Jurnal Hukum UNISSULA

Volume 39 No. 2, December
P-ISSN: 1412-2723

Justice as a Meta Value of Corrective Justice in Providing Restitution for Unjust Enrichment: A Study on Rules, Norms, Principles, and Foundation

Faizal Kurniawan
Faculty of Law, Postgraduate School of Universitas Airlangga, Indonesia, E-mail: faizal@fh.unair.ac.id
Prawitra Thalib
Faculty of Law, Postgraduate School of Universitas Airlangga, Indonesia, E-mail: prawitra@fh.unair.ac.id
Hadi Subhan
Faculty of Law, Universitas Airlangga, Indonesia, E-mail: hadi@fh.unair.ac.id
Bart Jansen
Leiden Universiteit, Nyenrode Business University, Netherland, E-mail: b.jansen@nyenrode.nl
Zuhairah Ariff Binti Abd Ghadas
Department of Law, University of Sultan Zainal Abidin, Malaysia, E-mail: zuhairahariff@unisza.edu.my

ARTICLE INFO

Keywords:
Foundation, Principle, Value, Norm, Rule, Unjust Enrichment, Corrective Justice, Justice

DOI :
10.26532/jh.v39i2.33049

ABSTRACT

The legal foundation is one of the most important sources of law that has been emphasized in several legal theories. However, concepts regarding legal foundation are still heavily debated and intertwined with other legal principles, legal values, legal norms, legal theorems, and legal rules. Foundation, principles, and norms are general concepts discussed in the law field as a separate point of discussion in the study of law, especially in legal theory.This showcases that the knowledge regarding concepts and the standing of different principles, values, norms, and rules are important in studying a particular field of law. However, in practice, most legal scholars and professors in the field of law are still unaware of such concepts that often overlap with one another. Generally, foundations are meta values from principles, principles are the meta values of norms, and norms are meta values of a rule. In comparison, values are the equivalent of principles and fundamental values. A theorem is the equivalent of a norm, which is embodied in a rule, and the rule itself is the most concrete implementation of a principle, which may be in the form of a written or unwritten rule. This paper aims to explore the relationship between justice, corrective justice, restitution, and unjust enrichment. It will discuss how fundamental values, principles, and norms serve as meta-values in achieving justice. Additionally, it will examine the role of corrective justice in providing restitution for cases of unjust enrichment.

1. Introduction

Legal foundation is one of the most important sources of law that has been emphasized in several legal theories.[1] In principle, a crime is defined as an action that violates the standards set by society. As a result, the state, acting on behalf of the community that is impacted, is granted the power to punish those who commit criminal acts according to the relevant laws.[2] However, concepts regarding legal foundation are still heavily debated and intertwined with other legal principles, legal values, legal norms, legal theorems, and legal rules. In several pieces of literature, the discussion focus of scholars emphasizes differentiating legal foundations, legal norms, and legal rules. One such book was authored by Ronald Dworkin and Paul Scholten. This means that legal certainty and legal protection[3] are two of the purposes. Both scholars distinguished between the foundations of law and the rule of law (*rechtsregel*) based on their content and application. The rule of law represents a more tangible concept that guides the application of rules in legal proceedings to resolve disputes. On the other hand, legal foundations are more abstract and indirectly influence the interpretation of existing rules.[4] Legal protection is protection accommodated by law as an effort to restore or balance against violations of rights that occur.[5] Furthermore, In its dissertation titled "*Drie Beginselen van Het Contractenrecht*," Niewenhuis has explicitly elucidated the functional correlation between legal foundations, legal norms, and legal rules. These foundations are employed as fundamental elements of a system due to their significant influence on positive law.[6]

The concept of legal foundations must be identified with existing legal principles, and such views are adopted by several legal scholars.[7] This is the consequence of the interpretation of the Latin word '*principium'* to the Dutch word '*beginsel'*, the English word '*principle'*, and the Indonesian word '*prinsip*'.[8] Nevertheless, the existence of legal foundations and principles are separate.[9]

1 Joaquin R.-Toubes Muniz, Legal Principles and Legal Theory, *Ratio Juris*, Vol.10 No.3, September 1997, page. 267-287.

2 Rizal Faharuddin and Jefferson., Hakim Restorative Justice for Corruption Cases the Settlement of Corruption Cases: is it Possible?, *Yuridika,* Vol.38 No.1, January 2023, page. 73-95

3 Ricki Azis Dzaki., Legal Certainty of Measurement And Mapping Of Land Basic Maps, *Jurnal Hukum Unissula*, Vol.38 No.2, December 2022, page. 148-159

4 Ronald Dworkin., *Taking Rights Seriously*, Cambridge, Harvard University Press, 1977, page. 4-28.

5 Gusriadi and Taufiq El Rahman., Perlindungan Hukum Terhadap Kreditur Akibat Surat Kuasa Membebankan Hak Tanggungan Yang Terdegradasi Sebagai Akta Di Bawah Tangan, *Jurnal Hukum Unissula*, Vol.37 No.2, 2021, page.134-154

6 Agus Yudha Hernoko, *Asas Proporsionalitas Dalam Kontrak Komersial*, Disertasi, Surabaya, Fakultas Hukum Universitas Airlangga, 2007, page. 26.

7 *Ibid*

8 Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, 1995, page. 60 & 788

9 See: Henry Campbell, Black's Law Dictionary, St. Paul Minn., West Publishing Co., 1990, page. 682 and page. 1231.

This is what was asserted by Joseph A. Tetlow in his book "The Fundamentum: Creation in the Principle and Foundation," which asserts that:

FIRST PRINCIPLE AND FOUNDATION. A principle is a beginning for the mind, and a foundation is a beginning for the will. With this first principle we begin all our reasoning about human life. The truth about human life can be deduced from it; error cannot, but must have another beginning. Upon the same principle the will builds its moral life as upon a foundation. What is good fits upon its; what is bad does not, but must have another foundation. By means of this first principle the mind and will get a start in the process of discovering the secret of life-what is true in life, what is good in life. And at the very start they must find God".[10]

In regard to this matter, it is essential to do more study and examination on the notion of legal basis and principles.

In the discussion of legal theory, foundation (*beginselen*) is asserted as the basis for the formulations of legal norms that are applied as the basis for examining a legal norm, whereby the legal norm itself embodies the content of a legal rule.[11] Regarding the existence of legal norms, in the study of legislative law, there exists a hierarchy of legal norms [12] that are established by a particular hierarchical order resembling that of a pyramid, as defined by the Studenbau Theory (*stufenbau des rechts theorie*) of Hans Kelsen. Hans Kelsen states as follows.

"The creation creation of one norm-the lower one-is determined by another-the higher-the creation of which is determined by a still higher norm, and that this regresses is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes in unity".[13]

The basic norm (*grundnorm*) is established by the people as a fundamental norm that is a pendant for other norms that are considered to be pre-supposed.[14]

Hans Kelsen's thesis, subsequently expanded upon by Hans Nawiasky, posits that the legal standards of a state are always organized in a hierarchical manner. This hierarchy is structured as follows: 1) Fundamental norms of the state (*staatsfundamentalnorm*); 2) Fundamental rules of a state (*staatsgrundgesetz*); 3) Legislations (*formellgesetz*); and 4) Rules and autonomous regulations implementation (*verordnung und autonome satzung*).[15]

10 Joseph A. Tetlow., *The Fundamentum: Creation in the Principle and Foundation*, The Seminar on Jesuit Spirituality, St. Louis, 1989, page. 45-46.

11 Satjipto Rahardjo, *Ilmu Hukum*, Bandung, Citra Aditya Bakti, 2000, page. 45.

12 Maria Farida Infrati S., *Ilmu Perundang-Undangan, Jenis, Fungsi dan Materi Muatan*, Yogyakarta, Kanisius, 2007, page. 19.

13 Hans Kelsen, *General Theory of Law and State*, New York, Russell & Russell, 1945, page. 113.

14 Maria Farida Infrati S., *Opage.Cit.*, page. 41.

15 Hans Nawiasky, *Allgemeine Rechtslehre als System der rechtlichen Grundbegriffe*, Benziger, Einsiedeln/ Zurich/ Koln, 1948, page. 31.

Staatsfundamentalnorm contains norms that are essential in forming the constitution of a state (*staatsverfassung*), including the altering norms. Thus, *staatsfundamentalnorm* exists before the formulation of a constitution. The *staatsfundamentalnorm* refers to the fundamental norms of the state (*staatsgrundgesetz*) that are often specified in legislation or a constitution. Below the *staatgrundgesetz*, there is a more specific regulation known as *formellegesetz* or formal legislation, while the regulation that occurs below formal legislation is *verordnung und autonome satzung* or the executing or autonomous rules.[16]

Furthermore, within several works of literature, there exists a rule that is only effective when it contains values.[17] However, other literature states that the rule of law without morality cannot be stated as law.[18] Some works of literature also state that morality is above the law itself.[19] The difference in viewpoints and perspectives raises a fundamental question: the true meaning of value and whether or not such values can be equated with morality, principles, or foundations. The lack of understanding of principles, values, foundations, norms, and rules causes a theoretical fallacy from such interpretations. One of the concrete pieces of evidence is the errors in interpretation of the concept of foundations, principles, and legal norms found in the four foundations that form the pillar of nationality. Such theories state that the four pillars of nationality are the Pancasila, the 1945 Indonesian Constitution, *Negara Kesaturan Republik Indonesia* (NKRI, Unitary State of the Republic of Indonesia), and *Bhinneka Tunggal Ika* (Unity in Diversity). The aforementioned theories clearly cannot be justified, remembering the substance of the Pancasila, which remains as the foundation of the formation of the other three pillars. In other words, national and state life based on Pancasila and the 1945 Constitution of the Republic of Indonesia, [20] the Pancasila should have stood as the foundation for the formation of the 1945 Constitution, the NKRI, and Bhinneka Tunggal Ika.[21]

Currently, there are ongoing advancements in the law of responsibilities aimed at offering compensation for injustices arising[22] As a general understanding, unjust enrichment can be explained as the following:

General principle that one person should not be permitted unjustly to enrich himself at expense of another but should be required to make restitution of or property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no

16 *Ibid.*
17 Sudarsono, *Kamus Hukum*, Jakarta, Rineka Cipta, 2009, page. 397
18 J.J.PAGE. Bruggink, *Refleksi Tentang Hukum*, Bandung, Citra Aditya Bakti, 1999, page. 223
19 Salman Luthan., Dialektika Hukum Dan Moral Dalam Prespektif Filsafat Hukum, *Jurnal Hukum Ius Quia Iustum*, Vol.19 No.4, Oktober 2012, page. 506-523.
20 Muhammad Ridwan Lubis, Law Enforcement Concerning The Crime Of Money Laundering Based On Pancasila*, Jurnal Hukum Unissula*, Vol.38 No.1, Maret, 2022, page. 32-43
21 Jimly Asshidiqie, *Pancasila dan Empat Pilar Kehidupan Berbangsa*, page. 5. Dapat diakses di http://www.jimly.com/makalah/namafile/202/PANCASILA_DAN_4_PILAR_BARU.pdf.
22 Richard Stone., *Principles of Contractual Law*, London, Cavendish Publishing Limited, 2000, page. 341.

violation or frustration of law or opposition to public policy, either directly or indirectly.[23]

In the Indonesian context,[24] restitution in a legal context is compensation given to victims or their families by the perpetrator of a crime or a third party. Restitution can take various forms, including compensation for loss of wealth or income; Compensation for material and/or immaterial losses resulting from suffering directly related to criminal acts; Reimbursement of medical and/or psychological care costs; Other losses suffered by the victim as a result of the criminal act, such as basic transportation costs, attorney's fees, or other costs associated with the legal process. Several scholars believe that the basis for providing restitution in cases of unjust enrichment is based on the execution of corrective justice that attempts to balance something that has become imbalanced due to injustice.[25] Such opinions must be further tested based on existing foundational concepts, principles, values, norms, and legal rules that determine the standing of corrective justice, restitution, and unjust enrichment in the structure of meta values from foundations, principles, values, norms, and legal rules, as to provide a conclusion that correctly states the validity of such opinions.

2. Research Methods

This is normative legal research (juridical law research) that studies legal effectivity[26] , which not only examines the law in terms of legislation but also includes a broader aspect, namely something that can be traced through library materials. [27] A qualitative method was used to generate words rather than numbers.[28] It is for that precise reason that this writing attempts to elaborate on the functions of foundations, principles, and norms as a meta value[29] and meta values of a rule in obtaining justice through a focus of the discussion that emphasizes legal norms, types, and the hierarchy of legal principles, legal values, and rules as the implementation of principles/legal norms; as well as

23 Henry Campbell, *Opage.Cit.*, page. 1573-1574.

24 Rian Saputra, M Zaid, Silaas Oghenemaro Emovwodo., *Journal of Human Rights, Culture and Legal System*, Vol. 2, No. 3, November 2022, page. 139-148

25 Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, Essay, page. 227.

26 Suwarti, S., Khunmay, D., & Abannokovya, S., Conflicts occurring due to the application of different legal inheritance systems in Indonesia, *Legality : Jurnal Ilmiah Hukum*, Vol.30 No.2, 2022, page. 214–227.

27 Fahri Bachmid, Diani Indah Rachmitasari., The Supreme Court's Authority: Judicial Review of Statutes and By-Laws of Political Parties against Laws, *Law Reform*, Vol. 18, No. 2, 2022, page. 184-204

28 Anshori Ilyas, Hamzapage., Administrative Land Conflicts and Reforming StateOwned Enterprises in Indonesia, *Hasanuddin Law Review*, Vol.8 Issue.2, August 2022, page. 186-194

29 The term meta value used in this paper replaces the term meta norm in the study of statutory law, which refers to the values contained in the principles, principles, norms and legal rules. The term meta value is more used because value is the core of every concept, be it principles, principles or norms, while the term meta norm cannot be used to show the meta value of the norm itself because it can lead to fallacy. The term meta-rule used by Bruggink in the book Reflection on Law is also not used in this paper because the concept of the rule is the same as the norm.

corrective justice as the basis for providing restitution in unjust enrichment that focuses on the historical discussion which developed the concept of unjust enrichment, corrective justice as a legal principle.

3. Result and Discussion

3.1. The function of foundation, principles, and norms as a meta value and the meta values of a rule in achieving justice

The term meta value, in essence, originated from the term 'meta', which means 'object', which means that the term meta determines the trust of a particular object. For example, meta-theory is the theory that exists another theory in its consideration, and meta-language is the language whereby another object-language exists that is discussed.[30] In other words, the term meta value points to the norms pertaining within a value being considered, and meta values point to the values being considered at a meta-value level. Thus, there exist several systematic steps towards the meta value itself.[31] In relation to this subject, the process of categorizing meta values may be compared to the phases involved in establishing a structural norm, as explained by Hans Kelsen and Hans Nawiasky in the Studenbau Theory (*stufenbau des rechts theorie*). In order to comprehend the position of legal foundations, legal principles, values, norms, and legal regulations within a meta-value system, it is necessary to first grasp the notion of each individual component.

In the context of legal foundations, various legal scholars have expressed their opinions on the subject. One such scholar is Bellefroud, who argues that legal foundations are essential principles derived from positive law. However, the field of law does not universally acknowledge these principles as rooted in general rules. [32] Paul Scholaten has stated that legal foundations are fundamental thoughts embodied inside and behind the legal systems of each legislation, rule, and judicial decision.[33] Based on the opinions of scholars, it can be ascertained that the position of legal foundations is, in principle, the basis of all legal rules. In other words, legal foundations are the meta values of each legal rule.[34]

Furthermore, relating to the standing of principles in a foundational structure, principles, values, norms, and legal rules, principles cannot be equated with foundations at their essence. Principles originate from the English word '*principle'* whereas foundations originate from the English word '*foundation'*, which are the accurate translations to showcase *principium* from the Latin word which originates from the word *'primo'* meaning first and '*capere'* meaning to take. [35] Foundations serve as the fundamental underpinnings upon which regulations are established. Foundations may exist alone, without relying on

30 J. J. PAGE. Bruggink, *Opage.Cit*., page. 171.
31 *Ibid*, page. 172.
32 Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar*), Yogyakarta, Liberty, 2003, page. 34.
33 J. J. PAGE. Bruggink, *Opage.Cit*., page. 119.
34 Agus Yudha Hernoko, *Opage.Cit*. page. 23.
35 J.M. Turlan., Principe: Jalons Pour I'histoire D'un Mot, *La Responsabilite A Travers Les Ages*, Economica, Paris, 1989, page. 115

other notions. Principles are derived from the presence of foundations, which may also be seen as the starting point.[36]

Consequently, foundations primarily focus on providing advice for the creation of the rule of law, whereas principles primarily focus on the practical implementation of established foundations. In other words, foundations retain an abstract character, and fundamentals work with principles to retain a more operational character. Furthermore, legal foundations retain a self-explanatory characteristic, embodying the foundations within themselves. In other words, foundations do not require another requirement to explain themselves or are not dependent on another element. If we compare it to the notion of knowledge, there are two types: an *apriori* knowledge, which includes abstract information and axioms, and an *aposteriori* knowledge, which is based on sensory experience, as exemplified by Socrates. Foundations are a kind of *apriori* knowledge that necessitates the application of principles as an *aposteriori* knowledge.

Regarding the influence of values on the fundamental structure of principles, norms, and legal norms, Ronald Dworkin argues that "principles not only have a different linguistic status compared to rules but they also valid due to moral deliberation" because Dworkin uses the term 'principle' to refer to values or goal-oriented principles.[37] In addition, Robert Alexy states that "a principle is always a normative reformulation of a value", and "some open texture rules are at least partially reformulations of values too".[38] In other words, values point to what is embodied in foundations, principles, norms, and legal rules.[39] Values also retain a hierarchy that is based on the embodiment of such values. Values contained within legal foundations are fundamental values that have become the basis of the birth of inherited values embodied within principles, norms, and legal rules. Fundamental values that are embodied in such concepts are justice, certainty, and utility.[40]

Regarding the fundamental values of justice, certainty, and utility, several scholars state that these certain fundamental values contradict one another, especially in terms of justice and legal certainty.[41] Those opinions are often regarded as incorrect because these concepts should not have contradicted one another as they exist on a different level. The acceptance of such understanding would potentially lead to the possibility of legal practitioners applying their own legal interpretation that may not be founded on a moral

36 Patrick Morvan., What's a Principle?, *European Review of Private Law*, Kluwer Law International, Britain, No.2, 2012, page. 313-322.
37 *Ibid*.
38 *Ibid*.
39 Jordan DACI., Legal Principles, Legal Values and Legal Norms: Are They The Same or Different?, *Ratio Juris*, Vol.10 No.3, September 1997, page. 267-268.
40 Peter Stein dan John Shand, *Legal Values in Western Society*, Britania Raya, Edinburg University Press
41 Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Jakarta, Kencana Prenada Media Group, 2009, page. 107-123.

obligation to apply the law as it should be.[42] It must be understood that every legal rule must contain values of utility in order to abide by legal certainty and the values of justice because laws are designed to provide certainty and contain justice.[43] In other words, the value of justice is the highest fundamental value. However, it is not limited to such values alone, as justice must be utilized to maintain sustainability to ensure and ascertain its effective application.[44]

The fundamental values embodied in such concepts are then inherited to become derivative values embodied within principles. For example, the principles of balance and proportionality are derived from the foundation of justice. These fundamental values originate from life as a form of interaction between relevant organs. This is commonly known as first-order interaction as a fundamental right,[45] whereby first-order interaction cannot maintain the quality of life without being combined with second-order interaction in the form of interactions with other elements, which births into existence a fundamental right. One of the examples of instrumental rights is cultural rights such as honor that uphold the sustainability of life.

Values that are acknowledged and adopted by society are what are called morals.[46] The values embodied within foundations and principles as the basis of the birth of such norms make up the content of legal rules. These values have been redacted to become a certain moral ground, which are values acknowledged and adopted by a group of society. In other words, such values retain a universal characteristic. Therefore, it can be said that morals are intended to be formalized in a legal framework.[47]

Furthermore, regarding the differentiation of legal foundations with legal norms and legal rules by several scholars based on their content and application, legal principles can be more concrete to provide a direct application and vice versa. In a certain period of time, legal rules also retain characteristics similar to that of a foundation. This was elaborated by Giovanni Sartor, who states, "Every norm possesses the characteristics Dworkin attributes to principles: it is defensible in a set of circumstances not abstractly predetermined and remains valid even if contradicted by prevailing norms in particular cases."[48]

Moreover, Giovanni Sartor states that "a norm can be classified as a principle to the extent that its antecedent contains imprecise or evolutional terms, and its

42 For example, in the event of a conflict between legal certainty and expediency, where existing legal rules do not benefit victims or legal practitioners, then legal practitioners can interpret to deviate existing legal rules in order to provide benefits for victims and legal practitioners themselves. This actually leads to nepotism and even corruption.

43 In practice, a legal rule is considered just when it aligns with the norms pertained within the legal rule.

44 Jordan DACI, *Loc.Cit*.

45 Curtis F.J. Doebbler, *International Human Rights Law: Cases and Materials*, CDP special printing, United States of America, 2003, page. 6.

46 Alex Page. Schmid, *Research on Gross Human Rights Violation*, PAGE.I.O.O.M., Leiden, 1989, page. 6.

47 Peter Mahmud Marzuki, *Loc.Cit.*

48 Aulis Aarnio, *Essays on the Doctrinal Study of Law*, Springer Science & Business Media, London, 2011, page. 121.

priority is indeterminate".[49] It was further asserted that the establishment of a norm and principles are of the following:[50]

3.1.1 The principles expressing the basic ideological values of the legal order. In modern Western States, the principle of the rule of law and the assumption of the rational legislator belong to this category. Certain moral principles concerning private ownership, the family, and the welfare of children are also involved in the ideological foundation of the legal order. Some of these principles may be manifested in the statutes but some are a non-articulated basis of law.

3.1.2 Positive legal principles are included in the valid law or they are assumed to be relevant to it. The following examples elucidate the nature of this kind of principles:

3.1.2.1 Formally valid principles like principles of basic social and political rights are directly manifested in valid statutes. To this group belong principles which guarantee freedom of speech, freedom of association, equality and so on. Some formally valid principles are manifested in private law as well as is the case with the principle of bona fides in contract law.

3.1.2.2 Principles based on legal induction have traditionally been much discussed in legal philosophy. The idea of legal induction concerns the possibility to derive a general principle from a set of particular valid rules by means of inductive reasoning.

3.1.2.3 Decision-making principles in both adjudication and DSL are standards like "audiatur et altera pars" as well as the principle of legality in criminal law, and the "praeter legem" principle. Some of these principles are expressed in the statutes, as are "audiatur et altera pars" and "praeter legem". The prohibition against the use of analogy in criminal law is an example of a principle not specifically recorded in (Finnish) law. Principle of the last type are tacitly accepted in the legal community.

3.1.2.4 A moral principle is a typical example of an extra-systemic principle. Prima facie,m law and morality are two different things. Only legal rules can be formally valid in a certain legal order, although moral principles may have a role in legal reasoning as an argument in the choice between two or more meaning alternatives. As a part of legal reasoning, moral principles "become" legally relevant. Law and morality become intertwined, as shall be demonstrated below.

Based on such elaboration, it can be understood that there exist at least four scales that differentiate legal norms and legal foundations, which are the rules (R); rule-like principles (RP); principle-like rules (PR); and principles (P).[51]

49 *Ibid*.
50 *Ibid*, page. 122.
51 *Ibid*.

Furthermore, several legal scholars are of the opinion that legal norms can be in the form of written and unwritten norms.[52] It was also mentioned that there exists the potential for conflict of norms between one legal norm and another.[53] Such opinions were formed by the existence of fallacies or legal norms that were distracted from the concept of rules. Norms are one of the measures that must be obeyed by a person concerning his/her interaction with others or his/her surroundings, as defined by Hans Kelsen as '*das sollen*' (ought to be/ ought to do) or the term in Indonesian means '*hendaknya*' or free-will.[54] As a result, a norm can only exist if more than one person or interaction exists in human life.[55] The term *'norm'* in Indonesian is stated with a guide or directive from the Latin language, which is called *'kaidah'* or theorem in Arabic. This is also asserted by Soerjono Soekanto and Punardi Purbacaraka as "A theorem is the guideline or measure of a rule for the behavior or response of man towards life,"[56] or in other words, the nature of a theorem is the formulation of a viewpoint (*oordeel*) regarding the actions or response, whereby such nature aligns with the nature of a norm.

From the perspective of a legal theory, Hart and Strumholm classified legal norms into two categories: primary legal norms and secondary legal norms. Primary legal norms are norms that regulate attributes or qualities of individuals, also referred to as "Character Norms". Character norms may be classified into two distinct groups depending on their content: norms that impose obligations and norms that provide permissions. Norms that impose an obligation typically apply to the subject they regulate, whereas norms that provide permission particularly apply to the subject they govern. Character norms that entail an obligation can also be separated into two scales: the obligation to execute a certain legal act, also known as a '*mandatoir'* norm, and the obligation to not commit a certain legal norm, also known as '*prohibitoir'* norm.[57] Character norms that entail permissions can be categorized into two categories: permission not to commit a particular legal act embodied in a *mandatoir* norm, commonly known as 'Dispensation Norms'. Meanwhile, the permission to commit a certain *prohibitoir* norm is also known as 'Permission Norms'. [58] Regarding secondary legal norms, Hart and Strumholm retain a different opinion, whereby, according to Hart, secondary legal norms are meta norms or meta theorems that regulate matters relating to behavioral norms. Hart classifies secondary legal norms into five categories, which are acknowledgment norms, changing norms, authoritative norms, definitive norms,

52 Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Yogyakarta,Liberty, 1996, page. 31; lihat juga: Maria Farida Infrati S., *Opage.Cit.*, page. 19; see also: Marwan Effendy, *Teori Hukum dari Prespektif Kebijakan, Perbandingan dan Harmonisasi Hukum Pidana*, Jakarta, Referensi, 2014, page. 9.

53 Philiphus M. Hadjon dan Tatiek Sri Djatmiati, *Argumentasi Hukum*, Yogyakarta, Gajah Mada University Press, 2005, page. 31.

54 Hans Kelsen, *Opage.Cit.*, page. 35.

55 Maria Farida Infrati S., *Opage.Cit*., page. 18.

56 Soerjono Soekanto dan Punardi Purbacaraka, *Perihal Kaidah Hukum*, Bandung, Citra Aditya Bakti, 1989, page. 6.

57 Maria Farida Indrati S., *Loc.Cit*.

58 J.J.PAGE. Bruggink, *Opage.Cit.*, page. 103.

and judgment norms. Strumhold asserts that there is just one form of secondary legal norms, namely sanction norms.[59]

From the law of legislation perspective, the classification of legal norms elaborated above cannot be merely accepted. Maria Farida Indrati classifies legal norms from several aspects, such as based on the *addresat* or the subject in which these norms address based on what is regulated or the actions that are regulated, based on the applicability of such legal norms, and based on the number of legal norms that are regulated in a specific rule of law. Based on the aspect of the subject, legal norms can be classified into general legal norms, which are the rules subjected to multiple people. Individual legal norms refer to legal standards that are specifically directed at an individual, many individuals, or a group of individuals. Legal norms can be classified into two categories: abstract legal norms and concrete legal norms. Abstract legal norms pertain to actions that have no definitive limitations or are not concrete. On the other hand, concrete legal norms focus on the real actions of individuals.[60]

Based on their applicability, legal norms can be classified as recurring legal norms (*dauerhaftig*), which are legal norms that are applicable without time limitations except in cases where such rules are revoked and replaced with new rules, and legal norms that only apply in a particular time frame (*einmahlig*). The latter is legal norms only valued in a one-time situation, making its characteristic merely an asserting instrument. Based on the number of aspects of legal norms, legal norms can be classified as individual legal norms, which are legal norms that can stand alone and not be followed by other legal norms. These are known as primary and secondary legal norms. The regulation of secondary legal norms, according to Maria Farida Indrati, is similar to Strumhold's opinion, which defines secondary legal norms as merely sanction norms.[61]

Furthermore, from the perspective of the law of legislation, legal norms can also be differentiated based on the regulated legal subject, which forms behavioral and authoritative norms.[62] Behavioral norms are norms that regulate the behavior of role occupants.[63] In comparison, authoritative norms are those that regulate the use of authority that is provided to Law Implementing Agencies (LIA). Thus, in authoritative norms, the subject regulated are public officials who are authorized to provide sanctions.[64]

A rule is the expression of a legal principle, whether it encompasses a single legal principle or many ones. Consequently, all rules of law are normative, indicating that rules are derived from a variety of conceptions that include commands, such as *mandatoir* orders or *prohibitoir* orders, as the guidelines to

59 *Ibid*, page. 109.
60 Maria Farida Indrati, *Opage.Cit.*, page. 26-29
61 *Ibid*, page. 34-35.
62 Authoritative norms according to Hart falls under secondary legal norms. See: J.J.PAGE. Bruggink, *Loc.Cit.*
63 Sukardi., *Struktur dan Penormaan Pada Peraturan*, Surabaya, Fakultas Hukum Universitas Airlangga, 2011, page. 3.
64 *Ibid*, page. 2.

behavior.[65] In other words, the legal rules are the institutionalization of legal norms, regardless of whether or not such rules are written or unwritten. However, such rules retain binding powers to the societies that abide by such rules.[66] Based on the aforementioned elaboration, then conceptually, it is not norms that can be written or unwritten, but only legal rules can be written or unwritten.

Therefore, when examining the process of the rule formulation, it must begin with the existence of value. Individual values are a form of implementation from natural teachings, including godly teachings (given) that are absorbed by oneself based on one's beliefs and understanding. These values will then become the guidelines for a person regarding what is good and bad according to their faith. Where an individual retains the same values as another individual, the similarities in those values show that these individuals have to abide by the same morality. In other words, morality is one of the reasonable measures of what is agreed or believed to be good and bad in a particular group of people. When clear measures of what is good and bad produced by a society in the form of morality exist, norms within those societies regulate what is permitted and prohibited. Norms are one of the behavioral theorems for society because norms are often defined as such. Norms will then evolve to become rules for societies that abide by those rules. These rules will then be institutionalized by institutions that retain such authorities to become positive laws in the form of written rules. However, if those rules are not institutionalized, then those rules are still considered binding by the societies that recognize them as such, regardless of whether they are written or unwritten.

Values as the basis of the birth of such rules are known as the terms *'foundations'* and *'principles'*, whereby the gradation of such values, which are fundamental values termed as foundations, and inherent values are termed principles. As a result, it can be known that the foothold of identical values with the foothold of *staatsfundamentalnorm*, which is as the meta value of a principle; identical principles to the concept of *staatsfundamentalnorm* sits as the meta value of a norm of the theorem, and norms or theorem which are identical to *formellgesetz* sits as the meta value of a legal rule that is identical to *verordnung und autonome satzung*.

3.2. Corrective Justice as the Basis of Providing Restitution in Cases of Unjust Enrichment

The historical development of unjust enrichment begins from the Greek philosophy, namely "The Moral to Nichmaquean"[67] which is then developed during the time of Quintus Mucius Scaevola[68] in the form of "one shall not be allowed to unjustly enrich himself at the expense of another" whereby Keener

65 J.J.PAGE., Bruggink, *Opage.Cit.*, page. 93.
66 Peter Mahmud Marzuki., *Opage.Cit.*, page. 103.
67 Frank Edgar., *Narcissus and Echo, Greek and Roman Mythology*, United States of America, Mark Twin Media, 1994, page. 55-56
68 Marek Sobczyk., Application of the Concept of Conditio Causa Data Causa Non Secuta in Pecuniary Settlements Between Cohabitants, *Comparative Law Riview*, Nicolaus Copernicus University, 2014, page. 33

also elaborated this in an article published by the Harvard Law Review 1887. These fundamentals align with the principle of *suum cuique tribune* which teaches the concept of giving others what their rights retain. The principles of "one shall not be allowed to unjustly enrich himself at the expense of another" have been known since Justinian's Digest (6th Century AD), formulated within two texts for the Roman scholar Pomponius. In Digest, 12.6.14 states that "*Nam hoc natura aequum est neminem cum alterius detriment fiery locupletiorem*" which is freely translated to "For this is by nature fair that another's loss should enrich nobody"; and in Digest, 50.17.206 it writes "*Iure naturae aequum est neminem cum alterius detriment et iniuria fiery locupletiorem*" which is openly translated as "It is fair according to the law of nature that nobody should be enriched by loss and injustice to another".[69]

In the last few decades, such foundations have become the basis for filing reparation claims, which is the principle of "A person who has been unjustly enriched at the expense of another is required to make restitution to the other". The United States has codified this principle into the Restatement of Law (Third) Restitution and Unjust Enrichment, which was then amended to the Restatement of Restitution (1938).[70] The principle that has become the basis for these claims has recently emerged in the common law system in the last few decades but has been adopted by the civil law system for a long time.[71] The doctrine of unjust enrichment has become a relatively new basis for the claims of reparation that has become the most dynamic amongst another basis in civil law since the mid-1980s and has evolved to become a vital doctrine in civil law.[72]

In current times, several states have regulated the concept of unjust enrichment in its positive law; among a few is the Dutch in Article 212 Book 6 NBW, which states the following:

A person who has been unjustifiably enriched at the expense of another is obliged, insofar as reasonable, to make good the other's loss up to the amount of his enrichment.

3.2.1 The enrichment shall not be taken into consideration to the extent that it is decreased by reason of circumstances for which the person enriched is not accountable.

3.2.2 An enrichment shall be discounted to the extent that it is decreased during a period in which the person enriched could not reasonably be expected to recognize the existence of an obligation to make good the other's loss. In determining such a decrease account must be taken of

69 Peter Birks, *Unjust Enrichment*, Oxford, OUP, 2005, page. 268.

70 Alvin W. L., An Introduction to the Law of Unjust Enrichment, *Malayan Law Journal*, Research Collection School of Law, 2013

71 Julio Alberto Diaz., Unjust Enrichment and Roman Law, *Pensar, Fortaleza*, 2007, page. 114-121

72 Ernest J. Weinrib., Unjust Enrichment, *Corrective Justice*, Oxford Legal Philosopy, Vol. January 2013.

> any expenditure which would not have been incurred but for the enrichment.[73]

Furthermore, the United States published Restatement of the Law (Third) Restitution and Unjust Enrichment with the following criteria: "a). a benefit which has been unjustly received (the enrichment); b). a loss or detriment suffered, usually by the plaintiff; c). a rule of law which deems the enrichment (or the retention of it) "unjust"; d). a *prima facie* duty to make restitution; e). absence of a valid legal basis for the payment or transaction (including voluntariness or election); and f). absence of a defense".[74]

Several literatures and essays state that corrective justice is the philosophical basis of applying the doctrine of unjust enrichment.[75] The concept of corrective justice originates from the mind of Aristotle, one of the philosophers who pioneered the concept of justice. Aristotle states that reparation is a legal response to the absence of justice.[76] Furthermore, Aristotle states that the concept of justice can be differentiated into two types: distributive justice and corrective justice.[77] Distributive justice is defined as "that which is manifested in the distribution of honor or money or the other things that fall to be divided among those who have a share in the constitution, which may be allotted among its members in equal or in unequal shares". At the same time, corrective justice is defined as the restorative form of justice, which is defined as the act of balancing something that has been imbalanced by the absence of justice.[78]

In the beginning, corrective justice was only used as the basis to determine justice and reparation for unlawful acts; in contrast, distributive justice was used as the basis for the distribution of rights and obligations proportionately between the parties under a contractual obligation.[79] This is because corrective justice has attempted to eliminate the obtaining of profits/reparations that are unjustified and may result in the loss of the parties. Thus, corrective justice aims to provide restitution[80] to the parties at a loss or, in other words, to restore the situation before the loss occurred.[81] Distributive justice emphasizes

73 Hans Warendorf., *et.al.*, *The Code Civil of the Netherland*, Kluwer Law International, Netherlands, 2009, page. 696.

74 The American Law Institute., *Restatement of the Law Third, Restitution and Unjust Enrichment*,

75 Ernest J. Weinrib., *The Idea of Private Law*, Cambridge, Harvard University Press, 1995, page. 140-142.

76 Aristoteles, *Nicomachean Ethic*., v.4.1131b25-1132b20, diambil dari Ingram Bywater, *ed*., 1894.

77 John Rawls, *A Theory of Justice,* Massachusetts: The Belknap Press of Havard University Press, Cambridge, 1971, page. 103.

78 Ernest J. Weinrib, *Loc.Cit.*

79 Agus Yudha Hernoko, *Hukum Perjanjian Asas Proporsionalitas dalam Kontrak Komersial*, LaksBang Mediatama Yogyakarta, Yogyakarta, 2008, page. 70-73.

80 Maurice J. Holland., Law of Restitution, by George E. Palmer, *Indiana Law Journal*, Vol.54 Iss.2, Article 6, see also: Henry Campbell, *Opage.Cit.*, page. 1339-1340.

81 Jules Coleman., The Practice of Corrective Justice, *Owen 1995b*, page. 53-72; see also: Richard A. Epstein., Causation and Corrective Justice, A Reply to Two Critics, *Journal of Legal Studies*, Vol.8, page. 477-504; see also: Scott Hershovitz., Corrective Justice for Civil Recourse Theorists, *Florida State Law Review*, Vol.39, page. 107-128.

the efforts to provide or distribute the rights and obligations of the parties proportionately, indicating that a contractual relationship exists as the base to place the requirements for this proportionate distribution between the parties.[82] The consequence of the existence of the separation of the concepts of distribution justice and corrective justice was elaborated by Aristotle, which states that distributive justice cannot be applied as the basis for the existence of a claim of reparation towards another person, rather corrective justice must be the basis of the considerations to such claims.[83]

Based on the elaboration above, it can be known that based on the structure of the foundation, principles, norms, and legal rules, the foothold of corrective justice in the implementation of unjust enrichment as the principle, whereby unjust enrichment was birthed from the will of corrective justice to provide justice for the parties. Corrective justice does not stand as the foundation of unjust enrichment but rather as the executor of the foundation for justice.[84] Whereas the concept of unjust enrichment, when examined from the foundational structure, principles, norms, and legal rules, sits on the level of legal norms, which is the norms that entail obligations, especially the obligation not to create a certain legal act, which is a legal act that can cause the existence of increased benefits or wealth that cannot be justified by law (otherwise known as unjust) and can even cause further loss to others,[85] where in Indonesia, such norms has yet to be institutionalized through written form within positive law or legal rules.

In addition, concerning unjust enrichment, corrective justice is the notion that underlies the concept of justice and leads to attempts to enforce and assess the application of unjust enrichment.[86] As a new branch on the concept of reparation in a civil suit, unjust enrichment becomes the strategy and new solution that can be legally offered to ensure that everything or every type of wealth that is owned by a party that does not have the right, must be returned to its rightful owner.[87] Unjust enrichment obliges parties to obtain wealth or profit 'unjustly' to execute restitution over such claims.[88] The term 'restitution' comes from the judicial decision; however, it is only widely known through the 1937 published writing called *Restatement of Restitution*. Black Law's Dictionary defines restitution as "a body of substantive law in which liability is based not on tort or contract but on defendant's unjust enrichment; The set of remedies

82 Ernest J. Weinrib., Correlativity and Personality, in *Corrective Justice*, Oxford, Oxford Legal Philosophy, 2012, page. 18-19.
83 *Ibid*, page. 19.
84 Burhanuddin Salam., *Social Ethics*, Jakarta, Rineka Cipta, 1997, page. 117; See also: L.J. Van Apeldoorn, *Pengantar Ilmu Hukum*, Pradya Paramita, Jakarta, 2004, page. 11-13.
85 Ernest J. Weinrib, *Loc.Cit.*
86 Dennis Klimchuck, *Unjust Enrichment and Corrective Justice*, in Jason W. Neyers, *et.al.*, *Understanding Unjust Enrichment*, Ontario, Hart Publishing, 2004, page. 111.
87 Sarah Worthington, *Loc.Cit.*
88 Lionel D. Smith., *The Province of The Law of Restitution*, 71 Canadian B. Rev. 672, 1992, page.694-99

associated with the body of law, which the measure of recovery is usually based not on the plaintiff's loss, but on the defendant's gain".[89]

Restitution is one of the legal responses, in this case, as the form of response through the execution of corrective justice over injustices caused by unjust enrichment.[90] Therefore, when evaluated from the structural foundation, principles, norms, and legal rules, the foothold of restitution is a legal norm, which are norms from the existence of charges against the foundation of justice, which works through the principle of corrective justice. Legal norms in the concept of restitution are norms that entail an obligation, especially obligations to conduct a particular legal act, which are the obligations of states that benefit from the existence of unjust enrichment to return the wealth or benefits that have been unjustly obtained, to the parties which are disadvantaged by unjust enrichment.[91] The legal norms of restitution in Indonesia have yet to be developed in written legislation. Therefore, based on the elaboration above, it can be said that in foundational structure, principles, norms, and legal rules, the foothold of the principle of justice is a meta value of the principle of corrective justice. The standing of the principle of corrective justice is a meta value from the norm of unjust enrichment, and the standing of corrective justice is the meta value of the norm of restitution.

4. Conclusion

As "fundamental truth," the foundation is the meta value of the principle; the principle is the meta value of the norm; and the norm is the meta value of the rule. Meanwhile, values are equivalent to principles and principles, with a hierarchy of values, namely fundamental values as equivalent principles and derived values as equivalent principles. The regulations themselves are the equivalent of norms, namely the content contained in the regulations, and the regulations themselves are the most concrete manifestation of the application of a principle, which can be in the form of written or unwritten regulations. The concept of corrective justice, which is rooted in the notions of justice, restitution, and unjust enrichment, asserts that restitution should be provided as a means of rectifying unjust enrichment. This principle has a central role in the pursuit of justice. Although restitution and unjust enrichment are considered normative concepts, it is necessary to apply the repositioning of the unjust enrichment theory in Indonesia to civil cases as well. This doctrine, which has been used to establish unlawful acts in criminal law, should be extended to civil law. In achieving corrective justice, the doctrine of unjustification needs to be realized in court decisions by referring back to the basic principle of separation between claims for unlawful acts and claims for unlawful acts. The realization of the doctrine of unfair enrichment can also

89 Maurice J. Holland, *Loc.Cit.*

90 Peter Birks, *An Introduction to the Law of Restitution*, Oxford, Claredon Press, 1985, page. 19; see also: James Penner, *et.al., ed., Introduction to Jurisprudence and Legal Theory (Commentary and Materials)*, London, Butterworths, 2002, page. 719.

91 Tulalip Shores, Inc., Respondent v. Elizabeth M. Mortland, et.al., Appellants, Division One. Court of Appeals No. 1361-1, 9 Juli 1973,

serve as a foundation for modifying the national contract law system, especially Indonesian liability law, as a basis for filing restitution claims in Indonesia.

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