The Effect of Extra Judicial Settlement in Criminal Cases Based on the Principle of *Ultimum Remedium*

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Abstract

The principle of *ultimum remedium* suggests that criminal sanctions should be used as a last resort when other legal avenues have been exhausted. The principle is not explicitly stated in the Indonesian Criminal Procedure Law and is often considered a mere slogan in practice. Recently, there has been a growing trend of resolving minor criminal cases outside the formal judicial process. Instead of imposing criminal penalties, conciliation or restorative justice methods are being used. In this context, restorative justice involves reaching an agreement that resolves conflict between the offender and victim. Although not specifically regulated by the Criminal Procedure Law, there has been a shift in how criminal law enforcement views minor cases, allowing for reconciliation or peace agreements. The introduction of restorative justice mechanisms by law enforcement agencies has made the practice of reconciliation more flexible, moving away from its initially punitive nature. Additionally, including peace within restorative justice indirectly strengthens the *ultimum remedium* principle, ensuring that criminal sanctions are truly used as a last resort in certain minor cases.

Keywords: reconciliation, restorative justice, *ultimum remedium*.

A. Introduction

The progression of legal principles is a recurring phenomenon across all nations, adapting and evolving in parallel with the dynamic shifts in society. These legal advancements transcend the scope of civil law, extending into the domain of public law, which encompasses criminal law. A distinguishing feature that differentiates criminal law from other legal domains, such as public and private law, is its utilization of punitive measures or penalties. These actions are formulated with dual objectives[1] to act as deterrents against future criminal behavior and to administer punitive consequences to those found guilty. Sanctions encompass a spectrum of options,

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[1] J. M. Van Bemmelen, *Hukum Pidana I: Hukum Pidana Materiel Bagian Umum Cetakan Kedua* (Bandung: Bina Cipta, 1987), 13.

ranging from the death penalty and imprisonment to fines and various penalties. In the context of the processes and resolutions governing criminal cases, as delineated in the Criminal Procedure Code, the criminal justice system is exclusively dedicated to addressing and adjudicating criminal offenses [2] Nonetheless, contemporary advancements in the execution of criminal law have ushered in an alternative paradigm surpassing conventional methodologies and punitive measures. This paradigm shift entails the incorporation of reconciliation mechanisms, exemplified by penal mediation and restorative justice, into the criminal justice system.

The core principle of mediation, whether within the realm of penal mediation or restorative justice, places a strong emphasis on reconciliation—a trait typically linked with civil law. It also champions the idea of conflict resolution achieved through mutual consensus and the reinstatement of harmony among all involved parties. As defined by the Great Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia*– KBBI), peace denotes the termination of hostilities or conflicts, symbolizing a return to friendly relations devoid of animosity.[3] According to some experts, peace is perceived as a form of penal mediation or negotiation occurring between the victim and the offender. Barda Nawawi Arief [4] has noted that the practice of penal mediation often goes by various names, such as "mediation in criminal cases" or "mediation in penal matters". This concept is termed *strafbemiddeling* in Dutch, *Der AuBergerichtliche Tatausgleich* (abbreviated ATA) in German, and *de mediation penale* in French. Given that penal mediation typically involves facilitating a meeting between the offender and the victim, it is commonly referred to as Victim-Offender Mediation (VOM) or *Tater-Opfer-Ausgleich* (TOA).

Additionally, the concept of reconciliation, fundamentally representing an agreement to harmonize relations in civil law is synonymous with the idea of peace in this context. The Indonesian Civil Code outlines the regulation of peace in Articles 1851 to 1864. Article 1851 defines peace as an agreement in which both parties mutually decide to relinquish, commit, or retain property, settle a contingent matter, or prevent the emergence of a dispute. It is essential for this agreement to be documented in writing to be considered valid. Subekti[5] further elaborates on the concept of peace characterizing it as a formal agreement. Peace agreements lack validity and enforceability unless they adhere to specific formalities, notably in the

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2 Law Number 8 of 1981 on Criminal Code of Law.

3 Kamus Besar Bahasa Indonesia, "Damai," last modified on 2023, https://kbbi.web.id/damai.

4 Barda Nawawi Arief, "Mediasi Pidana (*Penal Mediation*) Dalam Penyelesaian Sengketa atau Masalah Perbankan Beraspek Pidana di Luar Pengadilan," *Jurnal Law Reform* 2, no. 1 (2006): 1-13, https://doi.org/10.14710/lr.v2i1.12221.

5 Subekti, *Aneka Perjanjian Cetakan Revisi 2014* (Bandung: Penerbit Alumni), 195 - 196.

form of written documentation. The establishment of peace serves to resolve disputes, effectively eliminating any remaining issues between the involved parties.

The use of the reconciliation process has seen a notable rise in the resolution of criminal cases in Indonesia. It extends beyond cases involving child offenders, being applied within the juvenile justice system through diversion mechanisms. Moreover, this approach has been employed to resolve numerous cases concerning adult offenders in specific minor criminal instances. For example, several criminal offenses that transpired in 2022 were amicably resolved at the prosecutor or police level as demonstrated in the following table.

Table 1. Table of Criminal Cases Resolved with Reconciliation at the Police and Attorney Level

Suspect	Victim	Regulation
Julian Andreas Katiandagho alias Andi (Sangihe Islands)	Sangihe Islands Regent (Jabes Ezar Gaghana)	Article 45 Paragraph (3) of Law Number 19 of 2016 on Amendments to Law Number 11 of 2008 on ITE
Adi Akbar (West Kotawaringin)	No Name	Article 480 (1) of the Criminal Code on Collection by the West Kotawaringin District Attorney
Endang (the South Barito District Attorney)	No Name	Article 362 of the Criminal Code on Theft
M Saadi Manik alias M Rusli (Aceh Singkil District Attorney)	His Wife	Article 351 Paragraph (1) of the Criminal Code on Abuse
40 farmers (Mukomuko Bengkulu District)	PT Daria Dharma Pratama	Article 362 of the Criminal Code on Theft, stealing palm oil FFB (Fresh Fruit Bunches)
Andrew Girad Montung (the North Minahasa District Attorney)	No Name	Article 351 Paragraph (1) of the Criminal Code on Abuse
Yanianto bin Toyo (the Tulung Agung Attorney General's Office)	No Name	Article 310 paragraph (2) of Law Number 22 of 2009 on Road Traffic and Transportation
Wahab Bin Rullah (the Tarakan Kejari)	No Name	Article 351 Paragraph (1) of the Criminal Code

Source: Processed from Detik News.[6]

The cases in the table above can be explained as follows:

a. Julian Andreas Katiandagho (Andi) was suspected of violating Article 45 Paragraph (3) of Law Number 19 of 2016 on Amendments to Law Number 11 of 2008 regarding Information and Electronic Transactions (ITE). In this case, Andi insulted or defamed the Sangihe Islands Regent, Jabes Ezar Gaghana, on Friday, September 17, 2021, through a Facebook post.
b. Adi Akbar was suspected of violating Article 480 (1) of the Criminal Code on Embezzlement. Reconciliation took place on Thursday, February 14, 2022, at the West Kotawaringin District Attorney's Office. In this case, the victim forgave the actions of the suspect, and reconciliation was facilitated by the investigator.
c. Endang was suspected of violating Article 362 of the Criminal Code regarding Theft. This case was reconciled between the suspect and the victim on February 14, 2022, at the South Barito District Prosecutor's Office. During the resolution, the suspect returned the stolen cell phone to the victim and apologized.
d. M. Saadi Manik (M. Rusli) from the Aceh Singkil District Attorney's Office was suspected of violating Article 351 Paragraph (1) of the Criminal Code regarding Persecution. Reconciliation was conducted on Thursday, February 10, 2022, at the Makassar District Attorney's Office. The suspect apologized to the victim and promised not to repeat the actions. The victim forgave the suspect's actions and agreed to reconcile unconditionally due to their family relationship, as the suspect was the victim's son-in-law.
e. Andrew Girad Montung, a suspect in the North Minahasa District Attorney was accused of violating Article 351 Paragraph (1) of the Criminal Code on abuse. Peace efforts were made on Tuesday, February 8, 2022, at the North Minahasa District Attorney's Office. During the process, the suspect expressed remorse for the actions and promised not to repeat the act. The victim forgave the suspect and decided not to proceed with trial. The suspect also provided compensation costs to the victim.
f. Yanianto bin Toyo, a suspect in the Tulung Agung Attorney General's Office was accused of violating Article 310 Paragraph (2) of Law Number 22 of 2009 on Road Traffic and Transportation (LLAJ). On February 8, 2022, a peace agreement was reached between the suspect and the victim. In this case, the suspect apologized to the victim and the apology was accepted.

[6] Yulisa Meditiara, "Setop 1.334 Kasus Dengan Restorative Justice, Jaksa Agung Beberkan Kriterianya," accessed on July 16, 2022, https://news.detik.com/berita/d-6182703/setop-1334-kasus-dengan-restorative-justice-jaksa-agung-beberkan-kriterianya.

g. Wahab Bin Rullah, from Tarakan Kejari was suspected of violating Article 351 Paragraph (1) of the Criminal Code on Persecution. A peace agreement was reached between the suspect and the victim on February 14, 2022, at the Tarakan State Attorney's Office. In this case, the suspect, who was the victim's wife, apologized and was graciously forgiven, resulting in an unconditional restoration of peace.
h. In May 2022, in the Mukomuko Police area, the crime of stealing palm oil FFB (Fresh Fruit Bunches) owned by PT Daria Dharma Pratama (DDP) was committed by 40 farmers in Mukomuko Bengkulu District. A peace agreement was reached and both parties agreed to settle the case through restorative justice.

According to police data, since the issuance of the Indonesian Police Regulation Number 8 of 2021 until 2022, a total of 15.811 cases had been handled through restorative justice mechanism. This mechanism was mostly implemented by East Java, West Java, and North Sumatra Regional Police in resolving cases. On the other hand, the Regional Police of West Kalimantan, East Kalimantan, and Bengkulu were the lowest in implementing restorative justice.[7] Based on the data available at the Attorney General's Office, out of a total of 1.454 general criminal cases submitted for resolution through restorative justice, 1.334 cases had their prosecution discontinued by 2022.[8] The reconciliation or restoration of peace in these criminal cases signified a development, an acculturation of case settlement process with reconciliation mechanism. These two processes exhibited different characteristics; civil case resolution was highly dependent on the willingness of the disputing parties and resolution in accordance with the criminal procedural law involving state agencies.

The process began with the police conducting investigations, the prosecutor's office carrying out prosecution, and the judge conducting trial examinations to reach a verdict. This typically followed a punitive and legalistic positivism approach. The practice of peace in the lives of Indonesian people is not a novel concept, as it has often been employed to resolve disputes or conflicts. Peace is deeply rooted in the original values of Indonesian culture known as deliberation for consensus. Deliberation for consensus is an integral part of *Pancasila,* the national philosophy that is deeply ingrained and internalized in all aspects of the life of the Indonesian people and nation. Therefore, the implementation of reconciliation in recent criminal cases is not an implausible occurrence. Such reconciliation can take place in both litigation and non-litigation processes. In current criminal law, the resolution of

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[7] Ratna Puspita, "15.811 Perkara di Polisi Diselesaikan Melalui Mekanisme Keadilan Restoratif," accessed on July 6, 2022, https://www.republika.co.id/berita/relg5e428/15811-perkara-di-polisi-diselesaikan-melalui-mekanisme-keadilan-restoratif.

[8] Yulida Medistiara, "Setop 1.334 Kasus Dengan Restorative Justice, Jaksa Agung Beberkan Kriterianya."

cases in this manner is referred to as "restorative justice." In Indonesia, restorative justice is perceived as a mechanism that can contribute to a sense of justice for both victims and perpetrators. However, it is essential to further regulate the mechanism to prevent misuse, as it is not suitable for resolving all criminal cases. According to Sukardi, even the Indonesian legal system has not yet adopted the concept and method of restorative justice; therefore, substantial justice for the Indonesian people has not yet been reflected in legal enforcement in the *Pancasila* democracy system.[9]

According to Heath Thornton, restorative justice is a response to criminal behavior that focuses on the restitution of lawbreakers and the resolution of issues arising from a crime. It brings together victims, offenders, their families, and the community to facilitate the restoration. This mechanism encompasses direct mediation and conflict resolution between these parties.[10] However, from a legal regulation perspective, restorative justice has not been explicitly regulated in the current applicable Criminal Procedure Law.

The legislation generally recognizes both litigation and non-litigation settlement mechanisms. However, in criminal cases, non-litigation settlements are rarely explicitly regulated. According to Emmanuel Adi, non-litigation in criminal cases recognizes the concept of restorative justice for the public interest, which differs from the private sphere in civil law.[11] The concept of restorative justice aims to rehabilitate and reintegrate the offender into society. Although penal mediation is a form of restorative justice in criminal law, it lacks a strong legal basis. On an international level, UN resolution 1999/26 of July 28, 1999, titled "Development and Implementation of Mediation and Restorative Justice Measures in Criminal Justice," sets specific standards and stipulations on restorative justice, including the process, parties, outcomes, and facilitators. The resolution aims to assist United Nations member states in adopting and standardizing restorative justice within their criminal justice systems. It also specifically deals with minor offenses by utilizing mediation, seeking civil reparations or compensation, and considering community service as an alternative to imprisonment.[12]

The terms mediation and peace primarily exist within the realm of civil law, which possesses characteristics different from those of criminal law. According to Duignan,

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[9] Sukardi, Sukardi, "Restorative Justice Principles in Law Enforcement and Democracy in Indonesia," *Journal of Indonesia Legal Studies* 7, no. 1 (2022): 155-190, http://doi.ord/10.15294/jils.v7i1.53057.

[10] Debra Heath Thornton, "Restorative Justice," accessed on August 26, 2018, https://www.britannica.com/topic/restorative-justice.

[11] Emmanuel Adi, "Penal Mediation as the Concept of Restorative Justice in the Draft Criminal Procedure Code," *Lex Scientia Law Review* 5, no. 1 (2021): 139-164, https://doi.org/10.15294/lesrev.v5i1.46704.

[12] Mark, S. Umbreit and Marilyn P. Armour, *Restorative Justice Dialogue: An Essential Guide for Research and Practice* (New York: Springer Publishing Company, 2010), 281.

criminal and civil law in the United States differ in terms of how cases are initiated (who may bring charges or file suits), decided upon (by a judge or a jury), the types of penalty imposed, standards of proof required, and the legal protections available to defendants.[13] As mentioned, criminal law has a distinctive character in that it involves the imposition of punishments on offenders. J. Norton described the traditional approach to criminal law, where crime was viewed as a morally wrong act. The purpose of criminal sanctions is to provide retribution for the harm caused and address the offender's moral guilt. Therefore, punishment should be imposed in accordance with the defendant's guilt.[14] Over time, a more rationalistic and pragmatic modern view has emerged, advocated by experts such as Cesare Beccaria in Italy, Montesquieu and Voltaire in France, Jeremy Bentham in England, and P.J.A. von Feuerbach in Germany. These experts argued that the primary goal of criminal law was crime prevention. With the development of social sciences, new concepts such as community protection and offender reform have emerged. These goals can be observed in the 1998 German penal code, which advises courts to consider "the expected impact of the punishment on an offender's future life in society." In the United States, the Model Penal Code proposed by the American Law Institute in 1962 states that the purpose of criminal law should be "to provide fair warning of the nature of the conduct constituting the offense" and "to promote the correction and rehabilitation of offenders." Subsequently, there has been a renewed interest in the concept of general deterrence, including the prevention of potential offenders and the stabilization of social norms.[15]

Restorative justice mechanisms have been applied in several criminal case resolutions in Indonesia by law enforcement officials when victims and perpetrators agree, highlighting the importance of restoring the original state and balancing the protection and interests of all parties. Criminal law is not solely focused on sanctions as a form of retaliation but also aims to restore the situation by serving as a last resort. Although *ultimum remedium* is widely recognized in criminal law, it is rarely discussed in practice, leading to doubts and differing views. This principle facilitates the government to implement alternative policies beyond solely imposing criminal sanctions.[16]

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13 B. Duignan, "What is the Difference Between Criminal Law and Civil Law?" accessed on June 8, 2016, https://www.britannica.com/story/what-is-the-difference-between-criminal-law-and-civil-law.

14 J. Norton and Hans Heinrich Jescheck, "Criminal Law," accessed on October 6, 2022, https://www.britannica.com/topic/criminal-law.

15 J. Norton and Hans-Heinrich Jescheck, "Criminal Law."

16 Novita Sari, "Penerapan Asas Ultimum Remedium Dalam Penegakan Hukum Tindak Pidana Penyalahgunaan Narkotika," *Jurnal Penelitian Hukum De Jure* 17, no. 3 (2017): 13, http://dx.doi.org/10.30641/dejure.2017.V17.351-363.

According to Sudarto, criminal law serves as a subsidiary means of social control and should only be enacted when other efforts prove inadequate. [17] Harsh sanctions justify why criminal law should be considered the *ultimum remedium,* or last resort, when other efforts from different branches of law fail or are deemed ineffective. According to Topo Santoso, *ultimum remedium* underlies morals and law, serving as a guiding principle in all legislative processes. [18] The benchmark of the principle lies in how criminalization or negotiation is rejected rather than in the enforcement of law. As a result, once laws and articles are established, the police or prosecutors can no longer rely on the principle.

Given the growing use of conciliation in criminal case resolutions, *ultimum remedium* is progressively being integrated into the realm of criminal law enforcement. However, its application remains confined to cases characterized as mild or moderate. Hence, it is imperative to investigate how this implementation corresponds to the essence of *ultimum remedium* or whether it signifies an expansion of its initial scope. Furthermore, it is vital to assess the impact of conciliation on the continued relevance of this principle in criminal law.

B. The Practices and Form of Peace in Criminal Law Enforcement Mechanism

1. The Requirements for Peace According to Indonesian Civil Code

Peace is a process aimed at achieving peacefulness and agreement between conflicting parties. The Civil Code regulates reconciliation in Article 1851 to Article 1864. In Article 1851 of the Civil Code, reconciliation is an agreement where both parties, through the act of handing over, promising, or withholding an item, end an ongoing case or prevent it from arising. For a reconciliation agreement to be valid, as stated in Article 1851 of the Civil Code, it should be expressed in writing. Subekti explained that an agreement could be considered formal or invalid (and not binding) unless certain formalities in the form of writing were observed. [19] Individuals willing to enter into reconciliation should be able to relinquish their rights to the matters addressed in the peace agreement. For instance, guardians cannot enter into a reconciliation agreement unless they act in accordance with the provisions of the 15th and 17th Chapters of Book I BW (*Burgerlijk Wetboek*).[20]

The content of a reconciliation or peace mechanism should encompass matters that can be conducted or fall within the authority of the involved parties. For instance, when the agreement relates to the ownership of an item, only the owner

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[17] Novita Sari, "Penerapan Asas *Ultimum Remedium* Dalam Penegakan Hukum Tindak Pidana Penyalahgunaan Narkotika."

[18] Topo Santoso, "Ultimum Remedium antara Prinsip Moral dan Prinsip Hukum," (Internal Discussion *Ultimum Remedium* in Criminal Law - Faculty of Law Universitas Indonesia, Depok on September 2019).

[19] Subekti, *Aneka Perjanjian Cetakan Revisi 2014.*

[20] Subekti.

can enter into such an agreement. According to Article 1854 of the Civil Code, every reconciliation is limited to the matters contained or agreed upon. The waiver of all rights and demands in writing should pertain to the dispute prompting the reconciliation. Article 1855 of the Civil Code states that disputes can be explicitly resolved, regardless of whether the parties express their intentions in specific or general terms. Consequently, the contents of peace cannot be expanded beyond the boundaries of the resolved issues. When discussing written peace agreements, the term "peace deed" is used within the scope of civil law, which essentially refers to peace formally documented. According to Sudikno Mertokusumo, a deed is a signed letter that contains events forming the basis of a right or agreement intentionally created for evidentiary purposes. [21] Therefore, can a written and signed peace agreement as a peace deed be considered an authentic deed?

According to Article 1868 of the Civil Code, an authentic deed is a deed that fulfills the following elements: (a) the form of the deed adheres to the provisions of the law; (b) it is made by or before a public official; (c) made within the jurisdiction of the public official who issues authentic deed. According to Komar Andasasmita, an authentic deed was a document created with a backup of the law and made before a public official, including notaries, Land Titkes Registrar (*Pejabat Pembuat Akta Tanah*-PPAT), judges, bailiffs (*deurwaarder*), civil registration employees (*burgerlijke stand*), district heads, and others.[22] Regarding the formulation of the deed, the Republic of Indonesia Supreme Court Regulation Number 1 of 2016 in Article 1 Number 10 defines peace deed as follows:

> *"A deed contains the contents of the resolution and the judge's decision confirming the peace agreement. A peace agreement is referred to as a peace deed when two disputing parties reconcile and request a court to endorse resolution"*

Riko Kurnia Putra identified two types of peace certificates, namely peace certificates (*Acta van Vergelijk*) regulated under Article 130 Paragraph (2) HIR (*Herziene Indonesisch Reglement*) and peace certificates (*Acta van Dading*) regulated in civil law. *Acta van Dading* refers to a deed made without the involvement of a judge. This implied that the deed is made prior to the submission of the dispute to the court to resolve it before it becomes a formal case. *Acta van Dading* does not

[21] Sudikno Mertokusumo*, Hukum Acara Perdata di Indonesia* (Yogyakarta: Liberty, 1999), 106.

[22] Komar Andasasmita, *Notaris II Contoh Akta Otentik dan Penjelasannya* (Bandung: Ikatan Notaris Indonesia Daerah Jawa Barat, 2000), 430.

possess permanent legal force, and in the event of a conflict, it should be submitted to the court for resolution due to lack of executive power.[23]

Considering the description of a peace deed above, there are two important aspects to note in a written peace agreement. Firstly, every party involved assumes an obligation to abide by the terms of the agreement. Secondly, a peace agreement cannot be disputed or denied because of an oversight regarding the law or one of the parties experiencing harm. Article 1859 of the Civil Code stipulates that a reconciliation can be invalidated when there is an error pertaining to the individual or subject of the dispute. The agreement can be canceled when there is evidence of fraud or coercion, such as agreeing to fulfill impossible obligations or when the parties are not directly involved in the dispute, thereby lacking entitlement and authorization.

2. Regulation and Mechanism of Reconciliation in Criminal Cases Settlement

In the context of criminal law legislation in Indonesia, from a formal juridical perspective, there are no specific provisions governing the reconciliation mechanism in the process of resolving criminal cases. This can be observed in Law Number 8 of 1981 on Criminal Procedure Law. The resolution of criminal cases under the Criminal Procedure Code is based on the principle of legality, which obliges the prosecution of anyone suspected of committing a crime. Although limited, the Criminal Procedure Code does include the concept of restorative justice by providing an opportunity for the victim party to seek compensation as stipulated in Article 98 of the Criminal Procedure Code.[24]

The criminal procedural law, as the Criminal Procedure Code, does not provide opportunities for the resolution of criminal cases outside the court. Law enforcement institutions (police, prosecutors, and courts) have implemented a mechanism for resolving cases outside the judicial process, namely penal mediation or restorative justice. A skeptic, such as Chris Cunneen, doubts the success of restorative justice in practice, stating that it has not produced a significant change in the criminal justice system after several decades of experimentation. The attempt to be established as a feasible alternative has also failed.[25] However, there are still optimistic views of restorative justice as a suitable approach for restoring balance within society.

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[23] Riko Kurnia Putra, Marjo and Moch Djais, "Gugatan Wanprestasi AStas Putusan Akta Perdamaian di Pengadilan Negeri Semarang Putusan Nomor 436/Pdt.G/2014/PN Smg," *Diponegoro Law Journal* 5, no. 3 (2016): 9, https://doi.org/10.14710/dlj.2016.12340.

[24] Lies Sulistiani, *Hukum Perlindungan Saksi dan Korban Cetakan Kesatu* (Bandung: Penerbit Refika), 89.

[25] Chris Cunneen and Carolyn Hoyle, *Debating Restorative Justice* (Oxford: Bloomsbury Publishing Plc, 2010), 1-189.

Restorative justice within the ranks of the police is formulated as the resolution of criminal acts through the involvement of the perpetrator, victim, families of the perpetrator and victim, community leaders, religious leaders, traditional leaders, or other stakeholders to jointly seek a fair solution through peaceful means, emphasizing the restoration to the original state.[26] The Prosecutor's Office also formulates restorative justice as a potential means of resolving criminal cases. [27] In the court setting, guidelines for the application of restorative justice in general court proceedings describe it as a principle of law enforcement in the resolution of cases. It is an alternative approach that focuses on punishment and the process of dialogue and mediation to jointly reach a fair and balanced resolution of criminal cases between related parties.[28]

Internal regulations within law enforcement institutions, which serve as guidance alongside the Criminal Procedure Code, function as alternative rules for resolving criminal cases. There may be differences in emphasis or policy direction in these internal regulations, including the regard for peace as an important aspect of restorative justice. Legal certainty has become a relevant theme, considering the regulation and application of restorative justice in Indonesia. It encompasses not only the formal clarity of regulations but also the substantive acceptance of legal decision-making by the concerned legal community. [29]

According to the Indonesian Police Regulation Number 8 of 2021 on the Handling of Crimes Based on Restorative Justice, the Indonesian National Police needs to prioritize the resolution of crimes through restorative justice, which emphasizes restoration to the original state and a balance between protecting the interests of victims and perpetrators, rather than focusing solely on punishment. The implementation of restorative justice requires certain material, namely (a) the avoidance of public anxiety and rejection; (b) prevention of social conflict; (c) the inability to divide the nation; (d) not promoting radicalism or separatism; (e) not a repeat offender of a Criminal Act based on a Court Decision; and (f) not promoting terrorism, corruption or crime against state security and human lives. Formal requirements include the presence of peace from both parties (except for drug-related crimes), which should be proven by a signed peace agreement.

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[26] Article 1 Number 3 on the Indonesian Police Regulation Number 8 of 2021.

[27] Article 1 Number 1 on the Prosecutor's Office of the Republic of Indonesia Number 15 of 2020.

[28] Appendix of the Guidelines Decree of the Director General of the General Courts Number 1961/DJU/SK/PS.00/12/2020 on Guidelines for the Implementation of Restorative Justice in the General Courts Environment, December 22th, 2020.

[29] Paunio Elina, "Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order," *German Law Journal* 10, no. 11 (2009): 1469-1493, 10.1017/S2071832200018332.

The Attorney General's Office of the Republic of Indonesia, in Regulation Number 15 of 2020 on the Termination of Prosecution Based on Restorative Justice, emphasizes the importance of legal certainty, order, justice, and truth based on the law, religious norms, and decency, while exploring the values of humanity, law, and justice existing in society. It also states that the settlement of criminal cases should prioritize restorative justice, emphasizing restoration and a balance between the protection and interests of victims as well as perpetrators, without retaliation. Restorative justice is considered an unnecessary approach that should be integrated into the prosecution authority and the reform of the criminal justice system, implemented for the sake of justice based on the law and conscience.

The restorative justice approach was implemented in the prosecutor's office through the termination of prosecution. The public prosecutor responsibly conducted this process and submitted it in stages to the High Prosecutor's Office. According to the Attorney General of Indonesia Number 15 of 2020, the implementation termination should take into account the following conditions:

a. The interests of the victims and other legally protected interests;
b. Avoidance of negative stigma;
c. Avoidance of retaliation;
d. Community response and harmony; and
e. Decency, morals, and public order.

The following aspects should also be considered: (1) subject, object, category, and threat of crime; (2) background of the crime; (3) level of disgrace; (4) losses or consequences arising from criminal acts; (5) costs and benefits of case handling; (6) restoration of the situation to its original state; and (7) reconciliation between the victim and the suspect. The resolution process is initiated with the public prosecutors offering peace-making to the victim and the suspect. This process should be conducted without pressure, coercion, or intimidation. The public prosecutor is required to legally and appropriately summon the victim, stating the reason for the summons. Peace-making may involve the families of the victim and suspect, community leaders or representatives, and other relevant parties when necessary. Subsequently, the public prosecutor states the purpose and objective of the resolution, as well as the rights and obligations of the victim and suspect. This includes the right to reject the peace effort. According to the Prosecutor's Regulation Number 15 of 2020, the process may continue when both parties accept the peace effort. Otherwise, when rejected, the public prosecutor documents the failure of the efforts in the minutes, prepares a memorandum of opinion recommending that the case be submitted to the court, states the reasons, and submits the case file. It is important to note that the peace process is voluntary, based on deliberation leading to consensus, without pressure, coercion, or intimidation.

The public prosecutor acts as a facilitator during the resolution process and has no personal or professional interest or relationship with the case, victim, or suspect. The peace-making process is typically conducted at the Public Prosecutor's Office. However, under certain circumstances, such as security, health, or geographical constraints, it may be carried out at a government office or other agreed-upon location with the authorization of the Head of the District Prosecutor's Branch or the Head of the District Prosecutor's Office. In the event of reaching a peace agreement, the victim and the suspect are expected to write a peace agreement before the prosecutor. This can be a reconciliation with or without the fulfillment of specific obligations. The victim, the suspect, and two witnesses in the prosecutor's presence should sign the peace agreement. In case the process is accompanied by or without fulfillment of obligations, the prosecutor may prepare minutes of the agreement and a memorandum of opinion after fulfilling the obligations. Suppose the peace agreement fails or the obligations outlined are not fulfilled, the prosecutor will state in the minutes that the peace agreement was not reached, prepare a memorandum of opinion recommending the case submission to court, state the reasons, and submit the case file to the court.

The prosecution may proceed when the peace agreement fails due to disproportionate demands for obligation fulfillment, threats, or intimidation, sentiment, discriminatory treatment, or harassment based on ethnicity, religion, race, nationality, or certain groups against suspects acting in good faith. The consideration of the prosecutor also applies when the fulfillment of obligations is not carried out in accordance with the peace agreement, taking into account economic factors or other reasons accompanied by good faith from the suspect; in such cases, the considerations may include delegating the case with a brief examination procedure, mitigating circumstances in filing criminal charges; and filing criminal charges with conditions by the provisions of laws and regulations while still adhering to the Guidelines for Criminal Charges for General Crimes. In this case, it is important for law enforcement officials to remember that the resolution of criminal cases through the consistent and sincere implementation of restorative justice is expected to achieve the goals of law enforcement, namely, justice, legal certainty, and benefit to society, thereby supporting the realization of an orderly, peaceful, just, and prosperous society.[30] The peace effort can cease when there is pressure, coercion, and intimidation from the victim, suspect, or other parties. This decision is documented in the minutes, and a memorandum of opinion recommending the submission of the case to the court is prepared, stating the reasons.

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[30] Bambang Waluyo, "Relevansi Doktrin Restorative Justice Dalam Sistem Pemidanaan di Indonesia," *Hasanuddin Law Review* 1, no. 2 (2015): 225, http://dx.org/10.20956/halrev.v1i2.80.

In the court examination stage, according to the Decree of the Director General of the General Judiciary Agency Number 1691/DJU/SK/PS.00/12/2020 on the Enforcement of Guidelines for the Application of Restorative Justice, restorative justice is considered as an alternative settlement for criminal cases within the justice system. It focuses on transforming punishment-oriented governance mechanisms into a process of dialogue and mediation involving perpetrators, victims, families of perpetrators or victims, and other relevant parties. This is carried out to reach a fair and balanced agreement prioritizing the restoration of the original state and re-establishing good relations in society. The basic principle of this approach is to ensure the crime victims' recovery by providing compensation, facilitating peace, requiring perpetrators to perform social work, and reaching other agreements that promote restoration. The application of restorative justice in the courts is intended to reform the criminal justice system, which currently relies on incarceration and sentencing, to align with the interests of victim recovery and perpetrator accountability.

In terms of application, the restorative justice mechanism is suitable for minor criminal cases with penalties as stipulated in Articles 364, 373, 379, 384, 407, and 482 of the Criminal Code, provided that the value of the loss does not exceed Rp2.500.000 (two million five hundred thousand rupiah). The settlement of such cases through restorative justice can be initiated when peace has been established between the perpetrator, victim, their families, and community leaders with or without compensation. The judge made further efforts to reconcile by requesting the opinion of the defendant and the victim after the commencement of the trial and the reading of the indictments. In the event of a successful peace process, an agreement is made and signed by the defendant, victim, and relevant parties. This is subsequently taken into consideration for the court's decision. However, the judge may continue the trial examination process when the peace agreement fails.

The formulation of internal regulations regarding restorative justice emphasizes that law enforcement institutions within the criminal justice system can provide opportunities for perpetrators and victims to resolve peacefully conflicts arising from criminal acts. This reflects a development and even a breakthrough, as it allows for cases to be resolved not only by the state through law enforcement officials but also by the parties involved in the conflict or litigation. It highlights the understanding that violations of criminal law not only violate public law or state law but also infringe upon the subjective rights of victims. Therefore, victims are given the opportunity to participate in the resolution of their cases through peace agreements.

Based on the explanation above, the practice of peace in the resolution of criminal cases follows the substantial requirements of civil law, including a written agreement made by legally capable parties who voluntarily want or agree to seek

peace in resolving their conflicts. Therefore,[31] restorative justice actually has a strategic position, but the constraint is how restorative justice cannot run efficiently if applied inaccurately.

C. The Existence and Development of *Ultimum Remidium* Principle in Criminal Procedure

1. The Meaning of *Ultimum Remedium* as a Principle

Principles can be understood as fundamental values underlying rules or norms. Bellefroid emphasized that the principle of general law was the basic norm derived from positive law and not attributed by legal science to more specific regulations.[32] The principles represented the embodiment of positive law within a society. According to Romli Atmasasmita, law as a system governing human lives, cannot be separated from the culture, character of society, geographical environment, and the community's perspective of life.[33] In relation to this context, the principle of law serves as a fundamental value that aligns with the essence of a nation.

Van Erkema Hommes emphasized that legal principles should not be considered concrete legal norms but general principles or guidelines for applicable law. Therefore, the formulation of practical law should be oriented toward these legal principles as they serve as the foundation and direction in developing positive law.[34] Meanwhile, Van der Velden described legal principles as certain decisions used as benchmarks for assessing situations or as guidelines for behavior.[35] Scholten also agreed legal principles were inherent tendencies demanded by the moral perspective of law. Although the principles possess general characteristics and limitations as a common trait, they are not obligatory or mandatory in nature.[36]

Fundamentally, legal principles are not concrete norms but relatively underlying values that shape and inform the norms or laws themselves. Sudikno claimed they represented general and abstract fundamental thoughts, serving as the background for concrete regulations in every legal system. These principles are embodied in statutory regulations and judges' decisions, constituting positive law.[37] Satjipto Rahardjo emphasized the significance of legal principles as fundamental elements of legal regulations and were even considered the "heart" of such regulations. Although

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[31] Boyce Alvhan Clifford dan Barda Nawawi Arief, "Implementasi Ide Restorative Justice Ke Dalam Ketentuan Peraturan Perundang-Undangan Anak Di Indonesia," *Jurnal HUMANI (Hukum dan Masyarakat Madani)* 8, no. 1 (2018): 28, http://dx.doi.org/10.26623/humani.v8i1.1385.

[32] Sudikno Mertokusumo*, Penemuan Hukum Sebuah Pengantar Cetakan Kedua* (Yogyakarta: Penerbit Liberty, 2001), 5.

[33] Romli Atmasasmita, *Teori Hukum Integratif Cetakan kedua* (Yogyakarta: Genta Publishing, 2013), 94 - 103.

[34] Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar Cetakan Kedua*.

[35] Sudikno Mertokusumo.

[36] Sudikno Mertokusumo.

[37] Sudikno Mertokusumo.

legal principles were distinct from legal regulations, no law could be fully understood without underlying legal principles. Therefore, these principles encompass ethical demands assisting as a bridge between legal regulations and the moral or social ideals.[38]

Ultimum remedium, as a principle in criminal law, asserts that criminal law should only be utilized as a last resort when all other means of resolution have been exhausted. Although not explicitly stated in criminal law legislation, it is commonly recognized as a fundamental principle in the field. The presence of *ultimum remedium* as a legal standpoint is inherent and does not depend on its inclusion in specific articles or formulations. Satijpto Rahardjo stated that even though the legal principle was not explicitly articulated or directly derived from specific provisions (*verondersteld*), they were still presumed to exist in unifying the law. This intangible element was referred to as a legal principle.[39] Legal principles were integral to humans' psychological lives and encompassed fundamental wisdom regarding humans and societal perspectives.[40] In this regard, *ultimum remedium* is necessary to consider the use of other sanctions before resorting to harsh and severe criminal penalties. If other legal functions are inadequate, criminal law can be employed.[41]

Considering the above viewpoint, *ultimum remedium* should not be considered a mere decoration, pleasantries, or jargon used by legal experts since it provides moral guidance, such as the application of peace mechanisms in the resolution of certain minor crimes, in determining punishments. Examples of the crimes are theft, minor maltreatment, slander, defamation, and stolen goods, as mentioned in the introductory table. When the parties voluntarily agree and peacefully resolve conflicts stemming from the perpetrator’s actions, the law enforcement authorities have no choice but to provide support and facilitate the process. However, exceptions can be made in the cases of exceedingly cruel acts where peaceful resolution is no longer feasible, and punishment becomes necessary as a deterrent to the perpetrator. In this regard, Van der Munt has shown that the fundamental nature of criminal law as an *ultimum remedium* is open to multiple interpretations. Regardless of the effectiveness of sanctions and the imposition of suffering, administrative sanctions can still be clearly distinguished from criminal sanctions.[42]

The *ultimum remedium* principle inherently acknowledges that severe penalties prescribed by criminal law may not always constitute the most effective approach to

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[38] Satjipto Rahardjo, *Ilmu Hukum* (Bandung: PT Citra Aditya Bakti, 2014), 41 - 47.

[39] Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban* (Jakarta: Penerbit UKI Press, 2006), 123 - 131.

[40] Satjipto Rahardjo.

[41] Mas Putra Zenno Januarsyah, “Penerapan Prinsip Ultimum Remedium Dalam Tindak Pidana Korupsi,” *Jurnal Yudisial* 10, no. 3 (2017): 257 – 276, http://dx.doi.org/10.29123/jy.v10i3.266.

[42] Lidya Suryani Widayati, ”Ultimum Remedium dalam Bidang Lingkungan Hidup,” *Jurnal Hukum Ius Quia Iustum* 22, no. 1 (2015): 1- 24.

reestablishing the relationship between the wrongdoer and the victim. The pursuit of peace, on the other hand, holds the potential to yield more substantial advantages and contribute to overall enhancement, aligning with the aspirations of the community. Consequently, peace can be perceived as a tangible representation of the ethical essence ingrained within the *ultimum remedium* principle. In accordance with this perspective, Romli Atmasasmita has advocated for the foundations of criminal law to be rooted in a dynamic legal framework, notably *Pancasila*. This suggests that Indonesian criminal law should aim to foster a harmonious existence, devoid of conflicts, as its ultimate objective centers around cultivating peace through consensus.[43]

2. The *Ultimum Remedium* in Peace Implementation on Criminal Cases Settlement

Remmelink asserts that authorities often hold the belief that they can achieve their objectives by employing civil, administrative, disciplinary, or other social regulations, thereby obviating the necessity of resorting to criminal law, whether in part or entirely.[44] This concept is commonly recognized as the *ultimum remedium* principle within the realm of criminal law. Nevertheless, the practical impact of this principle has been relatively limited, leading to its characterization as more of a catchphrase or rhetoric. As a principle, *ultimum remedium* serves as a broad, general argument articulated without specific methods of implementation. It operates as a perspective guiding both the formulation and enforcement of law. The responsibility for its development and practical application, ensuring that legal principles are faithfully translated into practice, lies with the legislators and lawmakers.

The recent emphasis on reconciliation efforts in criminal cases is intricately tied to the *ultimum remedium* concept. This emerging emphasis on reconciliation, guided by the principles of restorative justice, presents itself as an alternative mechanism integrated into the criminal law framework. In essence, peace embodies the very essence of the *ultium remedium* principle, stipulating that criminal sanctions should be employed as a last recourse. This shift in the direction of criminal law enforcement steers away from a punitive approach focused on retribution and reparation, opting instead for the restoration of harmony through peaceful resolutions. Within the *ultimum remedium* context, the consideration of implementing criminal sanctions only becomes pertinent when administrative penalties, reconciliation, or

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[43] Romli Atmasasmita, *Rekonstruksi Asas Tiada Pidana Tanpa Kesalahan* (Jakarta: PT Gramedia Pustaka Utama, 2017), 215-216.

[44] Jan Remmelink*, Hukum Pidana Komentar Atas Pasal-pasal Terpenting Dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya Dalam Kitab Undang-Undang Hukum Pidana Indonesia Cetakan ke 14* (Jakarta: Gramedia Pustaka Utama, 2013), 27-28.

agreements between the perpetrator and the victim prove insufficient in achieving adequate restitution or societal equilibrium.

Efforts directed at realizing peace through the restorative justice framework have gained substantial support by being integrated into the regulations of several law enforcement institutions. Notable examples include the Regulation of the Chief of National Police Number 8 of 2021, the Regulation of the Attorney General Number 15 of 2021, and the Decree of the Director General of the General Judiciary Agency Number 1691/DJU/SK/PS.00/12/2020. These measures play a crucial role in fortifying the *ultimum remedium* principle within criminal law, particularly in the context of specific case resolutions.

D. Conclusion

In summary, the recent introduction of reconciliation in the resolution of minor criminal cases represents a significant shift in the field of criminal law. Traditionally characterized by its punitive nature, criminal law has adopted a more adaptable approach by offering opportunities for peaceful conflict resolution through restorative justice mechanisms, which are governed by the policies of law enforcement institutions, including the police, prosecutors, and courts. The process of achieving peace in these cases aligns with the core principles of civil law, requiring that any agreements be formally documented in writing by legally competent parties who voluntarily and mutually consent to resolving disputes. The inclusion of peace within the restorative justice framework indirectly reinforces the *ultimum remedium* principle, ensuring that criminal sanctions are employed as a last resort in less severe cases and are genuinely reserved for extraordinary circumstances.

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