

The Urgency of Restorative Justice Regulation on Hate Speech

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ABSTRACT

Regulations on the imposition of criminal sanctions in cases of hate speech on social media are, at some point, considered to degrade human rights to express opinions in the context of a democratic country. This research aims to provide an overview of resolving hate speech cases on social media using a restorative justice approach and how regulations should be created and developed. This research uses normative legal research methods using statutory and conceptual approaches. The concept proposed refers to the theory of restorative justice and the theory of establishing appropriate regulations. This research indicates that until now, there has been no strong and adequate legal basis for implementing non-penal resolution of hate speech cases through a restorative justice approach. In the Criminal Code, which revokes the article regarding hate speech in the Information and Electronic Transactions Law both before and after the Constitutional Court Decision, there is no reference to using a restorative justice approach in resolving existing cases. It is urgent to regulate restorative justice arrangements to guarantee legal certainty for the parties by considering recovery for damage and losses victims suffer based on a mutually agreed agreement. Restorative justice can mediate accusations of degradation of freedom of opinion and can maintain democratic values. Based on the regulatory formation process theory, some factors must be considered in designing and making restorative justice arrangements in hate speech cases.



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1. Introduction

The position of regulations in a legal state is vital. In a country based on law, all government actions when carrying out its duties and functions must be found on the applicable laws and regulations.¹ Mika Lehtimäki said that a fundamental legal objective is established to provide a normative basis for an action.² Various forms of legal regulations

¹ Ludvig Beckman, 'Three Conceptions of Law in Democratic Theory', *Canadian Journal of Law & Jurisprudence*, 36.1 (2023), 65–82 <https://doi.org/10.1017/cjlj.2022.22>

² Mika Lehtimäki, 'Necessary Connection between a Theory of Law and Theory of the State', *SSRN Electronic Journal*, 2019 <https://doi.org/10.2139/ssrn.3390484>

are used by states and governments that are actively involved in the economic and social fields to realize social welfare and maintain order and security. This means that the existence of law from the perspective of a legal state is related to the legal objectives to be achieved. According to the 1945 Constitution of the Republic of Indonesia, Indonesia is a democratic legal state. In a democratic rule of law, government actions must obtain legitimacy from the people, formally stated in statutory regulations. Every form of law and various decisions receive the approval of the people's representatives by considering the interests of the people. Therefore, forming legitimate rules to provide legal certainty regarding critical societal problems should receive a significant portion in the legislative process, including regulating restorative justice in hate speech crimes.³

Based on data from the Central Statistics Agency (BPS), in 2023, Indonesia's population is projected to be 278.8 million people. Indonesian society lives communally and has entered the era of digital development 4.0 and society 5.0, which has an impact on the development of technology itself and brings significant changes to people's social lives. The development of technology and society has also brought polarization in the form of freedom to express opinions.⁴ Freedom to express opinions verbally and in writing belongs to all Indonesian people, guaranteed in Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states, "Everyone has the right to freedom of association, assembly, and expression of opinion." As a country based on law (*rechtstaat*) and not based on mere power (*machstaat*), Indonesia recognizes that freedom to express thoughts and opinions verbally and in writing, freedom of expression, and freedom of the press are fundamental rights that must be enjoyed by entire society as the basis for upholding the pillars of democracy.⁵

Regarding expressing thoughts and attitudes by conscience, freedom of opinion and expression is part of human rights, protected by the constitution, statutory regulations, and international law. However, freedom of opinion and expression cannot necessarily be interpreted as freedom without restrictions, but rather a freedom that can be held accountable and follows applicable norms.⁶ Research conducted by M. Lutfi Chakim (2020) stated that freedom of opinion is not an absolute right and can be limited. However, these restrictions may only be implemented under strict, mandatory, and proportional conditions.⁷ Freedom of opinion that does not follow norms may lead to hate speech containing ethnicity, religion, race, and inter-group (*SARA*). Hate speech, in the legal sense, is words, behavior, writing, or performances that are prohibited because they can trigger acts of violence and prejudice on the part of the perpetrator of the statement or the victim of the act.⁸

³ Ema Mar'Ati Sholecha and others, 'Justice Collaborator's Position and Function on Witness Protection's Rights as a Suspect from the Perspective of Criminal Law in Indonesia', *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 6.1 (2023), 131–43 <https://doi.org/10.24090/volksgeist.v6i1.7246>

⁴ Malliga Subramanian and others, 'A Survey on Hate Speech Detection and Sentiment Analysis Using Machine Learning and Deep Learning Models', *Alexandria Engineering Journal*, 80 (2023), 110–21 <https://doi.org/10.1016/j.aej.2023.08.038>

⁵ Djamaludin and others, 'Assessing the Impact of Electronic Court Systems on the Efficiency of Judicial Processes in the Era of Digital Transformation', *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi*, 6.1 (2023), 1–18 <https://doi.org/10.24090/volksgeist.v6i1.8082>

⁶ Sayuti Sayuti and Illy Yanti, 'Freedom of Speech Without a Direction: Criticism of Promotion of Freedom of Speech in Indonesia', *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan*, 23.1 (2023) <https://doi.org/10.30631/alrisalah.v23i1.1389>

⁷ M. Lutfi Chakim, 'Freedom Of Speech And The Role Of Constitutional Courts: The Cases Of Indonesia And South Korea', *Indonesia Law Review*, 10.2 (2020) <https://doi.org/10.15742/ilrev.v10n2.605>

⁸ Sudirman and others, 'Examining the Complexity of Child Marriage as Sexual Violence in the Digital Era', *Legality: Jurnal Ilmiah Hukum*, 31.2 (2023), 310–28 <https://doi.org/10.22219/ljih.v31i2.28881>

Hate speech coexists with hoaxes or fake news, with many phenomena of hate speech in Indonesia, both in the form of speech and writing, which are widely spread through technology, thus trapping many groups, including ordinary people, religious figures, and political elites. Therefore, regulatory solutions to maintain democratic values within certain limits and enforce the law are essential.⁹ In the theory of regulatory formation, law is followed by sanctions. Hate speech can be said to be a criminal act, but hate speech crimes are different from ordinary criminal acts. Several scholars argue that resolving the crime of hate speech can be done through restorative justice. Restorative justice was introduced by Braithwaite in the 1980s as an approach to the punishment system because the Maori community inspired it to deal with deviations in their environment, which emphasized problem-solving by involving the community and local community leaders to resolve problems in a family manner.¹⁰ Umbreit defines restorative justice as a response to victim-centered criminal acts that allows victims, perpetrators of criminal acts, their families, and representatives of society to deal with the damage and losses caused by criminal acts.¹¹

The restorative approach aims to restore a problematic or imbalanced situation to a non-problematic state, achieve harmony in the life of a particular community, or provide benefits for the nation and state. The penal approach, the use of criminal law, and the theory of retributive punishment cause many problems. Such an approach should be considered a final effort or an *ultimum remedium*. The restorative justice approach can be applied to various criminal perpetrators. Therefore, resolving cases through a restorative approach is the realization of recovery for the damage and losses suffered by victims of criminal acts and providing compensation to the victims based on a mutually agreed agreement. The main principle of resolving criminal acts through a restorative approach is a resolution that is not just a tool to encourage someone to compromise to create an agreement. Still, the approach must penetrate the hearts and minds of the parties involved in the settlement process to understand the meaning and purpose of restoration. And the sanctions applied are recovery sanctions.¹²

Applying a restorative approach in the Indonesian criminal law system is a relatively new policy and is still sectoral. However, this policy is appropriate and in line with the United Nations declaration contained in the United Nations Declaration on the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters. In this declaration, each country was recommended to utilize the concept of restorative justice more broadly in its criminal justice system, as was later emphasized in the Vienna Declaration (Vienna Declaration on Crime and Justice). Law enforcement against hate speech in Indonesia is currently still not optimal because the resolution approaches are too varied and thus do not provide legal certainty. Likewise, resolving cases using restorative justice still faces obstacles because there are no regulations yet. This concept is not yet

⁹ Indriati Amarini and others, 'Digital Transformation: Creating an Effective and Efficient Court in Indonesia', *Legality: Jurnal Ilmiah Hukum*, 31.2 (2023), 266–84 <https://doi.org/10.22219/ljih.v31i2.28013>

¹⁰ N. G. A. N. Ajeng Saraswati and Muhammad Rustamaji, 'The Future of Corruption's Handling in the Regions and The Application of Restorative Justice', *Pandecta Research Law Journal*, 18.1 (2023), 64–75 <https://doi.org/10.15294/pandecta.v18i1.44207>

¹¹ Nur Rochaeti and others, 'A Restorative Justice System in Indonesia: A Close View from the Indigenous Peoples' Practices', *Sriwijaya Law Review*, 7.1 (2023), 87 <https://doi.org/10.28946/slrev.Vol7.Iss1.1919.pp87-104>

¹² Abdul Kadir Jaelani and others, 'Legal Protection of Employee Wage Rights in Bankrupt Companies: Evidence from China', *Legality: Jurnal Ilmiah Hukum*, 31.2 (2023), 202–23 <https://doi.org/10.22219/ljih.v31i2.25874>

recognized in the Criminal Code (Law No. 1 of 2023 concerning the Criminal Code in conjunction with Law No. 1 of 2024).¹³

Looking at several previous studies, for example, Devita Kartika Putri (2023) conducted case studies of twenty-seven court decisions. The research states that the regulation of hate speech in Indonesia is based on Article 28, paragraph (2) of the Information and Electronic Transactions Law (Law Number 19 of 2016 in conjunction with Law Number 11 of 2008 concerning Electronic Information and Transactions), which has no limits. Objective. The study results show that the construction of Article 28 paragraph (2) has provided a broad definition of hate speech because there are inconsistencies in considering the negative impact of hate speech, causing harm to the parties.¹⁴ The issues discussed in the article above have vital intersections with this article, but the data analyzed and the analytical perspective are very different. The author's research is directed at the policy formation process to deal with the law enforcement problem of hate speech, not at case studies of court decisions.

Toni Harmanto et al. (2022) researched the concept of penal mediation by police institutions in handling hate speech via electronic media.¹⁵ This research raises issues related to the concept of punitive mediation by the police in Indonesia and the approach to punitive mediation by the police. It was found that the Indonesian police have the authority to resolve problems with restorative justice. This research focuses on discovering and proving that the police institution has the legal authority to handle hate speech through penal mediation, not just enforcing the law, which leads to the courts in general. Meanwhile, this research is directed at forming restorative justice policies, which can later be used as a more robust and valid basis for law enforcers to carry out penal mediation.

In another study, Muhammad Okky Ibrohim and Indra Budi (2023) examined the influence of ease of use of social media, which allows people to abuse this media to spread Hate Speech and Abusive Language so that it can trigger conflict in society.¹⁶ In contrast to legal research studies, this research explains how to detect hate speech on social media. The research found that most Hate Speech and Abusive Language research in Indonesia still uses classic machine learning approaches with classic text representation features tested on text data sets.¹⁷ Meanwhile, a more suitable detection method in Indonesia is to detect the target, category, and level of hate speech and hate speech buzzers, thread initiators, and fake account spreaders.¹⁸ Based on research by Ibrohim and Budi (2023), the problem of

¹³ Dodi Jaya Wardana, Sukardi, and Radian Salman, 'Public Participation in the Law-Making Process in Indonesia', *Jurnal Media Hukum*, 30.1 (2023), 66–77 <https://doi.org/10.18196/jmh.v30i1.14813>

¹⁴ Devita Kartika Putri, 'Hate Speech and the Harm in Indonesian Judicial Decisions', *Cogent Social Sciences*, 9.2 (2023) <https://doi.org/10.1080/23311886.2023.2274430>

¹⁵ Toni Harmanto, Bagus Oktafian Abrianto, and Xavier Nugraha, 'Penal Mediation By Police Institution In Handling Hate Speech Through Electronic Media: A Legal Efforts To Resolve with A Restorative Justice Approach', *International Journal Of Artificial Intelligence Research*, 6.1.2 (2022). <https://doi.org/10.1080/23311886.2023.2274430>

¹⁶ Faizal Adhitama Prabowo, Muhammad Okky Ibrohim, and Indra Budi, 'Hierarchical Multi-Label Classification to Identify Hate Speech and Abusive Language on Indonesian Twitter', in *2019 6th International Conference on Information Technology, Computer and Electrical Engineering (ICITACEE)* (IEEE, 2019), pp. 1–5 <https://doi.org/10.1109/ICITACEE.2019.8904425>

¹⁷ Damayanti Elisabeth, Indra Budi, and Muhammad Okky Ibrohim, 'Hate Code Detection in Indonesian Tweets Using Machine Learning Approach: A Dataset and Preliminary Study', in *2020 8th International Conference on Information and Communication Technology (ICoICT)* (IEEE, 2020), pp. 1–6 <https://doi.org/10.1109/ICoICT49345.2020.9166251>

¹⁸ Muhammad Okky Ibrohim and Indra Budi, 'Hate Speech and Abusive Language Detection in Indonesian Social Media: Progress and Challenges', *Heliyon*, 9.8 (2023), e18647 <https://doi.org/10.1016/j.heliyon.2023.e18647>

enforcing hate speech comes not only from legal instruments that do not specifically regulate them but also from technical instruments.¹⁹ This adds to the heavy burden on regulators to be sensitive to hate speech indicators.

The high number of perpetrators of hate expressions means that a legal solution is needed that does not only focus on the deterrent effect for the perpetrators but on restoring society to its original condition. However, the application of the concept of restorative justice in Indonesia has encountered obstacles at the normative level, in which *mutatis mutandis* have impacted its implementation. The orientation of law enforcement so far has tended to be positivism, resulting in legal products that have low effectiveness in society. The orientation of law enforcement should shift towards being more responsive to the values that exist in society. Responsive legal theory argues that good law should provide more than just legal procedures. The law must be competent and also fair. The law should be able to recognize the public's desires and be committed to achieving substantive justice.²⁰

Therefore, to respond and restore society's conditions to normal, a restorative justice approach is used by law enforcers. Enforcement cannot be carried out without a basis for its legitimacy. Clear laws must be the basis. Restorative justice arrangements must be formed to resolve increasingly massive hate speech by considering various things. Lon Fuller illustrates that the formation of legislation should be based on measurable indicators or parameters of the formation process. This parameter will be a benchmark for the quality of a regulation and can be seen to what extent the regulation can be implemented/implemented. In the process of formulating regulations, Hellen Xanthaki said that the regulations created should use words that are straightforward, clear, well-understood, and unambiguous. This will be linear with the current hate speech regulations, which are still too broad, giving rise to too many different interpretations. Therefore, this article provides ideas for forming policies and/or rules for resolving hate speech cases through restorative justice based on indicators of an implementable formation process.

2. Research Method

This research is normative regarding restorative justice policies and rules in hate speech cases. In many instances, this research aims to determine the conditions for regulating hate speech and enforcing restorative justice.²¹ Next, what is more important is how to formulate more suitable arrangements to implement restorative justice in hate speech cases. This research was studied through a statute approach and a conceptual approach. Therefore, several regulations relating to hate speech and their current law enforcement are examined.²² The laws and rules used include the Criminal Code and Information and Electronic Transactions Law before and after the Constitutional Court Decision and mentioning technical regulations for law enforcement agencies related to resolving hate speech cases. Meanwhile, conceptually, the concept/theory of forming laws and regulations

¹⁹ Nofa Aulia and Indra Budi, 'Hate Speech Detection on Indonesian Long Text Documents Using Machine Learning Approach', in *Proceedings of the 2019 5th International Conference on Computing and Artificial Intelligence* (New York, NY, USA: ACM, 2019), pp. 164–69 <https://doi.org/10.1145/3330482.3330491>

²⁰ Agus Purnomo and others, 'Characteristics of Hate Speech and Freedom of Expression in the Perspective of Maqāṣid Al-Sharī'ah', *Juris: Jurnal Ilmiah Syariah*, 22.1 (2023), 171–83 <https://doi.org/10.31958/juris.v22i1.9446>

²¹ Hamza Abed Alkarim Hammad, Irwan Mohd Subri, and Hasanah Abd Khafidz, 'The Impact of Religiosity on the Malaysian Muslim Community's Attitude Towards the Practice of Cupping', *Juris: Jurnal Ilmiah Syariah*, 22.1 (2023), 145–58 <https://doi.org/10.31958/juris.v22i1.8461>

²² Masyhar Ali, Murtadho Ali, and Zaharuddin Sani Ahmad Sabri Ahmad, 'The Driving Factors for Recidivism of Former Terrorism Convicts in Socio-Legal Perspective', *Journal of Indonesian Legal Studies*, 8.1 (2023), 379–404 <https://doi.org/10.15294/jils.v8i1.69445>

and the concept of restorative justice are used. In several discussions, the author compares the application of restorative justice in other sectors and cases.²³ The data used for analysis are primary legal materials from statutory regulations, secondary from books and journals, and tertiary from other credible sources.²⁴

3. Results and Discussion

3.1. Restorative Justice Regulation for Hate Speech and Its Urgency

Hate speech cannot be separated from the development of information technology. The development of information technology is changing the behavior of society and human civilization in various fields. People can exchange information anywhere and at any time without any borders. This situation provides benefits to improve welfare and social problems that enter the realm of law, which, in this study, is in the form of hate speech via social media. In 2017, 3,325 cases of hate speech were reported and handled by the Indonesian police, an increase of 44.99% compared to 2016, which was 1,829 cases. In fact, in just half a year at the start of the 2020 COVID-19 pandemic, the Jakarta Police had received and investigated around 480 cases of hate speech.²⁵ In line with the development of hate speech cases through technological advances, enacting the particular Information and Electronic Transactions Law (*lex specialis*) from the Criminal Code has become a vital legal basis. However, criminal law must also follow criminal acts related to factual technological developments and advances.

Hate speech is defined as a form of expression that spreads, incites, promotes, or justifies racial hatred, xenophobia, anti-semitism, or forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination, and hostility towards minorities, migrants, and people of migrant descent. Delgado & Stefancic (1995) define hate speech as deliberate and intentional public statements intended to demean a group of people.²⁶ Meanwhile, Mahoney classifies hate speech into four parts, namely: 1) Religious hate speech, 2) Cultural pollution, 3) Economic pollution, and 4) Extension or genocide.²⁷ Resolving hate speech cases in Indonesia, even other democratic countries have encountered problems with the way it is spread via social media verbally, non-verbally, and symbolically.²⁸ More complex than that, hate speech is deliberately expressed in unclear, ambiguous, and metaphorical forms, making it difficult to identify.^{29,30} Moreover, no regulation in Indonesia defines it clearly and firmly, so there is a tug-of-war in cases that leads to judgment subjectivity.

²³ Rodiyah Rodiyah, Siti Hafsyah Idris, and Robert Brian Smith, 'Mainstreaming Justice in the Establishment of Laws and Regulations Process: Comparing Case in Indonesia, Malaysia, and Australia', *Journal of Indonesian Legal Studies*, 8.1 (2023), 333–78 <https://doi.org/10.15294/jils.v7i2.60096>

²⁴ Khamami Zada, 'Sharia and Islamic State in Indonesia Constitutional Democracy: An Aceh Experience', *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 23.1 (2023), 1–18 <https://doi.org/10.18326/ijtihad.v23i1.1-18>

²⁵ Putri.

²⁶ María Antonia Paz, Julio Montero-Díaz, and Alicia Moreno-Delgado, 'Hate Speech: A Systematized Review', *SAGE Open*, 10.4 (2020), 215824402097302 <https://doi.org/10.1177/2158244020973022>

²⁷ Kathleen E. Mahoney, 'Speech, Equality, and Citizenship in Canada', *Common Law World Review*, 39.1 (2010), 69–99 <https://doi.org/10.1350/clwr.2010.39.1.0195>

²⁸ Laura Beth Nielsen, 'Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech', *Journal of Social Issues*, 58.2 (2002), 265–80 <https://doi.org/10.1111/1540-4560.00260>

²⁹ Fabio Giglietto and Yenn Lee, 'A Hashtag Worth a Thousand Words: Discursive Strategies Around #JeNeSuisCharlie After the 2015 *Charlie Hebdo* Shooting', *Social Media + Society*, 3.1 (2017), 205630511668699 <https://doi.org/10.1177/2056305116686992>

³⁰ Paz, Montero-Díaz, and Moreno-Delgado.

Various criminal acts of defamation through electronic media have given rise to controversy. The application of the defamation offense article is considered to be contrary to the 1945 Constitution of the Republic of Indonesia, namely the human right to express opinions and expression. The focus of the problem in the research is how criminal acts of defamation occur after the Constitutional Court Decision. After Constitutional Court Decision Number 50/PUU-VI/2008, Constitutional Court Decision Number 2/PUU-VII/2009, Constitutional Court Decision Number 5/PUU-VIII/2010, Constitutional Court Decision Number 31/PUU-XIII/2015 and Decision Constitutional Court Number 76 / PUU-27 paragraph (3) of the ITE Law and reduces criminal threats in 2 (two) provisions.³¹

Before it was revoked, hate speech was regulated in the Information and Electronic Transactions Law. However, several articles in the Information and Electronic Transactions Law are still controversial and considered unfair in their application to society, especially Article 28, paragraph (2), regarding hatred and SARA. Article 28 paragraph (2) jo. Article 45A states that: "Everyone intentionally and without right disseminates information that aims to create feelings of hatred or hostility towards certain individuals and/or groups of people based on ethnicity, religion, race, and inter-group (SARA)." Article 45A follows the criminal provisions, which read, "People who deliberately and without right disseminate information aimed at causing feelings of hatred or hostility towards certain individuals and/or groups of society based on ethnicity, religion, race, and inter-group (SARA) as intended in "Article 28 paragraph (2) is punishable by a maximum imprisonment of 6 (six) years and/or a maximum fine of IDR 1,000,000,000.00 (one billion rupiah)." Article 28, paragraph (2) explicitly regulates the prohibition of expression by disseminating information related to SARA. This article often punishes criminal acts of spreading hatred after Article 27, paragraphs (1) and (3). ITE Law. Constitutional Court Decision Number 76/PUU-XV/2017, Article 28 paragraph (2) and Article 45 paragraph (2) is considered to be contrary to the 1945 Constitution so that it is given an expansion of the meaning of inter-group, where inter-group does not only include ethnicity, religion, and race but also includes other entities that are not represented by ethnicity, religion, and race.³²

Referring to higher laws, in the Criminal Code, several articles are used to punish acts of hate speech, namely Article 154 concerning "Any person who in public expresses feelings of hostility, hatred or contempt towards the Indonesian Government," Article 155 concerning broadcasting criminal acts. Article 156 concerns "anyone who publicly expresses hostility, hatred or contempt towards one or several groups of Indonesian society." These articles expressly prohibit statements that, among other things, contain expressions of feelings of hatred towards the Indonesian Government (Article 154 and Article 155) or towards one/a group of Indonesian people (Article 156). However, through Constitutional Court Decision Number 6/PUU-V/2007, Article 154 and Article 155 of the Criminal Code were ruled contrary to the Constitution and, therefore, do not have binding legal force. The basis for the consideration of the Constitutional Court in its decision states that the provisions of Articles 154 and 155 of the Criminal Code, on the one hand, do not guarantee legal certainty and, therefore, conflict with Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Consequently, it also disproportionately hampers the freedom to express one's thoughts, attitudes, and opinions, contrary to Articles 28 and 28E, paragraphs (2) and (3) of the Constitution. The Constitutional Court assessed that

³¹ Ariefulloh Ariefulloh and others, 'Restorative Justice-Based Criminal Case Resolution in Salatiga, Indonesia: Islamic Law Perspective and Legal Objectives', *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan*, 23.1 (2023), 19–36 <https://doi.org/10.18326/IJTIHAD.V23I1.19-36>

³² Elfrida Ratnawati and others, 'The Cabotage Principle on Law Enforcement for Licensing Ship Operations in Indonesian Waters', *Journal of Human Rights, Culture and Legal System*, 3.3 (2023), 678–705 <https://doi.org/10.53955/jhcls.v3i3.182>

Articles 154 and 155 of the Criminal Code do not guarantee legal certainty and can inhibit freedom of opinion, thought, and behavior.³³

Apart from that, in the old Criminal Code, there was regulation of criminal acts of defamation in Article 310 of the Second Book (Crimes) Chapter XVI concerning Insults. However, by scholars, this article is considered very worrying and complete of dark notes. Because offenses are very subjective. Defamation is a dissemination offense. Apart from that, a person who commits defamation by accusing something is considered an attack on the good name of another person or party and must be allowed to prove the accusation.³⁴ The promulgation of the Law on the Criminal Code revoked the articles on hate speech, which were initially regulated in the Information and Electronic Transactions Law. It replaced them with Article 243 paragraph (1) in conjunction with paragraph (2) to read as follows: "Every person those who broadcast, show or paste writing or pictures so that they are visible to the public or listen to recordings so that they can be heard by the public or disseminate them using information technology means, which contain statements of hostile feelings to make the contents known or better known to the public, towards one or several groups or groups of the Indonesian population based on race, nationality, ethnicity, skin color, religion, belief, gender, mental disability or physical disability which results in violence against people or property, shall be punished with a maximum imprisonment of 4 (four) years or a maximum fine many category IV." This change is significant, especially in explaining the objects of hate speech and providing criminal sanctions. However, the point is not how strict the criminal sanctions are but rather the type of sanctions given and the process by which sanctions for hate speech are presented fairly. Unfortunately, revising the Criminal Code does not adequately address issues more critical than simply imposing prison sentences and fines through the courts.

However, until the revision of the Criminal Code, the regulations for law enforcement on hate speech did not follow the provisions of the laws and regulations. They did not fulfill a sense of justice. The practice of applying monistic teachings in enforcing hate speech laws creates problems in criminal justice practice. Law enforcement of hate speech prioritizes monistic doctrines that tend to pursue aspects of certainty rather than justice for all parties. Fulfilling the element of error (intentional) in hate speech is based on a subjective approach. Monoistic teachings combine actions and mistakes to create a bias in fulfilling the elements in practice.³⁵ On the other hand, the Criminal Code does not explain the relationship between criminal liability and the author, but criminal liability is only mentioned solely about forgiving and justifying reasons. As a result, many problems assume that if a criminal act occurs, the perpetrator can be punished. This is a crucial urgency to create legal products that are more relevant to the goals of justice. Moreover, understanding positivism - the principle of legality adopted in the Criminal Code provides a strong influence in deciding a case. What's worse is that existing regulations have not addressed the problem.

The absence of criminal law provisions in Indonesia that form the legal basis for implementing restorative justice is a serious problem. Since 2018, the Indonesian Police have issued Circular Letter Number SE/8/VII/2018 regarding the administration of Restorative Justice settlements. Likewise, the Attorney General's Office issued Republic of

³³ Supanto and others, 'Regulating Fake News and Hoaxes: A Comparative Analysis of Indonesia and Malaysia', *Journal of Human Rights, Culture and Legal System*, 3.3 (2023), 656-77 <https://doi.org/10.53955/jhcls.v3i3.113>

³⁴ Arief Budiono and others, *Cyber Indoctrination Victims in Indonesia and Uzbekistan: Victim Protection and Indoctrination in Practice*, *Journal of Human Rights, Culture and Legal System*, 2023, III <https://doi.org/10.53955/jhcls.v3i3.127>

³⁵ George P. Fletcher, 'Criminal Theory in the Twentieth Century', *Theoretical Inquiries in Law*, 2.1 (2001) <https://doi.org/10.2202/1565-3404.1023>

Indonesia Attorney General Regulation No. 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. There is also a Decree of the Director General of the General Judicial Body of the Supreme Court No. 1691/DJU/SK/PS.00/12/2020. In 2021, the National Police Chief Regulation No. 8 of 2021. At the practical level, according to information from the National Police Chief, in 2021, as many as 11,811 cases were resolved through restorative justice mechanisms. This will continue to increase in 2022 to 15,809 cases and 18,175 cases in 2023. Data from the Attorney General's Office in the same year, 2021, shows that 314 cases were decided through a restorative justice mechanism. As of July 11, 2023, as many as 3,121 cases have been terminated due to prosecution. Restorative justice mechanisms. The data above is cumulative data on various cases, not just hate speech. Meanwhile, there are not many hate speech cases; only around 1,800 cases from the Regional Police alone.

Therefore, although many cases have been resolved through restorative justice, the more critical issue is the existing regulations. Currently, each law enforcement agency issues its regulations. This shows that institutions independently seek a legal basis for implementing restorative justice as if each law enforcement agency has its authority according to its level. The process of resolving cases in making regulations. Because the rules don't say that, legal changes must be made to ensure the legality of implementing restorative justice. Changes need to be interpreted deeply and in line with national characteristics because hate speech cases are compassionate for a racially diverse country like Indonesia. The case in the United States is the first amendment to the United States Constitution, which is seen as a milestone in the history of discursive freedom. However, it turns out that there is an ideological refusal to acknowledge its dangerous implications for the growth of hate speech, either against society or other subordinate groups. This rejection has left a void in intelligently conceived strategies to combat hate speech.³⁶ This becomes material for reflection on how appropriate methods must be developed based on rules sensitive to core issues. Handling hate speech, which is increasingly widespread and not only carried out by adults, should be addressed with soft policies.

Hate speech can be said to be a criminal act, but hate speech crimes are different from ordinary criminal acts. There are criteria for elements of ordinary speech and hate speech, namely as follows: 1. All actions and efforts, whether direct or indirect; 2. Based on hatred based on ethnicity, religion, religious sect, belief, race, inter-group, skin color, ethnicity, gender, disabled people, and sexual orientation; 3. Constitutes incitement against individuals or groups to cause discrimination, violence, loss of life, and/ or social conflict; 4. They are carried out through various means. Therefore, non-penal methods should be promoted and regulated strictly in regulations to provide legal certainty and justice for handling cases of hate speech. Below is explained the difference between normal speech and hate speech, as follows:

Table 1. Differences between Ordinary Speech and Hate Speech

Ordinary Speech	Hate Speech
Religious lectures that state their teachings are the truest in the eyes of God without being inflammatory and do not use words that are discriminatory, hostile, and encourage violence.	Speeches/orations that incite hostility, discrimination, or violence based on religion by misusing the contents of the Holy Book.
Interpretation of religious teachings, which are the result of thought without being incitement.	Interpretation of religious teachings, which are the result of thought without being incitement.
Fatwa/religious opinion regarding a religious law that is believed to be non-inflammatory and does not	Fatwa/religious opinion regarding a spiritual law that is believed to be inflammatory and uses words

³⁶ JOHN D.H. DOWNING, 'Hate Speech' and 'First Amendment Absolutism' Discourses in the US', *Discourse & Society*, 10.2 (1999), 175-89 <https://doi.org/10.1177/0957926599010002003>

use words that discriminate, are hostile, and encourage violence.	that determine, are unfavorable, and promote violence.
Expressing thoughts in public, whether in writing or orally, without incitement to violence, discrimination, or hostility.	Expressing thoughts in public, whether in writing or orally, by inciting people to violence, bigotry, or hatred.
Insulting	Insulting based on religion, nationality, or race in the form of incitement to violence, discrimination, or hostility.
Defiling a good name. Scientific oration. Scientific debate. Academic work. Expressing hatred or dislike for people. Debate without incitement to violence, discrimination, or hostility.	Defamation based on religion, nationality, or race in the form of incitement to violence, discrimination, or hostility.

Based on Table 1, it can be seen that the essential difference between speech is that it can be said to be speech that incites and does not use discriminatory or hostile words that encourage violence. In several contexts, we often find orations or speeches that convey SARA but do not contain the element of 'hate.' The development of hate speech with social media increasingly shows a very high level of reporting. Punishment is no longer able to function as a deterrent effect. Disharmony in a multicultural society will become more widespread due to repressive handling. Developing criminal law in the context of enforcing hate speech laws requires modernizing criminal accountability. Applying this moderation of criminal responsibility indicates that applying the law prioritizes a non-penal approach. This effort is intended as part of the *ultimum remedium* and only applies to the interests of individuals (*individuale belangen*) and/or society (*sociale belangen*), not intended for the interests of the state (*state belangen*). Moderation of criminal liability is also aimed at dualistic doctrine enforcing hate speech laws.

The restorative justice approach aims to achieve peace between the victim and the perpetrator of hate speech, encourage community participation, and utilize the perpetrator's awareness regarding the sentence or action,³⁷ as well as the peace process—forgiveness from victims and other sanctions agreed upon by deliberation. Changes need to be made; it is unreasonable to reject hate speech laws because they aim to criminalize hateful emotions, feelings, or attitudes.³⁸ As long as it is provided that it is not against human rights in the constitution. Therefore, umbrella regulations, or at least special general regulations (laws), regulate restorative justice. It is not letting each institution take its stance without an excellent legal basis. Therefore, it is necessary to direct policies for resolving hate speech cases within a restorative justice framework.

3.2. Designing and Composing Regulation of Hate Speech based on Restorative Justice

In the next chapter, the author explains how to design and create regulations, especially to resolve hate speech cases, by adopting the concept of restorative justice. Freedom of opinion is essential not only for a democratic society but also for Still; it is also one of the most fundamental rights of every individual who has an attitude and expresses his opinion so that he as a human being can exist. Regulations regarding hate speech are less sensitive to non-penalty cases that can be accommodated through them. The lack of an agreed

³⁷ Mahfud Nazeri and Saroja Dhanapal, 'Restorative Justice: An Alternative Process for Solving Juvenile Crimes in Indonesia', *Brawijaya Law Journal*, 6.2 (2019), 157–69 <https://doi.org/10.21776/ub.blj.2019.006.02.03>

³⁸ Alexander Brown, 'What Is Hate Speech? Part 1: The Myth of Hate', *Law and Philosophy*, 36.4 (2017), 419–68 <https://doi.org/10.1007/s10982-017-9297-1>

definition of hate speech also makes it difficult to determine when precisely an expression constitutes hate speech and take steps to resolve it. We cannot argue some of the public speeches delivered may be very offensive and contain SARA so that it can foster a climate of prejudice or discrimination against minority groups. However, without regulations that define it precisely, it will be difficult to see whether it might not be hate speech. Media platforms may contain stories that disparage minority or religious groups or may depict members of religious or ethnic minority groups through clichés and stereotypical images, which may be offensive but are not hate speech. Therefore, a non-penal settlement would be more suitable for resolving cases by deliberation.

Crime prevention efforts can be divided into several ways, G.P. Hoefnagels explains as follows: 1) criminal law application); 2) prevention without crime (punishment); 3) influencing views of society on crime and punishment/mass media.³⁹ Therefore, efforts to resolve hate speech cases can generally be taken through two approaches: penal (first method) and non-penal (second and third methods). The two approaches must work together synergistically and complement each other so that the definition of hate speech has a measure for choosing which cases can be resolved by penal and non-penal methods. Thus, in handling hate speech cases, an integrated approach between punitive and non-penal policies is necessary. Restorative justice is an alternative to dealing with criminal acts through a non-penal approach.

Through a restorative justice approach as an alternative to a repressive approach in resolving criminal cases of hate speech, it is hoped that it will be fairer and pay attention to the aim of sanctions, which are not only punishing but also returning chaotic social conditions to normal. Efforts to build restorative justice in Indonesia are related to local wisdom values. Local wisdom values are laws that live in society and have beneficial values through deliberation that uphold victims' rights. The application of restorative justice prioritizes mediation between victims and perpetrators. About social engineering theory - social engineering and practicality, the application of restorative justice becomes relevant in resolving hate speech cases. The restorative justice approach returns the function of criminal law to its original path, namely to its *ultimum remedium* function.

Developing policies and regulations cannot be done without a complete conceptual basis. Moreover, studies that offer solutions that are more suitable to the culture of the society being regulated are ignored. In the end, laws are made to be implemented; laws that fail are products that are insensitive to problems and cannot even resolve cases objectively and fulfill a sense of justice in society. In drafting legislation, several legislative theories can be used so that the law is far from harmful elements. Legislative theory is a critical theory for analyzing the process of drafting legislation that will be made. Existing theories help legislators formulate detailed causal hypotheses to design effective laws. For example, Lon Fuller's *Morality of Law Theory* answers the "separability thesis" of the positivist argument, which states that there is no necessary connection between law and morality.⁴⁰

A legal regulation should be formed based on measurable indicators or parameters of the formation process. This parameter will be a benchmark for the quality of a regulation and can determine the extent to which the regulation can be implemented/implemented. According to Lon F. Fuller, the rules must be announced and "designed" properly in terms of how they are regulated (compilation/making process). The 'design' of these norms must

³⁹ Yanti Amelia Lewerissa, 'Criminal Policy of Hate Speech in Social Media Against The Religious Dignity of Society in the Digital Century', in *Proceedings of the International Conference on Religion and Public Civilization (ICRPC 2018)* (Paris, France: Atlantis Press, 2019) <https://doi.org/10.2991/icrpc-18.2019.13>

⁴⁰ Kristen Rundle, 'The Morality of the Rule of Law: Lon L. Fuller', in *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021), pp. 186–201 <https://doi.org/10.1017/9781108600569.011>

fulfill what Lon Fuller calls the internal morality of law: "The 'internal morality of law' is essentially concerned with the procedure of making law. It is the technique used by the lawmaker in deciding which rule of substantive law should be applied to the particular case he has called upon to decide". Lon F. Fuller believes that a rule will fail for several reasons, which failure can be avoided by paying attention to the material content of a rule based on 8 (eight) specific moral requirements that Fuller proposed, namely: 1) Laws should be general; 2) Laws should be promulgated that citizens might know the standards to which they are being held; 3) Retroactive rule-making and application should be minimized; 4) Laws should be understandable; 5) Free of contradiction; 6) Laws should not require conduct beyond the abilities of those effected; 7) Laws should remain relatively constant through time; 8) Laws should be a unity between the laws as announced and their actual administration.^{41,42}

According to Fuller, law (legislation) will cause problems when the law deviates from the moral criteria of a law. Lon Fuller will argue that the eight principles make up morality for two reasons. Two reasons exist: first, the law creates social order, which requires moral standards; second, the law respects individuality and the right to self-governance because, as Lon Fuller will explain, norms determine behavior. Without some innate moral value, it is impossible to be independent and adhere to the rules of law. This is the relationship between morality and the law: morals and principles create and maintain the law on an intrinsic and fundamental level.⁴³

In the case of the regulations governing hate speech in the Criminal Code, at least several moral indicators can be observed. First, laws should be understandable; rule makers must be able to formulate understandable article phrases and avoid multiple interpretations when they are implemented. A definition of hate speech that is not prepared will deviate from understandable legal rules. Likewise, various decisions of the Constitutional Court give new meanings based on the results of legal review due to phrases deemed contrary to the Constitution. The more an article is tested, the more the article contains noise in a regulated system. Second, regarding freedom of contradiction, the prohibition on hate speech should not combat democratic values in expressing opinions in public. The formulation of overly repressive rules, especially unclear, actually encourages conflicting laws.⁴⁴

Third, laws should not require conduct beyond the abilities of those affected in regulating hate speech; this moral value is significant. This does not mean that perpetrators of hate speech subject to criminal sanctions by the current Criminal Code can immediately be deemed incapable of carrying it out. Still, softer alternative case resolutions are certainly more suitable to the parties' ability to accept the resolution. Fourth, laws should remain relatively constant through time; laws should not lag behind the development of society. In the case of hate speech on social media, the motives and ways in which hate speech is carried out will continue to develop; general but clear laws will help solve this without changing the law occasionally. For example, the Criminal Code was just promulgated in

⁴¹ H. L. A. Hart, 'Lon L. Fuller: The Morality of Law', in *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), pp. 343–64 <https://doi.org/10.1093/acprof:oso/9780198253884.003.0017>

⁴² Raff Donelson and Ivar R. Hannikainen, 'Fuller and the Folk', in *Oxford Studies in Experimental Philosophy Volume 3* (Oxford University Press, 2020), pp. 6–28 <https://doi.org/10.1093/oso/9780198852407.003.0002>

⁴³ Ahmad Dirwan, Mohammad Jamin, and Jadmiko Anom Husodo, 'Indigenous Community Governance Policy Perspectives on Forest Area Protection', *Journal of Sustainable Development and Regulatory Issues*, 1.2 (2023), 122–32 <https://doi.org/https://doi.org/10.53955/jsderi.v1i2.12>

⁴⁴ Nilam Firmandayu and Khalid Eltayeb Elfaki, 'The Electronic Government Policy-Based Green Constitution Towards Good Governance', *Journal of Sustainable Development and Regulatory Issues*, 1.2 (2023), 108–21 <https://doi.org/https://doi.org/10.53955/jsderi.v1i2.11>

2023, but it was amended at the beginning of 2024. This amendment to the Criminal Code concerns the second amendment to the Information and Electronic Transactions Law. Legal products that cannot withstand rapid social change must be anticipated by formulating articles that look far into the future.⁴⁵

Helen Xanthaki, in her book *Thornton's Legislative Drafting*, mentions the process of drafting ideal legislation, which consists of:⁴⁶ 1) Understanding the proposal involves receiving and carefully reading the drafting instructions prepared by the department's policy and legal instructions officer requesting the drafting of the law. 2) Analyzing the proposal involves preparing a legislative plan, also known as a legislative research report. This involves a brief or more extended report on the essential elements of the designer's response to drafting instructions. 3) Designing the law involves designing the law, that is, compiling the text of the law in a way that facilitates understanding and implementation. 4) Composing and developing the draft. Preparing substantive provisions requires the application of word rules and grammar that are considered to serve the clarity of the text. The drafter uses direct, clear, well-understood, and unambiguous words. 5) Verifying the draft involves verifying the legislative text. Draft regulations need to be verified as a means of achieving quality. Verification is carried out internally, namely within the drafting team, and externally, namely by other interested Ministries and related agencies. Having established the main principles of drafting laws, the next step will be to define the main parameters of the drafting task. It is essential to identify in which legal context these principles are applied.⁴⁷

Xanthaki mentioned that an essential thing for designers when carrying out a legal transplant is to ensure that each case study selected is used to draw the correct conclusions.⁴⁸ Therefore, case studies in law drafting can only be carried out through information-oriented selection. This can also be used as a reminder to adopt the theories and principles used for drafting. The tens of thousands of cases chosen to be handled through restorative methods show the characteristics of a nation's tendency to see a condition that must be resolved. Cases determined through a restorative justice approach can certainly be considered for drafting legal reforms. Supervision of the drafter's effectiveness also needs to be carried out effectively to ensure the formation of regulations by the envisioned principles.⁴⁹ Referring to the process of forming the regulations above, there are two essential processes. First, designing the law in the context of regulating hate speech; this phase is crucial to see the direction of the policy for resolving hate speech cases, whether it tends to be through a penal approach. Policymakers must know the consequences of implementing regulations that have legal reasons for not using restorative justice. Second, composing and developing the draft is almost the same as the moral requirements proposed by Fuller, where drafting regulations must pay attention to the straightforward application of word rules and grammar. The aim is to eliminate elements of unclear definitions and criteria for hate speech.

⁴⁵ Anindita Kusumowijoyo, Anjani Marta, and Kimberly Natali, 'The Artificial Intelligence as a One-Stop Point for Dealing with Online Human Trafficking Scams in Indonesia', 1.3 (2023), 189–211 <https://doi.org/https://doi.org/10.53955/jsderi.v1i3.18>

⁴⁶ Daniel Greenberg, 'Thornton's Legislative Drafting', *Statute Law Review*, 44.1 (2023) <https://doi.org/10.1093/slr/hmac014>

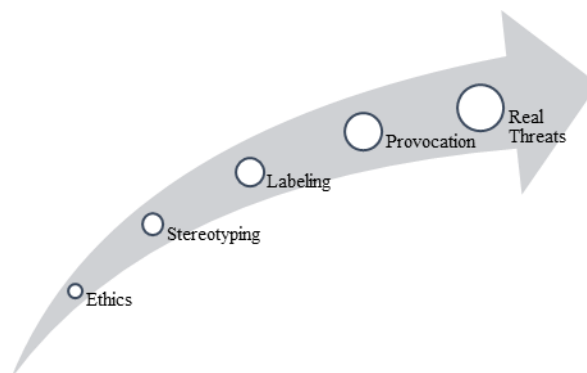
⁴⁷ Maria MOUSMOUTI, 'Drafting Legislation. Art and Technology of Rules and Regulation Helen Xanthaki London: Hart Publishing, 2014, 402 Pp. £51.70', *European Journal of Risk Regulation*, 9.1 (2018), 177–79 <https://doi.org/10.1017/err.2018.6>

⁴⁸ Helen Xanthaki, 'LEGAL TRANSPLANTS IN LEGISLATION: DEFUSING THE TRAP', *International and Comparative Law Quarterly*, 57.3 (2008), 659–73 <https://doi.org/10.1017/S0020589308000456>

⁴⁹ Helen XANTHAKI, 'An Enlightened Approach to Legislative Scrutiny: Focusing on Effectiveness', *European Journal of Risk Regulation*, 9.3 (2018), 431–44 <https://doi.org/10.1017/err.2018.25>

Theoretically, hate speech is recognized to some degree until hate speech is considered a real threat. However, legal products have not properly formulated the indicators for determining this level. Everything is seen from one point of view, namely hate speech. How to measure the level of hatred of a sentence spoken can be adopted. It influences determining which solution to take. Because penal and non-penal need to go hand in hand. Without indicators, there is no common perception for law enforcers to determine a case.

Figure 1. Danger level of Hate Speech



Even though this article encourages the use of restorative justice in hate speech cases, it is realistic that the level of danger of hate speech cannot be ignored. The destructive impact on society is an important factor. The ideal model for resolving hate speech cases can be carried out through a two-track system, namely, a non-penal and a penal approach. Implementation of the ultimum remedium principle as an alternative to the use of primum remedium. Therefore, the use of the penal approach must be limited so that criminal law should be the last resort. If a criminal act is committed for the first time, then criminal law is placed as a last resort. Criminal law is also placed as the last resort to achieve the value of proportionality which is closely related to its association with moral control in criminal law.⁵⁰ However, suppose the crime is committed a second time or the trial process is ongoing. In that case, the perpetrator is willing to fulfill the recovery by paying a certain amount, as stated in the violated article. If the perpetrator does not comply, then punishment will apply. The advantage of using out-of-court settlements in criminal cases is that a resolution option is left to the perpetrator and victim and can be done at a low cost. Additionally, sanctions can be replaced with other forms, such as compensation agreed with the victim.

Refocusing on a non-penal approach, the principle of ultimum remedium leads to restoration as the dominant element in conflict resolution. It is hoped that peace and tranquility can be fostered in social life by restoring the situation to the condition it was in before the crime occurred. The benchmark is actions and consequences. However large or small, the impacts caused will be restored in such a way through the mediation process. When mediation has been achieved and recovery has been carried out, the element of error, whether intentional with its three gradations or negligence by itself, is no longer meaningful. Thus, a non-penal settlement that results in the recovery of losses is a reason for deleting the penalty. Criminal liability is considered non-existent, and error has lost its object as a basis for criminal liability. In non-penal efforts that give rise to a peaceful resolution, the error is considered non-existent and, therefore, can no longer be attached to criminal responsibility. In the criminal justice process, the element of error is the basis for

⁵⁰ PANU MINKKINEN, “‘If Taken in Earnest’: Criminal Law Doctrine and the Last Resort”, *The Howard Journal of Criminal Justice*, 45.5 (2006), 521–36 <https://doi.org/10.1111/j.1468-2311.2006.00441.x>

consideration by the court in determining the size of the sentence. This criminal law concept can be used to formulate criteria for restorative justice arrangements.

In this way, justice results from a mutual agreement between the parties themselves, namely the victim and the perpetrator, not based on the calculations of the prosecutor and the judge's decision. In the restorative model, the emphasis is on conflict resolution. The restorative approach involves victims, families, and other parties in resolving problems.⁵¹ It makes perpetrators of criminal acts responsible for repairing the losses caused by their actions. The involvement of the parties with the same spirit will further strengthen peace. Empowerment of local wisdom, which becomes social capital, can be used as an alternative to resolving social conflicts in Indonesia. It is said to be an effective solution to overcoming and preventing social conflict in Indonesia because it is a communal society with many noble values that are respected. This social capital is an alternative for resolving hate speech cases because it enlightens togetherness, tolerance, and participation. It can be said that local wisdom is empowered. Remembering that an element of forgiveness must be considered to return to its original state.

In the case of hate speech, restorative justice means that the perpetrator apologizes to the victim, acknowledges the consequences of the mistake committed, and carries out vital actions. Restorative justice in Indonesian criminal justice is an integrated approach from inquiry, inquiry, and prosecution to court decisions. The criminal justice process aims to integrate perpetrators into society to become good citizens. However, returning the perpetrator to society and becoming a good citizen will not necessarily erase the suffering and resentment that exists between the victim and his family. Meanwhile, in the restorative justice mechanism, the ultimate goal is to restore social relations between parties to eliminate conflict and resentment between the perpetrator and the victim and his community.

Therefore, it would be better if the level of hate speech was given a measure to support the concept of non-penal mediation up to agreed sanctions for the perpetrator and, of course, considering forgiveness from the victim. The mediator can help provide relevant options to the case being handled. In non-penal mediation, mistakes, forgiveness, and sincerity can be assessed better than relying on a rigid court through the threat of punishment. What needs attention is the limited value of cases that can be resolved through the restorative justice process. There may be no limitations on value or threats of punishment as long as the parties, namely the victim and the perpetrator, are willing to resolve their legal problems using a restorative justice process.⁵²

Regarding forgiveness, for example, in cases of sexual violence, it produces complex justice for the survivors. Restorative justice administered in addition to or instead of the criminal justice process provides a basis for addressing needs and ameliorating adverse impacts. Dialogic forgiveness refers to the reduction of negative thoughts, feelings, and motivations towards the person in charge and the emergence of positive thinking in the process of mutual communication between the survivor, the person in charge, and supporters. Accountability, humanization, and gratitude are essential elements of implicit

⁵¹ Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy*, 2nd edn (London: RJ4All Publications, 2020) <https://doi.org/10.13140/RG.2.2.31927.80808>

⁵² Kurniawan Kurniawan and others, 'Legal Regulation of Hate Speech Offences with a Restorative Justice Approach', in *Proceedings of the International Conference on "Changing of Law: Business Law, Local Wisdom and Tourism Industry" (ICCLB 2023)* (Atlantis Press, 2023) https://doi.org/10.2991/978-2-38476-180-7_98

and explicit dialogic forgiveness, demonstrating healing power.⁵³ To implement restorative justice, you need to understand how to obtain justice through a long process involving human feelings, both individually and in groups, which is much more complicated. The impact of hate speech highlights the emotions, feelings, or attitudes of hate or hatred that can be triggered or provoked by intentional speech that certainly leaves grief that is not easily forgiven. In the analyzing and drafting phase, the drafter must feel these detailed regulations.

Restorative justice must be a legal principle that can trump legal rules, such as punishment rules. Second, the argument is the need to embed restorative justice in a hybrid political philosophy, namely republican-feminist-socialist-capitalist.⁵⁴ Restorative justice is an ideology that puts forward a process involving all parties involved in a particular criminal act jointly to solve problems and avoid negative consequences in the future. This umbrella concept covers various concrete activities, such as mediation and victim-offender meetings. Restorative justice recognizes victims as those who suffer losses as a result of crimes. Scholars emphasize that restorative justice is any process that allows victims and perpetrators to participate actively. Restorative justice is inclusion or encouraging the participation of victims and perpetrators. Recognition for the victim and affirmation of feelings of injury with forgiveness can speed up the healing or recovery of the victim. Restorative justice upholds the value of human rights and pays excellent attention to humanistic values. This is linear with the requirements for how the law must have morals; the process of designing and composing the law must pay attention to and be sensitive to the moral values of a case so that the final goal of resolving hate speech cases can be achieved.

4. Conclusion

The use of technology and information also causes social changes that are bad for the continuity of harmony in a nation. Cases of hate speech by intentionally and without rights spreading information aimed at creating feelings of hatred or hostility towards individuals and/or groups of people based on SARA are increasing. Resolving cases by imposing criminal sanctions in cases of hate speech on social media is considered to degrade human rights to express opinions in the context of a democratic country. It is considered not to provide a deterrent effect, let alone restore the situation to normal. Therefore, non-penal resolution of cases using a restorative justice approach is an alternative that can be the main one (takes precedence - the penal system still exists - a two-way system). However, until now, there is no solid and adequate legal basis for implementing the non-penal resolution of hate speech cases through a restorative justice approach, especially in the Criminal Code, which revokes the article regarding hate speech in the Information and Electronic Transactions Law. Both before and after the Constitutional Court Decision. The implication is that law enforcement agencies enact limited and institutional regulations to obtain a legal basis for implementing restorative justice. There should be umbrella regulations first to determine the value that will be aimed at. It is urgent to regulate restorative justice arrangements to provide guarantees of justice and legal certainty for the parties by considering recovery for damage and losses victims suffer based on a mutually agreed agreement. Restorative justice can mediate accusations of degradation of freedom of opinion and can maintain democratic values. Based on the theory of the regulatory formation process, in forming regulations - specifically in the case of hate speech - it is

⁵³ Natalie Hadar and Tali Gal, 'Survivors' Paths Toward Forgiveness in Restorative Justice Following Sexual Violence', *Criminal Justice and Behavior*, 50.6 (2023), 911–28 <https://doi.org/10.1177/00938548231162108>

⁵⁴ John Braithwaite, 'Hybrid Politics for Justice: The Silk Road of Restorative Justice II', *Restorative Justice*, 5.1 (2017), 7–28 <https://doi.org/10.1080/20504721.2017.1294795>

necessary to pay attention to the requirements for how the law must have morals, the process of designing and composing the law must pay attention to and be sensitive to the moral values of a case so that the final goal of resolving the case can be achieved.

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