

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

Restorative Justice as a New Breakthrough in The Justice System in Indonesia

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Abstract. *Restorative justice is an innovative approach to the resolution of criminal cases. The concept of a restorative justice model has been implemented in several countries, with emphasis on the role of offenders, victims and communities in the settlement of legal cases between them. While the concept of the restorative justice model is still under discussion at the theoretical level, it is still growing and existing. It also has a significant impact on the law and practice in many countries. The following are the main reasons for this study. Such as: How does restorative justice work in Indonesia's legal system? How can restorative justice be part of the future criminal law reform? The research uses descriptive analysis study with qualitative method. The outcome of the study is that Indonesia is a law state that has relatively high criminal figures. It should also be taken into account that the restorative justice model may become a way to solve legal cases. the concept of restorative justice in development has already been introduced through several provisions in Criminal Code Bill and the diversion of children, mainly to balance between the parties involved in criminal law (the perpetrator, the victim, the community and the state). Obviously, this model will be part of the future Indonesian criminal law reform to ensure justice, certainty and speed as the goal of the law itself.*

Keywords: *Breakthrough; Justice System; Restorative Justice.*

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1. Introduction

Conflict or dispute in today's society has been and will continue to be a common phenomenon in society, whether related between two or more individuals. This situation will further complicate the legal and judicial world if all conflicts, disputes or disputes are processed legally by the judiciary. Therefore, it is necessary to look for other efforts outside the existing criminal justice procedures, so that the community does not only depend on the current procedures. However, justice and problem solving can still be achieved, especially for the victim as the party that suffers the most, as well as for the perpetrator's accountability. One form of solution offered is a settlement process in the context of restorative justice.

The concept of restorative justice approach is an approach that focuses more on the conditions for the creation of justice and balance for the perpetrators of criminal acts and the victims themselves. The mechanism of criminal procedure and justice that focuses on punishment is changed into a process of dialogue and mediation to create an agreement on the settlement of criminal cases that is fairer and more balanced for the victims and perpetrators. Restorative justice itself means justice that restores, while restoration here has a broader meaning than what is known in the conventional criminal justice process of restitution or compensation for victims. This departs from the view that in a crime event, the suffering of a person who has become a victim not only results in the person himself, but also has an impact on the people around him, and even has an impact on society and the state in a broader scope.

In criminal justice practice, victims are only treated or positioned as witnesses (victims), without the right to participate actively in court proceedings. Law enforcement officials only position victims as instruments in order to help them punish or convict perpetrators, without ever proceeding to what they can provide for the benefit of victims. However, the concept of restorative justice includes restoring the relationship between the victim and the offender. This restoration can be based on mutual agreement between the victim and the perpetrator. The victim can convey the losses suffered and the perpetrator is also given the opportunity to make up for it, through compensation mechanisms, peace, social work, or other agreements. This is important, because the conventional criminalization process does not provide space for the parties involved, in this case the victim and the perpetrator, to actively participate in the resolution of their problems.

Lately, it seems as if only the courts are the best place to solve legal problems (conflicts) and seek justice. Thus, every indication of a criminal offense, without taking into account the escalation of the act, will continue to be rolled into the realm of law enforcement which is only

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the jurisdiction of law enforcers. Active participation from the community does not seem to be important anymore, everything only boils down to court decisions in the form of punishment without seeing the essence. In fact, in a criminal trial, the parties that play a role are the public prosecutor, judge, defendant, and legal counsel as well as witnesses. The victim is represented by the public prosecutor and to strengthen the evidence, he/she is usually used as a witness (victim). However, this has not yet had a real impact or benefit for victims of crime, even though many countries have begun to think about other alternatives to resolve conflicts that exist in society. This is due to dissatisfaction and frustration with the application of existing criminal law, as well as the application of the Criminal Justice System which does not provide justice for individuals, protection for victims, and does not provide benefits to society.

Historically, the restorative justice approach was an emergency approach in the 1960s to resolve criminal cases that did not use the criminal justice system. With this restorative justice approach, it focuses on the direct participation of perpetrators, victims and the community in the process of resolving criminal cases. While this approach is still theoretically contested, it has developed and had an impact on legal policy and law enforcement practice in several countries. Restorative justice is considered a new form of thinking that can be used to respond to various crimes and answer dissatisfaction with the performance of the current criminal justice system.

2. Research Methods

1. The Method of Data Collecting

In this research, data collection is carried out by means of document studies, by conducting an inventory of literature related to the research theme. This is done to obtain data in the form of principles, legal theories, concepts, doctrines and legal rules. In the study of literature or documentation conducted, it is directed to two things, namely:

- a. Conduct an inventory and review of various existing literature in order to strengthen the research results and get a comprehensive picture of the problems in the research;
- b. Examine theoretically / juridically the principles, legal theories, concepts, doctrines and legal rules related to obtaining the intended results.

2. The Method of Data Analysis

The data and information that has been obtained is then analyzed using qualitative methods. The results of this qualitative analysis will then be presented in an analytical descriptive manner, which is not only able to suggest and find categories related to a discipline, but is

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developed from a category found and its relationship with the data obtained. What is meant by qualitative is a research method that produces analytical descriptive data, namely what is found in practice and literature is studied and studied as a whole.

3. Results and Discussion

The purpose of punishment and punishment against perpetrators of criminal acts Before discussing restorative justice, it is necessary to mention in this paper first about the purpose of punishment and punishment of criminal offenders. This is because one of the integral parts of criminal law is the punishment itself. Criminal law is not a regulation that only regulates norms without being followed by a criminal threat. Criminal sanctions imposed for those who are considered wrong, is an attitude of suffering (suffering) that must be endured; however, criminal sanctions are not solely aimed at providing a sense of suffering.¹ Criminal sanctions are essentially a tool to achieve goals and how to formulate these goals in the concept or material of a law that the legislator wants to enforce by including punishment. In addition to being enforced, there are also objectives of punishment and conditions of punishment.

The purpose of punishment is the protection of society and the protection or guidance of the perpetrator. Barda Nawawi Arief stated that punishment in essence is only a tool to achieve goals that depart from the balance of two main objectives, namely the protection of society and the protection or guidance of individual offenders. Starting from this balance, the requirement of punishment according to the concept also stems from the idea of mono-dualistic balance between the interests of society and individual interests, between objective factors and subjective factors.² Garland defines punishment as "the legal process whereby violators of criminal law are condemned and sanctioned in accordance with specified legal categories and procedures" (a legal process whereby it is a reproach and sanction against violators of criminal law in accordance with predetermined categorization and legal rules).³ Thus, punishment is a pain imposed by the state to someone who violates the provisions of the law.

Criminal punishment is imposed intentionally by the state to the convict so that it is felt as a pain. The suffering of punishment is a penance from the perpetrator. With penance, the wrongdoing will be restored to the balance of value in the person. Self-redemption is a

¹ Niniek Suparni, Eksistensi Pidana Denda Dalam Sistem Pidana dan Pemidanaan (Jakarta: Sinar Grafika, 1993), hlm. 1-2.

² Barda Nawawi Arief, Bunga Rampai Kebijakan Hukum Pidana (Bandung: Citra Aditya Bakti, 2002), hlm. 88

³ David Garland, Punishment in Modern Society, A Study in Social Theory (Oxford: Clarendon Press, 1990), hlm. 312.

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fundamental need of our moral nature.⁴ On the other hand, punishment is also a "reaction to the offense, and takes the form of a punishment deliberately inflicted by the state on the perpetrator of the offense".⁵ The punishment inflicted on the perpetrator of the offense is not a final goal aspired by society, but the punishment is only a proximate goal. Criminal law in its efforts to achieve its goals is not merely by imposing punishment, but by using measures. According to Roeslan Saleh, "action can be seen as a sanction, but it is not retaliatory, and is aimed solely at special prevention, and action is intended to maintain public security against the threat of danger."⁶

According to Simons, punishment(straf) is "a suffering that the criminal law has associated with the violation of a norm, which by a judge's decision has been imposed on someone who is guilty".⁷ Meanwhile, Van Hamel defines punishment as: "A special suffering, which has been imposed by the authority authorized to impose punishment on behalf of the state as the person responsible for the involvement of the general law for an offender, namely solely because the person has violated a legal regulation that must be enforced by the state".⁸

The issue of punishment is not just a simple process of putting someone in prison. Criminalization is basically a picture of the moral system, human values and philosophical views of a human society at an era, so that problems regarding the criminalization system must at least cover three perspectives, namely philosophical, sociological and criminological.⁹ Criminalization is the most important part of criminal law, because it is the culmination of the entire process of holding someone accountable who has been guilty of committing a criminal offense. Andrew Ashworth said "a criminal law without sentencing would merely be a declaratory system pronouncing people guilty without any formal consequences following from that guilt".¹⁰ Thus, criminal law without sentencing means declaring someone guilty without any definite consequences for his guilt. Thus, the conception of guilt has a significant

⁴ Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara* (Semarang: Badan Penerbit Undip, 2000), hlm. 159.

⁵ Roeslan Saleh, *Hukum Pidana Sebagai Konfrontasi Manusia dan Manusia* (Jakarta: Ghalia Indonesia,

⁶ Roeslan Saleh, *Stelsel Pidana Indonesia* (Jakarta: Aksara Baru, 1983), hlm. 9.

⁷ P.A.F. Lamintang, *Hukum Penitensier Indonesia*, (Bandung: Armico, 1984), hlm. 35.

⁸ Ibid., hlm. 34

⁹ Eva Achjani Zulfa dan Indriyanto Seno Adji, *Pergeseran Paradigma Pemidanaan* (Bandung: CV. Lubuk Agung, 2011), hlm. 3.

¹⁰ Andrew Ashworth, *Principles of Criminal Law* (Oxford: Clarendon Press, 1991), hlm. 12.

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influence on the imposition of punishment and its implementation process. If guilt is understood as reprehensible, then punishment is a manifestation of that reproach.¹¹

However, in criminal law, the purpose and guideline of punishment must also be considered. Given that the formulation of the objectives and guidelines of punishment in a regulation occupies a central position that aims to provide clear direction and guidance for judges in imposing punishment. This is in accordance with the nature of the law itself which is actually a purposive system (law).¹² In addition, the existence of objectives and guidelines for punishment is intended as a control function, as well as providing a clear and directed philosophical basis, rationality and motivation for punishment.¹³

There are several objectives to be achieved by the punishment G. Peter Hoefnagels, as quoted by Muladi and Barda Nawawi Arief said that the purpose of punishment is to:

a. Conflict Resolution.

b. Influencing offenders and possibly others than offenders towards more or less Law-conforming behavior. While Roeslan Saleh argues that there are essentially two

axes that determine the lines of criminal law, namely:¹⁴

a. The aspect of prevention, namely that criminal law is a law of sanctions, an effort to be able to maintain the preservation of life together by preventing crime;

b. The aspect of retaliation, namely that criminal law is also a legal determination, is a correction of and reaction to something that is not legal. Thus, in essence, punishment is always the protection of society and retaliation for unlawful acts. In addition, Roeslan Saleh also argued that the punishment contains other things, namely that the punishment is applied as something that will bring harmony and punishment is an educational process to make people acceptable back in society.

by regarding to sentencing guidelines, there are several sentencing guidelines, namely:¹⁵

¹¹ Chairul Huda, *Dari Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan* (Jakarta: Kencana Prenada Media Group, 2011), hlm. 125.

¹² Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep KUHP Baru)*, (Jakarta: Kencana Prenada Media, 2008), hlm. 136.

¹³ Ibid.

¹⁴ Roeslan Saleh, *Suatu Reorientasi Dalam Hukum Pidana* (Aksara Baru: Jakarta, 1978), hlm. 25.

¹⁵ Ibid., hlm. 137.

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- a. General guidelines, which provide direction to judges regarding what matters should be considered in imposing punishment;
- b. Specific guidelines, which specifically provide direction to judges in choosing or imposing certain types of punishment;
- c. Guidelines for judges in applying the criminal punishment formulation system used in the formulation of the offense.

However, in practice there is a gap between expectation and reality. Such as the high rate of recidivism (repetition) of crimes, as well as the number of crimes that cause victimization of convicted criminals in the circle of the criminal justice system.¹⁶

Criminals who are sentenced to punishment (imprisonment) in correctional institutions, should be aware of all their mistakes and return to being good people in society. However, in reality, it is often the case that offenders cannot even return to being good people, so it is not surprising to say that prison is a "school of crime".

The emergence of the restorative punishment model is due to the current criminal justice and punishment system causing problems. In the current prison system, the purpose of punishment is deterrence, revenge, and suffering as a consequence of their actions. The indicator of punishment depends on the extent to

which the prisoner complies with prison regulations. Thus, the approach is more of a security approach. In addition to imprisonment which has consequences for the families of prisoners, the current system is considered not to relieve or heal victims. If the legal process takes a long time. In contrast, restorative punishment involves victims, families and other parties in solving the problem. In addition, it makes the criminal responsible for repairing the harm caused by their actions. For the victim, the emphasis is on restoring lost assets, physical suffering, security, dignity and satisfaction or a sense of justice.

Restorative justice places a higher value on the direct involvement of the parties. The victim is able to restore an element of control, while the offender is encouraged to assume responsibility as a step in righting the wrong caused by the crime and in building his or her social value system. Active community involvement strengthens the community itself and binds the community to the values of mutual respect and compassion. This reduces the role of the government in monopolizing the justice process. Restorative justice requires cooperative

¹⁶ Dey Ravena, Sistem Pemasyarakatan (Pergeseran Paradigma Pembinaan Narapidana dalam Sistem Peradilan Pidana di Indonesia), Disertasi, Universitas Diponegoro, Semarang, 1997.

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efforts by the community and government to create conditions in which victims and offenders can reconcile their conflicts and repair their wounds.

1. The Concept of Restorative Justice

The original concept of restorative justice practice comes from peacekeeping practices used by the Maori people (indigenous people in New Zealand). When conflicts arise, restorative practices address the perpetrators, victims, and stakeholders. In fact, Jeff Christian, an expert from Canada's International Correctional Institute, argues that restorative justice has been practiced by many communities for thousands of years, long before the birth of the formal state law that is now called modern law

The concept of Restorative Justice has actually emerged for quite a long time, approximately twenty years ago as an alternative to the settlement of prisoners, especially children, with various considerations. As stated by John Braithwaite, restorative justice is a new direction between "justice" and "welfare model", then between "retribution" and "rehabilitation".¹⁷ In North America, Australia and parts of Europe, restorative justice has been applied at all stages of the conventional criminal justice process, namely the investigation and prosecution stage, the adjudication stage and the execution stage of imprisonment.¹⁸ In its development, the growth and spread of restorative justice received the support of the United Nations (UN). At the 5th Five Year Congress in Geneva in 1975, the UN began to pay attention to compensation for victims of crime, as an alternative to retributive criminal justice,¹⁹

Basically, restorative justice prioritizes the meaning of meeting between interested parties in the crime and the period afterwards.²⁰ As stated by Achmad Ali who quoted Howard Zher, a pioneer of restorative justice in the United States, defines restorative justice as "a process that involves interested parties from a specific offense and jointly identifies losses and fulfills obligations and needs and places change as a right that must be received".²¹ Adrianus Meliala quotes Morrison's opinion that restorative justice "is a form of conflict resolution and seeks to make it clear to the offender that the behavior is not condoned (welcomed), at the same time

¹⁷ John Brithwaite, *Restorative Justice and Responsive Regulation* (University Press, Oxford, 2002).

¹⁸ Eriyantouw Wahid, *Keadilan Restoratif dan Peradilan Konvensional dalam Hukum Pidana* (Jakarta: Universitas Trisakti, 2009), hlm. 1

¹⁹ Hadi Supeno, *Kriminalisasi Anak, Tawaran Gagasan Radikal Peradilan Anak Tanpa Pemidanaan*, (Jakarta: Gramedia, 2010), hlm. 196.

²⁰ Ibid

²¹ Achmad Ali, *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicial Prudence)*, (Jakarta: Kencana Prenada Media, 2009), hlm. 247.

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as being supportive and respectful of the individual".²² Based on this opinion, efforts to resolve conflicts and at the same time heal between the perpetrator and the victim are by bringing together or introducing the perpetrator in one forum with the victim or his family to foster empathy on both sides.

Thus, in conflict resolution, what is highlighted is not affirming the guilt of the violator and then imposing criminal sanctions, but the active role of the conflicting parties through mediation or compensation for material and immaterial losses in the form of restitution or compensation and restoration of harmonious human relations between the parties (humanization). Van Ness, as quoted by Mudzakkir, said that restorative justice is characterized by several prepositions, namely:

- a. Crime is a conflict between individuals that results in harm to victims, society, and the perpetrators themselves;
- b. The goal that must be achieved from the criminal justice process is to reconcile between the parties while mutually repairing the losses caused by the crime;
- c. The criminal justice process should facilitate the active participation of victims, offenders and the community, and criminal justice should not be dominated by the state to the exclusion of others.²³

Based on the above opinion, the criminal justice system should be carried out with various approaches that still uphold justice for both victims and perpetrators. Theoretically, there are three models that place the relationship of restorative justice with the criminal justice system, namely:²⁴

- a. As part of the criminal justice system.

It makes sense for restorative justice to be a form of punishment given that the nature of punishment is coercive, causing pain along with guilt and remorse in the offender;

- b. Outside the criminal justice system through other institutions outside the system.

²² Adrianus Maliala, Restorative Justice dan Penegakan Hukum, Bahan Kuliah Mahasiswa PTIK Ang 54/55, Jakarta, 2009

²³ Mudzakkir, "Viktimologi: Studi Kasus di Indonesia" (makalah pada Penataran Nasional Hukum Pidana dan Kriminologi ke XI, Tahun 2005, Surabaya).

²⁴ Eva Achjani Zulfa, Keadilan Restoratif di Indonesia (Studi tentang kemungkinan penerapan pendekatan keadilan restoratif dalam praktek penegakan hukum pidana), Disertasi, pada Universitas Indonesia, 2009, hlm. 180-183.

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The view of restorative justice is inversely proportional to the criminal justice system, which prohibits the harsh nature of criminal law or referred to as soft justice, therefore it must be outside the criminal justice system;

c. Outside the criminal justice system while still involving law enforcement.

This is a description of the quasi system where the emphasis here is that the settlement model with a restorative approach must still coexist with the criminal justice system because basically this settlement model can be used as the basis of a criminal case handling strategy whose objectives are directed at the good of the perpetrator, victim and society.

Based on several opinions above, it is clear that restorative justice is a concept of thought that responds to the development of the criminal justice system by emphasizing the involvement of the community and victims in the settlement of existing criminal cases. This involvement is related to the stages of criminal law enforcement at the investigation level, especially in the process of law enforcement in certain cases in Indonesia based on the severity of the crime committed, the size of the loss caused, the background conditions and motives of the perpetrator and the sociological conditions of the local community

In Indonesia itself, the concept of restorative justice has long been practiced in Indonesian society, such as in Papua, Bali, Toraja, Minang Kabau, Kalimantan, Central Java and other communities that still hold strong culture. In the event of a criminal offense by a person (including unlawful acts committed by children). In practice, the settlement is carried out in a meeting or consensus meeting attended by community leaders, the perpetrator, the victim (if willing), and the perpetrator's parents to reach an agreement to correct the mistake. This is actually a value and characteristic of the philosophy of the Indonesian nation as stated in the fourth principle of Pancasila, namely *musyawarah mufakat*. Thus, restorative justice is actually not new to Indonesian society. Consensus deliberation aims to achieve peace, so that between the perpetrator and the victim there is no "grudge" and the victim can be restored

Criminal law as an independent part of public law is one of the most urgent legal instruments since ancient times. The existence of criminal law is very important in ensuring public security from the threat of criminal acts, maintaining state stability and is a moral institution that plays a role in rehabilitating criminal offenders. Therefore, criminal law continues to develop in accordance with the demands of society. One of these developments is the emergence of the idea of conflict resolution that does not only focus on the legal process in court, but is resolved by the parties to the conflict by restoring the existing situation. This principle is then known as restorative justice which is introduced in the Draft Criminal Code through a number of

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provisions in Article 2, Article 12, Article 54, and Article 55, the existence of mediation in Article 145 letter d, as well as diversion for children in the juvenile criminal justice system. The emergence of this concept is mainly to provide a balance of attention among criminal law stakeholders, namely the perpetrator, victim, community and the state. Furthermore, the balance is also seen in terms of the regulation of punishment (straf/punishment) with the regulation of measures (maatregel/treatment/measures) and the possibility of combined sanctions between punishment and measures (double track system), given the heterogeneity of crime problems, as well as awareness of the importance of appropriate therapy for victimless crime.

In the practice of criminal law, criminal mediation is regarded as a derivative of restorative justice, because there is no need to conduct criminal law through the courts. Although Alternative Dispute Resolution (ADR) is commonly applied in civil matters, but not in criminal matters. Because on the basic level, a criminal case cannot be resolved outside the court, but in practice for certain things may happen, even an out-of-court settlement may be the ideal thing. In the development of theoretical discourse as well as the evolution of criminal law reforms in various countries there is a strong tendency to use criminal mediation as one of the alternative solutions to problems in the field of penal law. It cannot be denied that law enforcement practices in Indonesia which in criminal matters are settled outside the courts through the discretion of the law-enforcement apparatus, let alone in the practice of the public also carry out forms of social discretions over criminal cases through mechanisms of peace, settlement of customary institutions, and so on, which then led to the demand to positively form out-of-court settlements of matters increasingly stronger.

Restorative justice also presses on human rights and the need to restore the effects of social injustice and in simple ways to give the perpetrator justice than formal justice (the law) victims do not get any justice. Then restorative justice is also seeking to re-establish the safety of victims, personal respect, dignity and more importantly is the sense of control.

4. Conclusion

This research is very important to be considered in the practice of criminal settlement that has taken place over the years, with this restorative justice approach, the enforcement of the law from the one that has always prevailed with the purely retributive approach will shift to a restorative approach by concerning these aspects as follows: 1. The settlement of criminal cases in Indonesia can be done using the restorative justice approach, where the mechanisms used by means of mutual understanding between the perpetrators, victims/families of the victims, the community and the state as stakeholders of the criminal law. Even develop and

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exist in the life of the community, because in concrito can bring common good and avoid the negative impact of criminal prison as well as the restoration of the victims of their rights. It is simply not formally part of the Indonesian legal system. 2. In the context of the reform of criminal law in Indonesia has also adopted the principle of restorative justice as laid down in the National Code of Criminal Procedure, where the formula on types of crime (straf maat) has a restorative nature. The same is true of the law of the child's criminal justice system. So, it is highly likely that this concept of restorative justice could be part of the criminal law reform in Indonesia in the future. Advice: For future law enforcement officers should also change their paradigm of thinking in the settlement of criminal cases so as not always to use retributive approaches that prioritize criminal prisons or other forms of crime that are sometimes contrary to the purposes of criminal law itself. For future legislators, it needs to think seriously, as well as facilitate making this restorative justice approach part of the national legal system, thus becoming part of a settlement mechanism in the Indonesian criminal justice system. There needs to be a serious effort by the government to dismantle as soon as possible the process of negotiation, validation, and enforcement of a new national Covenant that is consistent with Indonesian values. Given that the current KUHP is no longer compatible with the culture of the Indonesian nation based on customary law, Islamic law and other values of humility.

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