

Pancasila as the Parameter on Restorative Justice in Indonesian Legal System

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ABSTRACT: This research answers the following questions: (i) why is Pancasila needed to be the parameter of the process of internalizing law into Indonesian legal system, and (ii) what is the form of Pancasila as the parameter of external restorative justice internalization? Concerning Pancasila as a legal ideology, interpretation, development, implementation, evaluation, and evolution of law should be based on Pancasila values. Pancasila is axiomatic and a basic norm with final and rigid interpretation but flexible form. It is the advantage of Pancasila as a legal construct that can inspire each of legal products. This research is a normative one with reflections conceptual approach to enable Pancasila parameter filter the injection of the external restorative model. The result of the research shows that: (i) Pancasila is needed as the parameter in the process of internalizing law into Indonesian legal system, as it is a legal ideology that can be reviewed philosophically, theoretically, and sociologically; and (ii) Pancasila as the parameter of external restorative justice internalization has the following forms: a). Divinity and humanity as the moral parameter, b) unity and democracy as policy parameter, and c) social justice as the parameter of the objective to be achieved.

Keywords: Internalization, Pancasila, Restorative

1. Introduction

Pancasila has causality when compared with the restorative model coming from either the internal Indonesian legal system or external to it. The basic concept of restorative is to restore (to repair); as such, the question "Why should Indonesian legal system adopt restorative justice model?" should be answered first. From its historical aspect and practical implementation, restorative justice can be found in the Indonesian legal system through a variety of conflict resolutions, both customarily or socio-culturally. This essence is confirmed with Pancasila values comprehended in unity accommodating restorative justice.¹ It then changes along with the nation's experience with being the object of colonialism and imperialism, bequeathing a hegemonic and partial legal order.²

This fact manifests colonial government in separating socio-cultural power through policy differentiation, including discriminative legal implementation. This provision is supplemented with law enforcement prioritizing deterrent effect and firm and severe sanction (coercion).³ This historical perspective is supported post Indonesia's independence with an excuse to avoid a legal vacuum and hold control over the society post-independence.⁴ Nevertheless, as time goes by, cause and ideal to create a distinctive legal norm that lifts back the nation's authentic values degraded by political interest and other inhibiting factors. The implication is that the essence of restorative justice is gradually marginalized, viewed from Pancasila and socio-cultural values and customary inheritance.

The explanation of historical perspective is relevant to Joachim Friedrich's argument elaborating the process of a nation's legal essence disappearance due to other nations' experience with legal implementation through legal annexation.⁵ Such an idea brings a question "Are restorative justice-based legal essences found in Pancasila value and nation's socio-cultural values forgotten following a long period of colonial legal annexation before the independence period. As a result, the attempt of re-exploring the essence of conflict resolution or legal instrument based on restorative justice was not taken post-independence because there had been facilities inherited from the colonial legal order that are still applied in some conditions until today. Thus, such a condition is the critique against the non-evolving national legal order by adapting to time development.⁶ The implementation of criminal law still prioritizes physical punishment based on imposing misery and taking revenge, just like the classical one.⁷ Ironically, the development of former colonial states, like the Netherland, has been separated from the revenge group because it has successfully revitalized the composition of criminal law, prioritizing its beneficial goal.⁸ On the one hand, just like pendulum theory,⁹ The direction of national

¹Sinal, M. (2017). *Pancasila Konsensus Bangsa-Bangsa Indonesia*. Malang: Madani, p. 38.

²Busro, A. B. (1989). *Nilai dan Berbagai Aspeknya dalam Hukum, Suatu Pengantar Studi Filsafat Hukum*. Jakarta: Bhratara Media Niaga, p. 11.

³Andenaes, J. (1974). *Punishment and Deterrence*. Michigan: The University of Michigan Press, p. 41.

⁴Notoamidjojo. (1975). *Demi Keadilan dan Kemanusiaan*. Yogyakarta: BPK Gunung Mulia, p. 49.

⁵Friedrich, C. J. (1971). *Theory and Politics*. Netherlands: Springers Netherlands, p. 112.

⁶Artadi, I. (2006). "Menggugat Efektivitas Penerapan Pidana Penjara Pendek, Menuju Suatu Proses Peradilan Pidana yang Humanis", *Pro Justitia*, 24 (4), pp. 376-386.

⁷Muladi, Arief, B. N. (1984). *Pidana dan Pemidanaan*. Semarang: Badan Penyedia Bahan Kuliah FH UNDIP, p. 9.

⁸Graham, J. (2003). "Principles for Good Governance in the 21st Century", *Policy Brief*, 1 (15), p. 2.

⁹Paton, G. W. A. (1969). *A Textbook of Jurisprudence*. UK: Oxford University Press, p. 209.

legal order instead move backward while the development of restorative justice is known widely and runs rapidly in the international world.

The development of restorative justice has been used commonly to compare criminal law implementation in various countries.¹⁰ It is just like Plea Bargaining is an integral part of Deferred Prosecution Agreement (DPA) and Non-Prosecution Agreement (NPA) in the United States of America.¹¹ Furthermore, the optimization of repressive administrative sanction as the substitute for the implementation of corporal punishment in Netherland.¹² And other varying implementation creations with the same objective point, i.e., to find usefulness in the criminal law implementation. Such a condition proves that the national legal order instead finds a fact that is moving backward to prioritize revenge and corporeal punishment against the perpetrator and not attempting to seek usefulness or the objective of the development of law. For example, a corruption case becomes an ideal example that the state is inattentive in prioritizing the recovery of the state's financial loss or the recovery of the corruption-related asset. Meanwhile, the state is in a financial loss position due to: (i) having no effective facility to be implemented to the perpetrator to recover the corruption-related financial loss; (ii) not calculating the corruption-related sustainable cost (delayed public service, natural damage, macro and micro policy error, etc.); and (iii) states spend much money to resolve a corruption case. This is maybe because the implementation of law so far negligently prioritizes the usefulness of law implementation to be achieved. Ironically, the current condition creates a criminal legal order far away from the attempt to achieve usefulness using various restorative justice models. There is no effective law device to achieve the use of criminal law currently in Indonesia.

In dealing with the actual condition, an attempt is required to synchronize and adapt restorative justice models developing in international scope as external effect to the restorative justice model deriving from the reflection of Pancasila value and the community's socio-cultural condition. Such a mechanism can be called the legal internalization process.¹³ Legal internalization is an inevitable demand of time dynamic and replete of the globalization era's change. The process passed through involves testing Pancasila as a parameter in internalizing law into the Indonesian legal system and with reflections conceptual approach to formulating the margin of Pancasila's form as the parameter of internalizing external restorative justice model.

2. Reserch Method

This article belongs to normative law research using primary and secondary law materials, to be analyzed deductively further using reflectionist conceptual approach to develop Pancasila parameter in filtering the injection of the external restorative model. The research is classified into descriptive, analytical, and diagnostic category by seeing the problems related to the internalization of external law into the national legal system.

3. Results and Discussion

1) *Argumentation of Pancasila as the Parameter of the Process of Internalizing Law into Indonesian Legal System*

The first discussion is a step to test the author's hypothesis by proving the causality and urgency of Pancasila to be positioned as the parameter in internalizing law into the Indonesian legal system. Legal internalization is absorption, injection, or adoption of legal order from outside (external) into the state's law.¹⁴ In its process, legal internalization should be adjusted with legal tradition, legal culture and practice, and habit of legal implementation in a state to be synchronous and synergistic with the legal system constructed.

¹⁰Brainwaithe, J. (2002). "Setting Standards for Restorative Justice," *Brit. J. Criminol, The Centre for Crime and Justice Studies (ISTD)*, 42, pp. 563-577.

¹¹Packer, H. A. "The Limits of the Criminal Sanction" in Atmasasmita, R. (2011). *Sistem Peradilan Kontemporer*. Jakarta: Kencana Prenadamedia Group, p. ix.

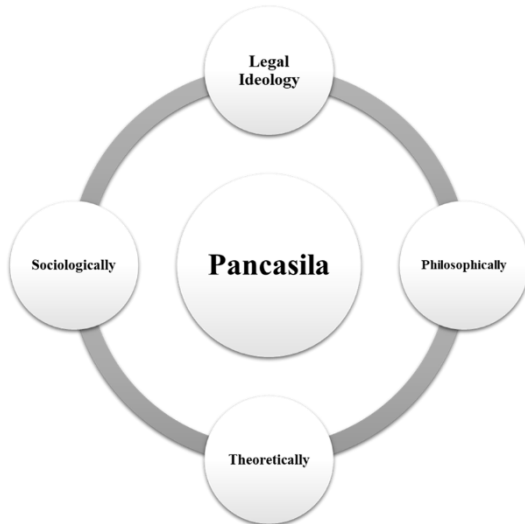
¹²Tollenaar, A. (2017). *Administrative Justice in Wales and Comparative Perspective*, (Ed) Nason, S. Cardiff: University of Wales Press, p. 308.

¹³Varella, M. D. (2014). *Internalization of Law, Globalization, International Law and Complexity*. Berlin: Springer, pp. 2-3; Goodman, R., Jinks, D. (2008). "Incomplete Internalization and Compliance with Human Rights Law," *The European Journal of International Law*, 19 (4), pp. 725-748.

¹⁴Klabbers, J. (2009). *The Internalization of Law and Legal Education*. Netherlands: Springer Netherlands, p. 3.

Table 1:

Pancasila as a form as the Parameter of the Process of Internalizing Law into Indonesian Legal System



Pancasila is inherent to Indonesians' typical characteristic and predisposition, playing an important as the guide value that can be applied to society's daily life.¹⁵ Primordial inherited preserved matters hereditarily create regular interactional patterns, including the applicability of norms within society. Those norms will evolve later into the rule living within society (living law). Considering such comprehension, Pancasila departs from an identical process. Nevertheless, Pancasila has its exclusive side, related to its axiomatic or unquestionable existence. Pancasila has a final form recognized as a guide (Leicester) in living within nation and state.¹⁶

Pancasila values are implemented, among others, through the actualization of Pancasila values, including internalizing law. This form of actualization is simplified into the Pancasila-based resolution of conflict by prioritizing the norm created and patterned within society.

Thus, Pancasila becomes a demand addressed to the government as the main stakeholder of legal development. It includes internalizing, injecting, or adopting law into the Indonesian law system. Barda Nawawi states that the national legal system is essentially Pancasila Legal System. If elaborated further, this thought identifies Pancasila legal system as a national legal system based on/or oriented to 3 (three) pillars of Pancasila's equilibrium values:¹⁷ (i) Divinity values-oriented (religious moral); (ii) humanity values-oriented (humanistic); and (iii) (societal values-oriented (nationalistic, democratic, social justice). Thus, the internalization of law should be adjusted with the Pancasila character.

In the case of environmental damage, for example, restorative justice is needed because components and other environment objects in the ecosystem, the Law No 32/2009 concerning environmental protection and management has not been well implemented because it experienced a proliferation of regulations as a result of liberalisation, free market domination and regional autonomy in the globalisation proces.¹⁸ Viewed from surrounding life even in our daily activities, we can find vital justice models with Pancasila, including creating organized and repeated patterns within society. Even it does not need an external internalization process. It includes, among others, discussion to achieve unanimity. Even the method has existed in various literatures since before Indonesia's independence, and its implementation is still preserved until today. The fact is confirmed with the existence of the democratic principle prioritizing deliberation within it. It is a phrase confirming that the internalization of law into the Indonesian legal system belongs to restorative justice internalization, thereby ideally using values within society. Thus, it can be parameter and reference to the internalization of law, particularly restorative justice, oriented to internal restorative justice model instead of having character in line with the values reflected on Pancasila.

Theoretical domain argues for Pancasila to be positioned as the parameter in internalizing law into the Indonesian legal system. The principles constructing a constitutional state, such as law certainty and justice as mandated in the Republic of Indonesia's Constitution of 1945, are also relevant to the reflection of Pancasila values as the source of any legal sources. Pancasila serves as

¹⁵Attamimi, H. S. in Arrsa, R. C. (2011). *Deideologi Pancasila, Analisis Kritis Perspektif Sejarah Hukum Ketatanegaraan Indonesia*. Bandung: UB Press, p. 201.

¹⁶Indrarti S., M. F. (2005). *Ilmu Perundang-Undangan, Dasar-Dasar dan Pembentukannya*. Yogyakarta: Kanisius, p. 49.

¹⁷Arief, B. A. (2001). *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana*. Bandung: Citra Aditya Bakti, p. 12.

¹⁸Geofrey, M. J. C., Samekto, F. X. A. (2021). "Barriers to the Enforcement of Environmental Law: An Effect of Free Market Domination and Regional Autonomy in Indonesia", *Hasanuddin Law Review*, 7 (1), pp. 31-45.

the basic norm or Staatsfundamental Norm,¹⁹ The supreme and foremost order in a national legal system. Nonetheless, the constitution as a form of written regulation is a legal foundation different from other legal foundations, in line with Hans Kelsen's idea that the constitution should be distinguished from ordinary law in its development, enactment, and amendment, and revocation.²⁰ Viewed from its interpretation aspect, according to Hans Kelsen, the constitution is a written rule becoming the foundation of national legal order.²¹ The comprehension of the constitution criticizes the content of legal norms and foundation or the legality of the development of lower regulation (legislation under the constitution).

Thus, the advantage of Pancasila lies in its non-concrete but abstract form. In this case, it can inspire the domain of legislation, legal interpretation, legal implementation, legal evaluation, and legal amendment. Pancasila is always axiomatic, so that its validity is unquestionable, as confirmed in the Preamble of the Republic of Indonesia's 1945 Constitution and legislation stating that Pancasila is the source of any legal sources. It means that referring to Nawiasky's norm classification theory, the principle of norm level also applies, just like Kelsen's Stufen theory.²² The difference lies in the Pancasila norm that cannot be equal to other written legal norms but is always on the top and becomes the foundation of the entire legal system in Indonesia, viewed from its form. Another theory confirming this is Savigny's theory stating that law is not made but found in the nation's self-identity and character,²³ Confirming the Pancasila argumentation from a theoretical perspective as the parameter of the internalization of law into the national legal system.

Sociological argumentation states that Pancasila should be the parameter in internalizing the law into the Indonesian legal system proves that Pancasila's character is closely related to the nation's character and soul (volkgeist).²⁴ In this case, the author summarizes some restorative justice mechanisms found and seen from customary society and socio-culture living within society. The plot is as follows: internal restorative justice mechanisms coming from local wisdom and the society's socio-culture are the building or construct connected to Pancasila values. Therefore, particularly in internalizing external restorative justice, Pancasila should be positioned to be the parameter. If Pancasila becomes the parameter, the external restorative justice internalized into the national legal system can be filtered by Pancasila values connected to internal restorative justice coming from local wisdom and the society's socio-culture. Thus, the internalization with Pancasila being the parameter is expected to provide direction in line with that intended by the nation's sociological condition.

2) Pancasila form as the parameter of External Restorative Justice Internalization

This second discussion uses a reflectionist conceptual approach and constructivist thinking to formulate the border and the form of Pancasila as the parameter of internalization of external restorative justice.

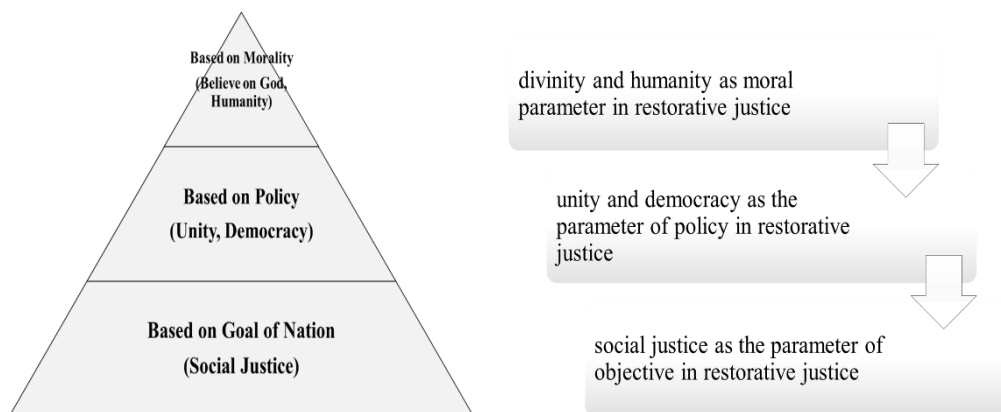


Table 2: Pancasila form as the parameter of External Restorative Justice Internalization

The principle of Divinity and humanity functions as the foundation of morality, meaning that the entire law enforcement process should prioritize morality in which the society also sees the process. Pancasila contains the abstract of nation's morality, in which with its position as legal ideology, the nation's morality will be the morality of law inherent to the Indonesian legal system. The use of Pancasila can put the law more appropriately to be the primary validity in line with the moral. In other words, moral is the corridor

¹⁹Kelsen, H. (1971). *General Theory of Law and State*. New York: Russel and Russel, p. 119; Indrarti S., M. F. (2005). *Ilmu Perundang-Undangan, Dasar-Dasar dan Pembentukannya*. Yogyakarta: Kanisius, p. 49; Attamimi, H. A. in Arrsa, R. C. (2011). *Deideologi Pancasila, Analisis Kritis Perspektif Sejarah Hukum Ketatanegaraan Indonesia*. Bandung: UB Press, p. 201.

²⁰Kelsen, H. *Op. Cit.*, p. 180.

²¹*Ibid*, p. 365.

²²Geiger, W. (1950). *Veröffentlichungen von Professor Dr. Hans Nawiasky*. Cologne: Benziger, p. 2.

²³Marini, G. (1978). *Friedrich Carl Von Savigny*. Como: Guida, p. 15.

²⁴Ruckert, J. (2006). "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law", *Juridica International*, 11, p. 55-67.

of legal guide implementation by the subject of law. Moral becomes the human's guide in each of life activities, providing for the truth according to ratio. Aristotele's elaborates the core of human beings as rational moral, viewing truth (theoria, contemplation) as the superiority of life (summum bonum). In its process, human beings are guided by mind and moral.²⁵

The moral foundation intended is the embodiment of the principle Belief in the divinity of God, (in Indonesian, Ketuhanan Yang Maha Esa) as manifested into the Indonesian law enforcers that should emphasize the moral responsibility to God the Only One. Law is basically closely related to morality, just like Hart's opinion reflecting the influence of morality on law. Law in each modern state indicates thousand points full of morality accepted by society and broader moral ideas. This influence then penetrates into the law obviously followed by the embodiment of humanity values underlying the argument that law enforcement should pay attention to humanism aspect to be called dignified.

The parameter of humanity in the principle "Just and civilized humanity, (in Indonesian, Kemanusiaan Yang Adil dan Beradab)" also emphasizes the human's prestige and dignity. God creates human beings along with a set of rights ensuring their degree as human beings as summarized in the Human Rights. In this case, the position of constitutional state (rechtstaat) is recognized as the regulator to ensure human rights to ensure justice interest to everyone. Everyone is entitled to get his/her right to justice. Thus, a constitutional law developed is not absoluterechtsstaat but democratischerechtsstaat.²⁶ Therefore, many things indicate how the law reflects morality. This is a fact, meaning that the stability of legal system is dependent partially on its compatibility to moral and its existence should be recognized,²⁷ Including the stability of law enforcement domain that should be compatible to Pancasila's morality values. The Parameter of Divinity mandates that no national legal product may be contradictory with religion, declining or opposing the religion. Meanwhile, the principle of humanity binds the law enforcement that has humanistic side.²⁸

Thus, with Pancasila as the parameter of the internalization of external restorative justice model through moral parameter can be embodied through adopting the principle of restorative justice not contradictory with Divinity value and nation's morality. Parameter of Divinity and humanity as the moral border in internalizing the external restorative justice model is the existence of ethical value as its mechanism guidance. In this case, law enforcers implementing restorative justice should adopt ethical value and position the consideration to Divinity value as its primary essence. Thus, thus external restorative justice model absorbed is expected to have morality accountability and accountable for personally to God. It is intended to enable the moral parameter as a form of Pancasila as the parameter in internalizing external restorative justice to provide a restorative justice mechanism with religious philosophy and to be a preventive tool in internal morality of its users. For that reason, restorative justice is not interest-nuanced but should be used efficiently in line with the essence to obtain benefit in its implementation in the term of accountability to God as a means of self correction or self reminder inside the law enforcers using it.

The next parameter lies on the Principles of Unity and Democracy that are always positioned to be the foundation of policy. Therefore, in the process of internalizing external restorative justice, public participation can be implemented as broadly as possible as the means of control and information transparency that can comply with the clause of Just and civilized humanity through participating in the process of using restorative justice, with the just feeling. It is intended to enable the process and outcome of restorative justice mechanism to obtain public legitimacy. Ruslan Saleh defines the position of Pancasila in the Preamble of Republic of Indonesia's 1945 Constitution in relation to its elaboration and interpretation into a legal product constituting the general legal ideology against Indonesia's Legal Order, the reflection of humanity values, ideals, and social justice with religious character from each of legislation.²⁹ The parameter of unity and integrity or nationality mandates that Indonesian law should be a national one applying to all the people of Indonesia.³⁰ Meanwhile, the parameter of democracydemocracy mandates that in the relationship between law and power, power should be subjected to law, power is on the people's and the representative of people's hands. Thus, the law enforcing process should reflect unity and integrity values. In this paradigm, law enforcers using restorative justice mechanisms should refer to public interest. Similarly, the norm of regulation development should not be contradictory with public interest, not in contradiction with the society norm, thereby can create law enforcement product with selling power and legitimacy, in the form of society's recognition. The compliance with public interest is in line with the beginning of the realization of public welfare. As such, the use of restorative justice mechanism with parameter of unity and integrity should provide outcome compatible to public interest or common interest, and in line with democracy parameter, through supervision and information transparency to the society in order to escort the use of restorative justice mechanism.

The next parameter is obtained from the principle of Social justice becoming the target to be achieved by the use of restorative justice in law enforcement based on morality and prioritizing the process involving public participation. Thus, the control, involving the public, over the law enforcement using restorative justice is expected to be achieved. The implication can provide legal supremacy actually in line with Pancasila's legal ideology. Parameter of social justice mandates that all citizens have equal rights and that everyone is equal before the law.³¹ The restorative justice mechanism in the law enforcement domain is required to maintain the stability of government in undertaking its function as the protection of society by means of reflecting obedience, defined as the embodiment of democratic values. Democracy adhered to in Indonesia is the one based on Pancasila. Thus, Indonesian democracydemocracy contains general value, in addition particular value. Indonesian democracydemocracy is the one guided by the

²⁵Tanya, B. L. (2011). *Penegakkan Hukum dalam Terang Etika*. Yogyakarta: Genta Publishing, p. 121.

²⁶Sinal, M. (2017). *Pancasila Konsesnsus Bangsa-Bangsa Indonesia*. Malang: Madani, p. 104.

²⁷Safa'at, M. A. (2016). *Konsep Hukum H.L.A Hart*. Jakarta: Konstitusi Press, p. 21.

²⁸Kusumaatmaja, M. (2006). *Konsep-Konsep Hukum dalam Pembangunan*. Bandung: Alumni, p. 73.

²⁹Safa'at, M. A. *Op. Cit.*, p. 34.

³⁰Kusumaatmaja, M. *Op. Cit.*, pp. 74-75.

³¹*Ibid*, p. 75.

inner wisdom in the unanimity arising out of deliberations amongst representatives. In this case, the government should hold tightly on the conception of by people, from people, and for people. It belongs to an activity of maintaining the stability of law enforcement composed of society's confidence and social legitimacy. Thus, the use of restorative justice in law enforcement as the form of state's guarantee over legal supremacy, should be manifested into the reinforcer of democracy based on people. In its development, restorative justice can be equipped with the society control mechanism by increasing public participation as the holder of social legitimacy.

In corporate crime, for example, the biggest obstacle is transparency which involves government intervention in it. Then a whistleblower is needed in the scope of restorative justice. Whistleblower protections are primarily for criminal cases. The Witness and Victim Protection Law is the primary piece of whistleblower legislation.³² Social justice contained in Pancasila becomes guideline philosophically and ideologically, and state's foundation to accommodate the phrase of justice and benefit, in addition to law certainty. Therefore, in addition to complying with law certainty, the state governance practice should also accommodate the compliance with justice value and benefit, in order to be in line with legal foundation value becoming the objective of law itself. The form of social justice as the ultimate goal of law enforcement is manifested into the consistency in implementing the principle of equality before the law. It is intended to provide justice in law protection scope to the people and the justice seekers. In Pancasila perspective, the principle of equity in correcting and realizing social justice relies on Pancasila values or philosophy. Therefore, the use of restorative justice in law enforcement may not break human rights and should obligatorily present the balance between state's interest representing public (society) and individual interests.

4. Conclusion

Pancasila is needed as the parameter in the process of internalizing law into Indonesian legal system as it is a legal ideology that can be reviewed philosophically, theoretically, and sociologically. The form of Pancasila as the parameter in internalizing external restorative justice involves: (i). Divinity and humanity as moral parameters, (ii) unity and democracy as policy parameter, and (iii) social justice as the parameter of objective to be achieved.

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³²Hajdú, J., Rahman, R. A. (2021). "The New European Union Whistleblowing Directive: In Comparison to Indonesia's Practice". *Hasanuddin Law Review*. 7 (3): 226-240.

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