

# A Study of Restorative Justice in Indonesia: An Eclecticism of Adat Law, Islamic Criminal Law, and Modern Law

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## Summary of Dissertation

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### A Study of Restorative Justice in Indonesia: An Eclecticism of Adat Law, Islamic Criminal Law, and Modern Law

#### インドネシアにおける修復的司法の研究：慣習法、イスラム刑法および現代法の融合

##### (Short Summary in Japanese)

伝統的な刑事司法では、被害者は自分の希望を表明する権利を持っていない。その代わりに、国家が被害者の権利を代弁する。裁判官の判断は被告の利益を代表するものとみなされる。しかし修復的司法（Restorative Justice）は、このような仕組みでは救えない、国家によっては代表しつくせない被告の利益があることを指摘するとともに、犯罪の見方に対する新しいパラダイムを提供する。重要なことは、被害者が修復的司法の手続きの中で、自らの場所を与えられることである。被害者の声に十分、耳が傾けられる。

修復的司法は、刑事法における新しいコンセプトであるとみなされており、その形態は多様である。すでに、インドネシアを含む多くの国々では、犯罪対応のために修復的司法の思想が採用されている。しかし、インドネシアの人々にとっては、修復的司法は全く新しい思想ではない。なぜなら、その特徴はアダット法、地域警察プログラムに反映している地方の賢慮、そしてイスラム刑法の中に見いだせるからである。19世紀中ごろにおけるインドネシアへの近代法の導入は、アダット法とイスラム刑法の地位の低下をともなった。アダット法やイスラム刑法は周縁化し、移植されたオランダ法によって徐々に置き換えられた。

修復的司法の基本的コンセプトを基礎とする本研究は、アダット法や、イスラム刑法に埋め込まれているいくつかの価値が、修復的司法の特徴と一致するかどうかを、修復的司法に関する文献に基づいて明らかにする。この問いに答えるために、フィールド調査も行ったが、それは書かれている法がしばしば実態とは異なるからである。この研究の結果、近代法には優れた価値が含まれているものの、近代法のインドネシアへの移植と、伝統的な法の近代法への置き換えによって、様々な問題が発生したことが明らかとなった。その問題の原因は、法体系の重要な要素であるところの法文化と、インドネシアの文化との不調和にある。

近年、インドネシア国会において、少年司法体系法（JCJSA）という新しい法律が可決され、従来の少年裁判法（JCA）は廃止されることとなった。JCJSAはJCAとは異なり、修復的司法のプログラムを導入し、インドネシアの文化との調和を考慮している。本研究は、このJCJSAの実施の際に予測される二つの課題を指摘した。すなわち、法を運用する諸機関の協力関係と、調停人の役割に関する課題である。さらに本研究は、修復的司法の枠内における公共の利益と私的利益の対立が、イスラム刑法を考慮することによって緩和されることも指摘した。最後にこの論文は、インドネシアにおける修復的司法はアダット法、イスラム刑法及び現代法の融合である、という結論に到達した。

(Long Summary in English)

This dissertation focuses on restorative justice, particularly in Indonesia. As a phenomenon in the criminal law field, restorative justice has been becoming a global trend in term of handling crime. It is a paradigm of dispute settlement in an integrative way which involves all stakeholders of a particular crime in an encounter in order to deliberate and come up with the best solution in the aftermath of the crime. Stakeholders of a particular crime means the victim, the offender and, if appropriate, the community that affected by the crime. Unlike conventional criminal justice system, this dispute settlement model works in a different way. Victim's and community's voices are heard, they also along with the offender decide the best outcome of the case to put things right where the same way does not occur in conventional criminal justice system.

This dissertation aims to investigate whether restorative justice notion exists also in Indonesia particularly within *Adat* law (Indonesian indigenous law), Islamic criminal law, and community policing program. The reason that I focus on these three legal practices is that *Adat* law (customary law-like) and Islamic criminal law are two legal systems that predominantly used prior to Dutch colonization whereas the last, community policing program, is the transformation of *Adat* law in modern era. To obtain the aim, I employ secondary data as its main sources and primary data as the supporting sources. Primary data in this research were gained by conducting interviews that were chosen based on purposive sampling method. The result of the research on these three legal practices then utilized as a touchstone for implementing the Juvenile Criminal Justice Act (JCJSA), a new act for handling juvenile in Indonesia which equipped with diversion as a restorative justice program.

Since there are many variations of restorative justice programs, I also propose four categories of restorative justice forms as a guideline to understand what restorative justice is. These categories are divided based on its (1) origins; (2) initial forms; (3) timeline operation and; (4) enforcement. By categorizing the forms of restorative justice, we could understand the working mechanism of restorative justice and get twenty-four possible permutations of restorative justice programs. This categorization also would analyze and determine to which restorative justice program in certain practices belong to.

The research in this dissertation found that restorative justice appears from the dissatisfaction of the conventional criminal justice system. Albert Eglash, a psychologist who coined restorative justice term, found incompleteness within criminal justice system and proposed restorative justice idea in his paper by referring to creative restitution as its restorative justice program. The main idea is that the offender fixes all the damage that caused by a crime which committed by the offender. In practical level, the first emergence of its initial practice in Ontario Canada also was triggered by the insufficient dispute settlement means that offered by conventional criminal justice system. Incarceration that is provided by the conventional criminal justice system leaves several problems which one of which is that there is no party who pays intention to the victim and fixes the harm that occurs from a crime. The failure of criminal justice system to settle criminal dispute in a holistic way obviously has triggered the emergence of restorative justice and subsequently spread around the world.

In respect to Indonesia, the dissertation reveals that the practice of *Adat* law in Indonesia shares the same notion with restorative justice value. Apologize, forgiveness and redress can be found within *adat* law. This result is revealed from the study of *adat* law in Baduy, an indigenous tribe in Indonesia. In a typical *adat* criminal justice process, the victim party naturally would seek justice to the offender party privately and directly. If the both party failed to reach a peaceful agreement then the case will be brought to the leader of the tribe to be settled. Interestingly, the leader, representing 'the state', does not take over victim's interest as what happen in criminal justice system. The tribe leader plays a significant role as a mediator who mediates the case. In Baduy, this role is played by *jaro tangtu* whereas in Navajo, an indigenous tribe in North America is played by *naat'aanii*. Unfortunately the existence of *adat* law particularly *adat* criminal law has been marginalized by the Dutch criminal law.

Like *adat* criminal law, the dissertation also conclude that the restorative justice values also exist within Islamic criminal law particularly within *qisas/diyyat* and *ta'zir* category that had been prevailed until the Dutch came and replaced its existence with the modern law. *Qisas/diyyat* means that the type of criminal offense along with the punishment is already prescribed in the Quran and Hadith (the second legal source in Islamic law after the Quran) whereas *ta'zir* means that the criminal offense and the punishment is not prescribed yet in the Quran and Hadith or the criminal offense is already prescribed but the punishment is not prescribed yet. Therefore the determination of *ta'zir*, both for criminal offense and its

punishment, is left to the state to determine. As a Muslim-majority country, Islamic criminal law has a certain place in Indonesia. Moreover in term of restorative justice values, Islamic criminal law has a general values that believed has little resistance to be accepted regardless the ethnic and religion.

In the context of modern law, the exercise of community policing in Indonesia affirms that the tenet of restorative justice has been practiced by Police-Community Partnership Forum (FKPM) in order to achieve a better dispute settlement by diverting the case in lieu of criminal justice system process. The result of the study reveals that there were nineteen cases in Lasem sub-district that settled through FKPM instead of criminal court. In this dissertation I describe two cases of nineteen cases to convince that the same result would probably not be reached if we employ conventional criminal justice system. The two cases above are domestic violence and theft that involves a teenager. The result is that the both parties (victim and offender) reach a peaceful agreement and end up in a joint decision letter. The relationship of the two has been fixed in FKPM whereas the same result would probably not occur within criminal justice system. These three legal practices namely *adat* criminal law, Islamic criminal law, and community policing convince that restorative justice notion is neither novel nor alien for Indonesian people.

The dissertation also reveals that the three legal practices i.e., *adat* law, Islamic criminal law, and community policing give a basic foundation for implementing the JCJSA. However this does not mean that there will be no resistance in enforcing the JCJSA since the JCJSA is the first act (statutory-base) that acknowledges and utilizes restorative justice in its modern form. Prior to JCJSA, there were no acts that recognize restorative justice explicitly as its dispute resolution method. Therefore the lack of experience would probably become an obstacle and, in the same time, a challenge since in the Juvenile Court Act (JCA) that precedes JCJSA does not have diversion as its restorative justice program. From the law enforcement of JCA, I predict several potential problems that appear to be emerge within the law enforcement of JCJSA. The potential obstacle and challenge on implementing restorative justice lies on the mediator and co-operation of law enforcement agencies.

By learning from other country, particularly New Zealand, that already utilizes restorative justice earlier than Indonesia and the three legal practices, this study reveals that unwell-trained mediator and synchronization of law enforcement agencies would become an obstacle

and challenge for implementing JCJSA. In this dissertation also I recommend that the police and prosecutor should not be a primary mediator within investigation and prosecution stage. This is because the nature of the two elements is not designed to become an impartial party.

Another problem that I discuss in this dissertation is that the possibility of the backlash from the community to demand a justice in the sense of public interest within restorative justice. This prediction can be understood since restorative justice takes back the victim's right from the state to return to the victim. This notion is definitely new in light of criminal law field where the public interest now becomes the victim interest. Introducing something new to an established society is not as easy as flipping a coin. Therefore the backlash may possibly occur. It is in this context the Islamic criminal law that I discuss takes its role. By proposing the concept of *qisas/diyyat*, public should understand that victim's right is the predominant right within *qisas/diyyat* crime. Interestingly, in Islamic criminal law, the public interest still can be accommodated in the concept of *ta'zir* crime. Because in *ta'zir*, the state through the judge, in order to gain a deterrence effect, still may hand down a verdict to punish the offender even though the victim has forgives the offender.

As the ultimate finding of this dissertation, I concluded that restorative justice especially in Indonesia is an eclecticism of Adat law, Islamic criminal law, and modern law. Modern law here refers to JCJSA as a statutory-base restorative justice program. The experience on implementing *adat* law and Islamic criminal law has given a fruitful contribution to the law enforcement of JCJSA in Indonesia that provides diversion as a restorative justice program.