

RESTORATIVE JUSTICE IN ISLAMIC LEGAL PHILOSOPHY PERSPECTIVE

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ABSTRACT

Law is a necessity that is needed by society to live their lives. However, until now, there have been various controversies over the processes and decisions of the criminal justice system that are considered fair or not by some people. The criminal law system in Indonesia provides space for the application of the concept of restorative justice. This study aims to examine how the concept of restorative justice in the perspective of Islamic legal philosophy is thus later it can be seen whether the concept of restorative justice is appropriate or not to be applied. The results showed that Islam even understood the concept of victim oriented long before the existence of restorative justice therefore substantially, restorative justice does not contradict with the values of Islamic criminal law and can be applied in Indonesia. However, in concept, restorative justice (Islah / Al Afwu) has not been clearly regulated in the Indonesian criminal justice system so that a legal umbrella is needed to make restorative justice get stronger roots in its implementation.

Keywords: Restorative Justice, Islamic Legal Philosophy, Criminal Cases Settlement

A. Restorative Justice

The development of public awareness of the need for law as a regulation for social life has a very strong influence on the development of the application of criminal law in Indonesia. This phenomenon shows the emergence of various controversies over the processes and decisions of the criminal justice system which are considered by some parties that it does not fulfill the sense of justice of society. The emergence of concept of *restorative justice* which is considered as a new notion in the criminal law system basically has a method with traditional patterns of conflict resolution and crime that has already existed in various cultures throughout history. The criminal law system in Indonesia provides space for the application of the concept of *restorative justice*, which substantially does not contradict with the values of Islamic criminal law. Therefore, the concept of *restorative justice* is considered as an appropriate concept in the criminal case settlement process, and is more effective in fulfilling the sense of justice in society. However, the construction of the concept of restorative justice needs to be adapted to the criminal law enforcement system in Indonesia which adheres to the concept of restitutive justice in cultural pluralism.

Many people see *restorative justice* as a philosophy, a process, an idea, a theory, and an intervention.¹ *Restorative justice* is a court emphasizing repair of losses which is caused or related to criminal acts. *Restorative justice* is carried out through a cooperative process that involves all parties (stakeholders). "*Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behavior. It is best accomplished through cooperative processes that include all stakeholders*".² *Restorative justice* is an alternative or another way of criminal justice by prioritizing the *integration* approach of the perpetrator on the one hand and the victim / society on the other hand as a unit to find solutions and return to the pattern of good relations in society. *Restorative Justice* is an approach model that emerged in 1960s in efforts to resolve criminal cases. Unlike the approach used in the conventional criminal justice system, this approach emphasizes the direct participation of the perpetrators, victims, and society in the criminal case settlement process.

Liebmann simply defines *restorative justice* as a legal system that aims to restore the welfare of victims, offenders and community damaged by a crime, and to avoid further violations or criminal act.³ Liebmann also provides formulation of basic principles of *restorative justice* as follows:

1. Prioritizing support to and recovery of the victims;
2. The offenders shall be responsible for their actions;
3. Dialogue between the victims and the offenders to reach an understanding;
4. There is an effort to position the loss incurred correctly;
5. The offenders must be aware of how to avoid crime in the future;
6. The community must also assist in integrating both parties: the victims and the offenders.⁴

This definition explains that in restorative justice, what is prioritized is not the imposition of punishment to the criminal offenders, but how the offenders can be responsible for the criminal act committed, and how the victim can get justice, thus the situation can recover as before. The main objective of restorative justice is the existence of a fair trial. In addition, it is hoped that all parties, including offenders, victims, and the community will play a major role in it. Victims are expected to receive appropriate compensation and are mutually agreed upon with the offenders to compensate for losses and reduce the suffering they have experienced. In *restorative justice*, the offender must take full responsibility thus he/she is expected to realize his/her wrong. Regarding the purpose of punishment with the concept of *restorative justice*, it can be seen from several scholars' opinions, such as Barda Nawawi Arief, who stated that there are two fundamental terms of criminalization, they are the principle of legality

¹ Darrell Fox, Social Welfare and Restorative Justice, *Journal Kriminologija Socijalna Integracija Year 2009 Vol 17 Issue 1 Pagesrecord No. 55-68*, 2009, London Metropolitan University Department of Applied Social Sciences, 56.

² Find it on <http://152.118.58.226> - Powered by Mambo Open Source Generated: 7 Januari, 2020, 21:00.

³ Marian Liebmann, *Restorative Justice, How it Work*, (London and Philadelphia: Jessica Kingsley Publishers, 2007), hal. 25.

⁴ Ibid.

and the principle of error, in other words, criminalization is closely related to the main idea of criminal acts and criminal liability.⁵ Andi Hamzah stated that the issue of imposing a crime or criminalization is very important in criminal law and criminal justice. Imposing punishment or criminalization is a concretization or realization of criminal regulations in law which is an abstract.⁶ Then the judge has tremendous power in choosing how long the imprisonment will be imposed on the defendant in a concrete case.⁷

An explanation of the definition of restorative justice proposed by Toni F. Marshall in his writing "*Restorative Justice an Overview*",⁸ developed by Susan Sharpe in her book "*Restorative Justice a Vision For Hearing and Change*" which reveals 5 key principles of restorative justice, they are:

1. There is full participation and consensus;
2. Attempting to cure the damage or loss that exists as a result of the crime;
3. Providing direct responsibility of the offender in its entirety;
4. Seeking for reunification to members of society who are divided or separated because of the criminal acts;
5. Providing resilience to the community in order to prevent further criminal acts.

Meanwhile, Marlina stated in her book that the concept of restorative justice is a process of resolving legal violations that have occurred by bringing the victim and the offender (suspect) together to sit in one meeting to be able to speak.⁹ As Marlina's opinion, it can be understood that the settlement of a criminal case through *restorative justice* is basically a joint settlement between the offender and the victim in a forum. The key word for *restorative justice* is *empowerment*, even this *empowerment* is the heart of restorative, therefore the success of *restorative justice* is determined by this empowerment.¹⁰ In the literature of *restorative justice*, it is said that *empowerment* is related to parties in a criminal case (victims, offenders, and society).¹¹ Scholars interpret it as follows:

*"has described empowerment as the action of meeting, discussing, and resolving criminal justice matters in order to meet material and emotional needs. To him, empowerment is the power for people to choose between the different alternatives that are available to resolve one's own matter. The option to make such decisions should be presented during the whole process. It means that; Empowerment in the context of restorative justice is a meeting process in this case between the offender and the victim or the community to discuss and actively participate in solving criminal problems. It is an alternative or another choice to the effect of the response to crime."*¹²

The concept of *restorative justice* offers answers to important issues in the settlement of criminal cases, they are:

1. Criticism of the criminal justice system which does not provide opportunities especially for victims (*criminal justice system that disempowers individual*);
2. Eliminating / reducing conflicts, especially between offenders and victims and the community (*taking away the conflict from them*);
3. The fact that feeling of helplessness experienced as a result of criminal acts must be overcome in order to achieve refinement. (*in order to achieve reparation*).¹³

Restorative justice practices and programs are reflected in the objectives of addressing criminal acts by:

1. *Identifying and taking steps to repair harm* (identifying and taking steps to repair loss / damage);
2. *Involving all stakeholders* (involving all parties (offenders, victims and concerned communities) and;
3. *Transforming the traditional relationship between communities and their governments in responding to crime*; it is the transformation from a pattern in which society and the state face offenders with the imposition of criminal sanctions into a pattern of cooperative relation between the offender on the one hand and the community/ victim in solving problems caused by crime.¹⁴

Restorative justice in this case changes the paradigm from a face-to-face pattern between the offender and the victim and the state into a cooperative or integration pattern, the problem of crime as an act by offenders against individuals or communities not against the state. "*Restorative Justice is commonly known as a theory of criminal justice that focuses on crime as an act by an offender against another individual or community rather than the state*".¹⁵ There are several basic principles that stand out from *restorative justice* related to the relationship between crime, offenders, victims, society, and the state, they are:

⁵ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, Cet. II, (Bandung: Citra Aditya Bakti), 2002, hal. 88.

⁶ Andi Hamzah, *Sistem Pidana dan Pemidanaan Indonesia dari Retribusi ke Reformasi*, Cet. I, (Jakarta: Pradnya Paramita, 1986), hal. 72.

⁷ *Ibid.*

⁸ Tony F. Marshall menyatakan: "*Restorative Justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future (restorative justice is a process in which parties with an interest in certain violations meet together to solve problems together, how to resolve the consequences of such violations for future interests.)*. See Marian Liebmann, *Restorative Justice, How it Work*, (London and Philadelphia: Jessica Kingsley Publishers, 2007), 25.

⁹ Marlina, *Peradilan Pidana Anak di Indonesia, Pengembangan Konsep Diversi dan Restorative Justice*, Cet I, (Bandung: Refika Aditama, 2009), 180.

¹⁰ C. Barton, Empowerment and Retribution in Criminal Justice. In: H. Strang, J. Braitwaite (eds), *Restorative Justice: Philosophy to Practice Journal TEMIDA* Mart 2011. Aldershot: Ashgate/Dartmouth, 55-76.

¹¹ Mc Cold called the three parties a stakeholder in a criminal case.

¹² Look for the other definitions in Ivo Aertsen, et.al, *Restorative Justice and the Active Victim: Exploring the Concept of Empowerment, Journal TEMIDA*, Mart 2011, 8-9.

¹³ *Ibid.*

¹⁴ McCold and Wachtel, *Restorative practices, The Inter-national Institute for Restorative Practices (IIRP)*, New York: Criminal Justice Press & Amsterdam: Kugler Publications Journal, Vol. 85-101, 2003, 7.

¹⁵ *Ibid.*

1. Crime is positioned as a symptom that is part of a social act and not just a violation of criminal law;
2. *Restorative Justice* is a criminal justice theory that focuses on the view that crime is an act by the offender against another person or society rather than against the state. So, it emphasizes more on how the relationship/ responsibility of the offender (individual) in solving the problem with the victim and/ or the community;
3. Crime is seen as an act that harms people and damages social relation. This is clearly different from the criminal law which has drawn crime as a matter of the state, only the state has the right to punish;
4. The emergence of the idea of *restorative justice* as a criticism of the application of the criminal justice system with imprisonment which is considered ineffective in resolving social conflicts.

This concept offers a form of settlement of various legal cases that occur outside the existing criminal justice process thus society does not depend only on existing procedures. However, they still get justice and solve problems, especially for victims who are the most disadvantaged (suffering), as well as for the responsibility of the offenders. One form of solution offered is the settlement process in the context of *restorative justice*. Some of the typical types of *restorative justice* include:

1. *Victim offender mediation* (mediating between the offender and the victim);
2. *Conferencing* (bringing the parties together);
3. *Circles* (supporting each other);
4. *Victim assistance* (helping victims);
5. *Exoffender assistance* (helping people who have committed crimes);
6. *Restitution* (giving compensation / cure);
7. *Community service* (service for community).¹⁶

The concept of restorative justice includes restoring the relationship between the victim and the offender. This rapprochement can be based on mutual agreement between the victim and the offender. The victim can convey about the losses they have suffered and the offender is given the opportunity to make amends, through compensation, peace, social work, and other agreements. This is important, because the conventional criminal process does not provide space for the parties involved, in this case the victims and the offenders need to actively participate in solving their problems. This concept offers a form of settlement of various legal cases that occur outside the existing criminal justice process thus society does not depend only on existing procedures. However, they still get justice and solve problems, especially for victims who are the most disadvantaged (suffering), as well as for the accountability of the offenders. One of solutions offered is the settlement process in the context of *restorative justice*.

B. Restorative Justice in Islamic Legal Philosophy

The added value of restorative justice is that crime is seen as part of a social act or a violation against individuals, not only as a criminal offense against the state. Restorative justice places a higher value on stakeholders' engagement. Restorative justice emphasizes the need to recognize the impact of social injustice in simple ways, rather than providing the offenders with formal justice while the victim does not receive any justice. If looking at the previous review, it will be found some important points which become *mind idea* of restorative justice. Restorative justice actively involves victims and their families in solving criminal cases. In the context of Islamic criminal law, the involvement of victims of criminal acts (recognition of the rights of victims) is firmly accommodated in the statement,¹⁷ as the word of Allah SWT in Al-Qur'an Al-Baqarah (2): 178-179.¹⁸

Meaning: "Believers! It is obligatory upon you qishaash regarding the people who were killed; if a freeman is guilty then the freeman; if a slave is guilty then the slave; if a female is guilty, then the female. So, whoever gets a forgiveness from his brother, let (who forgives) follow it in a good way, and let (who is given forgiveness) pay (diya) to those who give forgiveness in a good way (too). This is alleviation and a mercy from your Lord; and for him who commits excess after that, there is a painful chastisement.¹⁹ and in that qishaash there is (guarantee of continuity) of life for you, O people who understand, so that you may fear".

Islamic clerics explicitly state that rights in Islamic penalties are divided into the rights of Allah and human rights. Abdul Qadir Awdah explained that sometimes there are two rights in a criminal act. There are actions that touch individual rights, but community rights are more dominant in them such as: *qazaf*. There are also other acts that touch the rights of society, but individual rights are greater than the rights of society, such as: murder.²⁰ Although Awdah later confirmed back that every action that touches human rights basically also contains the rights of God in it (the community right).²¹ Awdah emphasized that individual rights in

¹⁶ Marian Liebmann, *Restorative Justice, How it Work*, (London and Philadelphia: Jessica Kingsley Publishers, 2007), 25.

¹⁷ Ina>m Al-Mawardi>, Al-Ahka>m As-Sult>a>niyyah translator Fadli Bahri, cet ke-3, (Jakarta: Da>rul Falah, 2007), 365. Lihat juga Abdul Qādir Awdah, at- Tasyri' al-Jinā'i al-Islāmi: Muqāranan bi al-Qānun al-Wa'i Jilid I, (Bairut: Dār al- Kātib al-Arabi, t.t.), 204. Ibnu Qayyim Al-Jauziyah, Panduan Hukum Islamalih bahasa Asep Saefullah FM dan Kamaluddin' Sa'adiya>tuharamain, cet. ke-2, (Jakarta: Pustaka Azam, 2000), 95.

¹⁸ Al-Baqarah (2):178-179.

¹⁹ *Qishaash* is taking the same retribution. Qishaash is not carried out, if the murderer gets forgiveness from the heirs who were killed by paying a fair diat (compensation). Diat payment is requested properly, for example, without urging those who kill, and those who kill must pay well, for example, not delaying it. If the heir of the victim after God explains these laws, kills those who are not the murderer, or kills the murderer after receiving diat, then qishaash is taken against him in the world and in the hereafter he will receive a painful torment.

²⁰ Abdul Qadir Awdah, *Ensiklopedia Hukum Islam* Jilid II, alih bahasa Tim Tsalisah, (Bogor: Karisma Ilmu, 2007), 204.

²¹ *Ibid.*, 236-237.

criminal law are not necessarily pure individual rights. The cancellation of the qisas sentence in deliberate murder and diya>t in wrongdoing resulted in the permissibility to replace it with *ta'zir*. So, after the forgiveness given by the victim / family, the authorities can impose *ta'zir punishment* on the offenders by paying attention to the condition of them. The above understanding shows that Islam understood first the concept of *victim oriented* long before Western criminal law experts initiated restorative justice. Islam does not only interpret criminal act as a violation against the state and is *offender oriented*, but Islam sees it from a more complex level. Criminal is also understood as a violation of individual or victim-oriented interests.

Based on the Treatise of the Caliph Umar bin Khatab; peace must be based on clear corridors. Peace does not justify something that is *haram* or forbid something that is *halal* (lawful).²² This basis is then seen in the context of criminal law, as long as this peace accommodates the interests of both parties, based on the pleasure of both, understanding the pros and cons and justice, peace can be enforced. The application of peace as applied to murder and persecution has similarities to the application of restorative justice in modern criminal law. Regardless of the pros and cons of what types of criminal restorative justice can be applied as in the Islamic criminal law system and modern criminal law, it must be admitted that Islam has long embraced restorative justice before modern criminal law used it.

Restorative justice embodies justice for the parties, not only realizing *legal justice*, but also considering *social justice*, *individual justice* and also *moral justice*. Justice that is widely applied by law enforcement officers is limited to *legal justice*. This is proven by many processes of solving criminal cases in the community which actually injure the sense of justice in the community. Legitimate when criminal law enforcement is applied based on what is stipulated by the Criminal Code or other laws. However, what is not realized is the intelligence of law enforcement officials in seeing which cases can be forwarded and which cannot be forwarded. That is the reason why they are given powers such as discretion and the right to opportunity. In Islamic doctrine, as emphasized by Marcel A. Boisard: justice is the center of movement of basic moral values.²³ So justice in Islam is one of the main principles which is very important. Justice in Islam includes individual justice (*al-ada>lah al-fardiyyah*) and social justice (*al-ada>lah al-ijtima>iyah*). Justice in Islamic law always considers morality, social and individuality. It is not just the application of *legal justice*.

As one example is what Umar bin Khattab had done by releasing punishment on a thief. As a type of *hudud* crime, theft is the right of Allah, which means that the state cannot be involved in deciding its release. However, with his intelligence, Umar released the thief of *udzq* (dates) taking into account the famine that occurred at that time.²⁴ That story of Umar shows that justice cannot be understood only as *legal justice* alone. However, it still has to consider moral justice, social justice and individual justice in accordance with the conditions and cases that occur. The practice carried out by Umar in the context of modern law today can also be known as the application of discretion and diversion.

C. *Is}la>h* as Mediation in Islamic Criminal Law

Mediation in Islamic concept is known as *shulhu/ishlah*, some *fiqh* experts provide almost the same definition even though in different editors, which is easy to understand in a contract with the intention of ending a dispute between two disputing people which ends in peace.²⁵ In another terminology of *fiqh*, it is also explained that mediation in Islamic literature is equated with *Tahkim*, which in this term involves two or more people asking other people to decide on disputes that occur between them with *syar'i* law.²⁶ *Tahkim*, is the protection of the two disputing parties to the person they agree with and agree to and are willing to accept his/her decision to resolve their dispute, the protection of the two disputing parties to the person they appoint (as an arbitrator) to decide / resolve disputes that occur between them.

Tahkim institution has been known since before the time of Islam. When Christians experienced disputes between them, they proposed disputes to the Pope to be settled amicably.²⁷ Allah SWT has spoken to us regarding the position between fellow human beings, this is stated in the Qur'an surah al-Hujuraat verse 10 which means: "*People who believe are actually brothers, therefore reconcile (improve the relationship) between the two brothers and fear Allah "so that you may find mercy"*":

There are several known forms of *ishlah* in Islam, including:

1. *Ishlah* between Muslims and unbelievers;
2. *Ishlah* between husband and wife;
3. *Ishlah* between people who demand each other;
4. *Ishlah* in terms of persecution such as forgiveness with compensation in the form of money;
5. *Ishlah* between group that is persecuting and those who do justice;
6. *Ishlah* to resolve a dispute over property.²⁸

D. Scope of *Is}la>h* in Islamic Criminal Law

In Islamic Law, the scope of mediation is based on *al-Mughn>i*, *Ibnu Quda>mah* explained that the law stipulated by *Hakam* applies to all *kinds* of cases, except in the fields of *marriage*, *li'an*, *qadhaf* and *qishas*. In this case, only the ruler makes the decisions. Mediation is contained in the Qur'an Surah Al-Hujurat verses 9 and 10. Below is the content of QS. Al Hujurat verse 9:

²² Ibnu Qayyim Al-Jauziyah, *Panduan*, 94.

²³ Muhammad Tahir Azhari, *Negara Hukum: Suatu Studi tentang Prinsip-Prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini* cet. ke-4, Jakarta: Kencana Prenada Media Group, 2010), 121.

²⁴ Umar also once released Hathib's slaves who stole male camels from Muzainah. This was done after he learned the cause of their actions because they were starving. Umar ordered to compensate the camel owner for the camel, even higher than the initial nominal. Find it on Ibnu Qayyim Al-Jauziyah, *Panduan*, 430-431.

²⁵ <http://www.pa-pekalongan.go.id>Mediasi dalam konsep Islam accessed on 6 September 2020.

²⁶ Samir aliyah, *Sistem Pemerintahan Peradilan dan Adat dalam Islam*, (jakarata: Khalaiifa, 2004), 328.

²⁷ *Ensiklopedi Hukum Islam*, (Jakarta : PT Ichtiar Baru Van Hoeve, 2003), 1750.

²⁸ <http://www.pa-pekalongan.go.id>

"And if there are two groups of those who believe go to war, let you reconcile the two! But if one violates the covenant against the other, let those who break the covenant fight it until it recedes back to God's command. If he has receded, reconcile the two according to justice, and let you be just. Indeed, Allah loves those who act justly."²⁹

In Islamic legal terminology, another meaning of mediation can also be called *s/ulhu* in the framework of *fiqh* science. One of the contracts is in the form of an agreement where two people are in dispute or litigating to resolve the dispute between the two. Below is associated with the pillar of *s/ulhu*, they are:

1). The pillars of *s/ulhu* (peace) are:

- a. *Mus/a>lih*, it is the respective parties making a peace agreement to eliminate hostilities or disputes;
- b. *Mushalih 'anhu*, they are issues that are disputed;
- c. *Mus/a>lih 'alaih*, they are things that one party does to his opponent to end a dispute. This is also called *badal al-s/ulh*;
- d. *Shigat ijab* and *Kabul* between the two parties who carried out the peace agreement. *Ijab kabul* can be done with *lafadz* or with anything that shows the existence of a consent granted that gives rise to peace, such as the words: "I make peace with you" 'and the other party answers' "I have received it".

The pillars of *s/ulhu* (peace) are *mus/a>lih*, *Mus/a>lih'anhu* and *Shigat Ijab Kabul* between the two parties carrying out the peace agreement. If all of these have been fulfilled, then the peace between the disputing parties has taken place. By itself, from the agreement a legal bond is born, in which each party fulfills the articles of the peace agreement.³⁰

2). *S/ulhu* is divided into four kinds, they are:³¹

- a. *Peace between the Muslims and the non-Muslim community*, it is making an agreement to lay down weapons for a certain period (currently known as a ceasefire), freely or by compensating for the losses regulated in a law agreed by both parties;
- b. *Peace between the ruler (imam) and the rebels*, it is by making agreements or regulations regarding security in the State which must be obeyed, the details of which can be seen in a special discussion on *bugha>t*;
- c. *Peace between husband and wife in a family*, it is by making agreements and rules for distribution of livelihoods, disobedience issues, and in matters of surrendering their rights to their husbands in the event of a dispute;
- d. *Peace between the parties who carry out the transaction (peace in mu'amalat)*, which is to form peace in matters that are related to disputes that occur in the *mu'amalat* issue.

3). The Lesson in the Concept of *S/ulhu*

In solving various problems that occur between mankind, Islam has provided several basic concepts to help resolve disputes that occur. The solution to this problem can be through *shulhu* (peace). Imam Ash-Shan'ani explained the hadith above by saying:

"The Islamic clerics have divided *ash-shulhu* (peace) into several types; peace between Muslims and unbelievers, peace between husband and wife, peace between *bughat* groups and just groups, peace between two people who rule on *qadhi* (judge), peace in matters of injury such as apologizing for property sanctions that should be given, and peace to give a number of assets to the opposing dispute in the event of joint property (*amlaak*) and rights. This division is what is meant here, it is the division which is referred to by the *fuqoha* in the *ash-shulhu* (peace) chapter."³²

E. Principles of Peace (*Is/la>h*) in Islamic Criminal Law

Is/la>h in Islam is a complete concept in the settlement of a case. Basically, the principles that must exist in the *ishlah* process include first, disclosing the truth, second, there are parties that include parties to a conflict in which case there must be a victim and an offender, while the other party is a mediator. Third, *ishlah* is a voluntary process without coercion, and fourth is a balance of rights and obligations.³³ The writer tries to divide it as follows;

1). Truth-Disclosure

Conflicts occur due to the lack of information or differences in information obtained by several parties. Starting from here, misunderstandings occur and actions are not based on facts that actually happen. The disclosure of the truth is an indispensable principle. In Surah Al-Hujurat verse 6, which is a series of issues of conflict and *ishlah*, it states clearly how the importance of a truth must be revealed so as not to wrongly commit injustice to other people.

"Believers! If a wicked person comes to you with news, then check carefully so that you do not impose a disaster on a people without knowing the circumstances that cause you to regret your actions" (QS. Al-Hujurat: 6).

The verse mentioned above is not only an obligation to obtain correct information, but also contains a message of caution to the parties not to be easily provoked just because the information is not yet clear, so revealing the truth is very important and absolute in resolving a conflict. *Is/la>h* is a peace process in which the role of true information is very large, which is used as the basis for making an agreement by each party.³⁴

2). The Parties in *Is/la>h*

The parties in *ishlah* or peace can be seen from the verses of the Qur'an as follows:

²⁹ QS Al-Hujurat ayat (9 dan 10).

³⁰ Albulumam Albantani. *Hukum Islam, Mediasi dalam penyelesaian perkar*, Upload,12 Mei 2010. Accessed on September 2020.

³¹Fiqh Learning, <http://azizpwd.wordpress.com/2010/05/31/wakalah-dan-shulhu>, Accessed on September 2020.

³² Imam Ash-Shan'ani, *Subulus SSalam*, 4/247.

³³ Mahrus Ali, Syarif Nurhidayat, *Penyelesaian Pelanggaran HAM Berat In Court System &Out Court System*, Jakarta : Gratama Publishing, 2011, 301.

³⁴ *Ibid*, 302.

“And if there are two groups of those who believe go to war, you must reconcile the two! But if one violates the covenant against the other, let those who break the covenant fight it until it recedes back to God's command. If he has receded, reconcile the two according to justice, and let you be just; verily Allah loves those who act justly” (QS. Al-Hujurat:9)

The above verse contains an order for a third party to reconcile the parties in dispute. In addition, there is also an order to enforce the results of the peace agreement. It is by fighting those who violate the peace agreement. Based on this meaning, there are two parties that can be identified in an *ishlah* process. They are the disputing parties and one party as a mediator or *mushlih* (people who reconcile). However, if you look at the context of surah Al-Hujurat Verse 9 which contains an order to a third party, then basically the mediator is very important, even when he is a third party, according to the verse, the law is obligatory to reconcile.³⁵

3). The Parties in Conflict

Islam regulates that peace can only be carried out by parties who really have an interest in it, in the event of a crime, it is between the offenders and the victims. The existence of the offender and the victim in detail also has specific terms and conditions as follows:

- a. **Victim**, in the context of Islamic law, it is the direct victim. They are people who have been treated by the offender and suffered losses. A victim who can perform *ishlah* is also required to be responsible for his actions, which means that he is an adult, not insane, or drunk, or in a state of distress or compulsion.³⁶
- b. **Offender**, in *ishlah*, it must be the offender who is personally responsible for the crime he has committed, it is the person who if there is no *ishlah* then he will be punished according to the provisions.
- c. **Mediator** is a party who independently, without taking sides, actively assists in resolving disputes. The need for a mediator is determined based on the *mashlahah* principle.³⁷ The existence of a judge is able to act as a mediator or only as a legitimator of the result of the agreement thus the implementation of the agreement can be forced or *executable*.

4). *Is}la>h* is a reciprocal process

This principle is an absolute, because it will determine the validity of the *ishlah* process itself. *Ishlah* is an agreement between two parties without coercion, but it does not mean that the initiative to carry out *ishlah* must be from both parties. Initiatives can come from one of the parties and it can also be from a third party that tries to make an order. What is clear is that when it is in the *is}la>h forum*, then it is voluntary and without coercion. In the implementation, this process can be rejected by either party so that when it receives the process of *is}la>h* or peace, it is really a free choice, there is no coercion and pressure.

5). Balance of Rights and Obligations in Islam

Is}la>h is a process of finding a solution between two parties in which there is a balanced of rights and obligations. In Surah Al-Hujurat verse 9, it is clearly stated that *ishlah* must be completed or implemented fairly, in the sense that the joint agreement does not harm either party. It shows that in *ishlah* the consistency of the balance of the parties is very important. Because of the nature of conflict, each of them has a version of the truth so that *ishlah* will unite their views in one common framework so that it can be resolved without being prolonged. Forgiving the guilty and providing assistance to the lazy person, is said to shake the foundation of society's life, because it goes beyond social justice.³⁸ Islamic criminal law provides a two-way balanced solution in *ishlah*, with the goal of true peace. It is the loss of the burden of sin for the offender, and the loss of a sense of anguish and resentment of the victim. *Is}la>h* is a command from Allah that must be endeavored fairly as a blessing from Allah SWT, who loves peace.

F. The concept of *Al-'Afwu* (Forgiveness) in Islamic Criminal Law

In Islam, the rules of life have been established through an absolute source of law which is the Qur'an as the source of the first law, Sunnah as the second source of law, *ijma* ulama (consensus) as the source of the third law and *qiyas* (legal analogy) as the fourth law. The sources of Islamic law are a hierarchy in the Islamic legal system. The laws and regulations do not contradict the commands and prohibitions of the Qur'anic norms, because as we all know the Qur'an is the touchstone of all laws and regulations.³⁹ The concept of criminal mediation is said to have many similarities to *al'afwu*, there are even some Islamic clerics who equate *is}la>h* and *al'afwu*. However, when listening to Shahrour's statement regarding synonymy in the Qur'an, there is actually no synonym in the Qur'an. The assumption that there is synonymy in the Qur'an will give the possibility of replacing the word of Allah in His glorious Book and the presumption of additions in it, where neglect will not change or add to its meaning at all, and this is very unlikely to happen for the most holy Allah SWT.⁴⁰ Although the terms of forgiveness in Islamic criminal law are not widely formulated by *fiqh* experts, there are still explanations for the term forgiveness, with a view to knowing the limits and types of forgiveness that can be granted for the criminal act or crimes committed. Referring to the etymological study above, we can draw a difference in the meaning of language between *is}la>h* and *al-'afwu*. *Ishlah* is a process or peace itself, while *al-'afwu* is forgiveness. The word *al-'afwu* (العفو) itself is a form of isim which gets the affix of the word *al* (ال) in front of it, or equated with the word *afwun* (عفو) in the form of its *masdar*, which in terms of language implies lost, erased and forgiveness. While the word *al-'afwu* (وَعَفَا) according to the term as defined by Islamic cleric expert *us}u>l* Abi> al-Husain Ahmad bin Fa>ris bin Zakariyya> al-Ra>zi>, it is every sinner (criminal) who should serve a sentence is eliminated because he has received forgiveness.⁴¹

³⁵ *Ibid*, 303.

³⁶ Ahmad Djazuli, *Fiqh Jinayah*, PT. Raja GrafindoPersada, Jakarta 2000, 168.

³⁷ Adi Sulityono, *Mengembangkan Paradigma NonLitigasi di Indonesia*, (Surakarta: UNS Press, 2006), 401.

³⁸ M. Quraish Shihab, *Wawasan Al-Qur'an Tafsir Maudhu'i Atas Pelbagai Persoalan Umat*, Bandung: Mizan Cet.XI, 124-127.

³⁹ T.M. Hasby Ash-Shiddiqiey, *Falsafah Hukum Islam*, (Jakarta: Bulan Bintang), 119.

⁴⁰ Muhammad Shahrour, *Metodologi Fiqih Islam Kontemporer*, Judul Asli: Nahwu Usul, Jadidah Li al Fiqih al Islami, cet.I, publisher ELSAQ Press, 2004. 256-257.

⁴¹ Abi> al-Husain Ah}mad bin Fa>ris bin Zakariyya> al-Ra>zi>, *Mujmal al-Lughat*, (Beirut: Da>r al- Fikr, 1414 H/1994 M), 472.

In the context of *jina>ya>t* and more specifically the issue of murder, implicitly drawing a line between *al-afwu* and *sfulh* by looking at the meaning in which the compensation initiative arises. If the initiative to provide compensation for the *qisa>s* punishment comes from both parties, then it is said to be *sfulh* (peace). Meanwhile, if the initiative to provide compensation only comes from one party (to be precise the victim), then that is included in the category of *al-afwu* (forgiveness). The distinction between *sfulh* and *al-afwu* can be said to be only at the conceptual level, whereas in practice, it is possible to have technical similarities in the implementation of *sfulh* and *al-afwu* as a method of solving problems. Whereas *sfulh* is a concept of peace in general for family matters down to state politics, and also covers the field of criminal law by emphasizing the results of collective agreements. While *al-afwu* is a concept of practical settlement in the form of forgiveness by exempting the offenders from prosecution by the consequences of the victims have the option to request *diya>t* (compensation) or without compensation.⁴²

In Islamic criminal law, the law of *qis>a>sf-diya>t* applies. The punishment for the offender is commensurate with his actions (*qis>as*) and this is in accordance with the victim's sense of justice. However, acts of forgiveness and peace from the victim / his family are seen as something better. The offender may be subject to legal sanctions (ex: a certain amount of assets for the victim and his family). This is good for both parties and there is no longer any grudge between the two parties. The victim's party gets improvement from the sanctions imposed, and there is a role for the victim in the criminal justice system and process. *Sfulh* itself in Islam is a complete concept in the settlement of a case. Basically, the principles that must be in place in this process are, first, to reveal the truth, second, there are parties which include parties in conflict, in which case there must be victims and offenders, while the other party is the mediator. Third, *ishlah* is a voluntary process without coercion, and fourth is a balance of rights and obligations.⁴³

Meanwhile, Saamikh As Sayyid Jaad,⁴⁴ revealed six conditions in the process of *al is}la>h wal'afwu 'anil' uqu>bah* which is known in the general public as reconciliation. The last condition is that there must be legitimacy in the form of a court decision so that it is *executable*. In the context of the research the writer wants that the role of *Al-'afwu ani al-Uqu>bah* is as a means of solving certain crimes which can later be classified and make the basis of legitimacy in future reform of criminal law. Another application in the concept of criminal forgiveness, in fact, punishment can also be applied to the case of *Jarimah ta'zir* with the condition that there is a *direct victim* aspect in it. *Al-afwu 'anil' uqubah* (forgiveness in the criminal) is similar but not the same with the concept of *Rechtelijk Pardon* (pardon track authority committed by a judge), because the authority of criminal forgiveness in *Al-'afwu 'anil' uqubah* intended victim of *jarimah*, whereas in *Rechtelijk Pardon's* concept there is a Judge. *Al-afwu anil uqubah* when compared with the concept of western criminal law actually tends to synergize with the Islamic concept of *reconciliation*, as a medium for solving crimes that are *Out Cort System*, but still within the corridor / legal framework.⁴⁵

If we examine the philosophy of the concept of *Al-'afwu' an al-uqu>bah*, the imposition and execution of criminal are actually only one of media or how to solve the problems of crime with a wide range of goal orientation (purpose of sentences). Conceptually, the objectives of Islamic criminal law are:

1. *Dar'ul mafa>sid wa jalbu al mas}alih* as a general purpose;
2. While the specific objectives are in the form of:
 - ❖ *Arrodu wa al-jaza>* (retaliation and prevention of crime);
 - ❖ *At-ta'di>bu wa al-Isla>hu* (teaching / coaching and the goodness of living together).

Because in the process of self-improvement of the offender of crimes that grow internally are the main emphasis in Islamic criminalization, in Islamic criminalization, there is no *limitative* or intermediate pattern of crimes, such as those contained in the Criminal Code or other criminal laws outside the Criminal Code.⁴⁶ The orientation of the goal of *al-Islah* (self-improvement) implies that with this punishment, Islam wants to form a good society based on mutual respect and love among fellow community members, but by still being aware of the limits of rights and obligations. The manifestation effort in the criminal goals of *Arrodu wal jaza* and *Atta'dibu wal Islakhu* is integral in that Islamic punishment does not have to be severe or light, but what is important is *predictable* to realize these goals. In other words, we can conclude:

1. *Roddu al-mafsadah bi al-'uqu>bah* (to prevent damage to the sentence)
2. *Wuju>du al-ada>lah bil'uqu>bah* (the existence of a justice with punishment)
3. *Wuju>dullmas}lahah bil'uqu>bah* (manifesting benefit with punishment)

Therefore, those who are reluctant to forgive, in essence, are reluctant to obtain forgiveness from Allah SWT.

In the view of Islam, being able to forgive the mistakes of others is part of a very noble character.⁴⁷ It is one of the characteristics of a pious person (*muttaqi>n*) and it is an attitude that is prioritized in the sight of Allah SWT. Then in the hadith narrated by Imam Ahmad bin Hanbal, Rasulullah SAW has been affirmed of that when a friend Uqbah bin Amir⁴⁸ asked about the most important practices. He welcomed him by saying:

⁴² Mahrus Ali, Syarif Nurhidayat, *Penyelesaian Pelanggaran*, 290.

⁴³ *Ibid*..., 301.

⁴⁴ Six conditions put forward by Saamikh Sayyid Jaad, they are: 1) forgiveness is given by the party who is entitled, 2) the party giving forgiveness must be legally competent ("aqil and baligh), 3) forgiveness must not be based on coercion, 4) forgiveness must be with shorih (clear) words or sentences, 5) forgiveness followed by the provision of compensation (*diya>t*) by the offender to the victim or his heirs, and 6) forgiveness must be legitimized by a court decision so that it is executable. Find it on M. Abdul Kholiq, *Impunitas Kejahatan MasaSilam* (Sebuah telaah Menurut Perspektif Hukum Pidana Islam), The discussion pointers were delivered at the discussion forum entitled *Menolak Impunitas*, held by LEM FH UII, on February 27, 2006, page 5. As quoted in Mahrus Ali, Syarif Nurhidayat., 307.

⁴⁵ Muhammad Abdul Kholiq AF, *Kumpulan Materi Sistem Pemidanaan Islam Pemaafan pidana*. Fak. Hukum. Universitas Islam Indonesia, 1.

⁴⁶ *Ibid*..., 4.

⁴⁷ Rasulullah Saw had often exemplified this noble attitude, so that he was very well known as a forgiving person. In history, it is stated that he saw his forgiveness on those who hurt him and drove him out of his homeland. He even handed over his turban as a sign of his forgiveness to Wahsyi who had killed his beloved uncle Hamzah. Find it on Jalaluddin Rahmat..., 218

⁴⁸ Ahmad ibnu Hanbal, *Musnad Ahmad*, (Beirut: Darul Fikr, T.th), hadits Uqbah bin Amir, juz 35, 206.

"From Uqbah bin Amir he said; I met Rasullah SAW then I took his hand and asked; O Rasullah, tell me which practices are the foremost; Then he answered. O Uqbah, connect the ties of brotherhood with those who cut ties with you, give people who do not want to give to you and forgive those who have wronged you".

Therefore, if there is someone who commits wrongdoing to us, what religion prioritize and is ordered is to forgive that person's mistakes or injustices, although repaying tyranny or badness is also allowed, forgiveness is still more important. This is evident in the word of Allah SWT; " And the reward for a crime is a similar crime, so whoever forgives and does good, then the reward is on (dependents) of Allah. Indeed, He does not like unjust people." (QS. Asy-Syûrâ [42]: 40).

G. Conclusion

Forgiveness usually comes and occurs after the wrongdoer apologizes first. In fact, if we research and study the verses of the Qur'an related to the forgiveness to forgive problems (*al-'Afwu*), we will find that the concept of the Qur'an regarding *al-'Afwu* is an order to give forgiveness to people who doing wrong or wrongdoing is not an order to apologize, so we need to wait for an apology from the guilty person, but it should be before being asked. The relevance in this discussion is that forgiveness cannot simply be used as a method of criminal mediation, but must be very selective so that it does not go beyond the values of justice that live in society, and will only be counterproductive to achieving peace itself. Islamic criminal law provides a two-way balanced solution through *ishlah*, with the aim of true peace. It is the loss of the burden of sin for the offender and the loss of the victim's pain and revenge. *Al-'afwu* is an order from Allah that must be endeavored fairly as a blessing from Allah SWT, who loves peace.

The concept of restorative justice (*Islah/ Al Afwu*), has not been clearly regulated in the Indonesian criminal justice system, so it places law enforcers in a difficult and dilemma position considering that the settlement of cases in Indonesian criminal cases is very formalistic and legalistic. This concept must be given an umbrella/ legal framework which is integrated in the material criminal law (KUHP) and formal criminal law (KUHAP). In order for this concept to be used in resolving cases of minor crimes, assets and body and soul, this concept should be formulated in national legislation. This is necessary because without a law that clearly regulates the concept of restorative justice or peace, law enforcement officials will face difficulties in its application. Legal politics in legislation policy regarding *restorative justice* is an answer or solution to overcome problems that arise in practice due to the operation of the criminal justice system. Therefore, the existence of a legal protection is needed thus restorative justice gets stronger roots in its implementation, so that it returns the purpose of criminal law as *ultimum remedium*.

Bibliography

- Arief, Barda Nawawi. *Bunga Rampai Kebijakan Hukum Pidana; Perkembangan Penyusunan Konsep KUHP Baru*, (Jakarta: Kencana, 2010).
- Arief, Barda Nawawi. *Bunga Rampai Kebijakan Hukum Pidana*, Cet. II, (Bandung: Citra Aditya Bakti, 2002).
- Al-Mawardi, Imam. *Al-Ahkam As-Sultaniyyah* alih bahasa Fadli Bahri, cet ke-3, (Jakarta: Darul Falah, 2007).
- Awdah, Abdul Qādir. at- Tasyri' al-Jinā'i al-Islāmi: Muqāranan bi al-Qānun al-Wa'i Jilid I, (Bairut: Dār al- Kātib al-Arabi, t.t.).
- Awdah, Abdul Qadir. *Ensiklopedia Hukum Islam* Jilid II, alih bahasa Tim Tsalisah, (Bogor: Karisma Ilmu, 2007)
- Al-Jauziyah, Ibnu Qayyim. *Panduan Hukum Islam* alih bahasa Asep Saefullah FM dan Kamaluddin Sa'adiya>tu haramain, cet. ke-2, (Jakarta: Pustaka Azam, 2000), 95.
- Ash-Shan'ani, Imam. *Subulus SSalam*, 4/247.
- Ali, Mahrus. Syarif Nurhidayat, *Penyelesaian Pelanggaran HAM Berat In Court System &Out Court System*, (Jakarta: Gratama Publishing, 2011)
- Aliyah, Samir. *Sistem Pemerintahan Peradilan dan Adat dalam Islam*, (jakarata: Khalaifa, 2004).
- al-Razi, Abi al-Husain Ahmad bin Faris bin Zakariyya, *Mujmal al-Lughat*, (Beirut: Dar al- Fikr, 1414 H/1994 M).
- Azhari, Muhammad Tahir. *Negara Hukum: Suatu Studi tentang Prinsip-Prinsipnya Dilihat dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini*, cet. ke-4, (Jakarta: Kencana Prenada Media Group, 2010).
- Ash-Shiddiqiey, T.M. Hasby. *Falsafah Hukum Islam*, (Jakarta: Bulan Bintang).
- Djazuli, Ahmad. *Fiqh Jinayah*, (PT. Raja Grafindo Persada, Jakarta 2000).
- Ensiklopedi Hukum Islam*, (Jakarta: PT Ichtiar Baru Van Hoeve, 2003).
- Fox, Darrell. Social Welfare and Restorative Justice, *Journal Kriminologija Socijalna Integracija Year 2009 Vol 17 Issue 1 Pagesrecord No. 55-68*, (London Metropolitan University Department of Applied Social Sciences, 2009).

- Hamzah, Andi. *Sistem Pidana dan Pemidanaan Indonesia dari Retribusi ke Reformasi*, Cet. I, (Jakarta: Pradnya Paramita, 1986).
- Hanbal, Ahmad Ibnu. *Musnad Ahmad*, (Beirut: Darul Fikr, T.th).
- Kholiq, Muhammad Abdul. *Impunitas Kejahatan Masa Silam (Sebuah telaah Menurut Perspektif Hukum Pidana Islam)*, Pointer diskusi disampaikan pada forum diskusi Bedah Buku Berjudul Menolak Impunitas, (LEM FH UII, pada tanggal 27 Februari 2006).
- Kholiq, Muhammad Abdul. *Kumpulan Materi Sistem Pemidanaan Islam Pemaafan pidana*, (Fak. Hukum. Universitas Islam Indonesia).
- Liebmann, Marian. *Restorative Justice, How it Work*, (London and Philadelphia: Jessica Kingsley Publishers, 2007).
- Shahrour, Muhammad. *Metodologi Fiqih Islam Kontemporer*, Judul Asli: Nahwu Usul, Jadidah Li al Fiqih al Islami, cet.I, (ELSAQ Press, 2004).
- Sulityono, Adi. *Mengembangkan Paradigma Non-Litigasi di Indonesia*, (Surakarta: UNS Press, 2006).
- Shihab, M. Quraish. *Wawasan Al-Qur'an Tafsir Maudhu'i Atas Pelbagai Persoalan Umat*, (Bandung: Mizan Cet.XI).
- <http://152.118.58.226> - Powered by Mambo Open Source Generated: 7 Januari, 2020, 21:00.
- <http://www.pa-pekalongan.go.id>_Mediasi dalam konsep Islam akses 6 september 2020.
- Albantani, Albulumam. *Hukum Islam, Mediasi dalam penyelesaian perkar*, Upload, 12 Mei 2010. Akses. September 2020.
- Pembelajaran Fiqih, <http://azizpwd.wordpress.com/2010/05/31/wakalah-dan-shulhu>, Akses September 2020.

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