

The Resolution Of Criminal Cases Through A Restorative Justice Approach in Islamic Law Perspective

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Abstrak

Penelitian ini bertujuan untuk menganalisis pendekatan restorative justice sebagai alternatif penyelesaian kasus pidana dalam perspektif Hukum Islam, dimana proses pemidanaan tidak hanya sebatas pada pembalasan bagi pelaku, melainkan juga harus bertolak pada berbagai prinsip keadilan restoratif. Penelitian ini menggunakan metode yuridis normative dengan pendekatan filosofis, konseptual dan perundang-undangan, Sumber bahan hukum diperoleh dengan inventarisasi, kategorisasi dan sistematisasi bahan hukum, Analisis menggunakan preskriptif dengan logika dan penalaran hukum, Hasil penelitian menunjukkan bahwa restorative justice dipandang sebagai salah satu alternatif pendekatan yang dapat diterapkan dalam menyelesaikan masalah pidana dengan mempertimbangkan berbagai aspek di luar proses peradilan dan diorientasikan kepada upaya memulihkan kembali apa yang telah dirusak oleh adanya kejahatan., Penerapan restorative justice dalam hukum Islam berdasarkan pada atsar sahabat Umar r.a. dalam hal menangani kasus pencurian di musim Paceklik dengan keputusan hukum yakni membebaskan pelaku karena faktor kemanusiaan. Oleh karena itu, restorative justice dapat diterapkan dengan pertimbangan meliputi: aspek keadilan, kemanusiaan, kepentingan umum, pema'afan korban, dan perdamaian (al-Islah).

Kata Kunci: *Hukum Islam, Pidana, Restorative*

Abstract

This study aims to analyze on the restorative justice approach as an alternative to resolution criminal cases in Islamic law perspective, where the criminal process is not only limited to retaliation for the perpetrator, but must also be based on various principles of restorative justice. This research uses method normative juridical with a philosophical, conceptual and legislations approach. Sources of legal materials are obtained through inventory, categorization and systematization. Analysis using prescriptive with logic and legal reasoning, The results show that restorative justice is seen as an alternative approach that can be applied in resolution criminal case by considering various aspects outside the judicial process and is oriented towards restoring what has been damaged by the existence of crime. In Islamic law, the application of restorative justice is based on the above of Umar's friend r.a.

in the case of handling theft cases during the Paceklik season, the legal decision is to release the perpetrator due to humanitarian factors. Therefore, restorative justice can be applied with considerations including: aspects of justice, humanity, public interest, forgiveness of victims, and peace (al-Islah).

Keywords: *Criminal; Islamic Law, Restorative Justice;*

Introduction

Indonesia is a law state (rechstate). In this case, the law becomes the commander who guides the running of the state. Therefore, its implementation must be an ideal law enforcement system so that able to provide peace and security for citizens. Ideal law enforcement has the three main supporting aspects, namely good legal material, good law enforcers and legal awareness. Nowadays, the phenomenon of law enforcement in Indonesia is the problem of criminal law, where a legal settlement that exists so far is seen as only fulfilling the formality side and tends to be more repressive and has not been fully able to position the victim and the perpetrator as the parties directly involved in the case. It means, the law enforcement that occurs seems only as a means of reprisal for the person. crime maker. This can be seen from the series of law enforcement processes which until now have only been adhering to statutory provisions without considering else factors such as sociological, philosophical and various other factors. Whereas substantially the case caused by crime can be caused due to various factors and also have an impact on various aspects such as the destruction of the social order in society. This condition, in the end, has an impact on the disorientation of law enforcement in the criminal system which in fact is only able to retaliate against the perpetrators of crime by imprisoning them but has not completely succeeded in restoring the balance in the midst of society. Law enforcement is considered to have failed to bring a sense of justice that is desired by society.

The law enforcement conditions have further encouraged experts to look for other alternatives, to create the fairest sense of justice for the community. Therefore, to restore this balance, the interests of the victim and the perpetrator of the crime must be given greater attention. The involvement of victims must also be directly involved to determine the forms of resolution by their basic needs (Tambir, 2019: 553). This correct law enforcement reorientation step can actually be initiated by applying a restorative justice approach, which is a criminal settlement step oriented towards restoring a situation that has

been damaged by a criminal act. Of course, this recovery process cannot be carried out only by punishing the perpetrator as the criminal responsibility he bears, but also how they impact on the victim and society must be restored. The idea of a restorative justice approach is actually a reaction to the theory of punishment with a retributive approach which has been carried out in the legal settlement process and tends to be oriented towards retaliation. The concept of punishment is only based on the nature of criminal responsibility which must be imposed on the perpetrator of the crime only, how the perpetrator of the crime should be rewarded for his evil deed. The criminal process should also be based on the existence of sanctions to protect all elements of society, especially the perpetrators and victims themselves. Therefore, if in retributive theory criminal sanctions are placed on the wrongdoing of the perpetrator through the imposition of suffering to deter the perpetrator, then the action sanction tries to see the perpetrator to provide help so that he changes and becomes better (Muladi & Arief, 2005: 4). Thus the sanctions for this action become more educative in nature and restore the perpetrators and are oriented towards protecting the community so that punishment is not focused on the concept of retaliation.

Islam a religion that of *rahmatan lil 'alamin*, provides a principle of value that can be used as a guide for humans to regulate their life. The purpose of Islamic law to realizing the benefit of human life in general (*al-Maslahat al-'Amah*). Even in Islam, there is the principle of *al-Maslahah al-Khomsah*, which is five basic things that must be protected in upholding Islamic law, namely maintaining religion, soul, property, reason and descent. Islamic law recognizes a concept of criminal settlement which rests on the involvement of perpetrators and victims such as forgiveness in murder cases. The perpetrator of murder does not always have to be sanctioned, this can happen when the guardian of the victim has completely forgiven him voluntarily, or when between the perpetrator and the victim there is an "al-Islah" peace. From these two concepts, it can be understood that legal settlement does not always lead to the imposition of sanctions as retaliation for the perpetrators of crimes.

Hasan (2013) about "*The Application of Restorative Justice in the Child Criminal Justice System in Indonesia*". Hasan stated that restorative justice has the character of complementing the existing criminal system, not replacing it. Therefore, restorative justice can be integrated into the criminal justice process such as in the case of handling crimes committed by

children while still accommodating the main objective of restorative justice. Arief and Ambarsari (2018) with the title "*Application of the Principles of Restorative Justice in the Criminal Justice System in Indonesia*". That restorative justice is a manifestation of the theory of justice which focuses on efforts to recover losses caused by criminal acts. Pakpahan (2015: 129) about "*Restorative Justice Against Users of Narcotics and Dangerous Drugs*". Pakpahan stated that narcotics abusers who by statutory regulations can be threatened with imprisonment are an ironic thing considering that Narcotics abusers are actually victims of illegal drug traffickers. Therefore, the formulation of sanctions must contain the values of restorative justice by restoring it in the form of treatment. This is based on the reason that Narcotics abusers are sick victims and must be given treatment, not imprisoned. Kristian and Tanuwijaya (2015: 592) about "*Settlement of Criminal Cases with the Concept of Restorative Justice in the Integrated Criminal Justice System in Indonesia*", in this paper, it is confirmed that the handling of crimes in this formal route does not always take place in line with what is expected and still raises several new case, including the pattern of punishment which is still retaliatory in nature, resulting in the accumulation of cases, not paying attention to the rights of victims, formal and rigid settlement, not restoring the effects of crime. The convictions that have been taking place so far seem to have left many case in various aspects, coupled with the budget burden that must be issued by the government which is allocated to carry out judicial processes and accommodate prisoners in prisons, it is of particular concern that the problem of handling criminal cases in Indonesia is becoming increasingly complex. Based on these case, then it causes a solution, namely the approach to resolution criminal case with restorative justice.

The difference with research conducted with previous research is from the aspect of analysis with a used comprehensive study of various scientific fields about the application of restorative justice. This is of course very important considering that substantially law enforcement must be able to provide satisfaction for the community. Good law enforcement must also be supported by the formulation of ideal legal material according to the needs of the community. Therefore, this research aims to explore various Islamic thoughts about the spirit of restorative justice as an approach in resolution criminal cases in formulating new ideas to build a new paradigm in resolution the criminal case in Indonesia. This research uses method normative juridical with a philosophical, conceptual and legislations approach. Sources of legal materials are obtained through inventory,

categorization and systematization. Analysis using prescriptive with logic and legal reasoning,

Result and Discussion

1. Restorative Justice Approach as a New Paradigm in Resolution Criminal Case

The form of criminal resolution that is currently being looked at is restorative justice approach, this is due to the fact that restorative justice is considered by some groups to be more capable of providing guarantees for achieving the most essential legal objectives. In principle, these objectives refer to fulfilling the sense of justice in society, providing legal certainty and also ensuring the welfare of the community. The view of restorative justice as an ideal criminal settlement departs from the main idea it carries by focusing more on creating a balance for the perpetrators of crime and the victims themselves (Juhari, 2017: 97). This balance is then expected to be a stimulus for the presence of a sense of justice for the parties. In practice, the concept of restorative justice can be carried out by means of judges given the authority to override case settlement through formal judicial channels as has been done so far, namely by implementing legal steps outside the court by involving various parties including victims in order to provide a more sense of justice. In the Indonesian law enforcement system, this is also often known as a form of opportunity and discretionary principles. In the world of law enforcement, it is known that the Attorney General is allowed to exclude criminal cases with the authority he has, namely the principle of opportunity. Meanwhile, for the police, this principle is known as discretion. Both the principles of opportunity and discretion are guided by the existence of other alternatives in resolution criminal case, namely by using their powers to exclude criminal cases.

The definition of restorative justice refers to the restructuring of the punishment system that is fairer for all parties. Therefore, a criminal settlement with a restorative justice approach focuses more on the needs of involving perpetrators, victims and the community (Ginting and Muazzul, 2018: 37). The use of restorative justice has been mentioned in Indonesian legislation, i.e. in Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, in which Article 1 paragraph (6) states that: *"Restorative justice is the settlement of criminal cases by involving perpetrators, victims, families of perpetrators/victims, and other related parties to*

jointly seek solutions. fair by emphasizing restoration to its original state, and not retaliation ”. This formula stems from the idea that crime is basically an attack on individuals and social relations. The attack then had an impact on the destruction of the existing social order in society, so that restorative justice is interpreted as an effort to solve the case by restoring the conditions caused by the crime attack (Muhaimin, 2019: 205). The recovery process can be carried out by making the perpetrator responsible for repairing the damage caused by the crime he committed (Yulia, 2012: 232). This restorative justice approach settlement model in juvenile justice is considered to be the best form of criminal settlement to tackle the case of child offenders because it puts forward various aspects of humanity (Putra, 2020: 9). Therefore, in its implementation, restorative justice involves several parties to take a role in finding the best solution for handling child crime. The use of this approach is then considered not only effective for resolution juvenile crimes, but also crimes committed by adults. Mechanism of restorative justice is a functionalization than customary law as a supporting factor, this is seen as a form of legal pluralism and the principle of diversity (Sosiawan, 2019: 436). Through this functionalization, customary law is no longer placed as a legal settlement mechanism for various cases that escape formal law, so that its involvement in resolution case in the midst of society can be integrated with the restorative justice approach.

Restorative justice occupies the criminal process where essentially the purpose of punishment is to provide protection to the public from crimes and provide guidance to the perpetrators. This idea then opens a different paradigm with the current criminal process, that restorative justice can be placed as an instrument to achieve two main goals, namely the protection of the community and the guidance of the perpetrators. These two goals must be considered in a balanced manner which in legal terms is called mono-dualistic thinking, namely the interests of society and the interests of individuals (Arief, 2002: 88). The main target of punishment is to protect the parties directly involved with the crime and also the society. Through an approach that emphasizes these two aspects, the criminal process will be felt to affect fulfilling the sense of community justice.

Based on the description above, it can be understood that punishment is not only intended to provide retaliation against the perpetrator of the crime as a consequence or evil deed but also must be able to protect the interests of victims and the community. Therefore, punishment must at least consider several important aspects, such as

philosophical, sociological and criminological. In resolution criminal case, must look at many aspects to achieve the value of justice so that it can be felt by all parties. Restorative justice can be placed as an effort for a responsive criminal case settlement process by the current developments and the needs of society. In fact, this paradigm does not necessarily exclude the criminal settlement system that has been going on so far, but rather integration by looking for other more effective alternatives for resolution criminal case so that they do not go out of their way. The main goal of restorative justice is the achievement of the sense of justice for all parties and not just promoting the side of the punishment. The conception of justice that is now being embraced in the criminal process is retributive justice which defines crime as an offence that must be accounted for by imposing legal sanctions on the maker. This concept contradicts with restorative justice offers, which defines that criminal liability for the perpetrator is designed to help decide which one is best. This thinking is none other than the viewpoint of a crime which is considered not as an evil act that must be repaid, but as a disease that must be cured. Therefore, this restorative justice approach seems very conditional, depending on the extent of the impact of the damage caused by the crime itself so that the legal settlement process.

2. Restorative Justice and its Rationale

The restorative justice approach as an alternative to resolution criminal case is an implementation rather than an out of court settlement model, namely the settlement of crimes outside the court which in fact is mostly carried out in the community. From the point of view of normative law enforcement, there are still a lot of questions, considering that so far restorative justice is still not widely included in normative laws and regulations (Zulfa, 2010: 195-196). Legislation in Indonesia regarding restorative justice has only been found in the juvenile criminal justice system, and even then it is still not fully used as a reference for judges in handling child criminal cases. Theoretically, the application of restorative justice cannot just be done without any underlying considerations. This consideration is very necessary considering that there must be strong reasons to be used as a basis for considering the possibility of applying the restorative justice approach. The basic consideration for the application of restorative justice as below.

a. Fairness

Fairness is the main ideal of law, therefore it is not surprising that the main purpose of law enforcement is interpreted to ensure a sense of justice. The inculcation of the principle of justice, becomes the benchmark assessment of the performance of judges in deciding a case. Legal decisions issued by judges must be reflect the sense of justice, therefore these decisions must be acceptable . A judge must be able to see the substance of law enforcement that is desired by the community through the decisions that of justice. Substantially, the justice must be felt by all parties, not only limited to the reason for the subjectivity of judges taking legal considerations but more on objective considerations and truly upholding the principles of just law enforcement

In Islamic law, justice is taken from the syllable "just" which is adopted from Arabic, namely "al-'adl". This word can be found in 28 places in the Qur'an, which etymologically means "middle". Justice is interpreted as the act of placing something by their respective proportions (Basyir, 2000: 30). That means, the right of every person that should be provided by law, without exception, even though the perpetrator still has the right to be treated fairly, especially for the victim and also for the community. The judge's error in making the basis of legal considerations for decisions he makes may be considered inconsistent with the principle of justice because he has put something out of place so that the judge is required to act appropriately in taking legal considerations on the decisions. The fair in a broader sense can be interpreted as an act of maintaining the balance of society. That means anything that can create, maintain and maintain the benefit of the ummah. From this terminology, it can be understood that justice includes all matters relating to the embodiment of benefit values. The law is enforced it must be in line with the value of benefit because indeed the purpose of the law itself is a benefit. This benefit can then be used as a parameter of legal justice. There are many verses of the Koran that mention the issue of justice, among others: the Q.S. an-Nisa verse 58.

وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

“*And (orders you) when establishing laws among men so that you may determine fairly*”.

In resolution criminal cases the fulfillment of a sense of justice for all parties, especially the perpetrators, victims and the community is very important as a basis for consideration of judges in deciding cases. Judges in this case must try to see the side of

the needs of all parties in a case so that the decisions passed can contain the spirit of justice. Therefore, normative rules do not always have to be the only way to solve criminal case considering that the fulfillment of a sense of justice can be achieved by other alternatives such as using a restorative justice approach. The resolution of criminal case should consider various aspects, not only in juridical aspects but also philosophical aspects such as the fulfillment of a sense of justice. Therefore, it is very clear that the aspect of justice is very important in resolution criminal case. This is because the main objective of law enforcement is to uphold justice and provide a sense of justice to all people, especially those who are related to legal cases. Justice refers to the fulfillment of the rights of all parties.

b. Humanity

Human values are important to be involved in filling the spirit of law enforcement by making it a part of legal considerations that fill the spirit of law enforcement itself. This is done to make the law not a disaster for society, but the law must be able to deliver people to a just and prosperous life and make human life happy. In this condition, the law can be used as an instrument to humanize humans, not punish humans for the mistakes they make, because the law itself is for humans, to regulate life in a better and more peaceful environment. It is in this paradigm that the law is positioned not as something absolute and final, but rather that the law must be flexible according to the needs of the community. Thus in a law enforcement process, it is not only formal truth that is addressed, but how the law can be enforced humanely (humanist) by looking at the very fundamental side of humanity. The basis for consideration of this human aspect then becomes a very important factor in the settlement of criminal cases.

The idea of restorative justice is seen as the answer to a number of legal case that exist today. Restorative justice is very appropriate to be placed as a legal settlement step based on social values that is in line with humanitarian principles so that law enforcement becomes more meaningful because it does not ignore human rights principles. In the eyes of the law, humans deserve to be treated as humans, by humanizing their rights which must be fulfilled by law. Efforts to humanize humans in the context of law enforcement can be realized by taking an approach that is able to

guarantee human values, namely restorative justice. Therefore, in the consideration of the application of restorative justice, humanitarian considerations are an aspect that should not be overlooked.

c. Public interest.

The spirit of the restorative justice approach in resolution criminal case has actually begun to become the attention of policymakers in the criminal justice system in Indonesia, this concern has even attempted to be realized in criminal law formulations that are being drafted by Indonesian legislative bodies. For example, this can be seen in the authority of the prosecutor's office in applying the opportunity principle as contained in the meaning of Article 140 paragraph 2 letter an of the Criminal Procedure Code, which states that the prosecutor has the authority to stop cases in the prosecution stage. This chapter opens an alternative, not accumulative, interpretation. Referring to this article, it is found that a legal basis is that the prosecutor's office is indeed given the authority to set aside cases in the public interest. This legal formulation was then confirmed in Article 35 C of Law No. 16 of 2004 concerning the Attorney General's Office, which reads "*Attorney General has the duty and authority to override cases in the public interest*". Therefore, the intended public interest can serve as an excuse in excluding criminal cases from the normative side but not neglecting the substance of law enforcement. The ability to exclude criminal cases as a manifestation of the principle of opportunity must be based on the reasons for the public interest which in general rests on the interests of the nation, state and society. Therefore, this authority actually takes a place similar to restorative justice starting from the exception of criminal cases and looking for alternative solutions outside the normative arrangement.

In Indonesia itself, the existence of the principle of opportunity today is considered a principle rather than the resolution of legal case which is commonly regarded as a valid principle, even though this pattern of law enforcement actually falls under the category of unwritten law (Hamzah, 2008: 17). However, unwritten law is still a living and developing a value system in Indonesian society, it can even be said to be ingrained. The Indonesian people are known for their hospitality and upholding a sense of brotherhood even though they are of different ethnicities and races, it has been

proven by the unification of this nation through the bonds of a unitary state. This is also a confirmation that this nation has a rich legal culture, even though it is not written.

The accuracy of the implementation of the opportunity principle is very much determined by the accuracy of the consideration of real circumstances not to prosecute a criminal case in front of a judge so that the public interest is not more disadvantaged (Amiati, 2014: 47). Meanwhile, if a question arises about what exactly is meant by "public interest" in case exceptions, it is based on the interests of the state and society and not only for the benefit of society. Thus, the principle of "opportunity" in criminal charges means that the prosecutor as a prosecutor takes action not to prosecute if the demand is deemed not "opportunistic", it is useless for the interests of the community (Amiati, 2014: 20). It can clearly be understood that the opportunity principle is part of the spirit of the restorative justice approach. The principle of public interest is one of the considerations in resolution criminal case through the restorative justice approach.

d. Forgiveness.

The bases that can be taken into consideration in applying the restorative justice approach to resolution crime case is by way of forgiveness. This forgiveness comes from the victim or his family and can be taken into consideration by the judge in deciding the case. Article 55 paragraph (1) point (j) The Draft Criminal Code, explains that in the case of punishment, the forgiveness aspect of the victim and/or his family must be considered. The doctrine of forgiveness in resolution criminal case, when examined actually comes from Islamic law. In a murder case, for example, it is permissible for the victim's family (guardian) to provide forgiveness to the perpetrator of the murder, so that the qishash penalty can be cancelled and replaced with another punishment in the form of diyat (compensation) or the perpetrator is completely forgiven without any charges. Allah said in the Qur'an al-Baqarah verse 178:

يَا أَيُّهَا الَّذِينَ ءَامَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتَّبِعْ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ذَلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ فَمَنْ أَعْتَدَىٰ بِغَدَاةٍ فَلَهُ عَذَابٌ أَلِيمٌ

“Hi believers, it is obligatory for you to qishaash regarding those who are killed; free people with free people, servants with servants, and women with women. So whoever gets forgiveness from his brother, let (who forgives) follow in a good way, and let (who is given forgiveness) pay (diat) to

those who give forgiveness in a good way (too). in this way, it is a relief from your Lord and a grace. Whoever goes beyond the limit after that, it is a very painful torment for him”

Referring to that paragraph, the legal sanctions imposed on the perpetrators of murder are an autonomous right for the family (guardians) of the victim to take legal steps by choosing the type of punishment to be imposed on the perpetrator, whether to choose *qishash* or to forgive the perpetrator by asking for compensation in the form of *diyat*. Even when the guardian of the victim does not take the *diyat* even in the sense that the perpetrator is genuinely forgiven by the victim's guardian without a demand for *diyat*, the perpetrator cannot be subject to legal sanctions for murder as defined in the formal rules. The reason is none other than because of the complete forgiveness of the victim's guardian without any conditions. Thus, if the victim's guardian demands a *diyat*, the criminal responsibility for the perpetrator is only to pay the *diyat* without being sentenced to *qishash* or death. Therefore, the existence of forgiveness is one of the things that can hinder the imposition of the *qishash* law for the perpetrator of the murder. This is as stated by Abdul Qadir Audah:

تَسْقُطُ عُقُوبَةُ الْقِصَاصِ بِأَرْبَعَةِ أَسْبَابٍ هِيَ : فَوَاتِ مَحَلِّ الْقِصَاصِ – الْعَفْوُ – الصَّلْحُ – إِرْثِ حَقِّ الْقِصَاصِ.

“Qishash sanctions fall for four reasons, namely: loss of place for diqishash, the existence of forgiveness, existence of peace, and inheritance of qishash rights” (Audah, 2005: 127).

The information described above provides an understanding that in terms of considering legal decisions, the reasons for forgiveness can be used as a basis for consideration that can be used by judges in resolution criminal cases using the Restorative Justice approach. The explanation above is actually not only about forgiveness, but there are also other reasons that can invalidate the imposition of criminal sanctions in the form of *qishash*, namely the absence of a place to carry out the *qishash* which is inherent in the perpetrator, peace and also the inheritance of *qishash* rights in the sense that if the guardian the victim as the recipient of the right demands that *qishash* release the perpetrator from all charges, either by forgiving or making peace. Clearly, it can be seen that forgiveness can be used as a basis for consideration in taking a solution to solve crime case. This then has an impact on the existence of other alternatives in reresolution cases by not always having to prioritize the formal side, such

as referring to the article texts contained in the law which so far are still considered rigid.

e. Reconciliation.

Reconciliation in Islamic law is known as *al-Islah*. According to the language, the root word Islah is derived from the syllable صلح - صلحي - صلاحا, which means "good". In terms of vocabulary structure, the word Islah is a *mashdar* form of إصلاحا - إصلاح - صلح - ي صلح, which means to improve, improve, and reconcile, (dispute resolution). The word صلح is usually used specifically to eliminate disputes that occur among humans. Thus, إصلاحا means to eliminate and stop all forms of enmity and conflict. Peace (*Islah*) is a contract with the intention of ending a dispute between two parties who are litigating each other. The termination of this dispute is at the same time a step to end the previous hostilities and to be restored by way of implementing peace.

Reconciliation (al-Islah), is a conflict resolution mechanism offered by Islamic law by taking an agreement from the parties to jointly solve case and find solutions. Basically, every conflict that occurs between humans must be resolved in a peaceful way as the first way to be taken, if this effort is not successful then it is permissible to take judicial steps. Regarding allowing peace efforts it can be traced from various concepts in the al-Qur'an. For example, it is emphasized in the Al-Qur'an surah al-Hujurat verse 9:

وَأِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا

“And if there are two groups of those who believe go to war, you must reconcile the two”.

Looking at this verse, it is very clear that efforts to make peace in the settlement of cases are highly recommended. In positive legal provisions, the concept of peace is known as penal mediation, which is an alternative settlement of criminal cases outside the penal route, with the intention of reresolution conflicts that occur between the perpetrator and the victim. Through this route, it is hoped that the tension between the perpetrator and the victim must be restored because the relationship has been damaged due to the occurrence of a criminal act. The idea of improving this then becomes the starting point for the emergence of ideas regarding restorative justice, then in the development of criminal law reform that is oriented towards the principle of restorative justice, then legal settlement is oriented towards restorative values. This recovery process certainly

also involves all parties, including judges as the key to law enforcement. Therefore, in the implementation of restorative justice, it also requires the presence of judges to take a role for criminal settlement by not being fixated on the normative side but must see various legal considerations outside the normative side. If the parties in a case have taken a conciliatory path, actually the judicial process does not mean that it is just that the legitimacy of law enforcement is still needed by involving the role of judges in approaching criminal case settlement through restorative justice.

3. Restorative Justice in Islamic Law Perspective

In Islamic law, the term restorative justice can be equated with the term "al-Isti'adah", which means restoration. In another sense, *al-Isti'adah*, can be interpreted as "to return". The point is to return something to the state it should be. Based on this meaning, then *al-Isti'adah*, is used to mention another term for restorative justice. In principle, restorative justice focuses on efforts to restore the damage to the social order that has occurred as a result of criminal acts. If you look at the history of Islamic law, the practice of implementing the criminal problem resolution outside the judiciary has actually been going on for a long time since the time of the companions of the Prophet, to be precise during the Caliphate of Umar bin Khattab. During this time, there was a slave belonging to the Khatib who stole, but Umar took legal steps by not enforcing the law of cutting off his hand but freeing the perpetrator from the threat of punishment. This is because at that time there was a famine and the slave was starving. The following is a description of the incident:

أَنَّ عُمَرَ إِعْتَبَرَ الصَّرُورَةَ إِكْرَاهًا ضَمَنِيًّا. وَيُظْهَرُ لَنَا ذَلِكَ فِي حَادِثَةِ سِرْقَةِ عَبِيدِ حَاتِبِ بْنِ أَبِي بَلْتَعَةَ نَاقَةَ لِيَأْكُلُواهَا. وَهِيَ كَمَا رَوَاهُ الْأَنْمَةَ أَنَّ رَفِيقًا لِحَاطِبٍ سَرَقُوا نَاقَةَ لِرَجُلٍ مِنْ مَزِينَةَ 'فَانْتَحَرُواهَا' فَرَفَعَ ذَلِكَ إِلَى عُمَرَ فَأَمَرَ عُمَرُ كَثِيرَ بْنِ الصَّلْتِ أَنْ يَقْطَعَ أَيْدِيَهُمْ ' وَلَكِنَّهُ لَمْ يَلْبِثْ أَنْ عَدَلَ عَنْ ذَلِكَ وَقَالَ " لَوْلَا أَنِّي أَظُنُّ أَنَّكَ تَجِيعُهُمْ حَتَّى أَنْ أَحَدَهُمْ أَتَى مَا حَرَّمَ اللَّهُ لَقَطَعْتَ أَيْدِيَهُمْ ' وَلَكِنْ وَاللَّهِ لَئِنْ تَرَكْتَهُمْ لِأَغْرَمَكَ غَرَامَةَ تَوْجَعِكَ' وَغَرَمَهُ ضَعْفُ ثَمَنِ النَّاقَةِ ' وَفِي امْتِنَاعِهِ رَضِيَ اللَّهُ عَنْهُ عَنِ إِقَامَةِ حَدِّالسَّرْقَةِ فِي عَامِ الْمَجَاعَةِ ' فَقَدْ جَاءَ رَجُلٌ إِلَى عُمَرَ فِي نَاقَةٍ نُجِرَتْ فَقَالَ لَهُ عُمَرُ " هَلْ لَكَ فِي نَاقَتَيْنِ بِهَا عَشَارَتَيْنِ مُرَبَعَتَيْنِ - مَخَصَبَتَيْنِ - سَمِينَتَيْنِ - فَأَنَا لَا نَقْطَعُ فِي عَامِ سَنَةٍ.

"In fact, Umar r.a considered the element of compulsion as an emergency motive (ad-Dorurot). It is very clear in the case of theft committed by the slaves of Khatib bin Abi Balta'ab against a camel to eat. This incident was narrated by the Imams that in fact the slave of Khatib stole a man's camel from his stable and slaughtered it. The case was then reported to Umar, then Umar ordered Katsir bin as-Shalt to cut off the slave's hand. But Umar did not remain silent in adjudicating the case,

then he said: If I did not have the presumption that you (the owner of the slave's slave) had let hunger until one of them had to do something forbidden by Allah, then I would have cut their hands. However, by Allah, if I let them, I would definitely punish you with very heavy and painful punishment, even a punishment that is heavier than the price of the camel. As for the case of the prohibition of Umar on the execution of theft during the Paceklik season, a man came to Umar with a camel that had been slaughtered, then Umar asked: Do you have two camels that are fertile and fat? In fact, I will not cut off your hands. the thief in this year” (Qol'ahji, tt: 491).

Looking at the information above, it seems that the spirit of resolution criminal case through the restorative justice approach already exists in Islamic law. The existence of the application of criminal settlement with a restorative justice approach in Islamic law can be traced from various available information. One of them is a history of legal decisions issued by a friend of Umar r.a. It is said that during the reign of Umar r.a. there was a slave belonging to Khatib bin Abi Balta'ah who had stolen a camel to eat because of hunger and indeed at that time there was a Paceklik season which resulted in the difficulty of finding food at that time. The occurrence of the famine at that time was estimated to have occurred in the 17th year of H, when Muslims were being hit by two great calamities, namely famine and the spread of the leprosy epidemic that attacked Muslim troops in Syria. This famine was caused by rainy conditions that had not fallen for 9 months. The entire Arab region at that time experienced crop failure. The lands became arid (Haikal, t.t.: 265-266). As a result, it was difficult for the Muslim community to get food supplies, which led to the theft of the case. In deciding the case for a servant who stole the camel, Umar r.a. took the decision to let it go. And throughout this season, the sanction of cutting off a hand for a thief was not applied by Umar r.a. What Umar decided in relation to releasing a thief from having his hand cut off was not something without reason. In this case Umar r.a. in the result of its ijtihad, exceptions are made for the validity of texts which become the legal basis for cases of theft. Even though the verse of the al-Qur'an speaks strictly as expressed in the letter al-Maidah verse 38:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

“Men who steal and women who steal, the cut off both hands (as) retribution for what they do and as torment from Allah. And Allah is Mighty, and Most Wise”.

In the information stated above regarding the theft case at the time of Umar's friend, there are actually two stories about the lawlessness of this hand cutting, namely the story of a

slave belonging to Khatib who stole a camel and the story of two men slaughtering someone else's camel during the famine season. This condition prevented Umar from implementing the law of cutting off hands for thieves, even though the clarity of the verse was very real. The cancellation of the execution of the cutting of the hand by Umar ibn Khattab in the two cases was due to strong reasons for not carrying out the execution of the cut off of his hand. The reason for the two cases above is hunger both individually and in general (عام المجاعة). The hunger experienced by the slave servants during Umar's time was indeed very much supported by the situation at that time which was experiencing a famine due to crop failure. This is an *ad-Dorurot* effect that Umar found as *illat* (legal argumentation) in resolution cases of theft.

When understood in-depth, the case findings at the time of Umar's best friend are very clearly the spirit of the restorative justice approach. Umar r.a put aside the normative rules, in this case, the verse of the Koran, which talks about the law of cutting off a hand for a thief, and tried to find other considerations that were in accordance with the conditions for the occurrence of the crime of theft. If analyzed carefully, Umar seems to consider the human aspect as a material for consideration and becomes the basis for resolution cases of theft at that time. Consideration of Umar r.a. This is also reinforced by the circumstances at that time with the existence of the Famine season which made it difficult for most people to find food so that they were threatened with starvation and on a further concern, was losing their lives. Through this incident, it is very clear that normative rules such as laws are not the only way out in seeking legal justice, because there are still other alternatives such as trying to apply the concept of a justice restorative approach. What Umar did in his *ijtihad* in making the decision to release the perpetrator of theft was very appropriate considering that humanitarian issues are actually a part that must be maintained by the spirit of law enforcement.

Besides, Islam also recognizes the concept of forgiveness as in the case of murder (*al-Qatl*). The *qishas* sentence for the murderer is cancelled in the sense that it cannot be enforced if the victim is forgiven by his guardian (family). the excuse of forgiveness which becomes the basis for the removal of one's punishment. In principle, Restorative Justice adheres to a process of forgiveness from the victim to the perpetrator. The settlement of murder cases in Islamic criminal law does not only have to be subject to *qishas* law against the perpetrators, but the settlement can also be done through the way of forgiveness, in an

atmosphere of believers, brothers and sisters, is highly desirable. This principle is very clearly the value of the restorative justice approach where the settlement of criminal disputes does not always have to go through the judiciary which leads to a judge's verdict. Islamic criminal law also recognizes the existence of a system of reconciliation (*al-Islah*) or peace between litigants in an effort to find legal solutions. *Islah* comes from al-Qur'an as mentioned in al-Qur'an surah al-Hujarat verse 9:

وَأِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا

“And if there are two groups of those who faith go to war, you must reconcile the two”.

The concept of *Islah* can be used as an alternative to resolution criminal case. *Al-Islah* or peace can impose punishment for criminals such as in matters of murder and persecution. In principle, a term is an *Islah* is between the parties involved in an enmity to end it by means of peace. The parties are called *mussalib*, while what is in dispute is called *musalih 'ah*, then the content of the parties' agreement to end the dispute is called *musalib' alaih* (Sabiq, 2012: 275). In Islamic law, the concept of *Islah* can be used as an alternative to resolution criminal case. *Al-Islah* or peace can impose punishment for criminals such as in matters of murder and persecution. In principle, a term is an agreement between the parties involved in an enmity to end it by means of peace. The parties are called *musalih*, while what is in dispute is called *musalih 'anh*, then the content of the parties' agreement to end the dispute is called *musalih' alaih* (Sabiq, 2012: 275). Therefore, in relation to dispute resolution, Islamic law recommends parties in dispute to resolve it by peaceful means, whether carried out in front of a court or outside the court. Resolution of the case by peaceful means will further speed up the resolution of the problem at the will of the parties in dispute. In Islam, settling a case in this way is considered worship. The resolution of cases using *Islah*, it can be developed in alternative settlement of cases outside the court such as; mediation, arbitration, and so on. The concept of peace (*al-Islah*), it is in line with the principles of the restorative justice approach where the resolution of criminal cases must consider the will and interests of the perpetrators which are manifested in the form of peace. This approach is felt to be more able to provide satisfaction to the parties which in turn is expected to be able to provide a greater sense of justice because the parties ultimately become voluntary and accept decisions agreed upon by them through peace

Conclusion

Restorative justice is an alternative approach to resolve criminal cases that were oriented aimed at realizing restorative justice by taking into account the values of justice which are substantially the main and most basic objective of the criminal law enforcement system. According to of Islamic law, the application of the restorative justice approach has been practised for a long time in taking legal settlement steps, i.e. at the time of the Caliph Umar bin Khattab in completing the case of a servant who stole a camel in the famine season, by releasing the perpetrator based on humanitarian considerations. The spirit of enforcement through a restorative justice approach in Islamic law can also be seen in the cases of murder (al-Qatl) and persecution (al-Jarh), where the *qishash* sanctions are not the only way to resolution, but there is another in the form of forgiveness when the victim or his guardian forgives the perpetrator which then results in obstruction of the perpetrator from being sentenced to *qishash*. Likewise, if the victim or guardian only demands *diyat*, without demanding *qishash*, then the perpetrator is only subject to *diyat* punishment. The another alternative that describes a restorative justice approach in Islamic law is the existence of an agreement to make peace (al-Islah) made by both parties. The most important aspect in applying the restorative justice approach is the basis for legal considerations, which include: (a) aspects of justice; (b) human aspects; (c) aspects of general interest; (d) aspects of forgiveness; and (e) aspects of peace (al-Islah)

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