

## Islamic Criminal Law Review On Termination Of Prosecutions Based On Restorative Justice

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### Abstract

*The purpose of this study is to describe and describe the provisions and mechanisms of restorative justice in the settlement of cases of the crime of persecution, to describe the theory of restorative justice in the Islamic criminal law order, to describe the comparison of restorative justice in the Islamic criminal law system and the criminal law system in Indonesia. The research method used by the author is normative juridical. The results of this study obtained provisions for restorative justice in the settlement of cases of the Crime of Persecution which are regulated in the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. The theory of restorative justice in the order of Islamic criminal law uses jarimah qisas diyat whose criminal determination is the right of the victim and also his heirs including in Islamic criminal law in order to settle cases of persecution can also be done by providing compensation or in accordance with the agreement of both parties, but in Islamic criminal law there is no limit to the threat of punishment given, even murder cases can be carried out with restorative justice, in contrast to the existing provisions in the Regulation of the Attorney General of the Republic of Indonesia which requires a maximum imprisonment of not more than 5 (five) years and the suspect has committed a crime for the first time.*

*Keywords: Criminal; Restorative Justice; Persecution.*

### 1. Introduction

The issue of justice and human rights in relation to the enforcement of criminal law is not an easy task to realize. One example of the lack of attention to issues of justice and human rights in criminal law enforcement is related to legal protection for victims. Victims are those who suffer physically and spiritually as a result of the actions of others who seek fulfillment for themselves or others that are contrary to the interests and human rights of those who suffer.<sup>1</sup>

Romli Atmasasmita acknowledged that Romli Atmasasmita acknowledged that: "The function of the Criminal Procedure Code (KUHP) is to protect the dignity of the suspect or defendant."<sup>2</sup>Protection of victims in the Criminal Procedure Code is only

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<sup>1</sup>Bambang Waluyo, 2012, *Viktimologi Perlindungan Korban Dan Saksi*, Sinar Grafika, Jakarta, p. 2.

<sup>2</sup>*Ibid*

regulated in Chapter XIII of Articles 98-101 of the Criminal Procedure Code.<sup>3</sup>In practice, it is also rare or even almost never to combine cases of compensation claims.<sup>4</sup>

As a result of the criminal justice system which tends to be offender oriented<sup>5</sup>. The solution offered is the settlement of criminal cases in the context of restorative justice. Restorative justice is an approach that focuses more on the conditions for creating justice and balance for victims and perpetrators.<sup>6</sup> The concept of restorative justice is a critique of the concept of the criminal justice system which sees crime as a violation of state rules.<sup>7</sup> Offender-oriented punishment results in the perpetrator as the main subject in a crime so that the sanctions given sometimes create a sense of injustice for the perpetrator.<sup>8</sup> The victim is represented by the public prosecutor and to strengthen the evidence he is usually used as a witness (victim).<sup>9</sup> However, this has not yet provided a real impact or benefit for victims of crime.

Settlement of criminal cases with a restorative approach has begun to be applied in Indonesia, but its implementation is only related to the settlement of criminal cases of children and criminal acts that include complaint offenses. In practice, the restorative justice approach is often applied in cases outside of these normative rules. There is no legal umbrella and investigators are worried that they will be blamed by the supervisor/supervisory committee.

Currently, the Indonesian Attorney General's Office has made a breakthrough in handling cases, not all cases can be followed up to the Court, but for simple and minor cases, the aspect of justice must be considered, so that guidelines or technical instructions related to restorative justice are set out in the Regulation of the Attorney General of the Republic of Indonesia. Number: 15 of 2020 Dated July 21, 2020 concerning Termination of Prosecution Based on Restorative Justice.

Islamic criminal law as part of Islamic law is important to be taken into account as a source of development of national criminal law. The restorative justice approach provides attention and protection to victims or their families. Perpetrators of criminal acts can be held responsible for their actions and compensate for losses, victims or their families forgive and receive compensation, and future relationships can be restored. This also has similarities with the provisions of *qishâs-diyat* in Islamic criminal law. The punishment of *qishas* (compensation) and *diyat* (compensation) becomes the right of the victim or his heirs, so that they can provide amnesty (forgiveness) to the perpetrator. If you forgive, the *qishas* punishment will fall, replaced with *diyat* (compensation), even without *diyat* at all. The provisions of *qishas-diyat* are oriented towards attention and

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<sup>3</sup>Bambang Waluyo, Op. Cit., p. 58.

<sup>4</sup>*Ibid*

<sup>5</sup>Dikdik M. Arief Mansur & Elisatri Gultom, 2008, *Urgensi Perlindungan Korban Kejahatan Antara Norma Dan Realita*, Raja Grafindo, Jakarta, p. 25.

<sup>6</sup>Afthonul Afif, 2015, *Pemaafan, Rekonsiliasi dan Restorative Justice*, Pustaka Pelajar, Yogyakarta, p. 341-350

<sup>7</sup>*Ibid*

<sup>8</sup>G.Widiartana, 2014, *Viktimologi Perspektif Korban dalam Penanggulangan Kejahatan*, Universitas Atma Jaya, Yogyakarta, p. 5

<sup>9</sup>Bambang Waluyo, 2011, Op., Cit., p. 8.

protection for victims, and its settlement through peace (*sulh*). In Islamic criminal law, the loss of punishment is due to forgiveness (*al-afwa*) and peace (*sulh*).

Based on the background of the problems described above, the authors set up the purpose of this study, namely to find out and explain the provisions and mechanisms of restorative justice in the settlement of cases of the Crime of Persecution based on the Indonesian Attorney General's Regulation Number 15 of 2020 dated July 21, 2020. To find out and explain the theory restorative justice in the order of Islamic criminal law so that it can be part of criminal law reform in the future. To find out and explain the comparison of restorative justice in the Islamic criminal law system and the criminal law system in Indonesia.

## **2. Research Methods**

This study uses a normative juridical research method, which is a research conducted/focused on positive legal norms in the form of laws and regulations relating to restorative justice in the criminal law system in Indonesia.<sup>10</sup> The research specifications used in this research are descriptive analytical, that is, from this research, it is hoped that a detailed and systematic description of the problems to be studied will be obtained.<sup>11</sup> This type of data is collected through primary data sourced directly from the Gunung Kidul District Attorney and secondary data is data obtained from the literature which is the result of research.<sup>12</sup> In data collection techniques, namely documentation and literature study. This study uses a qualitative historical analysis method. This method focuses its attention on the general principles that underlie the manifestation of the units of symptoms that exist in human life.

## **3. Results and Discussion**

### **3.1. Restorative justice provisions and mechanisms in the settlement of cases of the Crime of Persecution**

Liebmann simply defines restorative justice as a legal system that “aims to restore the welfare of victims, perpetrators and communities damaged by crime, and to prevent further violations or criminal acts.”<sup>13</sup>

In this discussion the provisions of restorative justice in the settlement of criminal acts of persecution are regulated in the Indonesian Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, the formation of this law is based on the product of a law or system that must be more

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<sup>10</sup> Sutrisno Hadi, 1979, *Metodelogi Reserch*, Yayasan Penerbit Fakultas Psikologi Universitas Gajah Mada, Yogyakarta, p.4.

<sup>11</sup> Sunaryati Hartono, 1994, *Penelitian Hukum Indonesia Pada Akhir Abad ke-20*, Alumni, Bandung, p. 101.

<sup>12</sup> Hilman Hadikusuma, 1995, *Metode Pembuatan Kertas Kerja atau Skripsi Ilmu Hukum*, Mandar Maju, Bandung, p. 65

<sup>13</sup> Marian Liebmann, 2007, *Restorative Justice, How it Work*, London and Philadelphia: Jessica Kingsley Publishers, p. 25

flexible in accordance with its speed progress and development of the times.<sup>14</sup> Furthermore, if the settlement of criminal cases by prioritizing restorative justice which emphasizes restoration back to its original condition and a balance of interests as well as the protection of victims and perpetrators of criminal acts that are not oriented to retaliation is something that is needed by community law and also a mechanism that must be made in exercising authority prosecution and reform of the criminal justice system.

Meanwhile, in this case, the Attorney General has the duty and authority to streamline the law enforcement process provided by laws and regulations by taking into account the principles of fast, simple and low-cost justice, formulating and establishing case handling policies for the success of independent prosecutions to achieve justice based on law and conscience, including prosecution using a restorative justice approach carried out in accordance with statutory provisions.

In Article 1 of the Indonesian Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, it is stated that restorative justice is the settlement of criminal cases by involving the perpetrator, victim, family of the victim or perpetrator and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation.

According to HR Hooqe Raad, persecution is any act that is done intentionally to cause pain or injury to another person, and is solely the goal of that person and the act must not be a means to achieve a permissible goal.<sup>15</sup>

As is known above, restorative justice is an out-of-court settlement effort and has the principle of justice, thus related to criminal acts of persecution if the parties, namely the victim and the suspect, have agreed to make peace and compensate for the loss, then restorative justice can be carried out for this type of criminal act of minor mistreatment. .

So the provisions of restorative justice are not only limited to certain types of criminal acts but also all criminal acts that can be resolved amicably and carried out of court, by compensating for the loss, it can be given according to the agreement between the defendant or suspect and the victim. Because the concept is not to give revenge but justice or get a win-win solution between each party because of a crime, especially in this study, namely the crime of persecution.

### **3.2. The mechanism of restorative justice in the settlement of cases of the Crime of Persecution**

Furthermore, Andi Hamzah said that the issue of imposing criminal or sentencing is very important in criminal law and criminal justice. He continued, the imposition of a criminal or sentencing is a concretization or realization of criminal regulations in the law

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<sup>14</sup>I dewa Putu, 2018, *Formulasi Model Sistem Pemidanaan Anak di Indonesia*, Jurnal Daulat Hukum master of law faculty of law Univeristas Islam Sultan Agung, Vol.1, No. 1 (2018), p.1. Journal. Unissula.ac.id/index.php.RH/Issue/view/247

<sup>15</sup> Leden Marpaung, 2002, *Tindak Pidana terhadap nyawa dan tubuh (pemberantas dan prevensinya)*, Sinar Grafika, Jakarta, p.5.

which is an abstract.<sup>16</sup> Criminal law is a law that regulates violations and crimes against the public interest, acts that are threatened by law in the form of suffering or torture.<sup>17</sup> However, along with developments, punishment is gradually not only functioned as retaliation but also to provide justice for all parties involved, namely the implementation of a restorative justice system. The Prosecutor's Office in terms of stopping prosecution based on restorative justice is carried out on the principles of justice, public interest, proportionality, criminal as a last resort (*ultimum remedium*), fast, simple and low cost justice. This is because the criminal justice system as a law enforcement system using criminal law does not run optimally.<sup>18</sup>

Regarding the termination of prosecution of criminal acts of persecution based on restorative justice, it is carried out in accordance with the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice which is regulated in Article 4 which states as follows:

1. Termination of prosecution based on restorative justice is carried out by taking into account the following:
  - 1) Legal interests and the interests of other victims are protected.
  - 2) Avoiding negative stigma
  - 3) Retaliation avoidance
  - 4) Harmony and community response
  - 5) Morality, propriety and public order.
2. Termination of prosecution based on restorative justice is carried out by considering, namely:
  - 1) Objects, subjects, categories and threats of crime
  - 2) The background of the occurrence or execution of the crime
  - 3) Disgrace rate
  - 4) Losses or consequences arising from the existence of a crime
  - 5) Case handling costs & benefits
  - 6) Recovery back to its original state
  - 7) There is peace between the suspect and the victim.

Criminal cases can be dismissed based on restorative justice as regulated in Article 5 if the following conditions are met:

- 1) This is the first time the suspect has committed a crime
- 2) Criminal acts are only threatened with a fine or threatened with a prison sentence of not more than 5 years

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<sup>16</sup>Andi Hamzah, 1986, *Sistem Pidana dan Pemidanaan Indonesia dari Retribusi ke Reformasi*, Ed. I, Pradnya Paramita, Jakarta, p. 72.

<sup>17</sup>Aan Hardiansyah, Akhmad Khisni, Jawade Hafidz, 2018, *Tindak Pidana kekerasan Dalam Proses Belajar Mengajar Ditinjau Dari Perspektif Hukum Pidana Dan Undnag-Undang Nomor 14 Tahun 2005 Tentang Guru dan Dosen*, Jurnal Daulat Hukum Vo.1 No.1, Semarang, p. 91.journal. Unissula.ac.id/index.php./RH/Issue/284.

<sup>18</sup>Achmad Budi Waskito, 2018, *Impelemntasi Sistem Peradilan Pidana Dalam Perspektif Integrasi*, Jurnal DAULAT Hukum Master of law faculty of law, Universitas Islam Sultan Agung, Vol 1, No. 1 (2018) p.1. journal. Unissula.ac.id/index.php./RH/Issue/284.

- 3) The crime is carried out with the value of the evidence or the value of the loss caused by the crime of not more than IDR 2,500,000,000.00 (two million five hundred thousand rupiah)

Regarding the criminal act of persecution, which is basically a crime committed against people, bodies, lives and independence, therefore, regulation number 3 may not need to be fulfilled.

After the above conditions are met, the termination of the prosecution can be carried out under the following conditions:

- 1) There has been a return to the situation that was originally carried out by the suspect,
- 2) There has been a peace agreement between the victim and the suspect
- 3) The community responded positively.

These conditions may not be implemented with the conditions in which the suspect and the victim agree. This restorative justice mechanism can be implemented through peace which is regulated in Article 7 which regulates the following:

- 1) The public prosecutor offers peace efforts to the suspect and the victim
- 2) Peace efforts are carried out without pressure, coercion and intimidation
- 3) Peace efforts are carried out at the prosecution stage, namely at the time of handing over responsibility for the suspect and the second stage of evidence.

In the event that a peace agreement is made at the investigation stage, it can be considered by the public prosecutor to stop prosecution based on restorative justice by fulfilling the procedures and conditions for peace as regulated in the Indonesian Attorney General's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice.

### 3.3. The theory of restorative justice in the Islamic criminal law order

The theory of restorative justice in the Islamic criminal law order is very important so that it can be part of criminal law reform in the future. In Islamic law, criminal acts can be divided into three, namely criminal acts punishable by had (*jarimah hudud*), crimes punishable by *ta'zir* (*jarimah ta'zir*), criminal acts punishable by *qisas-diyat* (*jarimah qisas-diyat*).<sup>19</sup>In relation to the theory of restorative justice in the Islamic criminal law order, namely criminal acts that are threatened with *qisas diyat*.

The criminal act of *qisas-diyat* in Islamic criminal law is a crime that is threatened with *qisasa* or the equivalent, while *diyat* is replaced with compensation. Regarding the crime against life and mistreatment as discussed in this study, the determination of the crime is the right of the victim and also his heirs. In this case, it means that the victim or heir can cancel the crime by granting amnesty or forgiveness to the defendant or suspect. If forgiven by the victim or his heirs, the *qisas* punishment will be replaced with *diyat* or compensation. Thus the government no longer has the obligation to punish the perpetrators.

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<sup>19</sup>Achamd Irwan Hamzani, 2015, *Pendekatan Restorative Justice Dalam Pembangunan Hukum Pidana Nasional Berbasis Ketentuan Qisas-Diyat Dalam Hukum Pidana Islam*, Doctoral Dissertation, Universitas Diponegoro Semarang, p. XVII

The provisions of *qisas diyat* have an orientation towards attention and protection for victims and their resolution by making peace. Thus, it can be concluded that the settlement of the criminal act of *qisas diyat* is the same as the concept of restorative justice. The essence of the *qisas diyat* crime is the granting of rights to the person who is harmed or the victim in order to retaliate to the person who harmed him or the victim with the same or equal measure after passing the peace process (*sulh*). In Islamic law, the heirs or victims are highly recommended to forgive the perpetrators for the benefit or goodness, with the consequence that the perpetrators or defendants compensate the victims and the relationship between the victim and the perpetrator in the future will be good again.

#### **3.4. Comparison of restorative justice in the Islamic criminal law system and the Indonesian criminal law system**

The comparison of restorative justice in the Islamic criminal law order and the criminal law system in Indonesia can be explained based on the descriptions in the respective discussions above. Basically, between restorative justice in the Islamic legal order and the Indonesian criminal law system, they are the same.<sup>20</sup>

In the Indonesian criminal law order, criminal settlement in society can be carried out with litigation and non-litigation options. Litigation is carried out by solving problems through the courts, while non-litigation is settled out of court. For out-of-court settlements, this is often known as the Alternative Dispute Resolution. This is sought in order to obtain restorative justice by balancing the losses or consequences incurred with the criminal acts carried out. This restorative justice settlement method is carried out by penal mediation. Meanwhile in Islamic law, restorative justice is known as *qisas diyat* whose concept is almost the same as that in Indonesia, namely peace between the two parties and their heirs through peace (*Sulh*).

#### **4. Closing**

The provisions of restorative justice in the settlement of cases of the Crime of Persecution are regulated in the Regulation of the Attorney General of the Republic of Indonesia Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice. By implementing it through the mechanism of fulfilling the conditions, and if the conditions have been met, restorative justice can be carried out by the parties, the public prosecutor can carry out the peace process before the case is transferred to the court. The theory of restorative justice in the order of Islamic criminal law uses *jarimah qisas diyat* whose criminal determination is the right of the victim and also his heirs or *qisas diyat* which has an orientation to attention and protection for victims and the solution is to make peace (*Sulh*). Based on the above, suggestions are put forward, first, before the positive law was born, Islamic criminal law already knows the concept of restorative justice, this should be a consideration for the Indonesian

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<sup>20</sup>Arif Septria Hendra Saputro, 2018, *Penerapan Restorative Justice Sebagai Alternatif Penyelesaian Tindak Pidana Penganiayaan Di Satreskrim Polsek Lasem*, Jurnal Daulat Hukum. Vol.1 No.1, Semarang, p. 158.journal. Unissula.ac.id/index.php./RH/Issue/284.

Government or the Indonesian House of Representatives to make laws and regulations in a better direction in the settlement of criminal acts in Indonesia, especially the crime of persecution. And also the existing regulations or provisions can be refined by being oriented towards restorative justice which is regulated in the Islamic legal order. Second, for law enforcers to carry out restorative justice and suggest to the defendants and victims that these efforts run optimally so that the principle of a fast trial,

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