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# The Urgency of the Confidentiality Principle in Restorative Justice Mechanisms

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***ABSTRACT***

*One of the legal issues that is interesting and rarely receives attention in the application of restorative justice is the confidentiality principle. In international provisions, it is regulated in Paragraph 14 of the United Nations Basic Principles and in Paragraph 2 of the Council of Europe Recommendation. In several countries, such as the United States, Belgium, and others, it has attracted the attention of legal scholars. In contrast, research in Indonesia has yet to adequately address or explore this principle in detail. Accordingly, it is both relevant and necessary to investigate the significance of this principle within restorative justice mechanisms. The discussion begins with an exploration of the underlying legal rationale (ratio legis) behind the principle of Confidentiality in models of restorative justice, followed by an analysis of the urgency of reformulating restorative justice provisions within the Indonesian criminal justice system in a way that guarantees this principle. This study employed a normative legal research method, supported by several approaches, including the statute approach, comparative approach, and conceptual approach. The legal materials used consist of both primary and secondary legal sources. The main contribution of this research lies in its role as part of the law that ought to be (ius constituendum) for the reform of criminal procedure law in Indonesia.*

***Keywords**: Confidentiality, Reform of criminal procedure law, Restorative justice.*

## A. INTRODUCTION

The Restorative Justice Approach is increasingly recognised as a strategic element in efforts to reform the criminal justice system, not only in Indonesia but also in a

global context. This approach is based on the understanding that the meaning of justice is not solely determined by the imposition of sanctions, but also by efforts to restore relations between victims, perpetrators, and the community (Hamzani, Loso, & Nunna, 2025).

In 1990 and 1995, various transnational non-governmental organisations initiated and supported the holding of special sessions at international congresses to discuss and raise the issue of restorative justice. Since that period, various interests, programmes, and policies have been formulated and developed by adopting a restorative justice approach. At the Cairo Congress in 1995, comprehensive and critical discussions were held on the technical aspects of applying restorative justice in the handling of criminal cases (Zulfa, 2011). Furthermore, the 2000 Congress produced the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, which became the principal basis for the application of the restorative justice approach in the criminal justice system (Zulfa, 2011).

In 2002, the United Nations re-established the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (United Nations Basic Principles) to inform and encourage Member States to adopt and implement restorative justice measures within the context of their legal systems (United Nations, 2020: 14). These provisions regulate, among other things is confidentiality, as stipulated in Paragraph 14 of the United Nations Basic Principles and in Paragraph 2 of the Council of Europe Recommendation.

**Van Schijndel** considers “confidentiality” as a principle, with the term “principle of confidentiality”. This principle is enshrined and regulated in both the United Nations Basic Principles and the Council of Europe Recommendations (van Schijndel,

2009). It is interpreted as an obligation for all parties involved, including victims, perpetrators, and other parties related to the mediation process, to keep everything that happens during the meetings confidential (Jasmaniar & Khalid, 2023). In accordance with the scope of the recommended principle of confidentiality, the parties involved in the mediation process are not permitted to disclose or discuss the mediation process or results to their social environment, and are prohibited from conveying information obtained in mediation as evidence or testimony in criminal or civil court proceedings (van Schijndel, 2009).

In the Indonesian criminal justice system, discussions on the application of restorative justice are becoming increasingly relevant, given that at the end of 2025, Indonesia issued and enacted Law No. 20 of 2025 on the new Criminal Procedure Code (KUHAP). This procedural law reform regulates the mechanisms of restorative justice in Chapter IV, specifically in Articles 79 to 88 of the New KUHAP.

Before the concept of restorative justice was formulated into the new Criminal Procedure Code (KUHAP), its mechanisms were regulated in various regulations within each law enforcement agency. These provisions are contained in Indonesian National Police Regulation No. 8 of 2021 concerning the Handling of Criminal Acts Based on Restorative Justice, Indonesian Attorney General's Regulation No. 15 of 2020 concerning the Termination of Prosecution with a Restorative Approach, and Indonesian Supreme Court Regulation No. 1 of 2024 containing guidelines for the application of restorative justice in criminal case examinations.

When reading these provisions, whether in Police Regulations, Attorney General Regulations, Supreme Court Regulations, or the New Criminal Procedure Code, there

are no provisions that explicitly guarantee the confidentiality principle in restorative justice mechanisms.

Furthermore, upon reviewing a wide range of legal studies in Indonesia, the author found that although numerous previous studies have examined the application of restorative justice within the criminal justice system, none have specifically addressed the principle of confidentiality in the implementation and mechanisms of restorative justice. Conversely, in other countries such as the United States, Iran, Belgium, and others, the confidentiality principle in restorative justice mechanisms has become a focus of attention for researchers and is even regulated in their legal systems.

In the United States, for example, only seven percent of all restorative statutes, nineteen statutes across eleven states, include provisions concerning confidentiality (Young, 2023). This research is interesting to analyse in terms of the relevance and importance of the confidentiality principle in restorative justice mechanisms in Indonesia.

This study, therefore, begins by exploring the urgency of the principle of confidentiality in restorative justice models and proceeds to discuss the reformulation of restorative justice provisions within the criminal justice system to ensure the guarantee of this principle.

This study aims to describe the urgency of regulations on confidentiality in restorative justice. In addition to contributing theoretically to legal scholarship, this study offers practical value by providing recommendations for legislative reform (*ius constituendum*) concerning restorative justice, with a specific emphasis on ensuring the protection of confidentiality. The analysis in this study also takes into account the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

issued by the United Nations. And, it is supplemented by a comparative study of restorative justice regulations and practices in several other countries.

This study adopted a normative legal research method, supported by several approaches relevant to restorative justice, namely the statute approach, comparative approach, and conceptual approach. The legal materials used consist of primary and secondary legal sources. The primary sources of law used are legislation, international provisions, and rules applicable in other countries — Police Regulations, Attorney General Regulations, Supreme Court Regulations, the New Criminal Procedure Code, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, Council of Europe Recommendations — as well as other regulations in the United States, the Netherlands, Belgium, and Iran relating to confidentiality in restorative justice. Meanwhile, secondary legal materials or sources are derived from relevant scientific texts, namely books, legal journals, and previous research results, all of which are closely related to the subject matter.

After obtaining legal sources or materials, both primary and secondary legal materials, all legal materials in this legal writing are collected and organised systematically to find answers to issues concerning the principle of confidentiality in restorative justice.

## B. RESULT AND DISCUSSION

### 1. The Urgency of The Confidentiality Principle in Restorative Justice Mechanisms

#### a) Restorative Justice Mechanisms Through Penal Mediation

Before discussing the principle of confidentiality, it is essential to first understand the concept of restorative justice. In his book *Restorative Justice &*

*Responsive Regulation* (2002), **John Braithwaite** notes that **Albert Eglash** was the first to introduce the concept of restorative justice, which he defined as an alternative to retributive and rehabilitative justice. This is also acknowledged by **Bazemore** and **Washington** (1995), as well as **Van Ness** (1993) (Braithwaite, 2002: 8). Meanwhile, **Gordon Bazemore**, a scholar from Florida Atlantic University, began his work in restorative justice in the early 1990s. He interpreted restorative justice as a model for "doing justice" by repairing the harm caused by crime (Bazemore, 2009).

One advantage of the restorative justice approach is that it is better able to respect and fulfill the human rights of victims, perpetrators, and the community (Ward & Langlands, 2008). The principle of restorative justice emphasizes the importance of rebuilding broken relationships following a criminal act. Thus, restorative justice is not merely about repairing the relationship between the offender and the victim/community (Muladi, 2019). Furthermore, according to **Ann Wolbert Burgess, Cheryl Regehr,** and **Albert R. Roberts**, the restorative justice model is not focused on determining guilt or innocence, but rather serves as a means to negotiate the impact of the crime through mediation (Burgess, Regehr, & Roberts, 2010).

From a legal perspective, restorative justice refers to an approach in handling criminal cases that involves all parties (victims, the families of victims, offenders or juvenile offenders, their families, and/or other relevant parties) with a process and objective that aims for recovery rather than retribution. This approach aligns with the tradition of dispute resolution in indigenous communities. Restorative justice is typically carried out through a face-to-face process involving all parties, especially victims or those directly affected (Pavlacic, Kellum, & Schulenberg, 2022). This is because the core principle of restorative justice is the recovery process for victims of

crime, which is carried out through the provision of compensation or other forms of restitution (Ubleeuw & Mulyanto, 2022).

In Indonesia, provisions regarding restorative justice mechanisms are not regulated in a single regulation, but rather through regulations in each law enforcement agency, as detailed in Table 1 below:

**Table 1.**
Restorative Justice Regulations Across Law Enforcement Institutions

| No. | Institution | Regulation | Procedural Stage |
|---|---|---|---|
| 1 | National Police of the Republic of Indonesia | Regulation of the National Police of the Republic of Indonesia No. 8 of 2021 on the Handling of Criminal Offenses Based on Restorative Justice | Investigation and Inquiry |
| 2 | Attorney General's Office of the Republic of Indonesia | Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020 on the Termination of Prosecution Based on Restorative Justice | Prosecution |
| 3 | Supreme Court of the Republic of Indonesia | Supreme Court Regulation of the Republic of Indonesia No. 1 of 2024 on Guidelines for Adjudicating Criminal Cases Based on Restorative Justice | Trial |

Source: Compiled by the Author, 2025.

Principally, restorative justice is a principle or an approach in handling criminal cases, rather than a case resolution mechanism. In line with Marshall's (1999) view, which emphasizes that restorative justice is not a specific form of practice, but rather a set of principles that can serve as guidelines for the general practices of institutions or groups that deal with crime issues (Marshall, 1999).

However, within the Indonesian criminal justice system, restorative justice is still widely perceived and implemented as a form of alternative dispute resolution mechanism. This interpretation is evident, for example, in Article 1(3) of National Police of the Republic of Indonesia No. 8 of 2021 on the Handling of Criminal

Offenses Based on Restorative Justice, and Article 1(1) of Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020 on the Termination of Prosecution Based on Restorative Justice. Similarly, in practice, many law enforcement officers and members of the public view restorative justice merely as a means of resolving criminal cases outside the court system.

In contrast, the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) interprets restorative justice as a principle or approach to handling criminal cases, rather than a mechanism for out-of-court settlement. One of the ways to achieve restorative aims is through the mechanism of penal mediation, as regulated under Article 51h of the Dutch Code of Criminal Procedure. Penal mediation serves as a forum that brings together the victim and the offender to engage in restorative dialogue (Indonesia Judicial Research Society (IJRS), 2025).

In the United States, one of the most widely used restorative justice practices is Victim-Offender Mediation (VOM) (Reimund, 2004). In practice, there is no substantive difference between penal mediation and VOM; the distinction lies solely in terminology. From a terminological perspective, penal mediation may also be referred to as mediation in criminal cases, mediation in penal matters, victim-offender mediation, or offender-victim arrangement (in English); *strafbemiddeling* (in Dutch); *der außergerichtliche Tatausgleich* (in German); and *la médiation pénale* (in French) (Mulyadi, 2022: 3).

The ratio legis of penal mediation is grounded in the win-win solution principle, rather than outcomes that produce win-lose or even lose-lose situations, as may result from formal adjudication through adversarial litigation (law enforcement) processes (Mulyadi, 2022). Penal mediation is believed to produce the highest form of justice by

fostering mutual agreement between the victim and the offender involved in a criminal case. Both parties are encouraged to explore and reach a mutually acceptable resolution that reflects their needs and interests. As a result, compensation or restitution may be proposed, negotiated, and agreed upon between the parties, leading to a win-win outcome (Mulyadi, 2022). Furthermore, penal mediation has positive implications, particularly in achieving justice that is speedy, simple, and low-cost, as it generally involves fewer parties and procedures compared to formal litigation within the criminal justice system (Mulyadi, 2022). This voluntary settlement mechanism is often viewed as a more favorable dispute resolution method than a court decision (Pawlak, 2018: 114).

In the context of positive law (*ius constitutum*) in Indonesia, the concept of penal mediation is still relatively unfamiliar to the public, who are more commonly acquainted with the term 'restorative justice'. However, long before the issuance of Regulation of the National Police of the Republic of Indonesia No. 8 of 2021, Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020, and Supreme Court Regulation No. 1 of 2024, penal mediation had already been regulated under Letter of the National Police of the Republic of Indonesia No. B/3022/XII/2009/SDEOPS, dated 14 December 2009, concerning the Handling of Cases through Alternative Dispute Resolution (ADR), as well as Regulation of the National Police of the Republic of Indonesia No. 7 of 2008 concerning the *Basic Guidelines on Strategy and Implementation of Community Policing in the Execution of Police Duties* (Mulyadi, 2022). Fundamentally, these regulations provided a framework for handling minor criminal cases involving low material loss through ADR, based on mutual agreement between the parties, deliberation, and consensus,

respect for social and customary norms, and adherence to the principle of justice. If a resolution was successfully achieved through ADR, the offender would not be subject to further legal action (Mulyadi, 2022).

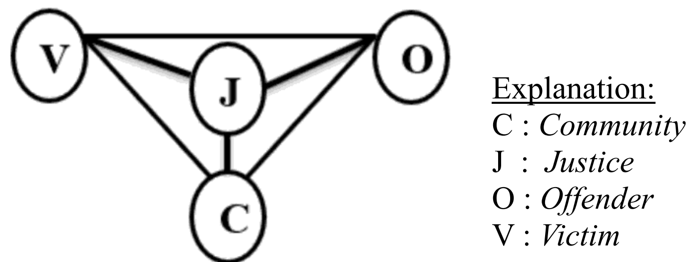
However, upon examining the content of Regulation of the National Police of the Republic of Indonesia No. 8 of 2021, Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020, and Supreme Court Regulation of the Republic of Indonesia No. 1 of 2024, no provision explicitly recognizes penal mediation as a formal mechanism within restorative justice.

Similarly, the new Criminal Procedure Code regulates provisions on restorative justice in Chapter IV, specifically in Articles 79 to 88 of the Criminal Procedure Code. Nevertheless, none of these provisions explicitly mentions penal mediation as a defined or required component of restorative justice mechanisms. This provision differs from the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*), which stipulates that one of the means of achieving restorative aims is through the use of penal mediation, as provided in Article 51h of the Dutch Code of Criminal Procedure.

**b) The Principles of Confidentiality in Restorative Justice Mechanisms**

**Tony F. Marshall**, a criminologist from the United Kingdom, views restorative justice as an approach to resolving criminal cases that involves the parties concerned and the wider community in constructive interaction with the relevant law enforcement agencies (Marshall, 1999). To illustrate this definition, **Tony F. Marshall** developed the Restorative Justice Triangle, as shown in Diagram 1 below: (Irsyad & Syahril, 2022).

**Diagram 1. Restorative Justice Triangle**




Source: Marshall (1999, p. 236), as cited in Irsyad & Syahril, (2022)

As an alternative mechanism for resolving criminal cases, Article 1 point 21 of the New Criminal Procedure Code defines restorative justice as an approach to handling criminal cases that involves the parties concerned, including victims, victims' families, suspects, suspects' families, defendants, defendants' families, and/or other related parties, to restore the situation to its original state. As a consensus-based model (involving the agreement of all parties), there is no doubt that the most widely adopted and implemented form of restorative justice is penal mediation (victim-offender mediation) (Mattevi, 2017).

The mechanism of restorative justice through penal mediation bears similarities to the Alternative Dispute Resolution (ADR) process in civil cases under Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, particularly in terms of involving the parties in a peaceful and voluntary resolution process, through deliberation and negotiation to reach an agreement between the Parties.

One of the advantages of resolving cases outside the court whether civil or criminal, as described above is the opportunity to make decisions about the offense and its consequences in a joint meeting that brings together all parties (victims, offenders, their families, and other relevant parties) (Abdulhamza, Farajiha, & Mojab, 2024). As the meeting only involved the parties concerned and was limited to those

with a legitimate interest, the case settlement process was required to be conducted in secret or closed to the public.

In the context of civil law, which is part of private law, the principle of confidentiality is relatively easier to understand and accept, given that civil disputes essentially concern the interests of the parties involved. Therefore, the settlement of civil disputes outside of court (mediation) is generally closed (Article 5 paragraph (1) of Supreme Court Regulations No. 1 of 2016 concerning Mediation Procedures in Court). Even though civil law is part of private law, when disputes are resolved through litigation in court, the proceedings are still open to the public (based on Article 13 of Law No. 48 of 2009 on Judicial Authority), except for divorce proceedings, which are conducted in closed sessions (Article 80 paragraph (2) of the Religious Court Law). This is due to the nature of open court proceedings.

Criminal law is conceptually part of public law, as it regulates the relationship between the state and its citizens. Criminal trials are also bound by the principle that trials shall be open to the public (Article 13 of Law No. 48 of 2009 on Judicial Authority and Article 202(2) of the New Criminal Procedure Code), except in cases involving morality or where the defendant is a child (Article 202 (2) of the New Criminal Procedure Code).

The nature of trials conducted openly to the public, both criminal and civil cases, is in line with **Rey Doubles**' opinion that '*a trial is a public event. What transpires in the courtroom is public property*.' (Ray Doubles, 1965). What happens in the courtroom is public property. Rey Doubles' view is in line with the provisions of Article 13 of Law No. 48 of 2009 concerning Judicial Authority, which requires trials to be held openly to the public (Rahman, 2022).

However, the nature of criminal law as public law does not necessarily negate the urgency of applying the principle of confidentiality when criminal cases are resolved through a restorative justice approach. Restorative justice places dialogue and active participation by the parties involved—victims, perpetrators, their respective families, and other relevant parties—as the primary means of restoring the situation to its original state. Within this framework, the principle of confidentiality should be a prerequisite for creating a safe and conducive space for the parties to convey their interests, acknowledgements, and agreements on restoration without public pressure. Although the criminal justice process is generally open, the settlement of criminal cases through restorative justice mechanisms should also guarantee the principle of confidentiality in order to achieve the goal of restoring the situation to its original state. One of the goals is to recreate an effective community that supports the rehabilitation process for both perpetrators and victims (Marshall, 1999).

This aligns with **Darabpour**'s view that meetings in the penal mediation process are held in private. The aim is, on one hand, to preserve the dignity and credibility of the offender and, on the other, to protect social relationships. Therefore, one of the key principles governing the restorative justice procedure is confidentiality (Abdulhamza et al., 2024). It means that all meetings and processes related to mediation between the parties must be conducted privately, and third-party attendance is only allowed with the consent of the parties involved. These meetings must not be recorded or filmed, and public dissemination whether in print or online is prohibited. This minimizes the risk of personal information being exposed and enhances the parties' trust in the mediator, enabling open, calm, and confident discussion (Abdulhamza et al., 2024).

Additionally, **van Schijndel**, in his 2009 dissertation at Tilburg University on *Confidentiality and Victim-Offender Mediation*, asserted that: “Confidentiality is one of the main requirements of penal mediation and is at its very foundations. The private nature of victim-offender mediation plays a crucial role in realising its potential” (van Schijndel, 2009). The parties' involvement in the process provides significant benefits for both the victim and the perpetrator. It offers an opportunity to speak directly about the crime that occurred and to express opinions on how the issue is being addressed. They can share their feelings and personal experiences in a way that is nearly impossible within the courtroom setting (van Schijndel, 2009).

The application of confidentiality principles requires that all participants, including facilitators and observers to keep all information shared during the process strictly confidential. Confidentiality must be ensured and respected throughout participation in penal mediation. This principle creates a safe space for honest dialogue, which ultimately fosters mutual understanding (European Forum for Restorative Justice, 2023).

In International Terms, the principle of confidentiality has been formally recognized in both the United Nations Basic Principles and the Council of Europe Recommendations (van Schijndel, 2009), as follows: Paragraph 14 of the Basic Principles reads as follows **“***Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law*”. While in Paragraph 2 of the Recommendation states **“***Discussions in mediation are confidential and may not be disclosed subsequently, except with the agreement of the parties*”.

Because penal mediation is private and non-public, the entire process and its outcomes must also remain confidential and must not be published. From this perspective, penal mediation should be bound by the principles of Confidentiality. However, in practice, many outcomes of restorative justice-based criminal case resolutions through penal mediation are openly published by the relevant institutions. These publications often disclose the identity of the offender, the victim, and the chronology of the criminal event, even including photographic documentation of the involved parties. Such disclosures contradict the principle of Confidentiality.

In this context, it becomes an urgent necessity to regulate the principle of Confidentiality in restorative justice mechanisms conducted outside the courtroom. According to **Darabpour**, the aim of confidentiality in penal mediation processes is: on the one hand, to safeguard the reputation and credibility of the offender, and on the other hand, to preserve social relationships (Abdulhamza et al., 2024). Confidentiality is essential in creating an environment where none of the parties feels vulnerable. Violation of confidentiality can lead to one or more parties being re-victimized, socially ostracized, or even subjected to further legal proceedings. By ensuring confidentiality, parties are better able to share their experiences regarding the factors that may have contributed to the offender's harmful behavior and its impact on the victim. Such sharing allows for more positive outcomes that comprehensively address the needs and interests of all parties involved. Building trust with the parties can also help maintain confidentiality throughout the process (European Forum for Restorative Justice, 2023).

The discourse on the urgency of applying the confidentiality principle in restorative justice mechanisms has been outlined by van Schijndel (2009) in his

research, outlining the main reasons for suggesting the principle of Confidentiality in restorative justice through penal mediation as follows (van Schijndel, 2009) :

(1) The potential disclosure of related information may discourage victims and offenders from participating in victim-offender mediation.
(2) Without privacy guarantees, people tend to hold back and are not free to express their needs and feelings.
(3) Statement given by the offender could disadvantage their position during the process.
(4) They might unintentionally incriminate themselves when explaining the circumstances leading to the offense.
(5) Offenders may be reluctant to participate in mediation if there is no guarantee of confidentiality in the process.
(6) If the information disclosed during mediation is disseminated and disclosed, the victim will feel uncomfortable
(7) When discussing the personal and sensitive information they disclose, especially when discussing the psychological impact of the crime in the mediation process, they may be reluctant to share it without a guarantee of privacy and often want it to remain confidential.

There are concerns that the implementation of restorative justice programs may ignore the basic human rights of perpetrators, including significant concerns about the neglect of due process and other legal rights in restorative justice mechanisms (Ward & Langlands, 2008). During Restorative Justice Week 2025, on November 18, 2025, there will be a call for the recognition of restorative justice as a means of upholding human rights, and the recognition of access to restorative justice as an inherent component of existing human rights related to justice (European Forum for Restorative Justice, 2025).

Failure to maintain confidentiality in restorative justice can lead to suboptimal implementation of restorative justice. As previously explained, conditions such as reluctance and inability to freely express their needs and feelings, discomfort felt by victims and perpetrators, or other aspects such as the discussion of personal/sensitive

information, may make them reluctant to share such information without a guarantee of privacy. This situation is closely related to the opportunity for each party involved to express their opinions, as part of upholding the right to freedom of expression (UDHR, Article 19), the right to life, liberty, and security of the individual (UDHR, Article 3); the right to own property (UDHR, Article 17); and the right to freedom of thought, conscience, and religion (UDHR, Article 18) (European Forum for Restorative Justice, 2025).

Furthermore, without guarantees for these principles, the identity and shame of the perpetrator may spread to the public. This can create a negative stigma in society. Such consequences do not align with the "right to protection of personal data" as a Human Right, as implicitly regulated in Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia and Article 29 paragraph (1) of Law Number 39 of 1999 concerning Human Rights.

## 2. Reformulation of Restorative Justice Mechanism Provisions in the Criminal Justice System to Ensure The Principle of Confidentiality

Criminal Law has long been under persistent scrutiny. A renowned Dutch legal philosopher, **Leo Polak**, who died in 1941 while imprisoned by the Nazis, dedicated nearly his entire life to investigating the foundations of criminal law. Even before he began his inquiry, he had expressed doubt, viewing criminal law as the most unfortunate branch of law, one that brings suffering to those who become involved with it (Zairudin, Rahman, & Maulidi, 2023). Today's modern criminal justice system has begun to evolve toward harmonizing the interests of victim restoration and offender accountability. This system not only functions to enforce justice repressively,

but also plays a role in encouraging the creation of restorative justice and social reintegration (Suryani Fithri, Pinem, & Ahmed Ezzerouali, 2025). Discussions of modern criminal justice are closely linked to the concept of restorative justice, which is now recognized and regulated in various legal systems around the world. As Sarre (2003) states, in many other countries, restorative justice is regarded as a hallmark of modern criminal justice systems (in Burgess et al., 2010).

In the United States, the concept of restorative justice is neither universally defined nor uniformly regulated. The lack of standardized procedural safeguards means that individual states determine how restorative justice is interpreted and which protections are afforded to its participants. Consequently, only 7% of all U.S. restorative justice statutes, just nineteen statutes across eleven states, include provisions addressing confidentiality (Young, 2023).

As previously explained, internationally, the principle of confidentiality has been formally recognized in both the Council of Europe Recommendations and the United Nations Basic Principles (van Schijndel, 2009), as follows:

> ***Paragraph 2 of the Recommendation states*:**
> *Discussions in mediation are confidential and may not be disclosed subsequently, except with the agreement of the parties.*
>
> ***Paragraph 14 of the Basic Principles reads as follows:***
> *Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.*

The above recommendations emphasize that all discussions during the mediation process must be kept confidential and cannot be shared without the consent of the parties involved. On the other hand, Paragraph 14 of the UN Basic Principles states that conversations that take place in closed restorative processes must be kept

confidential and may not be disclosed, unless the parties give their consent or if required by national law.

Both provisions provide exceptions to the principle of confidentiality, namely when the parties agree to disclose certain information. In practice, both the victim and the offender can determine and agree on the scope of confidentiality in the mediation process. If the parties agree that discussions on certain matters may be disclosed after the mediation concludes, the principle of confidentiality no longer applies (van Schijndel, 2009). In addition to confidentiality, there is also the principle of non-publicity, which requires that, after the conclusion of a penal mediation,

all parties involved, including victims, perpetrators/offender, mediators, and trusted third parties, are expected to maintain confidentiality by not disclosing anything related to the discussions or actions that take place during the mediation process. No participant is permitted to disclose information related to the mediation process (van Schijndel, 2009).

In Indonesia, the principle of restorative justice through penal mediation, as outlined in the Regulation of the National Police of the Republic of Indonesia No. 8 of 2021, the Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020, the Supreme Court Regulation of the Republic of Indonesia No. 1 of 2024, and the Law No. 20 of 2025 concerning the Criminal Procedure Code, does not include specific provisions on Confidentiality. This stands in contrast to certain policies in civil law, which provide explicit rules governing the nature of out-of-court settlement processes, as shown in Table 2.

**Table 2**.
The Differences of Mediation, Arbitration, and Restorative Justice Processes

| Aspect | Court Mediation | Arbitration and Alternative Dispute Resolution | Restorative Justice Mechanism |
|---|---|---|---|
| **Legal Basis** | Supreme Court Regulation No. 1 of 2016 on Mediation Procedures in Court | Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution | - Regulation of the National Police of the Republic of Indonesia No. 8 of 2021<br>- Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020<br>- Regulation of the Supreme Court of the Republic of Indonesia No. 1 of 2024<br>- Law No. 20 of 2025 concerning the Criminal Procedure Code (KUHAP) |
| **Article Content** | Article 5 Paragraph (1): Mediation proceedings are essentially closed to the public unless the parties agree otherwise. | Article 27: All dispute hearings by an arbitrator or arbitral tribunal shall be conducted in private. | N/A |
| **Article Explanation** | N/A | The provision that hearings be conducted in private deviates from the principle of civil court proceedings at the District Court, which are generally open to the public. This is intended to emphasize the confidential nature of arbitration settlements. | N/A |

Source: Compiled by the Author, 2025.

For example, **Iran**'s criminal justice system does not explicitly regulate the principle of confidentiality in restorative justice mechanisms. Although the principle of confidentiality in restorative justice mechanisms is not explicitly regulated within the Iranian legal system, mediation practices in criminal matters provide space for culturally embedded approaches. According to Articles 1, 18, and 27 of the *Mediation Regulations in Criminal Matters*, mediators are implicitly permitted to convene family sessions. At this stage, mediators may invite family members, community representatives, or relevant organizations to participate if their presence is deemed effective in facilitating compromise. In practice, these family sessions often

incorporate traditional cultural rituals and ceremonies led by tribal elders. Examples include the *Fasl* ritual among the nomads of Khuzestan, the *Khon-Bas* ("blood enough") ritual among the Bakhtiari people in southern Iran, the *Patar* (asylum) ritual among the Baluch tribes in southeastern Iran, and the *Oath* ritual among the Bakhtiari. Despite the formal non-recognition of family sessions in the Iranian criminal justice system (Heshmati & Gholdozian, 2012; Rahiminejad, 2022), these practices aim to moderate revenge, reduce interpersonal, inter-family, and inter-tribal violence, and restore social harmony. They achieve this by offering compensation to victims, fostering reconciliation between the victim, the avengers of blood, and their families or tribes, as well as the offender and his kin (Nadjafi, 2016; Rahiminejad, 2022).

Beyond reconciliation, these sessions also serve to instill a sense of responsibility and moral accountability in offenders, often accompanied by feelings of embarrassment or shame that reinforce social norms. The effectiveness of such mechanisms is notable: approximately 95% of criminal cases—including murder, assault, insult, theft, and even rape—are reportedly resolved through these processes (Rahiminejad, 2022). However, a significant challenge remains. During these proceedings, sensitive information, personal data, and the psychological states of both victims and offenders are not safeguarded under confidentiality principles. Instead, they are frequently exposed to the broader community, raising concerns about privacy, dignity, and potential secondary victimization.

As a point of comparison, **Belgium** pays great attention to the application of the principles of confidentiality in regulations governing penal mediation or victim-offender mediation. Belgian law governing mediation mandates a strict obligation of confidentiality (De Mesmaecker, 2011). The confidential or private nature of the penal

mediation process is mentioned multiple times in the Belgian Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv). Article 3 of the WvSv defines penal mediation and explicitly includes confidentiality as one of its core elements. Article 555, paragraph 1 of the WvSv stipulates that all documents related to mediation, as well as all statements made by the parties, are confidential. Consequently, such information cannot be used as evidence in any subsequent proceedings, whether criminal, civil, administrative, or arbitral (van Schijndel, 2009: 47). Paragraph 2 of Article 555 further states that any document disclosed in violation of this provision shall be formally excluded from judicial consideration. Lastly, Paragraph 3 affirms that mediators are prohibited from disclosing any information obtained through their professional role. Moreover, they cannot be compelled to testify in any of the aforementioned proceedings unless required to do so by law. If a mediator violates this duty, they may be subject to criminal penalties, including imprisonment or fines (van Schijndel, 2009).

Similarly, in several **U.S. states**, notably **Texas**, there are rules regarding confidentiality in mediation, especially in penal mediation or victim-offender mediation. The Texas statute provides the following policies (Reimund, 2004: 411):

(a) *Except as provided by subsections (c), (d), (e), and (f), a communica tion relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether be fore or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.*

(b) *Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the proce dure may not be required to testify in any proceedings relating to or aris ing out of the matter in dispute or be subject to process requiring disclo sure of confidential information or data relating to or arising out of the matter in dispute.*

……

*(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.*

Referring to the provisions as cited by Reimund (2004), it appears that in the alternative dispute resolution (ADR) process, both before and after the case enters the formal court system, the principle of confidentiality is of utmost importance. This procedure cannot be disclosed, and any form of communication that occurs within it cannot be used as evidence that is detrimental to the participants in any judicial or administrative proceedings. Moreover, all records generated during the ADR process are confidential, and neither the participants nor the third-party facilitators may be compelled to testify in any proceedings related to or arising from the disputed matter, nor may they be subject to any process that requires the disclosure of confidential information or data on the dispute (Reimund, 2004).

Within the framework of victim-offender mediation (penal mediation), facilitators must provide all participants with clear and detailed information regarding the principle of confidentiality at the outset of the process. They are required to explain what information must remain confidential, what exceptions may apply, and the consequences of breaching confidentiality. This must be communicated in an accessible manner that is easily understood by all participants (European Forum for Restorative Justice, 2023: 4). For instance, in **Hungary**, participants are explicitly informed that anything shared within the mediation room must remain within that room. Facilitators are also expected to address any questions or concerns raised by participants regarding confidentiality. All participants involved in the mediation process may draft and sign a written confidentiality agreement. At the end of the

process, further discussion is encouraged regarding the extent to which details may be disclosed to external parties (European Forum for Restorative Justice, 2023). In this context, the provision not only safeguards confidentiality but also ensures non-publicity throughout the proceedings.

In order to realise the principle of confidentiality in restorative justice mechanisms as described above, there is a need for *ius constituendum* or aspirational law that explicitly regulates the application of this principle in the settlement of criminal cases through a restorative justice approach. Further regulation through a Government Regulation is also necessary. This is in line with the provisions of Article 88 of the new Criminal Procedure Code (KUHAP), which states that 'further provisions regarding the implementation of restorative justice mechanisms are regulated in a Government Regulation'. Through these regulations, it is hoped that the principle of confidentiality will obtain a normative basis, thereby ensuring protection for victims and perpetrators, preventing revictimisation and stigmatisation, and ensuring the achievement of the main objective of restorative justice, namely restoration to the original state.

## C. CONCLUSION

The key conclusions of this study, as informed by the analysis conducted, are summarized as follows: **First,** restorative justice is fundamentally an approach in addressing criminal cases, rather than a dispute resolution mechanism in itself. This approach is commonly implemented through penal mediation or victim-offender mediation. The implementation of penal mediation is inherently bound by the principles of confidentiality and non-publicity. However, in practice, the outcomes of

restorative justice processes, particularly those involving penal mediation, are frequently made public by the relevant authorities. This indicates an urgent need for regulatory provisions that specifically uphold the principles of confidentiality within restorative justice mechanisms conducted outside the courtroom. **Second,** the principle of confidentiality has been recognized in international instruments, such as the Council of Europe Recommendations and the United Nations Basic Principles. In some countries, such as Belgium, considerable attention has been given to protecting the confidentiality of victim-offender mediation within their legal frameworks. Similarly, in the state of Texas, United States, these principles are also codified. By contrast, Indonesia currently lacks specific legal provisions regarding confidentiality and non-publicity, whether in the Regulation of the National Police of the Republic of Indonesia No. 8 of 2021, the Regulation of the Attorney General of the Republic of Indonesia No. 15 of 2020, the Supreme Court Regulation of the Republic of Indonesia No. 1 of 2024, even regulated in Law No. 20 of 2025 concerning the Criminal Procedure Code (KUHAP).

Based on the findings and conclusions outlined above, this study recommends the following: **First,** further regulation is needed through government regulations as mandated in the new Criminal Procedure Code, particularly regarding the implementation of restorative justice mechanisms. These implementing regulations need to explicitly stipulate the confidentiality principle as a binding standard procedure for all law enforcement officials. **Second,** technical guidelines need to be developed within law enforcement agencies such as the police, the public prosecutor’s office, and the Supreme Court that regulate the procedures for implementing restorative justice,

including the mechanisms within the criminal justice system, while guaranteeing the confidentiality principle.

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