

RESTORATIVE JUSTICE AS CRIMINAL POLICY: RECONCILING PENAL REFORM AND MAŞLAHAH IN INDONESIAN LAW

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Info Articles	Abstract
Article History Received : 08-13-2026 Revised : 09-18-2026 Published : 10-01-2026 Keywords: <i>Criminal policy; Maşlahah; Penal reform; Restorative justice; Şulh.</i> Kata Kunci: <i>Kebijakan kriminal; Keadilan restoratif; Maşlahah; Pembaruan pidana; Şulh.</i>	Restorative justice has become the dominant vocabulary of Indonesian criminal policy, yet it entered the legal system through institutional regulations issued separately by the police, the prosecution service and the judiciary rather than through statute, producing a practice of wide discretion without a common legal standard. This study aims to determine the normative position of restorative justice within Indonesian criminal policy, to examine its convergence with the victim-centred structure of Islamic penal law, and to formulate criteria for its legitimate institutionalisation. The research uses normative juridical research with statutory, conceptual, case and comparative approaches, supported by an uşul al-fiqh reading of ‘afw, şulh, ta‘zîr and maşlahah, drawing on Indonesian legislation and institutional regulations, selected foreign instruments and classical Islamic legal sources. The findings show that the current framework suffers from a legality deficit: eligibility rests on unpublished internal criteria, settlement risks being reduced to the payment capacity of the suspect, and no independent quality control exists over facilitation. Islamic penal law supplies an indigenous grammar for the reform through the distinction between the right of God and the right of the servant, which both authorises settlement and marks its limit. The study recommends anchoring restorative justice in the Criminal Procedure Code with statutory eligibility criteria, protection of victim voluntariness, independent facilitation, exclusion of offences involving dominant public rights, and mandatory judicial validation of agreements.

I. INTRODUCTION

Within a single decade, restorative justice has moved from the margins of Indonesian criminal law scholarship to the centre of official criminal policy. The police, the prosecution service and the judiciary have each issued their own instrument authorising the discontinuation or diversion of cases on restorative grounds, and the number of cases settled outside the ordinary penal process is now

counted in the tens of thousands annually.¹ The velocity of this change is remarkable in a system whose penal culture has been strongly retributive since colonial codification.

The reform responds to a real and measurable crisis. Indonesian correctional institutions operate far beyond design capacity, the majority of the incarcerated population is serving sentences for offences of modest gravity, and imprisonment demonstrably fails to repair the harm suffered by victims, who receive nothing from a conviction except symbolic vindication.² Restorative justice promises a different allocation of attention: the offence is treated as a harm to persons and relationships rather than as an abstract violation of state authority, and the response is negotiated among those directly affected.³

The ideal condition would be a coherent statutory framework in which restorative settlement is a recognised mode of case disposal, governed by published eligibility criteria, subject to judicial control and supported by trained facilitators. The actual condition is different. Restorative justice entered Indonesian practice through instruments of internal administrative rank, each institution defining its own thresholds, and the Criminal Procedure Code of 1981 still contains no provision authorising the termination of a case on restorative grounds. Two suspects in materially identical circumstances may therefore receive radically different treatment depending on which officer handles the file and in which region.

This produces a legality deficit with three faces. Vertically, discretionary powers affecting the liberty of citizens rest on regulations that were never enacted by the legislature. Horizontally, equality before the law is compromised where criteria differ between institutions and districts. Substantively, the practice invites a form of commodification in which the decisive variable becomes the suspect's capacity to compensate, converting restorative justice into a mechanism whose benefits accrue disproportionately to those able to pay.⁴

The enactment of Law Number 1 of 2023 concerning the Criminal Code changes the setting without resolving the problem. The new Code introduces sentencing guidelines directing courts to consider the victim's forgiveness and the offender's efforts at reparation, and it authorises judicial pardon, permitting a court to refrain from imposing punishment where the gravity of the act and the circumstances of the offender so warrant.⁵ These are substantive openings. They do

¹ Regulation of the Chief of the Indonesian National Police Number 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice; Regulation of the Attorney General Number 15 of 2020 concerning the Termination of Prosecution Based on Restorative Justice.

² Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana, 2017), 26–32.

³ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice*, 3rd ed. (Scottsdale: Herald Press, 2005), 181–186.

⁴ Kathleen Daly, “Restorative Justice: The Real Story,” *Punishment and Society* 4, no. 1 (2002): 55–79, <https://doi.org/10.1177/1462474022228464>.

⁵ Law Number 1 of 2023 concerning the Criminal Code, Articles 51–54.

not, however, supply a procedural pathway, because procedure belongs to the Criminal Procedure Code, whose reform remains pending.

International scholarship on restorative justice has matured considerably. Christie's argument that professionalised criminal justice expropriates conflicts from their owners established the theoretical foundation; Braithwaite's theory of reintegrative shaming supplied a criminological mechanism; Zehr provided the normative vocabulary; and a substantial evaluation literature has since tested outcomes with mixed but broadly favourable results for victim satisfaction and modest results for reoffending.⁶ Critical scholarship has warned with equal force about net-widening, the absence of proportionality constraints and the vulnerability of victims to informal pressure.⁷

Indonesian scholarship has largely proceeded on two separate tracks. Criminal law scholars have examined restorative justice through the lens of penal policy and the pending recodification, while Islamic law scholars have noted the affinity between restorative principles and the institutions of *'afw* and *ṣulḥ*. What has rarely been attempted is a rigorous integration of the two: an analysis that treats Islamic penal doctrine not as decorative confirmation of a Western reform but as a source of operative criteria capable of telling a legislature which cases may be settled and which may not. That is the gap this article addresses.

Three research questions follow. First, what is the normative position of restorative justice within the current Indonesian criminal policy framework, and what deficits does that position generate? Second, to what extent do the structures of Islamic penal law, particularly the distinction between the right of God and the right of the servant, converge with or constrain restorative settlement? Third, what criteria should govern the statutory institutionalisation of restorative justice so that it advances rather than compromises substantive justice? The novelty of the study lies in deriving the boundary of restorative settlement from a doctrinal distinction internal to Islamic law rather than from an intuitive gradation of offence seriousness.

II. RESEARCH METHODS

The research is normative juridical, treating the legal order as a system of norms to be analysed for internal coherence, validity and justificatory adequacy.⁸ It is doctrinal in method and prescriptive in ambition, since its final section defends criteria that current law does not yet contain.

Four approaches are used. The statutory approach analyses the Criminal Procedure Code, the Criminal Code of 2023, the Juvenile Criminal Justice System

⁶ Nils Christie, "Conflicts as Property," *British Journal of Criminology* 17, no. 1 (1977): 1–15; John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989), 54–68.

⁷ Daly, "Restorative Justice," 62–70.

⁸ Peter Mahmud Marzuki, *Penelitian Hukum*, rev. ed. (Jakarta: Kencana, 2017), 55–60.

Law and the institutional regulations of the police, prosecution and judiciary, with attention to their hierarchical rank under Law Number 12 of 2011. The conceptual approach reconstructs restorative justice theory and the Islamic legal concepts of 'afw, ṣulḥ, diya, ta'zīr and maṣlaḥah. The case approach examines judicial reasoning on the effect of settlement upon criminal liability. The comparative approach considers New Zealand, Norway and the European Union framework as functional reference points.

Primary legal materials comprise Indonesian legislation and institutional regulations, the relevant Qur'ānic verses on retaliation and pardon, and classical works of uṣūl and furū', principally those of al-Ghazālī, al-Ṭūfī, al-Shāṭibī and Ibn Qayyim al-Jawziyya. Secondary materials consist of peer-reviewed criminological and legal scholarship, predominantly from the last fifteen years. Analysis proceeds by qualitative content analysis, followed by a doctrinal test in which each element of current practice is assessed against the conditions classical theory imposes on maṣlaḥah-based reasoning, and finally by a comparative evaluation generating design criteria. The study does not include fieldwork; claims about implementation rest on published institutional data and the empirical findings of other researchers.

III. RESULTS AND DISCUSSION

A. A Reform Built on Institutional Regulation

The first finding concerns the architecture of the reform. Restorative justice in Indonesia rests on three parallel instruments issued by three institutions, each operating at a different stage of the process and each defining eligibility in its own terms. Police regulation governs the investigative stage; the Attorney General's regulation governs the decision not to prosecute; internal judicial guidance governs case management in the courts. None of these is a statute, and none binds the other two. A case terminated by one institution's criteria may have been ineligible under another's.

Under the legality principle, the state's power to prosecute and the conditions of its exercise belong to the domain of statutory regulation. Discretion is not itself objectionable; every prosecution system requires it. What is objectionable is discretion whose criteria are set internally, applied without published reasons and insulated from review. The Juvenile Criminal Justice System Law demonstrates that Indonesian law is capable of the alternative, since it establishes diversion in statutory form with defined thresholds, mandatory facilitation and judicial confirmation of the resulting agreement.⁹ The adult system has borrowed the philosophy of that regime without borrowing its legality.

The second structural defect concerns the position of the victim. Restorative theory treats victim participation as constitutive, not optional; a settlement reached

⁹ Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, Articles 7–12.

without free and informed victim consent is not restorative in any meaningful sense. The European framework accordingly conditions referral on the victim's free consent, requires that the victim be able to withdraw at any time, and obliges states to ensure that agreements are reached voluntarily and that facilitators are trained.¹⁰ Indonesian instruments mention agreement but contain no comparable safeguards against pressure, no confidentiality rule protecting statements made during facilitation, and no independent facilitator qualification.

The third defect is distributive. Where settlement in practice turns on the payment of compensation, access to the restorative pathway becomes a function of means. The wealthy suspect settles; the poor suspect proceeds to trial and to prison for the same conduct. This inverts the purpose of the reform, which was to reduce the penal system's disproportionate burden on the economically marginal. Any statutory design must therefore separate the question of eligibility from the question of the quantum of reparation, and must provide for non-material forms of reparation such as apology, community work and undertakings of future conduct.

B. The Islamic Penal Structure: Authorisation and Its Limit

Islamic penal law is frequently invoked in Indonesian debate as evidence that restorative justice is culturally indigenous. The claim is correct but usually made too loosely. What Islamic law supplies is not a general endorsement of settlement but a precise doctrinal architecture determining when settlement is permissible and when it is not.

The Qur'ānic treatment of homicide and wounding establishes retaliation as a right of the victim's family and simultaneously commends its remission in exchange for compensation, framing the remission as an act of alleviation and mercy.¹¹ The structure is significant: the state does not own the claim. Classical doctrine develops this into the distinction between rights of God, which belong to the public order and cannot be waived by individuals, and rights of the servant, which may be waived, compromised or pardoned by their holder.¹²

From this follows a workable boundary. Offences in which the private right predominates, including most property offences, personal injury and interpersonal disputes, are structurally open to *ṣulḥ*. Offences in which the public right predominates, including those touching the integrity of the state, corruption of public funds, and conduct endangering the community at large, are not available for private settlement, because no individual holds the right that would have to be waived. Rudolph Peters' analysis of the operation of this distinction in historical

¹⁰ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, Article 12.

¹¹ Qur'ān 2:178.

¹² Shihāb al-Dīn al-Qarāfī, *al-Furūq*, ed. Muḥammad Aḥmad Sarrāj and 'Alī Jum'a (Cairo: Dār al-Salām, 2001), 1:255–260.

practice shows that it functioned as a genuine jurisdictional filter rather than as a rhetorical formula.¹³

The doctrine of ta'zīr supplies the second element. Because ta'zīr penalties are not fixed by revelation, the authority holding jurisdiction may calibrate them to circumstance, including by substituting reparative and educative measures for detention. This is the classical locus of penal individualisation, and it is governed by siyāsa shar'īyya, the ruler's policy discretion, which Ibn Qayyim insists is legitimate only insofar as it actually realises justice.¹⁴ Discretion bounded by justice is precisely what the current Indonesian framework lacks.

C. Testing the Reform Against the Conditions of Maṣlaḥah

Restorative justice is commonly justified in Indonesian literature as an application of maṣlaḥah mursalah. The justification is sound but incomplete unless the classical conditions attaching to such reasoning are actually applied. Al-Ghazālī admits reasoning from unattested welfare only where the interest is of the essential order, certain rather than speculative, and general rather than particular.¹⁵ Al-Ṭūfī's more expansive position, giving priority to welfare in matters of social transaction, has been widely cited in Indonesian reform debates and is often invoked without its accompanying caution that the priority does not extend to matters governed by definitive texts.¹⁶

Applied honestly, the test yields a differentiated result. Diverting minor offences from imprisonment satisfies all three of al-Ghazālī's conditions: the protection of life, lineage and property is served, the harm of short custodial sentences to offenders and their dependants is established rather than speculative, and the benefit accrues to the community generally through reduced prison overcrowding. Conversely, extending settlement to offences dominated by public right fails the test, because the interest served is particular, accruing to the offender and a specific victim, while the harm to the general interest in deterrence and equal treatment is systemic.

This yields the central theoretical claim of the article. Maṣlaḥah cannot be invoked as a blanket authorisation for discretion; it is itself a disciplined method with conditions of application, and a legislature that invokes it must also accept its constraints. Read in this way, Islamic legal theory does not merely bless restorative justice. It demands that the reform be bounded, published, and justified case-

¹³ Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge: Cambridge University Press, 2005), 53–58.

¹⁴ Ibn Qayyim al-Jawziyya, *al-Ṭuruq al-Ḥukmiyya fī al-Siyāsa al-Shar'īyya*, ed. Nāyif al-Ḥamad (Mecca: Dār 'Ālam al-Fawā'id, 2007), 1:31–35.

¹⁵ Abū Ḥamid al-Ghazālī, *al-Mustasfā min 'Ilm al-Uṣūl*, ed. Ḥamza b. Zuhayr Ḥāfiẓ (Medina: n.p., 1993), 1:417–420.

¹⁶ Najm al-Dīn al-Ṭūfī, *Risāla fī Ri'āyat al-Maṣlaḥa*, ed. Aḥmad 'Abd al-Raḥīm al-Sāyih (Cairo: al-Dār al-Miṣriyya al-Lubnāniyya, 1993), 23–28.

typically rather than case-individually, which is exactly what a statute does and an internal regulation does not.

D. Comparative Reference Points

Table 1. Comparative Anchoring of Restorative Justice

Jurisdiction	Legal basis	Principal safeguard	Structural weakness
Indonesia	Institutional regulations of police, prosecution, judiciary; statutory only for juveniles	Agreement of the parties	No statutory criteria; risk of settlement by payment capacity
New Zealand	Statutory conferencing for youth; statutory pre-sentence referral for adults	Mandatory conference before sentencing in eligible cases	Resource dependence; uneven regional capacity
Norway	Mediation service established by statute	Independent state mediation service with trained mediators	Limited reach in serious offences
European Union	Directive 2012/29/EU minimum standards	Informed and revocable victim consent; confidentiality	Implementation varies widely among member states

Source: Processed from primary legal materials, 2026.

Two lessons emerge from the comparison. The first is that every mature system anchors restorative practice in legislation and treats institutional guidance as implementation rather than as source. The second is that safeguards cluster around the victim rather than the offender, because the risk that restorative processes actually generate is informal pressure on the person who has already been harmed. Indonesian instruments are, by contrast, drafted principally from the perspective of case disposal efficiency, which explains why their safeguards are thin.

E. Criteria for Legitimate Institutionalisation

Six criteria follow from the preceding analysis. First, statutory anchoring: restorative disposal should be regulated in the Criminal Procedure Code, with institutional regulations confined to implementation. Second, published eligibility criteria defined by offence type and by the predominance of private over public right, rather than by discretionary assessment of gravity. Third, protection of victim voluntariness through informed consent, a right of withdrawal, and confidentiality of statements made during facilitation. Fourth, independence and qualification of facilitators, who should not be the investigating officer in the same case. Fifth, decoupling of eligibility from financial capacity, with explicit statutory recognition of non-material reparation. Sixth, judicial validation of agreements, following the model already established for juvenile diversion, so that a settlement acquires the force of law and becomes reviewable.

These criteria are mutually reinforcing rather than cumulative burdens. Statutory eligibility criteria make judicial validation workable; judicial validation makes victim safeguards enforceable; decoupling from payment capacity makes the

reform distributively defensible. Together they convert restorative justice from an administrative efficiency measure into a genuine reorientation of penal policy, and they satisfy simultaneously the demands of the legality principle and the conditions classical Islamic legal theory attaches to welfare-based reasoning.

IV. CONCLUSION

Restorative justice occupies an anomalous position in Indonesian criminal policy: philosophically endorsed, institutionally embraced, and legally ungrounded. The reform currently rests on internal regulations that define eligibility without statutory authority, protect victims inadequately, and permit outcomes to track the financial capacity of suspects. The Criminal Code of 2023 has opened substantive space through its sentencing guidelines and judicial pardon, but the procedural gap remains until the Criminal Procedure Code is reformed.

Islamic penal law contributes more than cultural legitimation. Its distinction between the right of God and the right of the servant supplies a principled boundary for settlement, its doctrine of ta'zīr supplies the space for reparative sanctions, and its conditions on maṣlaḥah-based reasoning supply the discipline that the current framework lacks. The convergence between Islamic penal structure and restorative theory is therefore real, but it is a convergence that constrains as much as it authorises.

The study accordingly recommends that restorative disposal be enacted in the Criminal Procedure Code with published eligibility criteria keyed to the predominance of private right; that victim voluntariness, confidentiality and facilitator independence be given statutory protection; that eligibility be separated from the quantum of compensation; and that agreements be judicially validated. Further research should examine empirically whether settlements concluded under the current instruments in fact correlate with the economic position of suspects, since that correlation is the clearest available test of whether the reform is delivering justice or merely delivering disposals.

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