of the 1998 Rome Statute ("Rome Statute"). The crimes referred to are as follows: a. the crime of genocide; b. crimes against humanity; c. war crimes; d. the crime of aggression.[78]

1. The crime of genocide[79]

   The crime of genocide according to Article 6 of the Rome Statute is any act committed with the intent to damage in whole

[77] Dong Choon Kim, "Korea's Truth and Reconciliation Commission: An Overview and Assessment, Buffalo Human Rights Law Review, Vol. 19, 2013, p. 76

[78] Rome Statute

[79] Article 6 of the Rome Statute

or in part, a particular nation, ethnic, racial or religious group, such as killing group members, causing serious harm to the body or mentality of group members, by deliberately causing physical harm to the living conditions of the group, carrying out coercive acts with the intention of preventing births within the group, forcibly transferring children from one group to another.

2. Crimes against humanity[80]

   Crimes against humanity according to Article 7 of the Statute are any acts committed as part of a widespread or systematic direct attack against the civilian population, with knowledge of the attack. Included in these crimes against humanity are murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or cruel removal of physical freedom which is a violation of the basic principles of international law, torture (torture), rape, sex slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence, torture against groups identified as political collectivity, race, country, ethnicity, culture, religion, and gender, enforced disappearances, and apartheid crimes. In addition, any other acts that are inhumane or of the same

[80] Article 7 of the Rome Statute

character that are carried out intentionally with the intent to cause great suffering, physical or mental serious injury to the victim are also included in the category of crimes against humanity.

3. War crimes[81]

   War crimes according to Article 9 of the Statute include grave breaches of the 1949 Geneva Convention. These acts include intentional killing, torture or inhuman treatment including biological experiments, intentionally causing great suffering or injury. serious bodily harm, widespread mutilation and illegal appropriation of property, forcing prisoners of war or other protected persons to aid enemy forces, willfully depriving prisoners of war and protected persons of their rights to fair and regular trials , unlawful deportation and imprisonment as well as taking hostages

4. The crime of agression[82]

   A crime of aggression is committed when a political or military leader of a State causes the respective State to use force illegally against another State, provided that the force used constitutes a

[81] Article 9 of the Rome Statute

[82] Article 8 *bis* of the Rome Statute

> violation of the United Nations Charter in its character, gravity, and scale. The crime of aggression forms one of the four crimes over which the International Criminal Court's (ICC) jurisdiction falls upon. The crime of agression stipulated under Article 8 *bis* of the Rome Statute which means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[83]

Gross violations of human rights are the most serious crimes and need to be brought to the attention of the international community and are very heinous crimes that threaten world peace, security and prosperity. The Rome Statute of International Criminal Court uses the term The Most Serious Crime of International Concern.[84] The United Nations Diplomatic Conference adopted the Rome Statute of the International Criminal Court on 17 July 1998 to deal with these most serious crimes. The Rome Statute is the basis for the establishment of the International Criminal Court (ICC) or translated into Indonesian, namely the International Criminal Court. The ICC was officially opened in The Hague on 11 March 1998 in

[83] Robert Cryer, *Loc. cit.,* p. 314

[84] The ICC, *Understanding the International Criminal Court*, The Hague, Netherlands,

a special ceremony attended by Queen Beatrix of the Netherlands and UN Secretary General Kofi Annan.[85]

In Indonesia, the settlement process of gross human rights violations is regulated in the Law on Human Rights Courts, namely Law Number 26 of 2000 concerning Human Rights Courts ("Law No. 26 of 2000"). The settlement method can be carried out using judicial or non-judicial channels as follows[86]:

1. Procedures for settlement using the judicial route for serious human rights violations that occurred before the enactment of the Law on Human Rights Courts are regulated in Article 43 of Law No. 26 of 2000 which stipulates that:

   (1) Gross human rights violations that occurred prior to the promulgation of this law, were examined and decided by the ad hoc Human Rights Court
   (2) The ad hoc Human Rights Court as referred to in paragraph (1) was established at the suggestion of the People's Legislative Assembly of the Republic of Indonesia based on certain events with a Presidential Decree
   (3) The ad hoc human rights court as referred to in paragraph (1) is located in the environment of General Court

   The examination process at the ad hoc Human Rights Court is carried out in accordance with the provisions in the Law No. 26 of 2000. Examples of settlements using the judicial route for gross human rights

[85] Hans-Peter Kaul, "Construction Site for More Justice: The International Criminal Court After Two Years", Cambridge University Press, February 2017, p. 375

violations that occurred before the enactment of Law No. 26 of 2000 were ever carried out in Indonesia for the East Timor Incident and the Tanjung Priok Case.[87]

The settlement for the East Timor Incident[88] was carried out by establishing an ad hoc Human Rights Court at the Central Jakarta District Court based on Presidential Decree No. 53 of 2001 on April 23, 2001. The Presidential Decree was made based on the Decree of the Indonesian People's Representative Council Number 44/DPR-RI/III/2000-2001 dated March 21, 2001 which stated approval of the establishment of an ad hoc Human Rights Court for alleged gross human rights violations that occurred in Tanjung Priok and East Timor in 1984 which was then proposed to the president using the Letter of the Chairman of the Indonesian People's Representative Council Number KD.02/1733/DPR-RI/2001 dated March 30, 2001. Human rights court have duties and authorities to examine and decide cases of gross human rights violations. What is meant by "examining and deciding" includes resolving cases concerning compensation, restitution, and rehabilitation in accordance with applicable laws and regulations,[89] also examine and

[87] Presidential Decree No 53 of 2001 regarding the Establihsment of Ad Hoc Human Rights Court in Jakarta Pusat District Court

[88] Letter dated 22 August 2001 from the Permanent Representative of Indonesia, Makmur Widodo, to the United Nations addressed to the President of the Security Council of the United Nations

[89] Law No. 26 of 2000, Article 4

decide gross human rights violation cases that committed outside the territorial limits of the Republic of Indonesia.[90]

D. The Application of Restorative Justice in Islamic Sentencing

Restorative justice is a philosophy of justice that emphasizes the significance of and connections among the offender, victim, society, and government in cases of crime and delicacy, according to philosophers. It varies from a retributive justice system, which is focused more on punishing the offender than on putting the offender, victim, and other parties back in the proper relationship. The aim of the restorative justice process is to make amends for victims, offenders, and communities in a manner that all parties involved deem just. Instead of going to jail, the offender must make amends and pay the sufferer before being allowed to reintegrate into society. Certain underlying principles or ideals that permeate the discourse define the restorative justice system. These principles "place a strong emphasis on how people and the society are interconnected, and respect all those who are impacted by crime."[91]

Restorative justice recognises the contribution forgiveness can make to the well-being of both victim and offender. According to Zehr:

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[90] Law No. 26 of 2000, Article 5

[91] Ramizah Wan Muhammad, "Forgiveness and Restorative Justice in Islam and the West: A Comparative Analysis, Islam and Civilisational Renewal Journal, International Institute of Advanced Islamic Studies, December 2020, p. 279

> Forgiveness is letting go of the power the offence and the offender have over a person. It means no longer letting that offence and offender dominate...Real forgiveness, then, is an act of empowerment and healing. It allows one to move from victim to survivor.[92]

Restorative justice is based on the tenets of respect for all those impacted by the crime and the interconnectedness of the person and the community. Islam emphasizes respect for all people who are impacted by crime. Human dignity (karamah) is a principle that permeates Islamic legal theory. The phrase "inviolability of the human person, acknowledgment of a set of rights and duties, and guarantee of safe behavior by others, including the society and state," are all used to describe what is meant by human dignity. The Qur'an extends an unqualified recognition of dignity to all human beings irrespective of class, colour, and creed. It is also known as respect for people, which is a fundamental and unalienable right that every individual has from the moment of their birth. In Islam, God, the universe's Creator, Cherisher, and Sustainer, is the only being who truly deserves all reverence.[93]

According to the Qur'an, "Surely the believers are none but brothers unto one another, so set things right between your brothers, and have a fear of Allah that you may be shown mercy".[94] The Qur'anic term for brotherhood is all-inclusive; it refers to both men and women and conveys a feeling of

[92] *Ibid.*

[93] A. Helwa, "Secrets of Divine Love: A Spiritual Journey into the Heart of Islam", Penguin Random House India, 2021, p. 105

[94] Q.S. Al-Hujurat, 49:10

cohesion, friendship, and unity based on shared values. Muslims are encouraged to "hold firmly to the rope of Allah all together and do not become divided".[95] They should rid themselves of any resentment and hatred toward other believers in their minds.[96] The Prophet Muhammad (SAW) said: "Do not hate each other, do not envy each other, do not turn away from each other, but rather be servants of Allah as brothers. It is not lawful for a Muslim to boycott his brother for more than three days.[97]

Islamic criminal law valued the restorative justice movements. The aim of the values is to craft a just society which empowers victims, offenders, and the community. Under the shariah, crimes are classified into three broad categories: hudud (plural of hadd, i.e. the "limit" set by God), qisas (just retaliation), and ta'zir (discretionary punishment).

[95] Q.S. Ali Imran, 3:103

[96] Q.S. Al-Hashr, 59:10

[97] *Ibid.*

CHAPTER III

RESULT AND ANALYSIS

A. Restorative justice mechanism as a suitable mechanism to resolve past gross human rights violations in Indonesia

The idea of implementing restorative justice as a way of resolving past gross human rights violations has the purpose of healing the victims of crime, restoring the right of victims and their families, and providing compensation for the victim and the victim's family. Restorative justice can be less adversarial and traumatic for victims compared to traditional court proceedings.[98] This can help prevent the retraumatization that often occurs when victims have to recount their experiences in a formal legal setting repeatedly. Several reasons why applying restorative justice to past gross human rights violations in Indonesia is more suitable are :

1. The case has been going on for too long, making it difficult to find witnesses and evidence

From one regime to another, the human rights issue always emerged as a terrible and unsolved history. During the New Order era, with the dictatorship by the former President Soeharto and the government at that time, human rights violations were conducted and become a collective sin of the

[98] Sam Garkawe, "Restorative Justice from the Perspective of Crime Victims", Queensland University of Technology Journal, 1999, p.45

state apparatus. These are the various serious violations of Indonesia's human rights that happened before enactment of the Law Number 39 of 1999 regarding Human Rights ("Law No. 39 of 1999"). The legal process of these cases has not been completed.[99]

No.	Case Name	Years	Number of Victims	Information
1.	1965 Massacre1	1965-1970	1,500,000	The majority of the casualties belonged to the PKI or large groups that were thought to be connected to it, like SOBSI, BTI, Gerwani, PR, Lekra, etc. The majority of these are done outside of courtrooms.
2.	The mysterious shooting "Petrus"	1982-1985	1,682	Most of the casualties were criminals, repeat offenders, or ex-offenders. This military operation is being conducted unlawfully and lacks a distinct institutional character.
3.	Talangsari Lampung	1989	803	Repression of a number of Muslim populations in Central Lampung who were thought to be members of the extreme GPK
4.	The case in East Timor pre-referendum	1974-1999	Hundreds of thousands	beginning with the TNI's (Operasi Seroja) military aggression against the legitimate Fretilin administration in East Timor. Since then, the Tim-tim has consistently been a location of routine military activities where the Indonesian

[99] Rosnida, "Settlement of Indonesian human rights violations I the past through restorative justice approaches", Jurnal Hukum Volkgeist, Vol. 5 Issue 1, 2020, p. 26-27

				government has a history of using violence.
5.	Pre-DOM Aceh cases	1976-1989	Thousands	Aceh has always been a theater of military activities with a high level of violence since Hasan Di Tiro declared GAM.
6.	Cases in Papua	1966 -	Thousand	Intensive military operations were carried out by the TNI to confront the OPM. Part of it is related to issues of control of natural resources, between international mining companies, state officials, and local residents
7.	The case of the Banyuwangi Santhet Shaman	1998	Doens	There was a massacre of community leaders who were accused of being shamans
8.	May 1998	1998	1,308	The social unrest in Jakarta became a momentum for the transfer of power
9.	Semanggi I	1998	473	TNI repression of students who rejected the MPR Special Session
10.	Semanggi II	1999	231	TNI repression of students who reject the State Law in a State of Emergency
11.	The Shooting of Trisakti Students	1998	31	The security forces fired at Trisakti students who were demonstrating. It is the starting point for the transfer of political power and triggers social unrest in Jakarta and other big cities in Indonesia

Above all of these serious violations, some of the cases were recognized by President Joko Widodo as gross violations of human rights in Indonesia that

must be solved at his speech with the media on January 11th, 2023.[100] He condemned these tragedies and ensure that the government will reconcile the rights of the victim of the gross violations of human rights. The efforts to resolve gross human rights violations in the past have become the commitment of every government that has changed in Indonesia. In 2004, Indonesia declared its commitment to human rights and crimes related to the Rome Statute through Presidential Decree No. 40 of 2004 concerning the 2004-2009 Human Rights National Action Plan. At that time, Indonesia's former president Susilo Bambang Yudhoyono emphasized that the government was committed to resolving past gross human rights violations.[101]

The focus on restoring the rights of victims of gross human rights violations that have occurred is the main goal of the government in resolving cases of gross human rights violations in the past. However, it should also be remembered that the restoration of victims' rights also requires caution. Because there are many cases of gross human rights violations in which the victims' rights have not been fulfilled by the government. However, gathering sufficient evidence to prove crimes committed during conflict or oppression can be extremely challenging. Destruction of records, intimidation of witnesses, and

[100] "Jokowi Akui Pelanggaran HAM Berat di 12 Peristiwa", https://www.dw.com/id/jokowi-akui-pelanggaran-ham-berat-di-12-peristiwa/a-64347455 , Accessed on 20 January 2023

[101] Wakhid Apirzal Maruf, "Kebijakan Inodnesia Belum Meratifikasi Statuta Roma 1998", Journal of International Relatios, Vol 3 No. 2, 2017, Semarang, 2017, p. 3

the passage of time can all contribute to a lack of concrete evidence because of the case that has already existed for more than 20 years. Examples include the cases in Timor-Timor, Tanjung Priok, and Abe temple. With non-judicial mechanisms such as re-making the better version of the Truth and Reconciliation Commission will become a more sufficient way to deal with these past gross human rights violations issues.

2. The verdict ever was unsatisfactory

The existence of restorative justice derived from the struggle in strengthening the victims' rights in criminal justice. It is worth noting that the restorative justice program is based on the basic assumption that the response to crime must be as much as possible to repair the losses suffered by the victim. The perpetrator must be encouraged to understand that his actions are unacceptable and have real impacts and consequences for victims and society, perpetrators can and should accept accountability for their actions, and victims should have the opportunity to express their needs and to participate in determining the best way perpetrators can meet compensation and society is responsible for contributing to the process.[102]

Regarding the procedural law that applies to cases of gross human rights violations, Article 10 stipulates that if Law No. 26 of 2000 does not provide

[102] United Nations Office on Drugs and Crime, *Handbook of restorative justice programmes*, Second Edition, Criminal Justice Handbook Series, Vienna 2020, p. 56

otherwise, then the procedural law for gross human rights violations is carried out based on the provisions of the criminal procedural law. Thus, investigations, prosecutions, examinations at court hearings, legal remedies, implementation of court decisions and implementation of decisions in cases of gross human rights violations, use the instruments of UU 26/2000 and or the Code Criminal Procedure Code (KUHAP). In practice, human rights violations are resolved by the Human Rights Court as a special court (differentiation/specialization). The specialty of the Human Rights Court lies in its duties and authority to examine and decide cases of gross human rights violations. Article 1 paragraph 3 of Law Number 26 of 2000 concerning the Human Rights Court is a special court for gross human rights violations. The restorative justice approach in resolving cases of human rights violations is referred to as a non-trial mechanism by uncovering the truth and apologizing to the perpetrators, as well as repairing the victims.[103]

It started with the Tanjung Priok Tragedy which became a case that attracted the attention of the Indonesian people at that time. Several alleged perpetrators at that time made personal agreements with the victim's family to forgive each other according to Islamic tradition and law led by Muslim scholars and the initiator of the agreement. After the peace process, the resolution of the Tanjung Priok tragedy was still agreed upon by the People's Representative Council (“DPR”) to ensnare

[103] Institute for Criminal Justice Reform, *Loc. Cit*., p. 359.

the perpetrators in a human rights court session. So, the DPR also proposed the government form a human rights court and then the case was tried for the first time at the ad hoc human rights court from 8 September 2003 to 22 August 2004 in Jakarta. However, in the process, the trial drew a lot of criticism because of the weak arguments and strength of the indictment, the weak evidentiary process, and the judge's contradictory decisions.[104] ultimately, the ad hoc Human Rights Court for the Tanjung Priok tragedy failed. Failure in the judicial process to resolve gross violations of human rights also paved the way for other models of case settlement, namely through non-judicial procedures with the establishment of the Truth and Reconciliation Commission ("KKR") which focuses on restorative justice mechanisms.[105] The establishment of KKR was one of the implementations of Article 47 of the UU 26/2000 which stipulated that the gross violations of human rights cases that occurred before the enactment of the law, do not rule out the possibility of a settlement being carried out by KKR and KKR is established by Law.[106]

In addition, the settlement of past gross human rights violations in Indonesia through the Truth and Reconciliation Commission as an instrument of restorative

[104] Abdul Syatar, "Restorative Justice dalam Upaya Penyelesaian Kejahatan HAM dalam Perspektif Hukum Islam", Jurnal Ilmiah Mahasiswa Perbandingan Mazhab, Vo. 1 No. 1 Januari 2020, p. 24-26.

[105] Junaedi, "Human Rights Court and Truth Reconciliation Commission for the Settlement of Human Rights in Indonesia", Indonesian Comparative Law Review, Vol. 1 No. 1, December 2018, p. 30

[106] Article 46 verse (1) and (2) of UU 26/2000

justice is experiencing obstacles and challenges that are not easy. This can be seen from the government and DPR's lack of seriousness in finalizing and enforcing the legal basis for forming a KKR, considering that Law Number 27 of 2004 concerning the Truth and Reconciliation Commission had been canceled in its entirety by the Constitutional Court based on Decision Number 6/PUUIV/2006.[107] The Constitutional Court's decision was based on a judicial review submitted by the Truth and Justice Advocacy Team on several articles in the KKR Law (Article 1 point 9, Article 27 and Article 44) which contradicted the 1945 Constitution. However, the Constitutional Court in its decision considered material certainty The KKR Laws are contradictory and there is no legal certainty, so it is impossible to uncover the truth and carry out reconciliation. This means that it has been 10 years since the KKR Law was invalidated or canceled by the Constitutional Court, but there has been no significant development in the current settlement of human rights violations. The reality is that the KKR Bill was only included in the list of national legislation programs (Prolegnas) for 2007-2010, 2010-2014 and 2015-2019 without any discussion at all.[108]

The challenges in the history of law enforcement of gross human rights violations in Indonesia have made cases of gross human rights violations never end. However, until now, the use of restorative justice mechanisms has still been being

[107] Junaedi, *Op. cit.,* p. 31

[108] *Ibid.*

pursued. The mechanism of restorative justice focuses on restoring the rights of victims and their families. According to the United Nations ("the UN"),[109] The restorative justice approach is the most recent shift from the mechanism and model of the current criminal justice system. The UN, considers that a restorative justice approach is can be used in a rational criminal justice system based on the basic principles mentioned above. The restorative justice approach is a paradigm that can be used as a frame for a strategy for handling criminal cases that aim to address dissatisfaction with the current functioning of the criminal justice system.

The Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power explains that victims must be treated properly and their dignity respected. Victims have the right to access justice mechanisms and receive immediate compensation provided by the country's rule of law. Victims must be notified of their rights to obtain the right to compensation to guarantee an improvement in the treatment of these victims, the first step that the state needs to take is to establish a high-level working group represented by relevant institutions,[110] for example the Ministry of Law and Human Rights, the Ministry of Home Affairs, the Ministry of Social Affairs, the Ministry of Health, the Police, the Attorney General's Office and the Supreme Court. as well as the DPR and Regional Government, as well as involving academics, physical and mental health

[109] *Handbook of restorative justice programmes, Loc. cit.,* p. 64

[110] IJRS, *Loc. cit.,* p. 278

professionals, civil society organizations, religious organizations, can also involve the private/business sector.

Therefore, the restorative justice mechanism could be applicative to the settlement of Indonesia's gross violation of human rights case, here are several points that will explain the reason behind Indonesia's appropriate position to adopt the restorative justice mechanism to the settlement of gross violations of human rights in the past, which are:

i. As a country that governed various policies to strengthen the rights of victims in criminal acts, it would be a positive point to hold public awareness about the importance of securing the victims. The government can be held accountable for victims' policies by appointing high-level officials as spokespersons regarding victims' issues.

ii. Indonesia can continue or at its very best effort to reinforce the commitment of the government to solve the gross violation of human rights in the past, i.e. by assigning each of the cabinets to include the settlement of gross violation of human rights in the past national urgent agenda.

In this case Indonesia is categorized as a country that already has various policies related to strengthening the rights of victims of criminal acts, so the state needs to strengthen administrative structures and other organizations that deal with victims to ensure the strengthening of victims' rights is institutionalized in these

institutions, and also while ensuring awareness public about the importance of victims' rights. The government can be held accountable for victims' policies, by appointing high-level officials as spokespersons regarding victims' issues.

B. The Opportunities and Challenges in the Application of Restorative Justice for the Past Gross Human Rights Violations Cases in Indonesia

1. Challenges in the Application of Restorative Justice

The challenges to the goal of the settlement remained to exist, including:

a. Concrete steps from the Indonesian government to inform the public about the mechanism used by PPHAM in resolving cases of past human rights violations;

In the context of legislation and agreements between law enforcers in Indonesia, there have been many regulations that use the term restorative justice, including[111]:

i. Article 1 point 3 Regulation of the State Police of the Republic of Indonesia Number 8 of 2021 concerning Handling Crimes Based on Restorative Justice.

ii. The decision of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia No.

[111] IJRS, *Loc. cit., p. 347*

1691/DJU/SK/PS.00/12/2020 concerning Enforcement of Guidelines for Implementing Restorative Justice

iii. Decision of the Director General of the Supreme Court of the Republic of Indonesia General Court No. 1691/DJU/SK/PS.00/12/2020 concerning Enforcement of Guidelines for Implementing Restorative Justice

iv. Article 1 point 27 Police Chief Regulation No. 6 of 2019 concerning Investigation of Criminal Acts, ratified on 4 October 2019

v. Article 1 point 6 of Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, ratified on 30 July 2012

vi. Article 1 point 2 Memorandum of Understanding with the Chief Justice of the Supreme Court, the Minister of Law and Human Rights, the Attorney General, and the Head of the National Police regarding the Implementation of Adjustments to the Limits for Misdemeanor Crimes and the Number of Fines, Quick Examination Procedures, and Implementation of Restorative Justice.

The number of regulations were established to show that Indonesia has a solid commitment to the rights of the victim in its penal system. The Indonesian National Human Rights Commission recognized that the dissolved settlement of various serious human rights violations affects the fulfillment of the victim's rights of the serious

human rights violations.[112] Therefore, until present the commitment to uphold and protect human rights remains aspired, not only by regulations but also in practice.

Of the 15 incidents of gross human rights violations that komnas HAM has investigated, only three cases were submitted and decided by the court, namely, the East Timor Incident, the Tanjung Priok Incident and the Abepura Incident. Most recently, the Attorney General's Office formed an Investigation Team for Alleged Serious Human Rights Violations in Panai, Papua in 2014. The formation was based on the Attorney General's Decree Number 267 of 2021 dated December 3, 2021. Meanwhile, KKR was only established in Aceh but with different legal standing.

With the facts that every year, the news about Indonesia's past human rights violations always comes to upbringing like an iceberg but never been solved.

b. The willingness of victims, victims' families, and parties affected by past human rights violations to resolve cases through restorative justice

[112] "Komnas HAM dorong Komitmen Penyelesaian Pelanggaran HAM Berat", https://www.komnasham.go.id/index.php/news/2022/5/19/2130/komnas-ham-dorong-komitmen-penyelesaian-pelanggaran-ham-berat.html , Accessed on 30 February 2023

The first purported advantage of restorative justice for victims is that these programs will provide them a better chance of receiving restitution and/or compensation. This right could take the form of monetary compensation for the victim, return or repair any of the victim's property or the offender providing direct services directly to the victim and their families.[113] The government must look comprehensively the rights of the victims that will be given as well as concrete steps to reveal the truth of the tragedy. Many victims and their families were subjected to fear, intimidation, and violence during the Suharto era or any regime that has committed human rights violations. This era creates a climate of fear that deterred them from seeking justice or speaking out about the abuses they endured. In addition, victims' wishes face barriers in accessing justice, such as lack of legal protection and protection from possible retalitation.

c. The challenge in impunity

Impunity is that a person who has committed a human rights violation is legally exempted from prosecution or punishment, or damages. It usually results from a government's refusal or failure to take or enforce legal action against the perpetrator. Many perpetrators of gross human

[113] Sam Garkawe, "Restorative Justice from the Perspective of Crime Victims", Queensland University of Technology Journal, 1999, p.46

rights violations in Indonesia have not been prosecuted and still enjoy immunity. This creates a climate of impunity that can hamper law enforcement and justice efforts. It refers to individuals or entities responsible for committing serious human rights abuses are not held accountable or brought up to justice for their action. In several cases, restorative justice mechanism is considered as disregard for the appropriate punishment of the offender for gross human rigts violations. This can lead to opposition in society and among victims who want harsher punishments.[114]

To address the challenge of impunity, restorative justice approaches may need to consider other elements such as the implementation of legal system reforms and the establishement of specialized mechanisms to deal with gross human rights cases.

2. Opportunities on the Application of Restorative Justice

The settlement of gross violations of human rights that happened in Indonesia in the past must have a clear resolvement and ensure that all the victims and affected party's right can be fulfilled. Restorative justice mechanisms indeed opened the fresh

[114] Bianca Schmolze, "Justice heals: the impact of impunity and the fight against it on the recovery of severe human rights violations' survivoors", Torture Volume 18, Number 1, 2008, p. 43

air in the settlement of gross violations of human rights in the past. Some of the opportunities are as follows:

1. The Government of Indonesia has committed to promoting a restorative justice movement that focuses on recovering victims and families of victims of gross human rights violations by establishing a PPHAM Team according to the mandate of Presidential Decree Number 17 of 2022;

2. Through KOMNAS HAM, Standard Norms and Regulations have been made Number 9 regarding the Rights of Victims of Grave Human Rights Violations, which shows this country's active and concrete efforts in fulfilling the rights of victims of past gross human rights violations;

3. The resolution of gross human rights violations in the past has always been encouraged by activists and the media both verbally and practically. Some of them are through the active role of the Commission for Disappearances and Acts of Violence which has issued a book Advocacy Materials on Past Serious Human Rights Violations;

4. After the deadlock in resolving cases of gross human rights violations in the past, the use of a restorative justice mechanism is one way to restore victims' rights and reveal the truth of the case, bearing in mind that the concept of restorative justice through reconciliation and restoration of victims' rights has

been implemented in several other countries, including south Korea. South Korea's experience can be a reference and motivation for Indonesia.

In the settlement of gross human rights, normatively, the mechanism for resolving gross human rights violations in the past can only be carried out through two mechanisms: an ad hoc human rights court and the formation of a KKR. Historically, the judicial could have worked better and got stuck. The resolution of human rights violations through the Human Rights Court is too much influenced by the criminal case settlement model, so it tends to be criminal-oriented rather than victim-oriented.[115] Apart from that, the ineffectiveness of resolving cases of past gross human rights violations through the Ad Hoc Human Rights Court is also influenced by a very political mechanism, namely having to seek approval from the DPR and the President. In fact, the perpetrators of human rights violations may be political elites who are being revoked. The absolute competence of the Human Rights Court which is only limited to gross human rights violations, makes it impossible to resolve cases of human rights violations outside the definition of gross human rights violations in the Human Rights Court. The formation of the KKR was also considered that way because of its failure. Then, settlement through restorative justice that focuses on reconciliation or recovery

[115] Zainal Abidin Pakpahan, "Mekanisme Penyelesaian Pelanggaran HAM di Indonesia berdasarkan Undang-Undang No. 26 tahun 2000 tentang Pengadilan HAM", Jurnal Ilmiah Advokasi, Vol. 05 No, 01, 2017, p. 117

of victims is also the most relevant opportunity to find a bright spot in resolving serious human rights cases in Indonesia.

According to Bronkhorst,[116] has four minimum requirements for a reconciliation effort. It was first, upholding the truth. It must be presented according to accepted norms, and with the integrity necessary for "transparency". Second, reconciliation must contribute to strengthening the rule of law, in ways that are following international law and social justice. Third, reconciliation must be democratic, through a verifiable process. Fourth, victims are given the right to obtain compensation and recovery, at least morally, and materially if possible. The reconciliation process can take many forms with many variants of the process, but it still follows the main character of the reconciliation itself.

For example,[117] South Korea is one of the countries that established a Truth and Reconciliation Commission to resolve past gross human rights violations. During its journey, South Korea recorded several times on establishing the Truth and Reconciliation Commission until its finally released the Framework Act for Truth and Reconciliation based on the Law of the Framework Act Clearing Past Incidents for Truth and Reconciliation in 2005 ("TRCK"). In the Framework Act for Truth and

[116] Syarif Nurhidayat, "Peluang Rekonsiliasi Hak Asasi Manusia Masa Lalui melalui Mekaisme Kebijakan Politik Pemerintah Daerah", Jurnal Penelitian Universitas Kuningan, Vol. 12 Nomor 1, 2021, p. 61

[117] Anggarani Utami Dewi, "Truth and Reconciliation Commission in Non-transitional Era: Implementation in South Korea and Canada", Jurnal HAM, Vol. 13 No. 3, 2020, p. 419

Reconciliation, TRCK was given the mandate to investigate events related to the Japanese occupation in 1910, the mass killings that occurred from August 15, 1945 to the 1952 Korean War, deaths, violence, disappearances, terror, and various human rights violations including the sham trials that occurred from August 15, 1945 until the end of the authoritarian regime, other events that were considered important events by TRCK, as well as cases that were not sufficiently investigated by The Presidential Truth Commission on Suspicious Deaths due to lack of investigation time at that time. TRCK investigates past incidents of gross human rights violations over a long period of events, namely from 1910 to 1993.

For staff, commissioners, witnesses, suspected perpetrators or those who cooperate with TRCK guaranteed protection while TRCK is in operation. Among them, in the Framework Act for Truth and Reconciliation, TRCK was given the mandate to investigate events related to the Japanese occupation in 1910, mass killings that occurred from August 15, 1945 to the 1952 Korean War, deaths, violence, disappearances, terror, and various human rights violations. Including among others, the sham trials that took place from 15 August 1945 until the end of the authoritarian regime, other incidents considered significant by TRCK, as well as cases that were not sufficiently investigated by The Presidential Truth Commission on Suspicious Deaths

due to a lack of investigation time at the time. TRCK also regulates privacy policies for individuals and certain documents against damage. [118]

The first stage of reconciliation carried out by TRCK was an official apology from the state for past gross human rights violations. In uncovering the truth, TRCK will investigation at the request of the victim and the victim's family or referred to as based on the Petition. TRCK will screen the petition containing the name.

The use of the concept and mechanism of restorative justice is a win-win solution that will reconcile the state's desire for accountability with the victim's wishes. Readopting the values of reconciliation is expected to create a mechanism for human rights violations that can provide satisfaction for the victim and be a cure for the suffering that the victim has been experiencing so far. The values contained in restorative justice are expected to be able to rebuild commitment to realize the truth of past gross human rights violations and heal affected victims.

[118] Dong Choon Kim, "Korea's Truth and Reconciliation Commission: An Overview and Assessment, Buffalo Human Rights Law Review, Vol. 19, 2013, p. 101

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

A. Restorative justice mechanism is suitable for solving Indonesia's past gross human rights violations

To settle the dispute, victims and offenders of human rights violations need community and governmental cooperation to help them. From the analysis above, here are some arguments in supporting restorative justice to be applied in the Indonesian legal system as a settlement for past gross human rights violations:

1. The case has been going on for a long time, making it difficult to gather the victims and witnesses. The gross violations of human rights cases have appeared for more than 20 (twenty) years. The expectation from the victims, victim's family, society, and the perpetrator or witnesses involved to solve the matter with the general justice system is lacking. They just want the state to take responsibility for solving the case, finding the perpetrator and compensation for what they have lost for several years, materially and mentally. Therefore, the government and relevant state institution should prepare a scheme of restorative justice to solve these cases comprehensively and solyably.
2. The verdict was unsatisfactory to the victims, victim's family, and society. Most impacted parties (victims), the offenders, and their

> "community interests" are brought back into conflict and given priority in restorative justice. Instead of just providing the offender formal or legal justice while the victim receives no justice, restorative justice strongly emphasizes human rights and the need to acknowledge the effects of social injustice and return them in straightforward ways.[119]

Additionally, restorative justice aims to give victims a sense of control, regard for themselves, and safety. If a State's legal culture favors using restorative justice in a specific case, the system can be implemented. Indonesia's history in starting restorative justice mechanisms no longer starts from 0. Our country has already had experienced handling several gross human rights cases using the Truth and Reconciliation Commission, although the implementation has not been perfect. The government should continue these efforts and evaluate the shortcomings.

Indonesia's history of resolving gross human rights violations cases experienced an impasse in applying judicial and non-judicial mechanisms. Therefore, this thesis argues that implementing the concept of restorative justice in solving past gross human rights violations in Indonesia is a solution for every party involved.

B. Challenges and opportunities faced by Indonesia's government to implement the restorative justice mechanisms

[119] Roy Rovalino, "The Conception of Restorative Justice in Actualization of the Inodnesian Criminal Justice System", BIRCI Journal, p. 43

Indonesia's ability to apply restorative justice is seen in the current criminal justice system. Indonesia has taken the appropriate step to use restorative justice in cases of gross human rights violations because restorative justice is also applied in Indonesian criminal justice. Some opportunities for implementing restorative justice in Indonesia include:

a. Indonesian government has established Presidential Decree Number 17 of 2022 concerning the formation of the Team for the Non-Judicial Resolution of Past Gross Violations of Human Rights ("PPHAM")
b. KOMNAS HAM released the Standards Norms and Regulations to the Rights of Victims of Past Gross Violations of Human Rights in 2022
c. KONTRAS released a book in 2021 about the advocation of past gross human rights violations, which reminded the community that the past gross violations of human rights remained unsettled
d. The participation of the community, i.e. activists and media, in supporting the rights of the victims, victim's family, and those who were affected by the case
e. Many countries have experienced creating a commission to solve the past gross human rights violations in their country. This makes Indonesia reflect and take advantage and lessons on how those countries deal with the settlement of those cases.

The challenges that remain exist are:

a. Concrete steps from the Indonesian government to inform the public about the mechanism used by PPHAM in resolving cases of past human rights violations;
b. Lack of willingness of victims, victims' families, and parties to resolve cases through restorative justice;
c. Challenge in impunity.

RECOMMENDATIONS

Restorative justice aims to give victims a sense of control, regard for themselves, and safety. If a State's legal culture favors using restorative justice in a specific case, the system can be implemented. Indonesia's history in starting restorative justice mechanisms no longer starts from 0. Our country has already experienced handling several gross human rights cases using the Truth and Reconciliation Commission, although the implementation has not been perfect. The government should continue these efforts and evaluate the shortcomings.

Indonesia's history of resolving gross human rights violations cases has experienced an impasse in applying judicial and non-judicial mechanisms. Therefore, this thesis argues that implementing the concept of restorative justice in solving past gross human rights violations in Indonesia is a solution for every party involved.

After all, the mechanism of restorative justice must be implemented practically. Indeed, the formation of PPHAM and the implementation of the team's performance must be carried out as best as possible to uncover the truth and carry out the mandate of the Presidential Decree. But apart from that, as a legal basis and which exists to date, Law Number 39 of 1999 concerning Human Rights and Law Number 26 of 2000 concerning Human Rights Courts must be amended again to provide legal certainty to the community, especially victims of criminal cases of gross human rights violations in the past.

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